WE ARE FAMILY
(I GOT ALL MY CHILDREN WITH ME):
THE REGULATION OF GAY FAMILIES IN NORTH AMERICA

by

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A thesis submitted in conformity with the requirements for the degree of Master of Laws
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Abstract

In the 1980s, North America witnessed the emergence of a discourse on gay families, defined largely by choice and in opposition to nuclear, biological norms. Since then, there has been a general shift amongst lesbians and gay men towards a conception of family that accepts, rather than opposes, state-sanctioned relationships between two adults, and actively seeks to incorporate children as much if not more than extended networks of chosen family members. This paper addresses how the law in the United States and Canada has responded to (and been influenced by) the shift to the nuclear amongst lesbians and gay men, and how the discourse on gay families in North America has unfolded at a regulatory level. In particular, it is concerned to map and critique the law pertaining to queer families, and with how differences in levels and modes of recognition at sub- and supra-national levels affect gay families.
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INTRODUCTION

In the 1980s, North America witnessed “the emergence of a discourse on gay families, a reconfiguration of the terrain of kinship that continues to generate controversy among heterosexual and gay people alike”. ¹ In her seminal study of queer kinship structures in the Bay Area in that period, Kath Weston suggested that “it remains unclear how the emerging discourse on gay families will unfold, or in what directions lesbians and gay men will pursue the political implications of families organized by choice”, although she posited that marriage, adoption and custody rights would lead gay families down a path of development “largely congruent with socio-economic and power relations in the larger society”. ² Nearly 25 years since the publication of Families We Choose, it is clear that there has been a general shift amongst lesbians and gay men towards a conception of family that accepts, rather than opposes, state-sanctioned relationships between two adults, and actively seeks to incorporate children as much if not more than extended networks of chosen family members.³ At the same time, Weston’s suspicion has become a reality: the needs and voices of people with relational and affective needs that do not involve marriage and children have been relegated to a somewhat unfashionable sideline.⁴

This paper addresses how the law has responded to (and been influenced by) the shift to the nuclear amongst lesbians and gay men. It seeks to unpack how the discourse on gay families in the United States and Canada has unfolded at a regulatory level, and how the law assists and impedes gay families of various

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¹ Kath Weston, Families We Choose (New York: Columbia University Press, 1991) at 1.
² Ibid at 208-09.
³ Ibid at 29: “Lesbians and gay men, originally relegated to the status of people without family, later lay claim to a distinctive type of family characterized as families we choose or create.”
types. In particular, it is concerned with how differences in levels and modes of recognition at sub- and supra-national levels affect gay families. Its genesis lies in my own and others’ experiences of transnational gay family formation, and my reflection upon various forms and places of recognition and non-recognition. My Canadian marriage is not recognized in my own country of birth (Australia), but it is considered valid in my husband’s country of birth (Brazil); its validity in the United States depends upon where we travel. Friends of ours have recounted to us their intermittently fraught experience of engaging a surrogate in California whilst they were residents of the United Kingdom, and subsequently moving to New York, as unmarried fathers, with their young daughter. They are now looking to expand their family, this time through domestic private adoption, due to their desire for an infant and the increasingly prohibitive cost of commercial surrogacy. An Australian lesbian friend of ours living in New York has raised the possibility of some sort of shared parenting arrangement, now that she is able to marry her partner and remain in the United States.

Situations such as these raise new (and old) questions about the scope and forms of recognition that are available to queer families within and across borders. To what extent is it possible to have one’s relationship formally recognized? Is that recognition transportable, and in what ways? Should a same-sex relationship be recognized in places without equivalent forms of legal recognition? Why is it necessary for same-sex couples to marry in order to obtain particular state-controlled benefits, such as the ability to sponsor a spouse for immigration purposes? To what extent does the extension of marriage rights to same-sex couples meet the needs of lesbians and gay men who resist the paradigmatic nuclear norm? Adjunctively, does (and should) the law recognize non-conjugal relationships of care and dependence as familial? What does the law’s generally restrictive attitude towards commercial assisted reproduction, particularly surrogacy, mean for gay individuals and couples? What is the law for foreign commissioning parents? Is it appropriate for market forces to be involved in assisted reproduction and adoption? To what extent is adoption a formal and substantive possibility for lesbians, gay men, and persons in queer relationships?
It is possible for three or four adults to pool genetic, financial and affective resources to conceive and parent a child, but is it also possible to have each adult recognized as a parent? Is such recognition appropriate? If two women want a sperm donor to be involved in a child’s life without being a legal parent, what steps do they need to take to protect their position? These are some of the questions with which this paper is concerned.

My intention is to both map and critique the law pertaining to queer families in the United States and Canada. I contend that it is incumbent upon states (both national and sub-national, in accordance with federal divisions of power) to provide different forms of relationship recognition that respond to the diverse ways in which lesbians and gay men experience and instantiate their relational, affiliative and emotional capacities. Within the current legal framework, marriage is one aspect of this obligation, but it is by no means a complete response. With respect to parent-child relationships, I argue that the concern of the law ought to be with structuring relations in a manner that best meets the needs of children and parents in their diverse relational contexts, without regard to traditional Western conceptions of heterosexual, dyadic parenting. From these premises, I seek to cast attention not only on the advances made in recent decades, but also the “terms of legitimation”\(^5\) by which lesbians and gay men have attained varying degrees of equality, and some of the areas in which the law is yet to respond adequately to the relational needs and desires of queer people. In essence, where we are, but also where we need to go.

Part 1 of the paper grapples with normative questions concerning queer family formation: why and how the law should recognize and support relationships between same-sex adults, and between gay and lesbian parents and children. It does so by a focus on three conceptual frameworks: a capabilities-based approach to human development; feminist re-conceptions of (relational)

autonomy; and queer ethics. An overview of each framework is provided before considering their collective application to the specific issues of same-sex relationships and gay parenting. The discussion in this section provides the normative thrust for the remainder of the paper.

Part 2 addresses relationship recognition in the United States. It provides a doctrinal and critical analysis of the judgment of the Supreme Court in *United States v Windsor,*\(^6\) and considers the implications of the decision for federal recognition of same-sex relationships. It then surveys State laws concerning relationship recognition. Lastly, it addresses the conflict of laws issues that arise in the United States by reason of disparate rules regarding legal recognition of same-sex relationships.

Part 3 considers the treatment of relationships between gay parents and children in the United States. It does so in four sections concerned with, respectively: adoption; surrogacy; artificial insemination and in vitro fertilization; and multi-parentage. Pertinent cross-jurisdictional issues are addressed in each section.

Part 4 turns to the law concerning same-sex relationship recognition in Canada. It takes a somewhat different approach to Part II. This is due to the more developed and centralized state of the law in Canada on this issue, and the clearer lines of authority and legislative development that have established formal relationship equality between same-sex and opposite-sex couples. The first section is therefore devoted to charting and critiquing the legal steps towards formal equality, along with critical developments for same- and opposite-sex couples alike. The second section maps and critiques the law as it is presently is, with a particular emphasis on how marriage remains an ordering principle in Canadian family law.

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\(^6\) 133 S Ct 2675 (2013).
Part 5 is concerned with the establishment and recognition of relationships between gay parents and children in Canada. It is also structured differently to the treatment of this issue in Part III, again because of the Canadian distribution of powers, as well as legal treatment of parent-child relationships in Canada that has tended to imbricate multiple modes of family formation. The first section considers adoption in its various forms, while the second section cumulatively addresses assisted reproduction and surrogacy. Multi-parentage is primarily addressed in the latter section.

A note on terminology is in order. Throughout the paper, I use the descriptors “gay”, “lesbian” and “queer” to refer to people whose sexual and relational preferences tend towards or encompass their own sex. My intention in grouping together gay men and lesbians, and using “queer” as a collective noun interchangeably with “gay men and lesbians”, is in no way to deny the particular and potentially different experiences of gay men, lesbians, and queer-identifying persons, or to contribute to the “epistemic contract of bisexual erasure”. My concern is ostensibly to avoid becoming lexically cumbersome through an (inevitably incomplete) attempt to remain inclusive and respectful of difference at every turn; I also tend towards the view that a shared history of discrimination and effacement warrants an approach that emphasizes commonality rather than difference. This being said, I do not wish to prioritize “gay and lesbian” over alternative signifiers, thereby covertly effacing alternative modes and understandings of sexual/relational being – hence “queer”. As a synonym for “gay and lesbian”, “queer” is used in a sense oriented towards object choice and

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7 Accepting, of course, the “irresolvably unstable” nature of the heterosexual/homosexual dyad and the “definitional field” denoted by the term “homosexual”: Eve Kosofsky Sedgwick, Epistemology of the Closet (Berkeley: University of California Press, 1990) at 10, 45.


10 See further Sedgwick, supra note 7 at 37-38.
potentially encompassing a gamut of sexualities. As an analytic, “queerness” is understood to be more concerned with ethical and political positioning (which may arise out of object choice) and exists in a relationship of some tension with the terms (and meanings of) “gay”\textsuperscript{11} and “lesbian”.\textsuperscript{12}

On an additional and perhaps more substantive note of explication, this paper does not purport or attempt to encompass the particular experiences of trans persons, which are linked to but also distinct from those of lesbians and gay men.\textsuperscript{13} The narrow focus in this sense is borne of my belief that the law concerning trans family formation warrants its own theoretical investigation, which is beyond the scope of the present paper.\textsuperscript{14} To the extent that the discussion herein speaks to the experiences and needs of trans persons, it is to be read inclusively; to the extent that it does not, the exclusion is borne of the need to set parameters for analysis and a concern with not disrespecting the particularity of trans experience.

Lastly, many of the issues canvassed in this paper are in significant flux, particularly in the United States. The information herein is current as of 20 June 2014.

\textsuperscript{11} We seem to have moved from a time when using the term “gay” was “a powerfully assertive act” to one in which the same may be said of employing the term “queer”. See \textit{ibid} at 17.

\textsuperscript{12} See, e.g., Carl F Stychin, \textit{Law’s Desire: Sexuality and the Limits of Justice} (Oxford: Routledge, 1995) at 144: “[Q]ueerness is also a form of resistance to the agenda of the lesbian and gay movement, as it has been implemented in the past. The \textit{perception} in some quarters is that the movements around sexual orientation largely have been tied to a politics of liberal assimilation – a politics derived from the belief in the essential ‘sameness’ of minority sexual preferences.”


PART 1
GROUNDING RECOGNITION OF QUEER FAMILIES

Introduction

In this Part, I consider three conceptual frameworks that, in different ways, support state recognition and support of relational and familial structures involving lesbians and gay men: a capabilities approach to human development; feminist and relational conceptions of autonomy; and a queer sexual ethic. These conceptual structures are admittedly unusual bedfellows, and while I argue that significant congruencies exist between them, I do not seek to diminish their differences. Indeed, part of the value in bringing these frameworks together

For example, Martha Nussbaum’s capabilities approach, with its emphasis on self-determination and affiliation, arguably comports with key elements of a relational approach to autonomy. However, Nussbaum has expressed linguistic and conceptual discomfort towards “autonomy”, in particular because, “if autonomy were made central to a political conception, most religious believers could not accept it”: Martha C Nussbaum, “Political Liberalism and Respect: A Response to Linda Barclay” 4:2 Sats - Nordic Journal of Philosophy 25 at 41. I am not convinced that autonomy denies the possibility of divergent beliefs about the ultimate source of moral authority; Marilyn Friedman in particular argues for a content-neutral understanding of autonomy that does not deny that a person who self-reflectively chooses to live according to a certain set of rules, such as those imposed by religion, is acting autonomously: Marilyn Friedman, Autonomy, Gender, Politics (New York: Oxford University Press, 2003) at 19-25 [Friedman, Autonomy]. Nevertheless, Nussbaum’s objection cautions against conflating the approaches.

One of the most significant point of divergence between, on the one hand, a capabilities approach and relational autonomy, and, on the other hand, queer theory, relates to understandings of the self. Nussbaum and Friedman, for instance, adhere to the modernist paradigm of a coherent, unified self, albeit one that is socially located and hence socially influenced. Seyla Benhabib’s narrative understanding of selfhood and Jennifer Nedelsky’s view of relationships as constitutive shift the self further away from the prototypical Kantian rational agent, though each maintains a belief in the possibility of self-reflective subjectivity and autonomy. Queer theory of the sort practiced by Judith Butler rejects the stable existence of personal identity, arguing instead that the self is a site of discursive contestation where human capacity is “power’s own possibility”: Judith Butler, “Contingent Foundations” in Feminist Contentions: A Philosophical Exchange (New York: Routledge, 1995) 35 at 47. For attempts to reconcile the relationship between feminism and postmodernism see Nancy Fraser, “False Antitheses: A Response to Seyla Benhabib and Judith Butler” in Feminist Contentions: A Philosophical Exchange (New
consists in demonstrating that diverse approaches to human flourishing support diverse relational and familial forms. Accordingly, I do not attempt to establish any structural priority or hierarchy between autonomy, capacity and queer sexual ethics, although it is possible to conceive of these frameworks as bearing particular taxonomic relationships to one another (for example, autonomy as an overarching principle guiding the achievement of human capabilities, of which one is sexual pleasure).\(^2\) My approach is to consider the principles of each framework discretely and then see how these principles can be put to work together to meet the needs of diverse relational and familial structures, particularly those involving lesbians and gay men. Accordingly, in the first section of this Part, I provide an overview of the theoretical frameworks that guide this paper. I first consider Martha Nussbaum’s capabilities approach. I then move to a discussion of feminist conceptions of autonomy, specifically, the work of Seyla Benhabib, Jennifer Nedelsky, Marilyn Friedman, and Martha Fineman. Following that, I sketch the contours of a queer sexual ethic derived in large part from Michel Foucault, along with the work of Judith Butler and Michael Warner. In the second and third sections of this Part, I apply these frameworks in a cumulative manner to questions of state recognition and support of same-sex adult relationships and parenting by lesbians and gay men, including a focus on particular ethical questions raised by the means through which some lesbians and gay men become parents.

I wish to be clear from the outset that I do not view capabilities, autonomy or queer ethics, separately or in concert, as antithetical to rights-based claims for recognition and support of queer family structures. However, rights discourse, at

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\(^2\) Nor do I argue that these perspectives are the only standpoints from which to justify recognition of diverse relational and familial structures.
least in the classical liberal tradition, tends to avoid normative argument in favor of the clarity and aridity of formalism.\(^3\) Hence, my purpose in linking capabilities, autonomy and queer ethics to familial recognition for lesbians and gay men is to provide a normative basis (or bases) for those claims. I propose that in the legal context, capabilities, autonomy and queer ethics ought to be seen as adjuncts to or components of rights claims that are based on the “equal basic liberties”\(^4\) of lesbians and gay men.

I. Capabilities, Relational Autonomy and Queer Ethics

A. Martha Nussbaum and the Capabilities Approach

Martha Nussbaum’s capabilities approach to human development is avowedly essentialist\(^5\) and normative.\(^6\) It is not, however, a comprehensive doctrine


\(^5\) Nussbaum attacks the sort of relativist subjectivism that defends oppressive practices in the name of tradition and cultural difference: Martha C Nussbaum, “Human Functioning and Social Justice: In Defense of Aristotelian Essentialism” (1992) 20:2 Political Theory 202 at 203-12 [Nussbaum, “Aristotelian Essentialism”]. After a blistering account of the pious relativism she encountered at various academic gatherings, she concludes: “[Eric] Hobsbawm and [Amartya] Sen saw what the subjectivists did not perhaps so clearly see: that to give up on all evaluation and, in particular, on a normative account of the human being and human functioning was to turn things over to the free play of forces in a world situation in which the social forces affecting the lives of women, minorities, and the poor are rarely benign.” See also Martha C Nussbaum, \textit{Women and Human Development: The Capabilities Approach} (Cambridge: Cambridge University Press, 2000) at 49 [Nussbaum, \textit{Women and Human Development}].

\(^6\) “We are not pretending to discover some value-neutral facts about ourselves, independently of all evaluation; instead, we are conducting an especially probing and basic sort of evaluative inquiry.” Nussbaum, \textit{Women and Human Development}, supra note 5 at 214.
because of the importance Nussbaum places on political liberalism. In her view, “certain universal norms of human capability should be central for political purposes”, because “once we identify a group of especially important functions in human life, we are then in a position to ask what social and political institutions are doing about them. Are they giving people what they need in order to be capable of functioning in all these human ways?” The approach is thus focused on the state’s role in creating the conditions for individual flourishing, as well as setting out what it means for a human to flourish, because “a necessary condition of justice for a public political arrangement is that it deliver to citizens a certain basic level of capability”. Nussbaum encapsulates this dialogic process as follows:

Is the person capable of this, or not? We ask not only about the person’s satisfaction with what she does, but about what she does, and what she is in a position to do (what her opportunities and liberties are). And we ask not just about the resources that are sitting around, but about how those do or do not go to work, enabling [a person] to function in a fully human way.

Nussbaum’s theory is compelling because it is individualist and relational, liberal and normative. She emphasizes individual capabilities and the separateness of each human life, so that each person is to be respected “as an end, rather than simply as the agent or supporter of the ends of others”. At the same time,

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7 Martha C Nussbaum, Creating Capabilities (Cambridge: Harvard University Press, 2011) at 18 [Nussbaum, Creating Capabilities].
8 Nussbaum, Women and Human Development, supra note 5 at 35.
9 Ibid at 214.
10 Ibid at 71. See also Nussbaum, Creating Capabilities, supra note 7 at 17-18.
11 Nussbaum, Women and Human Development, supra note 5 at 71.
13 Nussbaum, "Aristotelian Essentialism", supra note 5 at 220. Nussbaum therefore aligns herself, at least in this respect, with Rawls: ibid at 233.
14 Nussbaum, Women and Human Development, supra note 5 at 55.
Nussbaum recognizes that humans are “bound to other human beings by ties of mutual attention and concern”.\(^{15}\) Accordingly, formal (liberal) rights are not sufficient (which is not to say that they are not important); it is necessary to find “an approach that is respectful of each person’s struggle for flourishing, that treats each person as an end and as a source of agency and worth in her own right”,\(^{16}\) while also recognizing the individual’s relational position.

Nussbaum’s approach is to identify constitutive aspects of our (individual) humanity and then reify those capabilities as the primary objects of individual, social and political development;\(^{17}\) she does not attempt to set parameters that limit the admissibility of moral concerns but argues instead that the relevant concern must always be the maximization of human capabilities. Similarly, Nussbaum’s focus on the importance of human relationships and affect clearly distinguishes her from the sort of de-contextualized atomism that communitarians such as Michael Sandel have detected in the liberalism of John Rawls.\(^{18}\) Unlike Sandel, though, Nussbaum does not admit the priority of the group over the individual in questions of moral determination:\(^{19}\)

\(^{15}\) Nussbaum, "Aristotelian Essentialism", supra note 5 at 223.

\(^{16}\) Nussbaum, Women and Human Development, supra note 5 at 69.

\(^{17}\) The list of capabilities is intended to instantiate Rawls’s “overlapping consensus”, i.e., “that people may sign on to this conception as the freestanding moral core of a political conception, without accepting any particular metaphysical view of the world”: ibid at 76.

\(^{18}\) Sandel points out that Rawls links the priority of right to a “voluntarist, or broadly Kantian, conception of the person”: a vision of “free and independent selves, unbound by antecedent moral ties, capable of choosing our ends for ourselves”: Michael J Sandel, “Political Liberalism” (1994) 107 Harv L Rev 1765 at 1768. In Sandel’s view, however, it is a fallacy to assume that we are “independent in the sense that our identity is never tied to our aims and attachments” because we are always “members of this family or community or nation or people”: Michael J Sandel, “The Procedural Republic and the Unencumbered Self” (1984) 12:1 Political Theory 81 at 90. Rawls thus “denied to the unencumbered self … the possibility of membership in any community bound by moral ties antecedent to choice”: ibid at 87. The original position is therefore epistemologically flawed because it (figuratively) situates individuals in a de-contextualized place devoid of a priori relations.

\(^{19}\) Nussbaum, Women and Human Development, supra note 5 at 72.
The core idea is that of the human being as a dignified free being who shapes his or her own life in cooperation and reciprocity with others, rather than being passively shaped or pushed around by the world in the manner of a ‘flock’ or ‘herd’ animal. A life that is really human is one that is shaped throughout by these human powers of practical reason and sociability.

The reference to “reason and sociability” in the passage above is important. It coheres with Nussbaum’s view of the individual as a socially situated being, albeit one who has intrinsic, personal value. Furthermore, it suggests that humans are defined not only by our capacity to reason, but also by our capacity to feel emotion\(^{20}\) and interact with other humans. For this reason, Nussbaum views the core capabilities of practical reason and affiliation as being “of special importance, since they both organize and suffuse all the others, making their pursuit truly human”.\(^{21}\) Reason enables the individual “to form a conception of the good and to engage in critical reflection about the planning of one’s life”,\(^{22}\) while affiliation entails the capability to “live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction”.\(^{23}\) Affiliation also requires “the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others”, which in turn requires protection against discrimination.\(^{24}\)

In addition to practical reason and affiliation, Nussbaum’s list of core human capabilities\(^{25}\) includes:\(^{26}\)


\(^{21}\) Nussbaum, *Women and Human Development*, supra note 5 at 82.

\(^{22}\) *Ibid* at 79.

\(^{23}\) *Ibid*.

\(^{24}\) *Ibid*.

\(^{25}\) The basic capabilities have both an internal and an external dimension. For example, the development of practical reason is internal in the sense that it arises within the individual. However, its achievement is also reliant on external factors such as access to sufficient nutrition to enable human growth and an absence of discrimination in the provision of education. *Ibid* at 85.
• Life – This is temporal and qualitative in the sense that Nussbaum focuses on living a life “of normal length” or not dying “before one’s life is so reduced as to be not worth living”.

• Bodily Health – Good health includes reproductive health, as well as adequate nourishment and shelter.

• Bodily Integrity – This relevantly entails freedom of movement, opportunities for sexual satisfaction and for choice in matters of reproduction.

• Senses, Imagination and Thought – Amongst other things, this involves “[b]eing able to search for the ultimate meaning in one’s life in one’s own way” and “[b]eing able to have pleasurable experiences, and to avoid non-necessary pain”. In her more recent work, Nussbaum has argued that imagination plays a critical role in ameliorating forms of injustice because it provides “the ability to see the other as an end, not as a mere means”.27

• Emotions – This requires the capability “to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger.” The prominent place of emotions in Nussbaum’s framework signals a shift away from cognitive Kantianism and towards a view of the self and motivations as constituted by a process of intellectual reason and emotion.28

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26 Ibid at 78-80.

27 Martha C Nussbaum, From Disgust to Humanity: Sexual Orientation and Constitutional Law (New York: Oxford University Press, 2010) at xix; also at 47-51 [Nussbaum, Disgust].

28 This suggests not so much that there is a fundamental disjunction between reason and emotion but more that the scope of what we mean by “reason” may need to be expanded beyond the narrow, cognitive sense. Marilyn Friedman similarly claims that “there is no good reason why features of emotion or character could not constitute reasons, in the sense of facts by virtue of which actions are right or good”: Friedman, Autonomy, supra note 1 at 9.
• Other Species – This concerns the ability to live “with concern for and in relation to animals, plants, and the world of nature”.
• Play – This qualitative capability concerns laughter, play and recreational activities.
• Control Over One’s Environment – This has two elements: the ability to participate in political choices, including freedom of speech and association; and the material ability to hold property on an equal basis, seek employment, and be free from unwarranted search and seizure.

Nussbaum forestalls arguments that specifying universal values risks paternalism and a denuding of autonomy by pointing out that capabilities are not synonymous with functions; that is to say, the mere fact that a person has an opportunity does not mean that she is required to make use of it in a particular way – the point is that the choice is available to her to make using her practical reason:

[The capabilities approach] is focused on choice or freedom, holding that the crucial good societies should be promoting for their people is a set of opportunities, or substantial freedoms, which people then may or may not exercise in action: the choice is theirs. It thus commits itself to people’s powers of self-determination.

She points out that even a supposedly neutral liberal such as Rawls essentialises human freedom and autonomy. While she agrees with Rawls on the centrality of human liberty, “he needs to go further in this direction, making the list of primary goods not a list of resources and commodities at all but a list of basic capabilities of the person”.

29 Nussbaum, "Aristotelian Essentialism", supra note 5 at 225. That being said, when a function is crucial to the achievement of other capabilities, we may be more entitled to promote actual functioning over capabilities in some cases: Nussbaum, Women and Human Development, supra note 5 at 92.
30 Nussbaum, Creating Capabilities, supra note 7 at 18 [emphasis in original].
32 Ibid at 234.
Nussbaum conceives of the family as an entity that is given legal and political form by the state.\textsuperscript{33} It is also a site in which human capabilities are fostered and undermined. The family is thus a legitimate focus of law and public policy, meaning that “capability-based principles of justice should apply to it directly as a part of that [basic] structure [of society], within limits set by the other capabilities, especially the personal liberties (associational, dignitary, and choice-related) of citizens”.\textsuperscript{34} The point is to balance values of personal choice with the family’s “profound influence on human development”\textsuperscript{35} by ensuring that state action in respect of the family is ultimately based on a concern for individual flourishing.\textsuperscript{36}

Insofar as rights are concerned, Nussbaum argues that the capabilities bear "a very close relationship" to human rights: \textsuperscript{37}

> [T]hey cover the terrain covered by both the so-called first generation rights (political and civil liberties) and the so-called second-generation rights (economic and social rights). And they play a similar role, providing the philosophical underpinning for basic constitutional principles.

The idea is not that the capabilities supplant legal rights; rather, the capabilities operate as “the moral core of a specifically political conception, and the object of a political overlapping consensus among people who have otherwise very different comprehensive views of the good”.\textsuperscript{38} Thus, rights function as the formal mechanisms by which claims may be brought, while the capabilities “provide a

\begin{footnotesize}
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\item \textsuperscript{33} Nussbaum, \textit{Women and Human Development, supra} note 5 at 263: “its very definition is legal and political”.
\item \textsuperscript{34} \textit{Ibid} at 276.
\item \textsuperscript{35} \textit{Ibid} at 270.
\item \textsuperscript{36} In the context of the capabilities, this tension speaks to a potential conflict between love and care, and the other capabilities; thus, the relevant question is not whether love is preserved by state action but “whether the capability of each person to select appropriate relations of love and care (and the other central functions) is preserved”. \textit{Ibid} at 274 [emphasis in original].
\item \textsuperscript{37} \textit{Ibid} at 97.
\item \textsuperscript{38} \textit{Ibid} at 105.
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benchmark as we think about what it is to secure a right to someone”. Rights discourse also remains important because it casts attention on the urgency of claims as well as the importance of “choice and autonomy”, rather than mere functioning.

B. Relational Autonomy

Autonomy as both concept and value has been subjected to significant criticism for its tendency towards an atomistic conception of the self and its basis in hierarchical, patriarchal and exclusionary perspectives. Autonomy nevertheless retains a powerful hold on political and philosophical thinking because it speaks to the value of human individuality (as opposed to individualism\textsuperscript{40}), self-determination, and engagement with the trajectory of our respective lives. In this section, I consider autonomy from the perspective of feminist scholars who have sought to refashion autonomy in ways that “combine the claim of the constitutiveness of social relations with the value of self-determination”.\textsuperscript{41}

Seyla Benhabib has captured both the conceptual potential of autonomy and its autarchic manifestation in “early bourgeois male imagination”.\textsuperscript{42} She points out that Lockean conceptions of social order and Kantian notions of rationality generate a world view in which “[j]ustice alone becomes the center of moral theory”, a world in which “[a]s long as the social bases of cooperation and the rights claims of individuals are respected, the autonomous bourgeois subject can

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\item \textsuperscript{39} Ibid at 98.
\item \textsuperscript{40} The difference between these terms is subtle but crucial. As I see it, “individuality” speaks to the distinctiveness of each person and his or her capacity for self-reflection and development. “Individualism”, on the other hand, refers to the essence of the feminist critique of classical notions of autonomy, which is the erroneous belief that individuals are entirely self-determining and develop separately from their relational context.
\item \textsuperscript{41} Jennifer Nedelsky, “Reconceiving Autonomy: Sources, Thoughts and Possibilities” (1989) 1 Yale JL & Feminism 7 at 8 [Nedelsky, “Reconceiving Autonomy”].
\item \textsuperscript{42} Seyla Benhabib, “Sexual Difference and Collective Identities: The New Global Constellation” 24:2 Signs 335 at 354 n 13 [Benhabib, “Sexual Difference”].
\end{itemize}
define the good life as his mind and conscience dictate”.\textsuperscript{43} Benhabib argues that this tradition is particularly evident in Rawls’s focus on equal basic liberties:

For Rawls ... the autonomous self is disembedded and disembodied; moral impartiality is learning to recognize the claims of the other who is just like oneself; fairness is public justice; a system of public rights and duties is the best way to arbitrate conflict, to distribute rewards and to establish claims.\textsuperscript{44}

In this liberal vision of “self-other relations”,\textsuperscript{45} what Benhabib calls “the standpoint of the generalized other” is reified as ideal because it “requires us to view each and every individual as a rational being entitled to the same rights and duties we would want to ascribe to ourselves”.\textsuperscript{46} Formal equality and reciprocity are thus valorized; the position of the individual as an entity distinct from the world around it is reinforced. In contrast, “[t]he standpoint of the concrete other ... requires us to view each and every rational being as an individual with a concrete history, identity and affective-emotional constitution”.\textsuperscript{47} Equity and complementary reciprocity (i.e., recognition of the specific needs and capacities of individuals) are prioritized; the position of the individual as embedded in her social situation and tied to other individuals is affirmed. Autonomy is thus refigured as involving “the ability to distance oneself from one’s social roles, traditions, history, and even deepest commitments and to take a universalistic attitude of hypothetal questioning toward them”.\textsuperscript{48} Unlike classical liberal visions of the self, such as Hobbes’ vision of men who “suddenly, like mushrooms, come to full maturity,

\textsuperscript{43} Seyla Benhabib, “The Generalized and the Concrete Other: The Kohlberg-Gilligan Controversy and Feminist Theory” (1986) 5:4 Praxis International 402 at 407; also at 408: “one of the most fundamental of these myths and symbols has been the ideal of autonomy conceived in the image of a disembedded and disembodied male ego” [Benhabib, “Generalized and Concrete Other”].

\textsuperscript{44} \textit{Ibid} at 409.

\textsuperscript{45} \textit{Ibid} at 410.

\textsuperscript{46} \textit{Ibid} at 411.

\textsuperscript{47} \textit{Ibid}.

\textsuperscript{48} Benhabib, “Sexual Difference”, \textit{supra} note 42 at 354, n 13.
without all kind of engagement to each other”,49 Benhabib’s view of individual autonomy “requires no denial of the heteronomy of the subject, i.e., of the fundamental dependence of the self on the webs of narrative interlocution that constitute it”.50 Nor does this involve any denial of human individuality, which is confirmed by having others treat us “in accordance with the norms of friendship, love, and care”.51 Critically, Benhabib argues that her communicative ethic, with its relational theory of the self, means that “not only rights but needs, not only justice but possible modes of the good life, are moved into an anticipatory-utopian perspective”.52

Jennifer Nedelsky has also confronted the problem of reconciling self-determination and relationality. In Nedelsky’s view, a reconceived notion of autonomy that rejects “the dichotomy between autonomy and the collectivity” achieves the necessary mediation by recognizing that “there are no human beings in the absence of relations with others”.53 Nedelsky argues that a focus on autonomy is politically necessary because “[i]t is too central to our aspirations not to let others define our lives, constrain our opportunities, or exclude us from

49 Benhabib, “Generalized and Concrete Other”, supra note 43 at 408.
51 Benhabib, “Generalized and Concrete Other”, supra note 43 at 411. In “Toward a Discourse Ethic of Solidarity”, Nancy Fraser agrees with Benhabib’s conception of identity as being, in Fraser’s words, “intertwined with the history and culture of the collectivity in relation to which one individuates”. However, she argues that Benhabib adopts a view of the concrete other that is overly individualistic. Fraser proposes instead “the standpoint of the collective concrete other”, in which the norms governing interactions would be norms of collective solidarities, and where autonomy “would mean to be a member of a group or groups which have achieved a degree of collective control over the means of interpretation and communication sufficient to enable one to participate on a par with members of other groups in moral and political deliberation”. Nancy Fraser, “Toward a Discourse Ethic of Solidarity” (1986) 5:4 Praxis International 425 at 428.
52 Benhabib, “Generalized and Concrete Other”, supra note 43 at 416-17. It is beyond the scope of this paper to parse the voluminous literature on utopian perspectives and aspirations. However, in the context of a discussion that brings together autonomy and queer theory, it would be remiss not to note the specifically queer vision of utopia presented by José Esteban Muñoz, Cruising Utopia: The Then and There of Queer Futurity (New York: NYU Press, 2009) [Muñoz, Cruising Utopia].
53 Nedelsky, “Reconceiving Autonomy”, supra note 41 at 9, 12.
the power to shape collective norms.”  

54 She conceives of “autonomy as the core of a capacity to engage in the ongoing, interactive creation of our selves.”  

55 Autonomy is not synonymous with independence or control. Instead, autonomy refers, in the broadest sense, to the “finding [of] one’s own law … a discernment of the kinds of commitments to oneself that will foster different components of the capacity for creative interaction”; put simply, self-reflection (not in an exclusively intellectual sense) and self-consciousness (in the sense of the “effort to know oneself”).  

56 The relational component of Nedelsky’s vision of autonomy is premised on the idea that “each individual is in basic ways constituted by networks of relationships of which they a part.”  

58 Nedelsky explains this view in part by reference to forms of harm that do not directly affect persons (Nedelsky gives the example of another’s homelessness) but which, by reason of our “fundamental interconnectedness”, impact upon us at an affective level (“I know that there is a direct relationship between my legally protected right to exclude even a cold and hungry person from my home and that person being on the street”). Despite her constitutive view of relationships, Nedelsky is equally clear that relationships are not determinative because “relational autonomy presupposes that autonomy is possible for relational selves”; relational determinism is thus 

54 Jennifer Nedelsky, Law’s Relations: A Relational Theory of Self, Autonomy, and Law (New York: Oxford University Press, 2012) at 43-44 [Nedelsky, Law’s Relations]. This is not to say that autonomy is the “highest of human values”; rather, it is “a powerful existing value” that can best be understood in relational terms: ibid at 45.  

55 Ibid at 46.  

57 Ibid at 50.  

58 Ibid at 19.  

59 Ibid at 24.  

60 Nedelsky’s definition of relationships is not restricted to intimate or familial relations; rather, her “nested relations” approach also considers relationships between, for example, employer and employee: ibid at 20-22, 30-31.
antithetical to autonomy. Moreover, a relational approach to autonomy does not, according to Nedelsky, “stand in opposition to the importance of individuality” because persons become individuals through participation in forms of relations. Accordingly, Nedelsky rejects the existence of a dichotomy between individual and community because the former arises out of the latter. The human capacity for creation thus develops “in constant interaction with layers of social relations”. The constitutive but not determinative aspect of Nedelsky’s concept of relational autonomy parallels Benhabib’s insistence that “to be ‘constituted’ by narrative is not to be ‘determined’ by it; situatedness does not preclude critical distantiation and reflexivity”.

Nedelsky, like Martha Fineman, emphasizes human dependency “as a core dimension of the relational self”. She argues that humans are interdependent not only in times of diminished capacity, whether age- or illness-related, but throughout our entire lives. Language is intrinsically dependent on others, just as (per Arendt) “our cognitive faculties, including both thinking and judging, require the presence of others”. Nedelsky charges Nussbaum with failing to fully recognize human interdependence in rejecting the idea that “Indian women cannot distinguish their own hunger from the hunger of a child or a husband,

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61 Ibid at 31.
62 Ibid at 27.
63 Ibid at 55.
64 Ibid. Nedelsky suggests that the epistemological conundrum of how one can know that one is acting autonomously can be dealt with through an Arendtian notion of judgment: “One cannot be autonomous without doing the work of exercising judgment about how one engages with the inevitably conditioned desires, interests, or aspirations one has. Similarly, when one reflects on one’s decisions, or a path of life one has chosen, trying to discern whether the choice was an autonomous one requires judgment.” Ibid at 58.
67 Nedelsky, Law’s Relations, supra note 54 at 28.
68 Ibid.
cannot really distinguish their own body and its health from someone else's body and its health". For Nedelsky, “this captures a kind of inability to see the nature of relational selves as consistent with what actually matters about individuality … it can be equally true that a mother is in pain when her children are hungry”. Despite this criticism, Nedelsky recognizes that her belief in “the infinite and equal worth of every individual” is concordant with Nussbaum’s focus on individual dignity and well-being; her disagreement is with the extent to which it is necessary to insist “on a kind of separateness in order to maintain the worth and dignity of the individual”.

Nedelsky’s work is particularly useful in considering the relationship between relational autonomy and law. In essence, Nedelsky argues that legal claims are best analyzed in terms of how they structure relations because “[w]hat rights and law actually do, right now, is structure relations”. She gives as an example the law of marriage, which raises “the extent to which it is appropriate for the state to reinforce or reward certain kinds of intimate relations over others”. Focusing on how different relationships foster autonomy would “aid reflection on this important question”. Crucially, a relational approach to law does not assume that the solution to every problem is more regulation and state intervention. It may be the case that the state ought to increase its presence in a particular area, but it may equally be autonomy enhancing for the state to retreat from certain areas, such as regulation of sexual activity. A relational approach enables one to assess the nature of state action by “highlight[ing] the way law participates in creating

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69 Ibid at 30.
70 Ibid.
71 Ibid at 86.
72 Ibid at 30.
73 Ibid at 65-66.
74 Ibid at 68.
75 Ibid at 70-73.
the problem”, “identify[ing] ways of shifting the problem by making changes in the way existing law structures relations”, and “mak[ing] it clearer when a solution actually calls for additional state action”.

Drawing on her conception of the interplay between relationality and law, Nedelsky suggests that we view “legal rights as a particular institutional and rhetorical way of implementing values”, meaning that “debates over how a particular right should be interpreted … should be structured around questions of which interpretation will promote the underlying, possibly competing, values.”

This view parallels Nussbaum’s conception of the relationship between rights and capabilities. The relational approach is thus “not some sort of collective alternative to protecting and enforcing individual rights. It is, rather, a means of doing so.” Accordingly, if autonomy were the relevant value at stake, “the question would be whether the contested outcome (e.g., legislation) so seriously undermines the structures of social relations that make the development of autonomy possible that it should be found to be a violation of a constitutional right (such as liberty)”. Nedelsky is clear that “[c]onceptualizing rights as institutional methods of protecting values does not mean that judges can simply disregard entrenched rights in the name of an underlying value”. Rather, “judges should ask whether a given interpretation of a right will structure relations in a way that will foster or undermine the value at stake”. In essence, “[t]he value would be a guide to interpretation of competing rights”.

Marilyn Friedman has offered a conception of autonomy that emphasizes individuality more than the constitutive view of human relationships shared by Benhabib and Nedelsky. Nevertheless, Friedman’s approach accepts and indeed emphasizes the importance of relationality to autonomy. In this sense, I would suggest that her framework bears a number of parallels with Nussbaum’s

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76 Ibid at 72.
77 Ibid at 75.
capabilities approach. For Friedman, “[a]utonomy is, of course, self-determination. Personal autonomy is self-determination by an individual self, a person.”\footnote{78} Like Nussbaum, Friedman accepts “the Western paradigm of individual human persons as the standard case of moral agents”\footnote{79} and does not reject the notion of a coherent, unified self,\footnote{80} or the possibility of self-determination. However, autonomy also “never loses its social rootedness”, despite being “individuating in its effects on persons”.\footnote{81} Friedman locates the importance of autonomy in the “presumption that there is value in a life lived in accord with the perspective of the one who lives it”.\footnote{82} She argues that there is intrinsic value not only in one’s personal autonomy but also the autonomy of others, because even from one’s personal perspective, the concern we have for others “extend[s] the apprehension of the intrinsic value of autonomy beyond the circle of self-concern”.\footnote{83}

Friedman emphasizes self-reflection in a manner that is similar to Nussbaum’s concern for practical reason.\footnote{84} Friedman says that “[s]omeone is self-determining when she acts for the sake of what matters to her, what she cares deeply about, and, in that sense, who she ‘is’”.\footnote{85} Friedman explores the relationship between

\footnote{78} Friedman, Autonomy, supra note 1 at 4.
\footnote{79} Ibid at 69.
\footnote{80} Friedman’s view is that “the problems that seem to arise from individualism derive instead from selfish egoism and other values that become commingled with individualism. They are not as such problems inherent to a focus on individuals or individuality … while an emphasis on individuality allows for selfish egoism, it does not entail it”: ibid.
\footnote{81} Ibid at 17.
\footnote{82} Ibid at 56.
\footnote{83} Ibid at 60.
\footnote{84} “When wants and desires lead to choice or action without having been self-reflectively endorsed by the person whose wants and desires they are, the resulting choices and actions are not autonomous.” Ibid at 5. See also ibid at 56: “An ideal of personal autonomy is based on the presumption that there is value in a life lived in accord with the perspective of the one who lives it.”
\footnote{85} In this vein, Friedman argues that “perspectival identity” is crucial; that is, the particular wants, desires, cares, concerns and values that motivate and actuate existence, not the
self-reflection and identity in her distinction between perspectival and trait-based identity. Identity in the perspectival sense depends, unsurprisingly, on an individual's perspective and a determination as to the important axes of her own existence, reached through a process of self-reflection. Trait-based identity refers to socially ascribed categories such as gender, race and citizenship, which may or may not have any especial salience in a particular individual's identity. In Friedman's view, perspectival identity is "what counts for autonomy"; trait-based characteristics matter only insofar as they form part of perspectival identity. This places Friedman at odds with communitarian concerns for the attachments between a person and the community or group(s) to which they belong because, on Friedman's account, "[i]nsofar as communal or any other humankind identity matters to autonomy, it does so to the extent that it constitutes something a person cares about". A focus on perspectival identity requires an approach that is neutral as to the content of an individual’s choices; that is to say, what a person chooses is less important than the ability to make autonomous choices. Thus, a choice to live hermetically is autonomous if it is made through a process of reflective, non-coerced decision-making. As noted above, this procedural view of autonomy establishes a nexus with Nussbaum’s approach because it recognizes that people exercise autonomy in different ways, including by reference to comprehensive moral doctrines. Nussbaum approaches this issue by drawing a distinction between capability and functioning. Functioning refers to

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86 Ibid. at 10-11.
87 Ibid. at 12.
88 Ibid. at 94. This is similar to Nedelsky’s view that decisions that are facially antithetical to autonomy can in fact be autonomous if they are made in accordance with other sets of values to which the person has chosen to adhere. This being said, Nedelsky seeks to avoid taking sides on the proceduralist / substantivist debate: Nedelsky, Law’s Relations, supra note 54 at 59-60.
the manifestations of one’s capabilities; in Nussbaum’s view, they should not be the concern of public policy because “[c]itizens must be left free to determine their own course” once the opportunity to exercise their capabilities is present.\(^89\)

Friedman claims that autonomy, while ultimately a matter for individual realization, is inextricably linked to the social context that one inevitably inhabits: “Although autonomy is individuating in its effects on persons, it never loses its social rootedness.”\(^90\) In my view, this coheres with Nussbaum’s belief in the architectonic nature of affiliation because each framework emphasizes human relationality and individual self-determination (though Nussbaum is more overtly accommodating of religious belief). Friedman’s position on the question of whether “social relationships [are] merely causal conditions that are necessary to bring autonomy about but are external to autonomy proper”, or whether they are “somehow partly ‘constitutive’ of autonomy”, is not made explicit.\(^91\) In my view, she tends towards the causal view.\(^92\) Her emphasis on human individuality does not sit comfortably with Nedelsky’s view that autonomy is constituted through social relationships:

Autonomy requires individuation to begin with, itself at least partly a product of social practices of differential naming and differential characterizing. At the same time, autonomy is also a mode of (further) individuating. Autonomy involves practices by which physically separate selves, who are already characterized by differentiated nominal identities and spatiotemporal life narratives, may reinforce their distinctness from others and their mutual differentiation by acting on concerns of their own that are distinct from, and may conflict with, those of others.\(^93\)

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\(^89\) Nussbaum, *Women and Human Development*, *supra* note 5 at 87.

\(^90\) Friedman, *Autonomy*, *supra* note 1 at 17.

\(^91\) *Ibid* at 96.

\(^92\) *Ibid* at 97, especially n 73. Cf Carlos A Ball, “This is Not Your Father’s Autonomy: Lesbian and Gay Rights From a Feminist and Relational Perspective” (2005) 28 Harv JL & Gender 345 at 358-59 (aligning Friedman with Nedelsky) [Ball, “Father’s Autonomy”].

\(^93\) Friedman, *Autonomy*, *supra* note 1 at 16.
Of course, the fact that individuation is “at least partly a product of social practices” negates any imputed lapse on her part into atomism.94

Martha Fineman has offered another important perspective on autonomy. In The Autonomy Myth,95 Fineman takes issue with the idea of autonomy as independence and self-sufficiency. She points out that dependence is an unavoidable fact of existence – as infants we require the care of others, usually our parents; as we age, the extent of our care requirements once again increase, this time to be provided potentially by children, able partners, or outside of the “private” realm of the family.96 Fineman also attacks the notion of autonomy as equivalent to economic self-sufficiency when in fact any coherent conception of autonomy must take account of state regulation, intervention and the unavoidability of some measure of dependence on the state’s (direct or indirect) largesse.97 This aspect of Fineman’s critique is also evident in Nedelsky’s more recent work on dependency and relational autonomy, discussed above.

Fineman contends that in modern Western culture, the corollary of autonomy-as-self-sufficiency is the notion of equal opportunity, which means “that each

94 Ibid. See also ibid at 17: “Atomistic selves, lacking any prior social relationships to other human beings, are not the bearers of autonomy.”

95 Fineman, Autonomy Myth, supra note 66.

96 Ibid at 34-35. This is not to suggest that between these life stages we are capable of autonomy in the sense that we are devoid of dependency on others or, crucially, the state: “We delude ourselves when we think that many (perhaps any) endeavors in our complex modern society can be undertaken in an autonomous and independent manner”: ibid at 33. Dependency may arise in a derivative form, for instance, when a person is tasked with the care of another, which in turn leads to dependence on “resources in order to undertake that care”: ibid at 36. Inevitable dependency of the type involving children and the aged of course implicates those who are depended upon – traditionally women. Even in the hackneyed vision of the breadwinning husband we see dependency – on him, of course, in a financial (and emotional) sense, but also dependency by him on the institutions that support his and his family’s existence – his (often ignored) wife, his employer, the state, and structural forces that have created the situation into which he was born.

97 “Autonomy in this regard is individual freedom from state intervention and regulation, the ability to order one’s activities independent of state dictates. In particular, we think of an economically self-sufficient individual as autonomous in relation to society and its institutions.” Ibid at 20.
individual can succeed or fail according to her or his own merits and initiative”. If, however, autonomy in its ordinary sense is a myth, what does this mean for equality? Fineman argues that in order to achieve substantive equality, it is necessary to move beyond a “shallow sense of autonomy” to “one that recognizes that the individual lives within a variety of contexts and is dependent upon them”. Fineman's point is that autonomy and equality are imbricated notions, and “we must begin to think of autonomy as possible only in conjunction with the meaningful and widespread attainment of equality”. Fineman’s focus is on the provision of equal basic resources, so that autonomy can be achieved in a meaningful sense. Extending this point, we might also say that equal access to the basic structures of society is a prerequisite for the exercise of autonomy. The critical point in respect of both resources and structures is that state intervention is not only involved but is also positively required. Fineman's focus on removing structural barriers to the exercise of personal volition, while couched in the language of substantive equality, can be seen to cohere with Friedman’s focus on procedural autonomy, because each is concerned with creating the conditions that enable the individual to achieve, respectively, equality and autonomy.

C. Queer Ethics

In this section, I consider the ethical vision that is offered by queer critique, which generally rejects “liberal assimilationist rhetoric in the lesbian and gay rights movement” and views with great skepticism the domestication, privatization and ultimate normalization of queer sexuality.

98 Ibid at 26.
99 Ibid at 28.
100 Ibid at 29.
Queer and progressive critique in the realm of sexuality and power owes a constitutive debt to Foucault’s axiom\textsuperscript{102} that homosexuality in the West emerged as a social category in the 19\textsuperscript{th} century via the twin impulses of sexual repression and a correlative explosion of sex-soaked discourses in the areas of medicine, psychiatry and science.\textsuperscript{103} Foucault argued that “[w]hat is peculiar to modern societies, in fact, is not that they consigned sex to a shadow existence, but that they dedicated themselves to speaking of it \textit{ad infinitum}, while exploiting it as the secret”.\textsuperscript{104} Victorian-era medical discourse, through its schematization of human sexuality, transformed sodomy from an act (“the sodomite had been a temporary aberration”) to a marker and a maker of identity (“the homosexual was now a species”).\textsuperscript{105} Having emerged via discourse, this new species also became

\textsuperscript{102}For a discussion of this aspect of Foucault’s work see Eve Kosofsky Sedgwick, \textit{Epistemology of the Closet} (Berkeley: University of California Press, 1990) at 44-48 [Sedgwick, \textit{Epistemology of the Closet}]. (Suggesting that the analysis begun by Foucault is incomplete to the extent that it counterposes “against the alterity of the past a relatively unified homosexuality that ‘we’ \textit{do} ‘know today’” and arguing that “an unfortunate side effect of this move has been implicitly to underwrite the notion that ‘homosexuality as we conceive of it today’ itself comprises a coherent definitional field rather than a space of overlapping, contradictory, and conflictual definitional forces”: \textit{ibid} at 45).

\textsuperscript{103}Michel Foucault, \textit{The History of Sexuality, Volume I} (New York: Vintage, 1990) at 17-49 [Foucault, \textit{History of Sexuality I}]. A contrasting view is John D’Emilio’s social constructionist claim that modern gay identity is a product of capitalism and industrialization, which engendered a shift in focus from act to identity. Individual wage labor enabled “particular men and women to act on their erotic/emotional preference for the same sex”, while “the new consciousness that this made them different, led to the formation of an urban subculture of gay men and lesbians”. Critically, D’Emilio connects these developments to the emergence of “pro-family” movements through capitalism’s logic of privatization. His argument is that wage labor weakened the family as an interdependent economic unit, transforming the family into “the source of love, affection, and emotional security, the place where our need for stable, intimate human relationships is satisfied”. To compensate for the “social instability of the system”, and to ensure that the heterosexual family remains the situs of reproductive fecundity, lesbians and gay men are constructed as threats to the family and hence to society (and capitalism). John D’Emilio, “Capitalism and Gay Identity” in Henry Abelove, Michele Aina Barale, and David M Halperin (eds), \textit{The Lesbian and Gay Studies Reader} (New York: Routledge, 1993) 467.

\textsuperscript{104}Foucault, \textit{History of Sexuality I}, supra note 103 at 35.

\textsuperscript{105}\textit{Ibid} at 43.
controlled by discourse, through what David Halperin has called “liberal power”, which exercises control through the very freedom of its subjects:106

Modern forms of governmentality actually require citizens to be free, so that citizens can assume from the state the burden of some of its former regulatory functions and impose on themselves – of their own accord – rules of conduct and mechanisms of control.

On this view, institutional and discursive forces of normalization – capitalism, marriage, reproduction – exert their own disciplinary force as citizens attempt, volitionally,107 to demonstrate their capacity to enter into “the various rights assigned by the state’s civil institutions exclusively to law-abiding citizens possessed of sound minds and bodies”.108 Gayle Rubin has expanded on the logic of this normalizing (and hence stigmatic) social structure:109

Stable, long-term lesbian and gay male couples are verging on respectability, but bar dykes and promiscuous gay men are hovering just above the groups at the very bottom of the pyramid. …

Individuals whose behaviour stands high in this hierarchy are rewarded with certified mental health, respectability, legality, social and physical mobility, institutional support, and material benefits. As sexual behaviour or occupations fall lower on the scale, the individuals who practice them are subjected to a presumption of mental illness, disreputability,

106 David M Halperin, Saint Foucault: Towards a Gay Hagiography (New York: Oxford University Press, 1995) at 18 [Halperin, Saint Foucault]. In a similar register, Brenda Cossman has argued: “Citizenship is not simply a normative aspiration, but a technology of governance that constitutes a highly disciplined citizen. Yet, it is also a citizen produced through the practices of autonomy and choice; citizens must choose among a range of available practices, discourses, and aesthetics: A citizen who is disciplined, but not wholly so.” Brenda Cossman, Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging (Stanford: Stanford University Press, 2007) at 14 [Cossman, Sexual Citizens].

107 Autonomy of a kind is by no means alien to Foucault’s worldview. Halperin has argued that “[t]he kind of power Foucault is interested in, then, far from enslaving its objects, constructs them as subjective agents and preserves them in their autonomy, so as to invest them all the more completely”: Halperin, Saint Foucault, supra note 106 at 18 [emphasis added].

108 Ibid at 19.

criminality, restricted social and physical mobility, loss of institutional support, and economic sanctions.

As Rubin points out, the creation of sexual and social hierarchies is the result of interplay between the discursive and the institutional – culture and law drawing together to set the acceptable parameters of sexual and intimate life. In this vein, Eve Kosofsky Sedgwick observed that “[t]he special centrality of homophobic oppression in the twentieth century, … [resulted] inextricably from the question of knowledge and the processes of knowing in modern Western culture at large”. 110

Sedgwick’s point is that the marginalization of lesbians and gay men was – and is – dependent not only on the creation of categories of others but also the intensification of discourses of normality. A similar point has been made by the liberal gay rights scholar William Eskridge, who has observed that the law “reinforced social pressure by normalizing sex around marital procreation and by empowering relatives who sought to control or strangers who victimized the invert”. 111 States devoted increasing energies towards deconstructing the closet and revealing its truths, thrusting gay men and lesbians into the social consciousness; 112 simultaneously, courts cemented queer alterity in “virulent ruling[s]” such as Bowers v Hardwick, 113 “whose language made from beginning to end an insolent display of legal illogic”. 114

For Foucault, a critical means of countering discursive and social structures of normalization and alterity was by focusing on pleasure as a crucial axis of queer

110 Sedgwick, Epistemology of the Closet, supra note 102 at 33-34.
111 William N Eskridge, Jr, Gaylaw: Challenging the Apartheid of the Closet (Cambridge: Harvard University Press, 1999) at 52 [emphasis in original].
112 In the 1940s and 50s, the American state enacted a vicious witch-hunt designed to sniff out the homosexual, publicly humiliate him or her, and then eradicate them from public life. In the United States, up to a million gay men and lesbians were subjected to criminal punishments for crimes as trivial as holding hands. William Eskridge has memorably called the result of this process “an apartheid of the closet, whereby homosexuals were segregated from civilized society, not physically, but psychically and emotionally”: ibid at 59-60.
114 Sedgwick, Epistemology of the Closet, supra note 102 at 6.
existence. He distinguished pleasure from desire on the basis that the latter has historically functioned as a method of categorization, "a grid of intelligibility". Pleasure, on the other hand, “is virgin territory”, meaning that a focus on it opens up new terrains of possibility to counter the “impoverished” state of the relational world with its “extremely few, extremely simplified, and extremely poor” options. Foucault argued for the establishment of “homosexual lifestyles, existential choices in which sexual relations with people of the same sex will be important. It’s not enough as part of a more general way of life, or in addition to it, to be permitted to make love with someone of the same sex.” Foucault saw homosexuality as “a historic opportunity to open up new relational and affective potentialities [virtualités], not in virtue of qualities intrinsic to the homosexual, but because the position of the homosexual ‘offcenter’ … makes it possible to bring to light these potentialities”. He detected such potentiality in non-normative forms of sexual engagement such as sadomasochism and fisting. The intrinsic relationship Foucault detected between sex, power and politics meant that he saw these practices as being invested with great political significance because of their focus on the “strategic use of power differentials to produce effects of pleasure instead of effects of

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116 Ibid at 93.
117 Ibid at 94.
119 Barbedette, supra note 118 at 36 in *ibid* at 79-80.
domination” (via a focus on desire). In *The Use of Pleasure*, Foucault drew on the sexual and lifestyle practices of Ancient Greece as an example of the way in which an emphasis on pleasure rather than desire involved technologies of the self, or an art of life. For Foucault, the point to be taken from the Greeks was the necessity of working with pleasure in order to transform oneself via a process of self-governance, as opposed to relying on or adhering to universalizing codes of conduct that categorize and thus place people in hierarchies of power.

Despite Foucault’s emphasis on the transformative potential of forms of queer sex, it is to be observed that his concern with pleasure was not confined to sexual practices. Towards the end of his life, Foucault observed that the true threat posed by homosexuality is not same-sex sexual intimacy but rather “that individuals might begin to love each other, that’s the problem”. The way of life is thus more threatening than the sexual act because disrupting the existing relational schematic suggests a host of new relational possibilities for myriad sexualities:

> We have to reverse things a bit. Rather than saying what we said at one time: “Let’s try to re-introduce homosexuality into the general norm of social relations”, let’s say the reverse: “No! Let’s escape as much as possible from the type of relations which society proposes for us and try to create in the empty space where we are new relational possibilities.”

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125 Foucault referred to “those intentional and voluntary actions by which men not only set themselves rules of conduct, but also seek to transform themselves, to change themselves in their singular being, and to make their life into an oeuvre that carries certain aesthetic values and meets certain stylistic criteria”: Foucault, *The Use of Pleasure*, supra note 123 at 10-11.
127 Barbedette, *supra* n 118 at 38-39 in *ibid* at 100.
proposing a new relational right, we will see that non-homosexual people can enrich their lives by changing their own schema of relations.

Heeding this call for new relational possibilities, Michael Warner has argued that the “anarchic gutter zone” of queer subcultures offers critical ethical insights into “the public questions of sexual culture”. The “ground rule” in this queer ethic is “that one doesn’t pretend to be above the indignity of sex … [which] is understood to be as various as the people who have it”. Warner understands this queer form of existence as an ethic “not only because it is understood as a better kind of self-relation, but because it is the premise of the special kind of sociability that holds queer culture together”. This focus on “self-relation[s]” and “special kind[s] of sociability” recalls the use of pleasure and the care of self that are central to the later Foucault. From this ethical premise, Warner makes a diacritical move towards notions of dignity, arguing that “most common judgments about sex assign dignity to some kinds (married, heterosexual, private, loving), as long as they are out of sight, while all other kinds of sex are no more dignified than defecating in public”. Thus, by acknowledging one’s queer sexuality and indignity, one paradoxically achieves a new form of “dignity in shame”. Marriage works to undermine this dignity because the corollary of its “ennobling” effect on its participants is the “demeaning” of those who remain unwed; accordingly, in Warner’s view, marriage is unethical because of its

129 Ibid at 35.
130 Ibid.
131 Ibid at 36.
132 Ibid at 36-37, 74-75. For discussion of this aspect of Warner's thesis see Dean, supra note 121 at 19-21.
133 Warner, The Trouble With Normal, supra note 128 at 95-109. See also ibid at 60: “embracing this standard merely throws shame on those who stand farther down the ladder of respectability”. Warner’s critique was in large part a response to Andrew Sullivan’s Virtually Normal, in which he argued that “[t]here are very few social incentives of the kind conservatives like for homosexuals not to be depraved … the proper conservative response to this is … to construct social institutions and guidelines to modify
discriminatory and stigmatic effects on those left outside of its privileged sanctum.\textsuperscript{134}

Drawing on Warner’s work, Tim Dean has called for an “ethics of alterity” that “begins not with making judgments about (or trying to regulate) others’ sex lives but with establishing others’ freedom from interference, even as we recognize our mutual sexual interdependence”.\textsuperscript{135} Dean argues that “cruising exemplifies a distinctive ethic of openness to alterity” and “a remarkably hospitable disposition towards strangers”\textsuperscript{136} that operates as a critical counter-narrative to family-values rhetoric.\textsuperscript{137} In a similar register to Warner, Dean draws on Foucault in concluding that from the perspective of an ethic of alterity, “gay marriage rights inevitably would stigmatize even further all those forms of intimacy that don’t fit into the connubial couple mold, and it would discourage everyone – whether gay, straight, or otherwise – from undertaking relational experiments”.\textsuperscript{138}

\textsuperscript{134} Warner, \textit{The Trouble With Normal}, supra note 128 at 107-09. This mode of analysis bears some resemblance to feminist work concerning the multiple effects of one’s positioning. Sedgwick explained this by referring to “how the person who is disabled through one set of oppressions may by the same positioning be enabled through others”: Sedgwick, \textit{Epistemology of the Closet}, supra note 102 at 32. In the context of a queer critique of same-sex marriage, this is shifted so that a person who is enabled by one set of oppressions (marriage) is by that positioning disabling others.

\textsuperscript{135} Dean, \textit{Unlimited Intimacy}, supra note 121 at 25-26.

\textsuperscript{136} \textit{Ibid} at 176.

\textsuperscript{137} \textit{Ibid} at 191. From this premise, Dean argues that “[i]n its refusal of the pernicious ideology of safety, bareback subculture infers that the pleasures of intimacy may be worth the risks”: \textit{ibid} at 211.

\textsuperscript{138} \textit{Ibid} at 197.

The relations of kinship cross the boundaries between community and family and sometimes redefine the meaning of friendship as well. When these modes of intimate association produce sustaining webs of relationships, they constitute a “breakdown” of traditional kinship that displaces the presumption that biological and sexual relations structure kinship centrally. … Within these frames, sexuality is no longer exclusively regulated by the rules of kinship at the same time that the durable tie can be situated outside of the conjugal frame. Sexuality becomes open to a number of social articulations that do not always imply binding relations or conjugal ties.

In the context of the same-sex marriage debate, Butler notes that “the question of whether marriage ought to be legitimately extended to homosexuals … means that the sexual field is circumscribed in such a way that sexuality is already thought in terms of marriage and marriage is already thought as the purchase on legitimacy”.\footnote{Judith Butler, “Is Kinship Always Already Heterosexual?” in Wendy Brown & Janet Halley (eds), \textit{Left Legalism/Left Critique} (Durham: Duke University Press, 2002) 229 at 232 [Butler, “Kinship”].}

A debate structured between the normal / pathological polarity thus implicitly accepts the terms of that defining framework, such that “we are as defined by those terms when we seek to establish ourselves within the boundaries of normality as we are when we assume the impermeability of those boundaries and position ourselves as its permanent outside”.

Butler’s point is that the very act of taking a position on the question of whether same-sex couples ought to be ‘allowed’ by the state to marry necessarily involves an acceptance and hence a reification of marriage as an organizing structure. This is not to deny that “marriage and same-sex domestic partnerships

\footnote{Accepting the parameters of such binaries is intrinsically melancholic because it means, “we have accepted an epistemological field structured by a fundamental loss, one that we can no longer name enough even to grieve”: \textit{ibid} at 255.}
should certainly be available as options”;\(^{142}\) rather, it is to question whether “the turn to marriage make[s] it thus more difficult to argue in favor of the viability of alternative kinship arrangements and for the well-being of the ‘child’ in any number of social forms?”\(^{143}\) Indeed, Butler points to the failure on the part of many advocates of same-sex marriage to recognize not only that “the state’s offer [of marriage] might result in the intensification of normalization”,\(^{144}\) but also the “fundamental occlusion” involved in considering that the “immanent possibilities” of intimate alliance are exhausted by the legitimate/illegitimate binary. This failure to see beyond the discursive field prescribed by liberal power reinforces hierarchies of the sort identified by Rubin, as well as producing “tacit distinctions among forms of illegitimacy”. Butler’s point about the circumscription of sexual fields is of course not limited to marriage. Her concern for the possibilities offered by non-traditional forms of kinship, “modes of social organization for sexuality that are neither monogamous nor quasi-marital”, speaks to the Foucauldian imperative to “escape as much as possible from the type of relations which society proposes for us.”\(^{145}\)

Presaging Butler on this point, Nancy Polikoff argued in the early 1990s that “any effort to legitimize lesbian and gay marriage would work to persuade the heterosexual mainstream that lesbians and gay men seek to emulate heterosexual marriage as currently constituted”.\(^{146}\) In turn, public critique of “the limitations of marriage, and of a social system valuing one form of human


\(^{143}\) Butler, "Kinship", supra note 140 at 231. See also Judith Butler, "Introduction: Acting in Concert" in Undoing Gender (New York: Routledge, 2004) 1 at 5: “efforts to establish bonds of kinship that are not based on a marriage tie become nearly illegible and unviable when marriage sets the terms for kinship, and kinship itself is collapsed into ‘family’” [Butler, “Acting in Concert”].

\(^{144}\) Butler, "Kinship", supra note 140 at 231.

\(^{145}\) Halperin, Saint Foucault, supra note 106 at 100.

relationship above all others, would be downplayed". Similarly, Kath Weston, in her study of gay families of choice, warned of the “accommodationist thrust” then evident in domestic partner legislation, and argued that “the logic of chosen families” means that “an individual should be able to pick any one person as a partner – domestic or otherwise – and designate that person as the recipient of insurance or other employment benefits, even when that choice entails crossing household boundaries”.

A position informed by queer ethics does not necessarily dismiss the relevance of rights. Nevertheless, queer sexual ethics exist in a relationship of greater tension with existing rights regimes than the capabilities approach and relational autonomy. In particular, queer theory’s emphasis on the discursive construction of homosexuality casts critical attention on the Western bias towards essentialist notions of gender and sexuality, and the deployment of prevailing conceptions of sexual and relational propriety, even when gay rights are formally vindicated. Lee Edelman, for instance, argues that a focus on the commonality of queers

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147 Ibid at 1546.

148 Kath Weston, Families We Choose (New York: Columbia University Press, 1991) at 209 [Weston, Families We Choose].

149 For example, Foucault stated: “It is important … to have the possibility – and the right – to choose your own sexuality. Human rights regarding sexuality are important.” Halperin, Saint Foucault, supra note 106 at 80. Butler has suggested that “[t]he necessity of keeping our notion of the human open to a future articulation is essential to the project of international human rights discourse and politics”: Butler, "Beside Oneself", supra note 139 at 36.

150 For example, there has been significant criticism of the inclusion of the terms “sexual orientation” and “gender identity” in international human rights documents, such as the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, on the basis that they adhere to and reify a distinctly Western, identarian view of sexuality that is at odds with the ways in which sexuality is understood in parts of the world. See generally Matthew Waites, “Critique of ‘sexual orientation’ and ‘gender identity’ in human rights discourse: global queer politics beyond the Yogyakarta Principles” (2009) 15:1 Contemporary Politics 137. For a trenchant criticism of Western gay organizations’ essentialized (mis)understanding of Arab sexuality see Joseph Massad, “Re-Orienting Desire: The Gay International and the Arab World” (2002) 14:2 Public Culture 361. While Massad does not argue from a queer theoretical perspective, his piece draws on Foucault’s work on the construction of homosexuality in Western discourse and culture.
and straight via the language of rights “would eliminate queerness by shining the cool light of reason upon it, hoping thereby to expose it as merely a mode of sexual expression”. Edelman makes a valid point about the potential for rights discourse to subsume sexual difference within its own logic; however, rather than dismissing rights altogether, I suggest that it is this very tension that makes queer critique useful and indeed complementary to rights discourses, by casting attention on structures of homogenization and normalization, and the ways that rights discourse “rearticulates the human when it comes up against the cultural limits of its working conception of the human”.  

An example of this process of critique is evident in Lawrence v Texas, in which the Supreme Court declared Texas’s criminalization of same-sex sodomy an infringement of due process. The case is generally understood as a significant advancement of gay rights and sexual liberty. However, a queer reading of the case exposes the troubling links between sex, privacy and relationships that inhere in Kennedy J’s judgment. Katherine Franke has argued that the judgment “relies on a narrow version of liberty that is both geographized and domesticated”; gay sex is thus tolerated “so long as it takes place in private and between two consenting adults in a relationship”. The judgment thus works to interpellate gay men as “domesticated creatures, settling down into marital-like relationships”. Nan Hunter has connected this move in Lawrence to Rubin’s sexual hierarchy, arguing that “the Justices drew the line of social acceptance at

151 Butler, "Beside Oneself", supra note 139 at 33.
153 Ibid at 1408. In this sense, invoking Warner, we might say that the sex at the center of the case was categorized within the hierarchy of sexual dignity in such a way as to occlude its most shaming aspects (the fact that Lawrence and Garner were not lovers, and that Garner’s boyfriend apparently made the call that led the police to enter Lawrence’s apartment). According to Franke, “Justice Kennedy takes it as given that the sex between John Lawrence and Tyron Garner took place within the context of a relationship”: ibid at 1407. Drawing on Butler, the judgment evinces a failure to see beyond the possibilities of sex occurring only within the confines of a relationship; in so doing, Kennedy J “underdetermines, if not writes out entirely, their sexuality”: ibid at 1408.
a new point in the hierarchy of sexual identities, accepting the most conventional same-sex couples into the realm of ‘respect,’ but potentially further isolating those whose lives place them in the regions of disrepute on the wrong side of the line”. The point here is not so much to question the overarching good of decriminalizing sodomy but rather the terms upon which such advances are made and the people who are marginalized by particular understandings of how certain rights function. I return to this point in Part 2 in a discussion of United States v Windsor.

II. Recognition of Same-Sex Relationships

In this section, I consider the application of the capabilities approach, relational autonomy and queer ethics to state recognition of intimate and kinship relations between lesbian and gay adults. The analysis in this section is geared towards recognition of relationships between two persons. While this limitation is itself conformist and arguably functions to reify the dyadic norm, I do not seek to make the case for state recognition of relationships involving more than two persons because to do so requires engagement with the vexed question of polygamy, which is beyond the scope of the present inquiry. Nevertheless. I

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154 Nan D Hunter, “Sexual Orientation and the Paradox of Heightened Scrutiny” (2004) 102 Mich L Rev 1528 at 1548 [Hunter, “Heightened Scrutiny”]. This point is well taken insofar as the judgment ties sexual intimacy to relationships; the “adult persons” to whom “substantial protection” is provided are generally equated with “[p]ersons in a homosexual relationship”: Lawrence, 539 US 558, 567 (2003).

155 133 S Ct 2675 (2013).

156 For a detailed discussion of gay and lesbian kinship relations outside of traditional marital and biological norms see Weston, Families We Choose, supra note 148. See also Butler, "Kinship", supra note 140.

157 Nussbaum has suggested that so long as vulnerable parties are protected, the state ought not to prohibit multi-party relationships, which should be subject to private contractual arrangement. Of course, the ability to enter into contractual relations is not the same as state recognition of multi-party relationships, but it may an appropriate place to start since, as Nussbaum puts it, “[i]f polygamy turns out to be a bad idea, it won’t survive the test of free choice over time”: Martha C Nussbaum, "Debating Polygamy", The
consider the approaches discussed below have potential merit in arguments for recognition of multi-party relationships.\textsuperscript{158}

It is useful to begin by reiterating the baseline concerns that animate each of the approaches. From a capabilities approach, one begins with “the core idea … of the human being as a dignified free being who shapes his or her own life in cooperation and reciprocity with others … [and whose life] is shaped throughout by these human powers of practical reason and sociability”.\textsuperscript{159} The relational autonomy frameworks of Benhabib, Nedelsky, and Friedman each, via varying emphases on issues of dependency and the constitutive nature of relationships, ultimately focus on the connections between an individual’s self-determining capacity and her relational context. (Fineman’s dependency-based view of autonomy leads her to specific policy recommendations that I address towards the end of this section.) A queer sexual ethic places the focus on the individual’s pursuit of pleasure and the development of new relational possibilities that resist discursive and institutional structures of normalization.

In the language of capability, “to form a conception of the good and to engage in critical reflection about the planning of one’s life”\textsuperscript{160} (that is, to use one’s practical reason) encompasses the capacity to determine for oneself the trajectory and objects of one’s sexual and relational desires. From an autonomy perspective, Nedelsky’s emphasis on “finding one’s own law” and Friedman’s focus on self-determination and perspectival identity speak to a similar concern with individual

\begin{itemize}
\item University of Chicago Law School Faculty Blog, 19 May 2008, online: \texttt{<http://uchicagolaw.typepad.com/faculty/2008/05/debating-polyga.html>}.\textsuperscript{158}
\item The structural logic of female domination that has historically attended polygamous relationships may require different or additional measures to ensure equality in multi-party relationships (whether comprised of people of the same or different genders).\textsuperscript{158}
\item Nussbaum, \textit{Women and Human Development}, supra note 5 at 72.\textsuperscript{159}
\item \textit{Ibid} at 82.\textsuperscript{160}
\end{itemize}
decision-making reached through a process of self-reflection. A queer perspective has less faith in the possibility of self-determination because of the contingency of selfhood; nevertheless, I suggest that Foucault’s concern with care of the self and queer theory’s more general call to consider non-hegemonic relational structures can be seen as congruent with reflective personal choice in matters of intimacy and relationality. Thus, we might say that each framework suggests that a precondition for a truly human life is the ability to choose the objects of one’s sexual and affective interactions with a minimum degree of external interference, whether overt (sodomy laws or restrictions on same-sex marriage) or, to borrow Nan Hunter’s felicitous terminology, “sub silentio”\(^{161}\) (normalizing discourses of privatization and the good of marriage).\(^{162}\)

Intimately linked to both sexual and relational choice is the capacity to experience emotions. Nussbaum stresses the importance of being able “to love those who love and care for us, to grieve at their absence” and not have “one’s emotional development blighted by overwhelming fear and anxiety”.\(^{163}\) Similarly, Friedman argues that emotions play a critical role in forming the judgments that make up an autonomous life.\(^{164}\) Benhabib, in her critique of Rawls, emphasizes the “affective-emotional constitution” of each individual.\(^{165}\) And Butler has written of the grief and mourning that inevitably attends the dissolution of our affective bonds with others.\(^{166}\)

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\(^{161}\) See Hunter, “Heightened Scrutiny”, supra note 154 at 1528.

\(^{162}\) See also David A J Richards, Identity and the Case for Gay Rights (Chicago: University of Chicago Press, 1999) at 196: “The right to choose gay and lesbian identity is grounded on the right to conscience … because only respect for this right ensures the required moral independence in taking responsibility … for convictions about homosexual love as deeply rooted in life experience and personality”.

\(^{163}\) Nussbaum, Women and Human Development, supra note 5 at 79.

\(^{164}\) Friedman, Autonomy, supra note 1 at 9.

\(^{165}\) Benhabib, “Generalized and Concrete Other”, supra note 43 at 411.

\(^{166}\) Butler, “Beside Oneself”, supra note 139.
This ability to choose the objects of one’s sexual and relational desires via a process of reason involving or derived from emotion is of little consequence, however, if one is unable to act upon one’s reflective desires. Affiliation and relationality thus require the capacity to act upon one’s sexual and affective desires and form relations of friendship, care and intimacy. As Carlos Ball argues:\footnote{167} 

Lesbians and gay men, like everyone else, pursue and express their humanity, in part, through their intimate relationships, including sexual ones ... It is no more possible to separate their needs and capabilities for physical and emotional intimacy from their moral personhood and their identity as human beings than it is to do so for heterosexuals. To attempt to do so is to attempt to quite literally dehumanize lesbians and gay men because it is an effort to strip them of a meaningful and enriching sexuality that helps define them as human beings.

Respect for human capacity and autonomy thus requires not only respect for the sexual and relational \textit{choices} that people make but also the \textit{means} by which each person chooses to fulfill his or her affiliative and relational needs. (The fact that Nussbaum emphasizes capacity over functioning does not detract from the importance of being able to instantiate one’s choices in functional ways.) Sexual liberty and pleasure is one (crucial) element in this equation,\footnote{168} particularly from a queer perspective, although Nussbaum also places great weight on “having opportunities for sexual satisfaction”.\footnote{169} While sexual intimacy may lead to, or be an aspect of an emotional connection with others, it does not depend on this for its worth; as Warner argues, sex has its own intrinsic value and those who practice sex for sex’s sake are possessed of their own form of dignity. Non-sexual forms of relationality are also crucial to most human lives, whether or not in the context of a sexual relationship. Nussbaum emphasizes the importance of

\footnote{167} Ball, \textit{Morality}, \textit{supra} note 12 at 104-05.  
\footnote{168} In the early years of gay liberation, it was considered by many to be sufficient for lesbians and gay men to be afforded the negative freedom to engage in same-sex sexual activity without the threat of criminal sanction. In the 1970s, this began to shift towards advocacy for more comprehensive forms of state recognition and support of gay and lesbian sexuality: Ball, "Father's Autonomy", \textit{supra} note 92 at 362-63. 
\footnote{169} Nussbaum, \textit{Women and Human Development}, \textit{supra} note 5 at 78.
loving others and being loved; Benhabib speaks of the importance of being treated “in accordance with the norms of friendship, love, and care”,\(^{170}\) while Butler has pointed to the diverse array of relationships that provide us with emotional succour.\(^{171}\)

For these reasons, I argue that the negative affect (and effects) of structural prohibitions on sexual and relational intimacy with persons of one’s choosing is a legitimate reason for creating conditions that enable people to maximize their choices concerning bodily integrity and affiliation,\(^{172}\) as reached through a process of practical reason or self-reflection.\(^{173}\) Put simply, a reflective decision to engage in same-sex sexual practices and to seek affiliation through attachments with people of the same sex as oneself, are instantiations of the basic human capabilities, relational autonomy, and the queer emphasis on pleasure, diverse relational structures and, to invoke Foucault’s rather antiquated phrase, “homosexual lifestyles”.

From this premise, it is possible to assess the state’s obligations vis-à-vis lesbian and gay relationships. The capabilities approach emphasizes the state’s role in giving legal and political form to the family in its various guises.\(^{174}\) Questions of form and recognition are thus intimately linked to state action. It is accordingly incumbent upon the state to foster human capacity via policies and laws that pay

\(^{170}\) Benhabib, "Generalized and Concrete Other", supra note 43 at 411.

\(^{171}\) Butler, "Beside Oneself", supra note 139.

\(^{172}\) See also Nicholas Bamforth, “Same-Sex Partnerships and Arguments of Justice” in Robert Wintemute & Mads Tønnesson Andenaes (eds), Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law (London: Hart, 2001) 31 at 41-42.

\(^{173}\) Though only to the extent that such exercise does not detract from others’ capabilities. I am thinking here of the need for state action to prevent sex without consent and exploitative relationships.

\(^{174}\) Nussbaum, Women and Human Development, supra note 5 at 263: “its very definition is legal and political”.

due regard to the family's “profound influence on human development”. Nussbaum has encapsulated her approach to matters of recognition in the following manner:

[W]e focus on each person as bearer of a variety of associative rights and liberties and as a potential enjoyer of affiliative capabilities. This focus should guide us when we ask which groupings of people, if any, deserve special protection in a political structure. Even where the capabilities of love and care themselves are concerned, the appropriate goal of public policy is the capabilities of citizens to form such relationships, should they choose to do so.

On this basis, it is apparent that the state ought to be concerned with recognition and support of relational structures that maximize human capabilities, not with matters of form and tradition. Nedelsky takes a broadly similar approach to questions of this nature. Her focus is on how different relationships foster autonomy; legal claims (such as claims to recognition of one’s relationship) should thus be analyzed by reference to how they structure relations. Additional regulation may be appropriate in certain contexts, while a retraction of state oversight may be warranted in other instances. The basic concern, though, is enhancing the “interactive creation of our selves” through the “networks of relationships” in which we exist. A queer perspective would not deny that the state is involved in, and has historically inserted itself into, the construction of family life, although it would also place emphasis on the ways that social discourses operate to reify particular familial structures. Indeed, a queer approach does not necessarily deny that it is inappropriate for the state to be involved in family life. It does, however, emphatically deny that the field of

175 Ibid at 270.
176 Ibid at 251.
177 Ibid at 278.
178 Nedelsky, Law’s Relations, supra note 54 at 45.
179 Ibid at 19.
possibilities concerning who and what constitutes family ought to be limited by tradition or normativity.

Concerning the specific issue of state regulation and recognition of lesbian and gay relationships, these frameworks cumulatively suggest that the state’s obligation is to respond to the diverse relational needs and structures of citizens. This is not to say that particular forms of recognition are universally required. As Nussbaum argues, no particular form of family is universally applicable or more beneficial across different contexts; the concern must therefore be with supporting relational forms that best meet the needs of the persons involved. Thus, it would be perfectly acceptable from the perspective of the capabilities approach to eradicate marriage as a civil institution and replace it with an alternative form of state recognition open to all persons. This is Nussbaum’s preferred approach.¹⁸⁰ I suggest that Nedelsky’s focus on fostering autonomy through relationships would also comport with such a move, if it were shown (as a matter of fact or likelihood) that replacing marriage with an alternative form of civil recognition would be autonomy enhancing.

Martha Fineman advocates an even more transformative approach to state relationship recognition. Like Nussbaum, Fineman conceives of the family as “a constructed institution contained within the larger society”.¹⁸¹ She argues that marriage, “the most gendered institution in society”,¹⁸² has historically worked to privatize family life, disadvantaging women and devaluing their work.¹⁸³ In her

¹⁸⁰ Nussbaum, *Disgust*, supra note 27 at 163. In this scenario, the expressive components of marriage would be left to religious and other private institutions. Nussbaum has also raised the possibility of states “back[ing] away from package deals [marriage and its attendant benefits] entirely, in favor of a regime of disaggregated benefits and private contract”: *ibid* at 162-63. In this scenario, individuals would be free to choose with whom they enter into formalized relationships irrespective of sex or conjugality.

¹⁸¹ *Ibid* at 161. This bears clear parallels to Nussbaum’s view that the “very definition” of the family “is legal and political”: Nussbaum, *Women and Human Development*, supra note 5 at 263.


¹⁸³ *Ibid* at 148-49.
view, the substantive inequality that this generates, not only between men and
women but also between socioeconomic classes, requires the eradication of the
institution of marriage and its replacement with alternative forms of state
recognition centered on caregiving.\(^\text{184}\) Fineman’s point is certainly not that
families are unimportant but rather that “family as a social and legal category
should not be dependent on having marriage as its core relationship”.\(^\text{185}\) As
such, she concludes that “adults should be free to fashion the terms of their own
relationships and rely on contract as the means of doing so, effectively replacing
the marital status with actual negotiation”.\(^\text{186}\) From a perspective attuned to the
needs of lesbians and gay men, Fineman’s proposal contains a compelling anti-
discriminatory element, in the sense that, as she puts it:\(^\text{187}\)

If no form of sexual affiliation were preferred, subsidized, and protected by
the state, none would need to be prohibited. Same-sex partners and those
forming other arrangements, such as multiple-partner sexual affiliations,
would just be viewed as forms of privately chosen and individually
preferred sexual connection.

Nancy Polikoff has made a similar point to Fineman, albeit from the perspective
of social and economic justice for lesbians and gay men.\(^\text{188}\) In Polikoff’s view, the
marriage equality movement has wrongly defined the problem faced by gay and
lesbian families,\(^\text{189}\) which is not the inability to access marriage but rather the

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184 See \textit{ibid} at 121-41.
185 \textit{Ibid} at 123.
186 \textit{Ibid} at 133-34.
187 \textit{Ibid} at 135-36.
188 Polikoff, "What We Ask For", \textit{supra} note 146 at 1549. See also Nancy D Polikoff, \textit{Beyond (Straight and Gay) Marriage} (Boston: Beacon Press, 2008) at 84: "Advocating marriage
for same-sex couples is a sensible way to champion equal civil rights for gay men
and lesbians. Unfortunately, it is not a sensible approach toward achieving just outcomes
for the wide range of family structures in which LGBT people, as well as many others, live.
These outcomes depend on eliminating the ‘special rights’ that only married couples
receive and meeting the needs of a range of family forms" [Polikoff, \textit{Beyond Marriage}].
189 In a similar register, though one not specifically concerned with lesbian and gay families,
June Carbone and Naomi Cahn have argued that “[u]ntil the study of the family is
reintegrated into a larger discussion of social and economic forces, true understanding of
the changing nature of family structure is impossible.” June Carbone & Naomi Cahn, “The
manner in which marriage is tied to the enjoyment of a swathe of social, economic and legal benefits.\textsuperscript{190} Thus, the solution to denial of, for example, hospital visitation rights and medical decision-making powers\textsuperscript{191} is not marriage but rather amendment of the laws concerning hospital visitation and third party medical decisions: “marriage as the solution to the problems that plaintiff couples describe bypasses better solutions that make marriage – whether it would help or hurt any particular couple for any particular purpose – matter less”.\textsuperscript{192} Butler has made a similar point, although she tends to accept the continuing existence of marriage, at least in a symbolic form: “A critical relation to this norm [of marriage] involves disarticulating those rights and obligations currently attendant upon marriage so that marriage might remain a symbolic exercise for those who choose to engage in it, but the rights and obligations of kinship may take any number of other forms.”\textsuperscript{193}

\begin{thebibliography}{99}


\bibitem{191} See generally Polikoff, \textit{Beyond Marriage}, supra note 188, ch 9.

\bibitem{192} \textit{Ibid} at 107. Similarly, Lisa Duggan and Richard Kim have focused on the regulatory shift away from government assistance in matters of caregiving. They argue that the precarious economic situation in which many family units are left by the state’s retreat from a supportive role underscores the need for secure bonds of attachment capable of withstanding the potential stresses caused by that absence, whatever form the family unit takes: Lisa Duggan & Richard Kim, "Beyond Gay Marriage", \textit{The Nation} (18 July 2005). With a rather different critical purpose, Lee Edelman has pointed out the absurdity of traditionalists’ coeval rejection of same-sex marriage on the grounds of child welfare while simultaneously “refusing health care benefits to the adults that some children become”: Lee Edelman, \textit{No Future: Queer Theory and the Death Drive} (Durham: Duke University Press, 2004) at 29 [Edelman, \textit{No Future}].

\bibitem{193} Butler, "Acting in Concert", \textit{supra} note 143 at 5.

\end{thebibliography}
Queer theorists and radical feminists have also argued for the dissolution of civil marriage based on its structural exclusivity and entrenchment of sexual hierarchies. In her seminal article, "Since When Is Marriage a Path To Liberation?", Paula Ettelbrick argued that "[b]eing queer is more than setting up house, sleeping with a person of the same gender, and seeking state approval for doing so".\(^{194}\) To opt in to the archetypal symbol and institution of the liberal state would therefore constitute acquiescence to structures of oppression: "marriage will not liberate us as lesbians and gay men. In fact, it will constrain us, make us more invisible, force our assimilation into the mainstream, and undermine the goals of gay liberation."\(^{195}\) For Warner, the corollary of marriage's "ennobling" effect on its participants is the "demeaning" of those who remain unwed;\(^{196}\) accordingly, in his view, marriage is unethical because of its discriminatory and stigmatic effects on those left outside of its privileged sanctum.\(^{197}\) Tim Dean has expressed a corresponding belief that marriage "becomes more, not less, discriminatory when extended to same-sex couples, insofar as the relational recognition that marriage brings inexorably detracts from

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\(^{195}\) Ibid. More recently, Jose Esteban Munoz attacked campaigns of the type led by the Human Rights Campaign and Freedom to Marry, in which marriage is equated with freedom, as "degrad[ing] the political and conceptual force of concepts such as freedom" through a homonormative infatuation with "the flawed and toxic ideological formation known as marriage": Muñoz, supra note 52 at 20-21. In his view, the anti-utopianism of support for "the prison that is heteronormativity, the straight world" and its apotheosis, marriage, "hamstrings not only politics but desire": ibid at 39, 26. Munoz makes a valid point about the circumscription of relational possibilities. However, with respect, his somewhat hysterical tone lends credence to Jasbir Puar's criticism of queer critique's dogmatic insistence upon "recenter[ing] the normative queer subject as an exclusively transgressive one": Jasbir K Puar, Terrorist Assemblages: Homonationalism in Queer Times (Durham: Duke University Press, 2007) at 22.


\(^{197}\) See Warner, The Trouble With Normal, supra note 128 at vii, 107-09.
all the other forms of intimacy that heterosexual as well as non-heterosexual people have invented”. In his view, “the price of these weddings will [be] … erotic diversity, relational possibilities, and a whole social fabric of interclass contact”.  

While it may ultimately be preferable to eradicate marriage and either replace it with a form of civil partnership or leave such matters to the realm of contract, it is equally clear that in societies where marriage remains extant, equality requires its extension to same-sex couples whichever framework one is applying: as Nussbaum, Nedelsky and Butler make clear, equality is a critical value and legal right that is infringed by restricting marriage to opposite-sex partners.  

To be clear, the argument is not that marriage is good for gays and lesbians because of any imputed civilizing influence that it may have or any particular significance held by marriage qua marriage. Rather, state recognition is good when it assists persons to realize their capabilities and autonomy.  

198 Dean, Unlimited Intimacy, supra note 121 at 95-96.

199 Ibid at 204. I tend to think that Dean undercuts his argument that same-sex marriage will “discourage everyone – whether gay, straight, or otherwise – from undertaking relational experiments” by also averring that “the emergence of a subculture of bareback sex is not merely coincident with but directly related to the campaign for same-sex marriage”: ibid at ix. If this latter statement is true, then on Dean’s own account, marriage is generative of one of the most outré “relational experiments” practiced by gay men, one in which “Bug chasing, cum swapping, and gift giving may be considered alternatives to gay marriage not because the former involve promiscuity instead of monogamy but because HIV makes the exchange of bodily fluids somewhat akin to the exchange of wedding rings.” Ibid at 85.

200 This point has also been made by Cass R Sunstein. Referring to what he calls “the anticaste principle”, meaning that “without very good reasons, social and legal structures ought not to turn differences that are irrelevant from the moral point of view into social disadvantages”, Sunstein argues that “[t]he anticaste principle means that with respect to basic human capabilities and functionings, one group ought not to be systematically below another”: Cass R Sunstein, “Homosexuality and the Constitution” in Martha C Nussbaum & David M Estlund (eds), Sex, Preference, and Family (New York: Oxford University Press, 1998) 208 at 217.

201 See, e.g. Sullivan, supra note 133.

202 There is a respectable argument that same-sex marriage may have the potential to “transform [marriage] into something new”, thus enabling it to “[divest] itself of the sexist trappings of the past”: Thomas Stoddard, “Why Gay People Should Seek the Right to Marry (1989) Out/Look 9, 13 in William B Rubenstein, Carlos A Ball and Jane S Schacter
chooses a particular form of recognition such as marriage, distinctions must not be drawn on the basis of characteristics that have no impact on others’ capabilities. The fact that Western society has prioritized one particular form of affiliation (marriage) over others speaks to the inadequate state response to differing human needs and capabilities more than it does to the underlying obligation of support and recognition for affective decisions derived from practical reason. Thus, to the extent that the state is obliged to afford marital recognition to persons, it is because of the pervasiveness of that institution and the disadvantage imposed on those persons who are excluded from it, which in turn impedes the full exercise of relational possibilities and capabilities.

This position does not lead to the conclusion that the mere extension of marriage rights to lesbians and gay men is a sufficient response on the part of the state, though it is a necessary condition of equality within the present structure. A marriage-or-nothing approach is only marginally more respectful (some would argue less respectful) of lesbians and gay men (and other citizens) than an absence of state recognition altogether, because such a binary fails to respect the antipathy many people feel towards marriage and their reasoned preferences for alternative forms of relationship recognition. In particular, the practice of linking social and economic benefits to marriage sharply curtails the ability to

(eds), Cases and Materials on Sexual Orientation and the Law, 3rd ed (West, 1997) 679 at 683. Nan Hunter has argued that gay marriage will “dismantle the legal structure of gender in every marriage” – that is, marriage will become an institutional recognition of the relationship between two people, not one man and one woman: Nan D Hunter, “Marriage, Law and Gender: A Feminist Inquiry” (1991) 1 Law & Sexuality 9 at 18-19. William Eskridge has made a similar point, arguing that same-sex marriage will “contribute to the erosion of gender-based hierarchy within the family, because in a same-sex marriage there can be no division of labor according to gender”. William N Eskridge, Jr, “A Social Constructionist Critique of Posner’s Sex and Reason: Steps Towards a Gaylegal Agenda” (1992) 102 Yale L J 333 at 356. See also Weston, Families We Choose, supra note 148 at 206: “Because gay families are not structured through hierarchically ordered categories of relationship ... they do not systematically produce gendered divisions of labor or relations stratified by age and gender”.

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enact one’s relational preferences without potentially pernicious repercussions. Thus, from the perspective of capabilities, autonomy and queer sexual ethics, I argue that it is incumbent upon the state to provide different forms of relationship recognition that respond to the diverse ways in which lesbians and gay men experience and instantiate their relational, affiliative and emotional capacities.

Thus, in addition to the extension of marriage rights to same-sex couples, alternative forms of registration ought to be made available to those persons who wish to formalize their relationship outside of marriage. Common law or de facto relationship recognition may also be an element of a relationship recognition menu, though the precise rights and obligations attached to such unregistered relationships must be calibrated to respect the choice not to enter into formal relationship structures. Expanding the relational horizon to include non-conjugal relationships of care and dependence comports with Nussbaum’s assertion that the capabilities approach “does not assume that any one affiliative grouping is prior to or central in promoting those capabilities”. An expansion of this sort also corresponds to the emphasis placed by Foucault and Butler on looking beyond existing relational fields towards new forms of pleasure and kinship. Indeed, following Fineman, it may be preferable to simply eradicate state recognition of intimate adult relationships based on sexual affiliation and move towards a system of recognition based on caregiving, leaving adult relationships to the realm of contract. Either way, I suggest that the baseline requirement is that

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203 See generally Polikoff, "What We Ask For", supra note 146; Polikoff, "Fineman", supra note 190; Polikoff, Beyond Marriage, supra note 188.


205 Fineman makes the interesting observation that such a move has the potential to engender additional forms of regulation and state oversight, albeit in new ways. Her argument is that the removal of marriage’s veil of privacy would enable greater application of criminal and tort law to sexual affiliates: Fineman, Autonomy Myth, supra note 66 at 134-35.
identified by Polikoff: de-linking the relationship between marriage (and state recognition generally) and social and economic benefits, to ensure that decisions to enter into formalized relations are truly autonomous and based in the reflective desire for the intrinsic possibilities and pleasures offered by the relationship, rather than the need to secure state- or privately-conferred benefits.

III. Recognition of Relationships Between Gay Parents and Children

This section considers legal recognition of parent-child relationships involving gay and lesbian adults from two angles. The first part considers the normative question of why diverse\(^{206}\) parent-child relationships involving lesbians and gay men deserve legal recognition and protection, from a perspective attuned to human capacity, autonomy and (to a lesser extent) queer ethics.\(^{207}\) The second part considers particular legal and ethical issues associated with how gay and

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\(^{206}\) The discussion is not limited by the means of establishing a legal parent-child relationship, which is to say that it is applicable to relationships involving a biological link between parent(s) and child(ren), assisted or otherwise, and relationships created through adoption (“partial adoption”, such as second parent adoption where existing parental rights are not terminated, or “full adoption” involving both the termination and creation of parental rights).

\(^{207}\) Indeed, the anti-relational strand of queer theory views gay and lesbian parenting with significant antipathy, not because of any inability on the part of lesbians and gay men to parent, or any potential harms to children or society, but rather because of the “reproductive futurism” that children represent. Lee Edelman has argued that “the Child has come to embody for us the telos of the social order and come to be seen as the one for whom that order is held in perpetual trust”: Edelman, No Future, supra note 192 at 11. He savages this “reproductive futurism”, arguing in favour of the “unthinkable” rejection of “the absolute privilege of heteronormativity” by “not ‘fighting for the children’”: ibid at 2-3. Edelman’s point appears to be that there is ethical value in rejecting a present based on the future, which correlatively entails a rejection of the children who constitute “the fetishistic fixation of heteronormativity” and who will occupy that future. While this is not specifically directed towards gay men and lesbians, Edelman’s own fetishistic fixation with disrupting heteronormativity – and his insistence that such rejecting reproductive futurism is at the core of “queerness” – strongly suggests that he would view a queer rush to the crib as a reprehensible accession to future-focused structures of normalization: ibid at 21. José Esteban Muñoz is equally critical of social preoccupations with child-rearing, though he does not reach Edelman’s nihilistic conclusions: “Queers, for example, especially those who do not choose to be biologically reproductive, a people without children, are, within the dominant culture, people without a future. They are cast as people who are developmentally stalled, forsaken, who do not have the complete life promised by heterosexual temporality.” Muñoz, Cruising Utopia, supra note 52 at 98.
lesbian adults become parents (i.e., generally with some form of ART or adoption). In particular, it examines: multi-parentage; issues of human commoditization, objectification, and consent; and changes of position on the part of relinquishing parents in adoption cases and situations involving gamete donors and surrogates.

A. Why Parenting by Lesbians and Gay Men Deserves Legal Recognition and Protection

It is appropriate to consider why queer parenting deserves legal recognition and protection via separate analyses of adults and children, given their differing needs and capabilities.

I begin with children, who commence life wholly dependent on other more developed humans for survival; in this respect, the development of their autonomy and capabilities, not only those pertaining to life, health, and bodily integrity, but also the development of senses and thought, emotional development, the capacity to reason and affiliate with others, and the capacity to exercise control over one’s environment, is fundamentally linked to the care and nurturing that is provided to them.\(^{208}\) In John Eekelaar’s words, “the ‘developmental’ interest of children … refers not only to physical and intellectual capacities, but is also a preparation for the exercise of autonomy”.\(^{209}\) From this premise concerning child development, the question becomes: Who is best placed and most willing to ensure that a child’s capabilities and autonomy are developed to their maximum degree? According to the capabilities approach, recognition of parent-child relationships and family structures ought to be guided by a concern for the child’s flourishing; conventional Western paradigms

\(^{208}\) See Nussbaum, "Aristotelian Essentialism", supra note 5 at 218-19 (discussing early infant development).

involving dyadic, heterosexual parenting have no currency unless, in the specific context applicable to a specific child, that model is likely to best meet this requirement (as it would, for example, in the case of a child born to loving and attentive opposite-sex parents). As Nussbaum puts it, “being a parent of offspring is a cultural and social matter, a matter of recognition and responsibility, not of mere bodily continuity.” Biology is thus recognized as having a symbolic rather than intrinsic relationship to parentage.

The same can be said of a relational autonomy approach. Fineman argues that the parent-child relationship is the core family connection and it, rather than the relationship between parents, ought to be the legally protected relation in family law. Her point is premised on the inevitable dependency of children, and the correlative derivative dependency of their carers on external resources to

210 “[T]here is no reason to think our options confined to the nuclear family in its traditional romanticized form”: Nussbaum, “Constructing Love”, supra note 20 at 32. This approach bears similarities to the diversity approach to family formation, such as that propounded by Linda C McClain. In this framework, diversity of family forms is itself considered to be of value because “achieving uniformity of family form could be done only with a degree of coercion that is unacceptable in a modern constitutional democracy”: Linda C McClain, “A Diversity Approach to Parenthood in Family Life and Family Law” in Linda C McClain & Daniel Cere (eds), What is Parenthood? Contemporary Debates About The Family (New York: NYU Press, 2013) 41 at 48.

211 Such parents need not be a couple in the sexual sense because it is functionally and morally irrelevant whether or not a child’s parents have a sexual relationship.

212 Nussbaum, “Constructing Love”, supra note 20 at 32.

213 Kath Weston has described how, “[f]or many in this society, biology is a defining feature of kinship: they believe that blood ties make certain people kin, regardless of whether those individuals display the love and enduring solidarity expected to characterize familial relations”: Weston, Families We Choose, supra note 148 at 34.

214 While Fineman refers to protecting the Mother-Child Dyad, “mothering” is not to be understood as gender or sex specific: Martha Albertson Fineman, The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies (New York: Routledge, 1995) at 234-35 [Fineman, Neutered Mother].

215 In Fineman’s words, “a state of dependency is a natural part of the human condition and is developmental in nature”: Fineman, Autonomy Myth, supra note 66 at 35. See also William N Eskridge, Jr, “Beyond Lesbian and Gay ‘Families We Choose’” in Martha C Nussbaum & David M Estlund (eds), Sex, Preference, and Family (New York: Oxford University Press, 1997) 277 at 284: “Human selves are from birth relational. Our early identity is interconnected with (and for a while dominated by) our parent(s) and other caretakers”.

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undertake that care. The family is thus defined by dependency, meaning that society’s concern ought to rest with the support of those in relationships characterized by dependency. David Meyer has offered a slightly different take on this question, arguing that:

The need to weigh a child’s own autonomy interests and developmental needs in determining the balance of her rights – to say nothing of the need then to balance these rights against rights of other affected family members – suggests the improbability that children’s rights hew to a single concept of parenthood.

Recognition of this reality and the increasing diversity of family forms has led to what Appleton calls “a functional turn in the field [of family law] – the rise of legal recognition for those who perform a family relationship, even in the absence of formal or biological connections”, because of the recognition that it is in a child’s best interests to have his or her relationships with primary caregivers recognized by the law, irrespective of biological connection or the relationship status of a child’s parents. The concern of the law respecting children thus ought to be with structuring relations in a manner that best meets the needs of children in their diverse relational contexts.

Concern for the development of children is of course one of the primary objections raised by conservative and religious objectors to gay parenting. An approach guided by human capacity and autonomy agrees with the premise that parenting is not simply a right held by an adult that exists irrespective of a child’s interests. Where these approaches differ, though, is in taking this logic to its conclusion, which is to deny also that dyadic, heterosexual or even genetically

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related parents are necessarily better equipped to maximize a child’s development. For the same reason, empirical evidence is not irrelevant to this question, because it supports the claim that gay and lesbian individuals and families headed by same-sex parents are equally able to provide for the wellbeing of children,\footnote{219} and that children raised by same-sex couples perform just as well on child development metrics as children raised by opposite-sex couples.\footnote{220} It is to be emphasized that this point applies whether or not the children are genetically related to their parents, which in turn has critical implications for gay and lesbian adoption and access to assisted reproductive technologies. Moreover, evidence of this sort provides a strong empirical argument\footnote{221} in favour of recognition of same-sex relationships because present data suggests that children perform better in households with parents whose relationships are recognized by the state.\footnote{222} All of this being said, empirical

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\footnote{219} Of course, such research would also be relevant if it disclosed that gay and lesbian parents are less equipped to parent children. The few studies thus far that have purported to demonstrate this conclusion have been the subject of scathing academic and judicial criticism: see, e.g., the discussion in DeBoer v Snyder, No 12-CV-10285 (ED Mich 21 March 2014).

\footnote{220} The literature on this topic is vast. For a review of international research, see, e.g., Fiona Tasker, “Developmental Outcomes for Children Raised by Lesbian and Gay Parents” in What is Parenthood? Contemporary Debates About The Family (New York: NYU Press, 2013) 171 (concluding that “it is parenting quality rather than family type, in and of itself, that matters to child well-being”) [Tasker, "Developmental Outcomes"], See also Brief of Amicus Curiae American Sociological Association in Support of Respondent Kristin M. Perry and Respondent Edith Schilain Windsor (2013) [ASA Amicus Brief].

\footnote{221} Courts have relied on this type of reasoning even in the absence of empirical data. For example, in Goodridge v Department of Public Health, 440 Mass 309, 335 (2004), the Court observed that excluding same-sex couples from marriage “prevent[s] children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of ‘a stable family structure in which children will be reared, educated and socialized’”. More recently, in Windsor, 133 S Ct 2675, 2694 (2013) Kennedy J observed that denying federal recognition of state same-sex marriages humiliated not only same-sex couples but also children (if any) being raised by those couples.

\footnote{222} See, e.g., ASA Amicus Brief, supra note 220 at 3-4. This being said, it is questionable whether it is the status of recognition that is important or the social and economic benefits that attend relationship recognition, and the potential for greater degrees of uncertainty about parent-child relationships in the event of separation by unmarried gay and lesbian couples. There is, therefore, a self-fulfilling quality about a link between marriage and child outcomes that says more about the exclusionary nature of marriage than any intrinsic link between marriage and child welfare.
evidence of a general nature can never be conclusive in respect of particular individuals because an assessment of parenting capacity must always be factually specific; thus, it should never be concluded that same-sex parents who refuse, or who are refused, state recognition of their relationship are less capable of providing the necessary environment to foster a child’s development.

Concern for the development of children’s capabilities by no means suggests that the interests of parents, including prospective parents, and caregivers are irrelevant; rather, the dependency and vulnerability of children means that to the extent that interested adults are unable to provide the necessary care and support to develop a child’s capabilities, their interests are subordinate to those of the child. This does not permit children to be removed from parents simply because aspects of their care are not ideal according to a particular framework: the interest of the child in developing a relationship with his or her parents (and the parent or parents’ interest or interests in also developing a relationship with their child) is of sufficient importance that the impairment of this capability is unlikely to outweigh any other benefits of removal except in extreme circumstances where a child’s capabilities are or will be severely impaired.

Fineman’s views on family privacy are apposite in this regard. She argues that while intervention by the state is entirely appropriate and necessary to protect relationships of care and dependence and to foster substantive equality, “[s]ome


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223 Appleton has also suggested that reliance on empirical data in determining appropriate legal responses to questions such as what is in the best interests of children is potentially problematic because such data only supplies information is necessarily general rather than individually specific. She also suggests that legal regimes need to be based on a stronger foundation than “today’s scientifically supported conventional wisdom”, which is potentially subject to underlying value judgments and hence changes that cannot be described as neutral: Appleton, "Gender and Parentage", supra note 218 at 246-47.

224 See, e.g., Stanley v Illinois, 405 US 645 (1972) where the Supreme Court held that the termination of a biological father’s legal status as a parent without his consent required the provision of an opportunity for the father to be heard concerning his fitness to parent.

225 Similar reasoning was deployed in Santosky v Kramer, 455 US 745 (1982), in which the US Supreme Court held natural parents have a fundamental liberty interest in the care, custody and management of their child, and that clear and convincing evidence of neglect is required before a parent may be deprived of parental rights.
concept of privacy is necessary for resisting assertions about the appropriateness of collective control". 226 Fineman would shift the emphasis in matters of privacy away from the individual and towards the family entity: “Collective resources provide the ability, while the norm of non-intervention provides the freedom, for families to freely undertake the societal tasks they have been assigned.” 227 Privacy is thus integral to achieving “the right to autonomy or self-determination for the family, even as it is firmly located within a supportive and reciprocal state”. 228

From the perspective of adults, one begins with the premise that “having and raising children can be an expression of one’s needs and capabilities to love and care for others”. 229 While Nussbaum does not include the rearing of children in her list of capabilities, it is apparent that parenting draws upon a host of other capabilities including reason, affiliation, emotions, and bodily integrity (specifically, reproductive autonomy). Thus, as Ball has argued:

The bottom line, then, is that denying lesbians and gay men the opportunity to parent – or making it more difficult for them to parent – is a denial of their basic human needs and capabilities to love and care for others. Such a denial, in the absence of evidence that the children of lesbians and gay men are harmed by the same-gender sexual orientation of their parents, raises troubling moral questions because it places state institutions and policies in the business of denying individuals the ability to exercise, if they so wish, important aspects of their humanity through parenting. 230

226 Fineman, Autonomy Myth, supra note 66 at 293.
227 Ibid.
228 Ibid at 294.
229 Ball, Morality, supra note 12 at 134.
230 Ibid at 136. This position raises the question of adults’ “rights” to become parents, which touches on the broader question of the relationship between capabilities, autonomy and legal rights. In my view, rights discourse can be relevant to this issue, but, as David Meyer argues, “rights claims cannot spare society the need to wrestle with the questions that divide us”, particularly when multiple rights conflict: Meyer, "Family Diversity", supra note 217 at 124.
Relational autonomy argues for a similar conclusion. A coherent decision\textsuperscript{231} to become a parent to a child is a manifestation of self-determination when it is derived from a process of self-reflective reasoning. Emotions are critical to this process because they are reflective of the deeper needs, wants and concerns of those persons who seek or decide to become parents.\textsuperscript{232} From the perspective of autonomy, these deeper desires are intrinsically worthy of respect partly because of the constitutive role that emotions play in developing autonomy. On this view, denying gay and lesbian individuals or couples the ability to become parents infringes not only the physical and intellectual freedom of the individual but also one’s perspectival identity – what it is that makes us individual humans.

B. How Lesbians and Gay Men Become Parents: Legal and Ethical Issues

One of the only points that opponents of queer parenting get right is that same-sex couples cannot (yet\textsuperscript{233}) procreate without one another absent some form of donated genetic material. It is the corollary of this truth that traditionalists get wrong: as the section above argues, parenting by lesbians and gay men is not only defensible but normatively good. Nevertheless, the imperative for some form of assistance in the path to parenthood – whether of the genetic or adoptive variety – raises a suite of legal and ethical issues that relate not so much to the capacity of queer people to be parents but rather to structural biases and the potential detriment to third parties (and prospective gay and lesbian parents) occasioned by alternative modes of family formation. It is to be emphasized that the issues canvassed in this section have no inherent relationship to sexuality; it is rather the particular need of lesbian and gay prospective parents to access

\textsuperscript{231} Friedman argues that a person’s emotions and character traits are capable of demonstrating coherent rational patterns over time: Friedman, \textit{Autonomy}, \textit{supra} note 1 at 9.

\textsuperscript{232} Ball, "Father's Autonomy", \textit{supra} note 92 at 364.

technologies of the family that makes their consideration pertinent to analysis of queer parenting.

1. Recognition of Multiple Parents

Recognition of multiple parents is especially relevant for gay and lesbian families. The biological necessity for same-sex couples to obtain donated genetic material in order to conceive (and potentially also the services of a surrogate mother), queer kinship structures, preferences for the involvement of different sex parents, and the involvement of stepparents where one or both legal parent(s) create new family structures, may separately or in combination engender a desire for the reality of queer family formation to be reflected in legal recognition of the multiple persons who constitute a child’s parents. For example, in the first Canadian case to recognize more than two legal parents, lesbian

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234 See further Pamela Gatos, “Third-Parent Adoption in Lesbian and Gay Families” (2001) 26 Vt L Rev 195 at 199 quoting from Fred A Bernstein, “This Child Does Have Two Mothers … And A Sperm Donor With Visitation” (1996) 22 NYU Rev L & Soc Change 1 at 17: “Co-parenting arrangements between gay men and lesbians are very positive for both the gay donor and the lesbian mother, and have a number of advantages including ‘a mutual interest in creating a new family form; a commonality of experience that permits complete candor; and a symmetry that should increase the stability of the arrangement’.

235 Human cloning, chimerization and haploidization are future possibilities for gay and lesbian couples to reproduce without additional genetic material from a third party. However, these techniques are sufficiently remote and ethically questionable that I do not consider them in this paper. For a discussion of the techniques in the context of gay and lesbian reproduction see Robertson, "ART", supra note 233 at 363-71.

236 See, e.g., Weston, Families We Choose, supra note 148.

237 Fiona Tasker has concluded that existing research “indicates that, in contrast to many heterosexual couples, many lesbian mothers prefer a known donor to an unknown donor … due in part to wanting to have male involvement in their children’s lives”: Tasker, "Developmental Outcomes", supra note 220 at 175.

238 The first wave of family law to deal with parent-child relationships involving lesbian and gay parents involved custody cases brought by or against women who had borne children during a heterosexual relationship and subsequently left their male partners or husbands for other women: see generally Carlos A Ball, The Right to be Parents (New York: NYU Press, 2012) at 21-58. While these cases did not seek to challenge the two-parent bias in Anglo-American family law, they demonstrate how same-sex families can be formed by the entry of an adult into the lives of a parent and a child, just as a child may enter the lives of two or more adults.

mothers who used the sperm of a known donor subsequently sought to have the
one-biological mother recognized as a legal parent in addition to the birth mother
and the donor because all parties wanted the donor to maintain his legal (and
functional) relationship to the child. The exigencies of lesbian family formation
thus required the courts to address the law’s dyadic bias.

In her discussion of capabilities and the family, Nussbaum does not expressly
address the possibility of multi-parenting structures in Western societies.
Nevertheless, she is quite clear that her approach is not wedded to any particular
family model:

By thinking of the affiliative needs of each person, as well as each
person’s needs for the whole range of the human capabilities, we can best
ask questions about how the family should be shaped by public policy,
and what other affiliative institutions public policy has reason to support.\(^{240}\)

Nussbaum’s approach “does not assume that any one affiliative grouping is prior
to or central in promoting those capabilities”; the mere fact that children need
love, support, and education, does not axiomatically translate into a preference
for the Western nuclear form.\(^{241}\) Nussbaum gives as an example the experience
of children in women’s collectives in India as compared with the experience of
children in situations of domestic violence inflicted by a husband on his wife.\(^{242}\)
One might easily extend the example to a contrast between, on the one hand,
the child of a multi-parenting arrangement involving a lesbian couple and a gay
male (individual or couple), or some similar variation,\(^{243}\) in which the child is

\(^{240}\) Nussbaum, *Women and Human Development*, supra note 5 at 244-45.

\(^{241}\) *Ibid* at 278-79. See also *ibid* at 251: “In the case of the family: we focus on each person
as bearer of a variety of associative rights and liberties and as a potential enjoyer of
affiliative capabilities. This focus should guide us when we ask which groupings of
people, if any, deserve special protection in a political structure. Even where the
capabilities of love and care themselves are concerned, the appropriate goal of public
policy is the capabilities of citizens to form such relationships, should they choose to do
so.” See further Nussbaum, “Constructing Love”, *supra* note 20 at 31.

\(^{242}\) Nussbaum, *Women and Human Development*, supra note 5 at 277.

\(^{243}\) In such circumstances, “it is in a child’s best interest to be a part of a non-nuclear family
with multiple parents”: Gatos, *supra* note 234 at 215 citing Alexa A King, “Solomon
exposed to the love and attention of three or four adults, and, on the other hand, a nuclear norm in which economic necessity means that a child spends more time in third party care than with his or her parents. Since “there is no way in which the state can really avoid constructing the family unit in accordance with some norms or other”, the overarching point is this: the state ought to be concerned with recognition and support that maximizes human capabilities, not with matters of mere form and tradition. To the extent then that a child’s best interests are served by recognizing his or her relationships with more than two parental figures – and there is evidence that this is the case at least in certain circumstances – the law ought to accommodate and protect the parties involved.

Similarly, there is no reason why a concern for autonomy leads to a cap on the number of parents that a child may have. Nedelsky reminds us that law ought to be approached from a perspective oriented towards maximizing relational autonomy. Thus, from a relational stance, the relevant question is whether limiting the number of legal parents of a child fosters autonomy. In circumstances where the interests of a child are best served not by limiting but rather by


Nussbaum, Women and Human Development, supra note 5 at 278.

King, supra note 243 at 389.

The corollary of multiple parents is, of course, different viewpoints and an arguably greater scope for conflict, especially in the event of relationship breakdown. This is a serious concern: Susan Frelich Appleton, “Parents By The Numbers” (2009) 37 Hofstra L Rev 11 at 45-46 [Appleton, “Parents By The Numbers”]. However, clarity around parental status and attendant rights and obligations might also reduce the scope for disputes. In the absence of evidence that clearly demonstrates worse outcomes for children (and, secondarily, for parents), I am not convinced that the potential for additional friction between parents outweighs the benefits to be gained from respecting family diversity.
expanding his or her legal ties to adult caregivers. Western laws’ dyadic biases may be seen autonomy infringing, and thus part of the problem.

Queer critique is also pertinent to the question of multiple parenting. Butler has pointed to the importance of considering “the viability of alternative kinship arrangements and for the well-being of the ‘child’ in any number of social forms.” More directly, Polikoff argues that three principles should play a defining role in valuing all families: the needs of children ought to be placed first; children in all family forms ought to be supported; and acknowledgement of adult relationships and interdependency. In a scenario where three or even four adults share the care of a child, act and consider themselves and each other to be parents the child, and the child sees each adult as an integral figure in his life, respect for the needs of that child, the family form created by the parties, and the interdependent relationship of the adults vis-à-vis the child (inevitable dependency, in Fineman’s language) and one another (derivative dependency) strongly supports legal recognition that the child has more than two parents.

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247 Conceivably, this proposal could also operate coercively, in situations where an adult seeks to decline or disclaim parentage. However, as Appleton points out, courts faced with unwilling parents impose financial, not custodial or visitation, obligations: *ibid* at 35-36. Accordingly, it would seem to be preferable to de-couple the obligation to provide financial support from parentage – as in cases where stepparents stand *in loco parentis* – and impose the support obligation without also imposing parentage.

248 Butler, "Kinship", *supra* note 140 at 231.

249 This was roughly the situation before the Ontario Court of Appeal in *AA v BB, supra* note 239, which concerned an application to recognize legal parentage in the partner of a child’s biological mother, without extinguishing the parentage of the child’s legal father, a donor who had remained an active part of the child’s life. This case is discussed in greater detail in Part 5.

250 Limits to the recognition of multiple parents are obviously necessary. For example, a fundamental condition for recognizing parents of newborn babies might be that adults played a formative role in the child’s existence, either through genetics or creating the conditions enabling existence (for example, in the case of intended parents in a surrogacy arrangement). In the case of children who are somewhat older, adding a parent should, to the extent possible, be made in consultation with the child, and be determined in accordance with the degree of involvement of the person in the child’s life. These principles are generally applied in the adoption context. For example, adoption of children over a certain age generally requires the consent of the child, while adoptions by stepparents or functional parents often involve a determination concerning the child’s relationship to the prospective adoptive parent.
2. Commoditization, Objectification and Consent

For prospective lesbian and gay parents, market forces may become involved when accessing assisted reproductive technology (ART) or the services of a private adoption agency (or intermediary).\(^{251}\) In ART cases, the market may be involved in some or all aspects of a child’s birth: for example, a surrogate may act altruistically\(^{252}\) but the gametes used to impregnate her are purchased; equally, the services of a commercial surrogate\(^{253}\) may be engaged while only one set of gametes or possibly none are obtained via commercial means.\(^{254}\) In this section, I first consider objectification-related arguments concerning commercialization in ART (including surrogacy) and adoption. I then consider how economic factors might vitiate consent.

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\(^{251}\) Adoption through public agencies is generally free: Courtney G Joslin & Shannon P Minter, *Lesbian, Gay, Bisexual and Transgender Family Law* (West, 2011) at § 2:3 (83-84).

\(^{252}\) Altruistic surrogacy refers to surrogacy without financial reward for the surrogate, although reimbursement of her expenses is generally permitted. (This in itself can raise vexed questions as to permissible limits that challenge the boundaries between altruistic and commercial surrogacy; see the discussion of the Canadian **Assisted Human Reproduction Act**, SC 2004, c 2 in Part 4).

\(^{253}\) Commercial surrogacy involves the payment of a fee to the surrogate for her services, in addition to the expenses associated with the pregnancy. Typically, a contract between the commissioning parent or parents and the surrogate stipulates that the surrogate will, upon the birth of the child, relinquish her parentage rights to enable the commissioning parent(s) to assume legal parenthood of the child. The enforceability of contracts of this nature varies between jurisdictions.

\(^{254}\) If the surrogate’s own human reproductive material is used, the surrogacy is referred to as “traditional”. In this form of surrogacy, fertilization (using the sperm of an intended parent or a third party donor) can occur in vitro or through intra-uterine insemination. Because of cases such as *In re Baby M*, 537 A2d 1227 (NJ 1988), traditional surrogacy is much less popular than gestational surrogacy, which necessarily involves in vitro fertilization because the surrogate’s ovum is not used; rather, the intended mother or a third party donor ovum is used. Some theorists use the terms “partial” and “full” surrogacy to refer to, respectively, traditional and gestational surrogacy: see, e.g., Richard J Arneson, “Commodification and Commercial Surrogacy” (1992) 21:2 Philosophy & Public Affairs 132 (arguing in favour of commercial surrogacy from a welfarist perspective).
a. Objectification

Objectification involves “treating one thing as another: One is treating as an object what is really not an object, what is, in fact, a human being.” Scholars and practitioners from diverse disciplines have expressed markedly divergent views over the potentially objectifying nature of paying for HRM, paying a woman to gestate and then relinquish a child, and paying adoption agencies substantial fees for their services.

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256 Concerns around objectification may differ depending on whether donation is from a man or a woman. For example, according to Carmel Shalev, “[t]he morality of selling sperm was not seriously questioned until the surrogacy debate framed it as a matter of gender equality making it appear that a man was being paid to father children he would never know”: Carmel Shalev, Birth Power: The Case for Surrogacy (New Haven: Yale University Press, 1989) at 71 [Shalev, Birth Power]. On this view, male sperm donation might be considered antithetical to gender equality, whereas egg donation might not be viewed as undermining gender equality because such practices do not continue the system of female reproductive subordination to male desires. This being said, as Shalev argues, such a view is predicated on a conception of the male donor as necessarily irresponsible by reason of his intention not to be involved in a child’s life, when in fact such intention is not so easily reduced to irresponsibility if “he has fully appreciated the meaning of his act”: ibid at 75.

257 Health is also a significant concern. For women undertaking gamete donation, physical health is a particular concern due to potential complications arising out of ovarian hyperstimulation. For a discussion of the procedure, potential side effects and complications, and mitigating strategies, see the papers collected in “Ovarian Hyperstimulation Syndrome” 16:3 Human Fertility 143. For surrogates, physical health is an issue because of potential complications arising out of IVF, gestation, and birth. Concern has also been expressed about the potential emotional harm to children born using commercial or even assisted means: see Shalev, Birth Power, supra note 256 at 70-71, n 42, referring to the 1984 report of the Warnock Committee in England, which suggested that children born of artificial insemination using donor sperm “may feel obscurely that they are being deceived by their parents, that they are in some way different from their peers, and that the men whom they regard as their fathers are not their real fathers”: Report of the Committee of Inquiry into Human Fertilisation and Embryology (London: HMSO, Cmnd. 9314, 1984), section 4.12. Emotional harm is generally not considered a reason against adoption per se (at least domestic adoption), though ensuring the emotional wellbeing of adopted children has long been a critical focus of law and policy. Most notably, there has been a distinct shift away from concealing a child’s adopted status from him or her in favour of a policy of openness, to the extent that birth parents are now involved in the lives of an increasing number of adopted children. See, eg, Evan B Donaldson Adoption Institute, Old Lessons for a New World: Applying Adoption Research and Experience to Assisted Reproductive Technology (2009) at 10.
(i) Assisted Reproduction

In the ART context, it is said that gamete donation and surrogacy respectively treat donors and surrogates as mere objects – bodies for the use of (generally more economically and socially privileged) others.\(^{258}\) For instance, Cass Sunstein has warned that “a world in which female sexual and reproductive services are freely traded on markets would legitimate and reinforce a pervasive form of inequality – one that sees the social role of women as that of breeders”\(^{259}\). Arguments against commercialization have also been made on the related ground of what Margaret Radin calls the “market-inalienability” of human life.\(^{260}\) This argument conceives of certain areas of human life as sacrosanct, justifying a prohibition on their submission to market forces.\(^{261}\)

In contrast, some feminist scholars have argued in favour of commercial surrogacy on the grounds that it instantiates women’s autonomy and self-determination; on this view, objectification arguments are held to be patriarchal and patronising because refusing to hold women to their considered (contractual) promises perpetuates a view of women as insufficiently rational to be held

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\(^{261}\) Radin, "Inalienability", *supra* note 260 at 1855. Radin has also argued, less plausibly in my opinion, that surrogacy operates as a symbol of female oppression by instantiating the idea that “women are fungible baby-makers for men whose seed must be carried on”: *ibid* at 1935.
accountable for their actions.\textsuperscript{262} In Carmel Shalev's words, impeding women's abilities to contract in this regard "implies that women are not competent, by virtue of their biological sex, to act as rational, moral agents regarding their reproductive capacity".\textsuperscript{263} From a distinctly libertarian perspective, Shalev argues:\textsuperscript{264}

To include surrogacy within the scope of the baby barter ban is to reactivate and reinforce the state's power to define what constitutes legitimate and illegitimate reproduction. To exclude surrogacy from the baby barter prohibition is to transfer that power to the discretion of the individual, to recognize a woman's legal authority to make decisions regarding the exercise of her reproductive capacity, and to change the legal position of other persons on the basis of mutual agreement.

In one of the earliest gestational surrogacy cases, \textit{Johnson v Calvert},\textsuperscript{265} the surrogate relied in part on arguments around objectification in her bid to retain parentage of the child to whom she gave birth. The California Supreme Court rejected this argument through a focus on individual autonomy, particularly female bodily autonomy:\textsuperscript{266}

The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the


\textsuperscript{264}Shalev, \textit{Birth Power}, supra note 256 at 94. See also \textit{ibid} at 99-104 for a discussion of Shalev's proposed contract-based approach to surrogacy arrangements.

\textsuperscript{265}851 P.2d 776 (1993).

\textsuperscript{266}851 P.2d 776, 785 (1993).
reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law.

(ii) Adoption

In the context of adoption, money enters the equation when prospective parents seek to adopt through private agencies or via the services of an intermediary; the fees involved are not in relation to specific children (that is to say, people do not “purchase” children through an auction system) but rather cover administrative and legal costs, as well as potentially the birth mother’s “reasonable expenses.” Fees associated with international adoption may be payable to private or public agencies.

Objectification concerns in the adoption context are centered on both the child and his or her natural parents (particularly the birth mother). In cases of private adoption, detractors argue that children are treated as chattels in a marketplace

267 Private adoption is also known as birth mother placement adoption because the birth mother usually selects the adoptive parent(s) based on profiles and meetings with prospective parents: see Deborah H Siegel & Susan Livingston Smith, Openness in Adoption: From Secrecy and Stigma to Knowledge and Openness, Evan B Donaldson Adoption Institute (2012) at 10 [Siegel & Smith, Openness in Adoption]. For a gay male American perspective on this process see Dan Savage, The Kid (New York: Plume, 2000).

268 This being said, there is evidence that in the United States white children tend to require a higher level of investment on the part of prospective parents than black children: see, e.g., Michele Bratcher Goodwin, “The Free-Market Approach to Adoption: The Value of a Baby” (2006) 26 BC Third World LJ 61.

269 “[M]edical payments to birth mothers …, transportation costs and living expenses, while characterized under the umbrella of ‘transactional costs,’ resemble ‘payments’ in most other spheres.” Ibid at 65.

270 As discussed in Parts 3 and 5, international adoption is generally unavailable to same-sex couples due to restrictions imposed by sending states. Nevertheless, since certain states permit adoption by single persons, and it is possible that in future states may accept the parenting capacity of lesbians and gay men, I consider both domestic and international adoption.

271 For example, China charges orphanage fees to assist with the costs of operating state-run orphanages: Elizabeth Bartholet, “International Adoption: The Human Rights Position” (2010) Global Policy 91 at 96 [Bartholet, "International Adoption"]). In the receiving State, however, fees may be payable to a private licensed agency. For example, California permits intercountry adoption services by a “private full-service adoption agency or a noncustodial adoption agency": Cal Fam Code § 8900(b).
designed to satisfy the desires of wealthy (white) prospective parents;\textsuperscript{272} this concern is amplified with international adoption, where the practice is viewed as tantamount to child trafficking and potentially enacting a new form of colonialist dominance. The biological parents of private and international adoptees are, it is said, treated as dispensable non-agents whose possible trauma and structural disadvantage carries little weight as compared with the desires of parents-in-waiting.

Proponents of private adoption counter charges of this sort on normative and instrumental levels. On the former front, the benefit to children who would otherwise enter the foster system or languish in state-run orphanages (where the rate of developmental impairment and death is orders of magnitude higher than for children raised by loving families\textsuperscript{273}) is said to justify the intrusion of market forces that, in any event, are designed to cover operating and pregnancy-related expenses rather than create a marketplace in which children can be bought and sold. On the latter front, the means by which private adoption operates is also said to ameliorate concerns over objectification. In essence, the fees associated with the adoption process are warranted by what the process itself offers; in particular, proponents argue that there is significant emotional benefit to women in being involved in the process of selecting parents for their child and, in the case of open adoption, of having a role in the life of the child.\textsuperscript{274} Open adoption is also said to benefit children by giving them access to their genetic origins and by enabling confirmation by birth parents that the placement was actuated by


\textsuperscript{273} Bartholet, “International Adoption”, supra note 271.

\textsuperscript{274} See, e.g., Siegel & Smith, Openness in Adoption, supra note 267 at 18-19 (referring to studies finding that “women in fully disclosed adoptions had significantly better grief resolution than did those in confidential adoptions”). See also LF Cushman, D Kalmuss & PB Namerow, “Openness in adoption: Experiences and social psychological outcomes among birth mothers” (1997) 25:1 Marriage and Family Review 7 study of 171 women who placed children for adoption through an open adoption system; findings included that birth mothers who helped choose the adoptive couple for their child reported more positive emotional outcomes than those who did not help to choose the adoptive couple).
concern for the child’s wellbeing, potentially ameliorating feelings of abandonment and lack.\textsuperscript{275} In the international adoption context, open adoption may offer a means of ameliorating cultural alienation, though there are equally weighty concerns about the child feeling torn between two cultures and feeling at home in neither their adopted or birth country.\textsuperscript{276}

(iii) Synthesis

Nussbaum has argued that “autonomy is in a sense the most exigent of the notions” associated with objectification because “treating an item as autonomous seems to entail treating it as noninstrumental, as not simply inert, as not owned, and as not something whose feelings need not be taken into account”.\textsuperscript{277}

If we place autonomy at the centre of the analysis, and recall that autonomy involves decisions made via a process of practical reason and/or self-determination, it would seem that a reasoned decision to donate HRM, provide bodily services, or place a child for adoption, is not intrinsically objectifying towards adults because it does not involve the instrumentalism or denial of subjectivity that characterizes objectification. In this respect, Nussbaum’s

\textsuperscript{275} For a discussion of the purported benefits and drawbacks for all parties of open adoption, see Marianne Berry, “Risks and Benefits of Open Adoption” (1993) 3:1 The Future of Children 125. For a distinctly pro-open adoption case see Kenneth Watson, “The Case for Open Adoption” (1988) 46:4 Public Welfare 24. For analysis of child outcomes in open adoptions see Jeffrey J Haugaard & Alison M Moed, “Outcomes of Open Adoptions” (2001) 4:3 Adoption Quarterly 63 (concluding, based on analysis of existing research, that “[l]evel of adoption openness seems to have little influence on child outcomes, several years after adoption. It may be that the comfort level of the adoptive and birth families with the amount of openness is more important than the level of openness itself”: at 72). See further Harold D Grotevant, “Openness in Adoption: Research with the Adoption Kinship Network” (2000) 4:1 Adoption Quarterly 45 (finding that “[n]o differences were found on any of the four scales of socioemotional development, regardless of how openness was assessed”: at 50). For discussion of the benefits as perceived by adoptive parents see, e.g., Abbie E Goldberg, “Lesbian, Gay, and Heterosexual Couples in Open Adoption Arrangements: A Qualitative Study” (2011) 73 Journal of Marriage and Family 502; Anne Marie McLaughlin et al, “Negotiating Openness: A Qualitative Study of Adoptive Parents’ Experience of Contact in Open Adoption” (2014) 30:1 CSWR 5.


\textsuperscript{277} Nussbaum, “Objectification”, \textit{supra} note 255 at 260.
distinction between capacity and functioning, and Friedman’s procedural conception of autonomy, are apposite: the relevant question is whether the decision to act is self-determined or derived from the capacity to reason, not whether the act itself is autonomy or capacity enhancing from the perspective of others. Accordingly, so long as the donating, gestating or relinquishing party acts in a truly autonomous manner, it is not apparent why the entry of market forces into ART or adoption makes otherwise generally acceptable practices objectifying. Market forces may affect the quality of a person’s consent, but this is a separate question canvassed below.

At least in cases of assisted reproduction, bodily integrity is a relevant consideration. In this regard, Nussbaum’s concern with seeing “the other as an end, not as a mere means” can be tied to Shalev’s argument that excluding surrogacy (and by extension gamete donation) “from the baby barter prohibition is to transfer that power to the discretion of the individual, to recognize a woman’s legal authority to make decisions regarding the exercise of her reproductive capacity.” Treating women (and men) as necessarily objectified by a decision to sell her (or his) HRM or bodily services is, on this view, itself an objectifying denial of bodily integrity.

Concerning children, the relevant indicia of objectification is not the mere presence of market forces but rather instrumental treatment that denies the child’s autonomy and development. The mere fact that payment is involved in a child’s existence or parentage does not objectify the child if his or her parent(s) were motivated by their own capacity for affective connection and caregiving. (This position does not deny that selective genetic alteration based on parental preferences might have a distasteful element of conditional affection, but it does mean that questions of this sort cannot be resolved by simple either/or binaries.)

278 Nussbaum, Disgust, supra note 27 at xix; also at 47-51.
279 Shalev, Birth Power, supra note 256 at 94.
While the involvement of market forces in surrogacy, gamete donation and adoption is not intrinsically objectifying, it is entirely possible that the conditions associated with these practices objectify the subject or deny her capabilities and autonomy in a manner that is incommensurate with human dignity and wellbeing. As Nussbaum argues, context is crucial in determining whether behaviour or actions are objectifying.\textsuperscript{280} For instance, a woman’s involvement in surrogacy is likely to be objectifying if, inter alia: she is treated instrumentally through the payment of a paltry sum (that is nevertheless enough to make the prospect too financially rewarding to turn down, which in turn implicates her autonomy); her autonomy is denied by treating her as an inert object of ownership who is not entitled to any decision-making role in the pregnancy;\textsuperscript{281} or she is treated as fungible by being discarded without payment and recognition of her sacrifice if pregnancy does not ensue. Similarly, an open market for children in which prospective parents are permitted to bid for children who most closely resemble their ‘ideal’ objectifies children not because of fungibility (quite the opposite) but rather because of the proprietary overtones of the transaction – the child’s subjectivity is denied, his or her capacities and autonomy are treated as being of subsidiary importance, and he or she is reduced to the status of property.

Shifting the circumstances in these examples, however, can engender different results.\textsuperscript{282} Consider the following statistically common Western surrogate profile: Caucasian, Christian, in her late 20s-early 30s, possibly with some tertiary education, with modest (as opposed to low) family income and hailing from a

\textsuperscript{280} Nussbaum, "Objectification", \textit{supra} note 255 at 251.

\textsuperscript{281} See, eg, Alexander M Capron & Margaret Jane Radin, “Choosing Family Law over Contract Law as a Paradigm for Surrogate Motherhood” (1988) 16 Law, Medicine, and Health Care 36 (referring to surrogates as “paid breeding stock, like farm animals”: at 36).

\textsuperscript{282} In \textit{Johnson v Calvert}, 851 P2d 776, 785 (1993) the Supreme Court of California responded to an argument that commercial surrogacy is inherently exploitative by stating, “there has been no proof that surrogacy contracts exploit poor women to any greater degree than economic necessity in general exploits them by inducing them to accept lower-paid or otherwise undesirable employment”.

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working class background. If this woman is paid a sum that she considers fair (or that is determined by the state to be fair and which she accepts), if she is involved in the decision-making process and retains bodily autonomy and integrity throughout the pregnancy, and if she is compensated and treated with dignity if pregnancy does not ensue, is she objectified? In my view, the answer is likely to be “no” for the following reasons: a measure of instrumentality is not antithetical to self-determination if the choice to engage in such work is self-reflective or derived through practical reason; increased involvement in the decision-making process can ameliorate the denial of autonomy involved in submitting to medical examinations and lifestyle regimens; fair compensation for unsuccessful efforts to fall pregnant can ameliorate concerns over fungibility, though people will disagree over quantum. Returning to the adoption example, if payment is capped at a certain level that is designed to cover the expenses of a birth mother and those involved in facilitating the adoption, and expense differences are not based on subjective factors such as race, then the involvement of market forces in the adoption process is not

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284 For a discussion of differing views on whether “generous payment for a surrogacy arrangement makes it less exploitative” see Field, supra note 258 at 26-27.

285 Autonomy concerning abortion ought to be complete; that is to say, the surrogate should retain the capacity to decide whether to have, or submit to, an abortion: see further Arneson, supra note 254 at 156.

286 Cf Berkhout, supra note 258 (arguing that commercial surrogacy is inherently objectifying).

287 Pro-surrogacy feminists have pointed out that all work involves a measure of instrumentality. This is true, although there is something qualitatively different about surrogacy from other forms of work, in the sense that it is quite literally full-time, and also because of the emotional and physical requirements of “the job”. Ultimately, I think that however one views surrogacy, one must accept that it involves a measure of instrumentality.

288 The fact that different people will disagree about the correct boundary line simply means that for some people surrogacy will not be a sufficiently tempting offer and the positions of those for whom it is acceptable may not be understood by a margin of the population.
intrinsically objectifying because the child is not commoditized on the basis of his or her personal characteristics.

b. Consent

Commercialization also raises questions about the effectiveness of a party’s consent to donation, gestation and/or relinquishment. The concern is that paying for HRM, bodily services and access to adoption procedures may vitiate the consent of the donor, surrogate, or birth parent through the exploitation of her (or his) economic need. (Consent may also be less than free for non-economic reasons, such as family pressure.)

In thinking through the issue of consent, it is productive to consider the type of situation that most concerns critics – that of an economically underprivileged woman of limited education who enters into a surrogacy arrangement or egg donation procedure, or who decides to place her child for adoption, out of financial need. Is the consent of this woman vitiated by structural disadvantage (reduced employment prospects, the potential for discrimination, 

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289 While the sums paid for donated sperm are minimal in comparison to the compensation for donated eggs, a man’s economic need may be severe enough to make the comparatively small sum an incentive that sufficiently influences his decision in a manner that vitiates his consent. Lack of economic resources to care for a child may also influence a father’s consent to place his child for adoption, although there is an argument that single women ought to have the freedom to place their children for adoption without the consent of the biological father: see Lori Chambers, “Newborn Adoption: Birth Mothers, Genetic Fathers, and Reproductive Autonomy” (2010) 26:2 Can J Fam L 339.


292 At least in the surrogacy context, this stereotype appears to be empirically unjustified, though it retains its emotive resonance. Canadian research has shown that most statistically common Western surrogate profile is as follows: Caucasian, Christian, in her late 20s-early 30s, possibly with some tertiary education, with modest (as opposed to low) family income and hailing from a working class background: Busby & Vun, supra note 283 at 42-43.
and basic economic need) and/or financial motivation even if she is not being
objectified? A simple “yes” or “no” is insufficient. Economic necessity may well
mean that a woman’s consent is somewhat less free than the consent provided
by a woman of means. However, concerning surrogacy and gamete donation
(where, at least in honest commercial situations, women are paid for their
services rather than simply having their expenses met), it is troublingly moralistic,
as well as economically illogical, to foreclose a woman’s reproductive choice
(which implicates her capacity to reason as well as her bodily integrity) by
preventing her from selling her gestational or gamete-producing capability when
she may well find the alternative options available to her significantly more
harmful not only to her self-respect but potentially also to her health and life.
For this reason, I suggest that while commercial surrogacy and egg donation
have the potential to involve decisions that, for structural reasons, do not derive
from perfect consent, the infringement of women’s capabilities and autonomy that
a ban on each practice involves tips the balance in favour of legalization.

See further Perry, supra note 290 at 133-35 (discussing the role of poverty in
international adoption).

At the extreme, one is concerned with what Michael Walzer calls “desperate exchanges”,
wherein one party’s “choice” is dictated by sheer necessity: Michael Walzer, Spheres of
a consideration of power imbalances in the context of gamete donation see Madelyn
Freundlich, Adoption and Ethics: Adoption and Assisted Reproduction (Washington:

Further restrictions on the options available to poor women will not contribute to their
empowerment; on the contrary, criminalization of commercial surrogacy removes a
potentially life-changing labor option. As Arneson puts it, “a concern that some people are
forced to choose their lives from an unfairly small menu of options is a reason to expand not restrict the range of options from which these people must choose”: Arneson, supra
note 254 at 159. See also Sunstein, supra note 259 at 46 (arguing against commercial
surrogacy on other, prudential grounds).

See, e.g., Radin, "Inalienability", supra note 260 at 1930: “It might be degrading for the
surrogate to commodify her gestational services or her baby, but she might find this
preferable to her other choices in life”. Martha Nussbaum has made a similar argument in
Services"].

Nussbaum’s work on prostitution suggests that she may agree with this view. She argues
that legalization of prostitution “is likely to make things a little better for women who have
position appears to be supported by empirical research into the experiences of surrogates in American, Canada and Britain, which suggests that “concerns that commercial surrogacy will lead to commodification and exploitation and that women cannot give meaningful consent to such arrangements, have not been realized in those countries”. 298 This is not to say that the giving and revoking of consent should be free from regulation, as discussed further in the next section concerning change of position.

In the adoption context, economic factors may influence consent in direct and indirect ways. Indirect influence may derive from structural disadvantage, particularly economic need and resulting (actual or perceived) inability to care for a child. In my view, structural disadvantage is a weak argument against the entry of market forces to the adoption system unless it is accompanied by provision of the resources necessary for a woman to raise her child; that is to say, a comprehensive focus on a woman’s needs and capabilities is necessary. The absence of reproductive choice in a particular society or individual life ought not to be compounded by a correlative denial of what may be the only realistic choice available to women of a particular socioeconomic standing. Furthermore, even if too few options to begin with”, whereas criminalization “reduces poor women’s options still further”: Nussbaum, “Bodily Services”, supra note 296 at 696. This view suggests that, with proper regulation and a focus on providing underprivileged women with alternative forms of employment, she would support legalization of commercial surrogacy: see further ibid at 696-97, 712-13, 716, 720-24.

298 Busby & Vun, supra note 283 at 92. The authors also found no empirical evidence that “surrogate mothers lose their autonomy during the pregnancy” (67) or that women in these countries entered into surrogacy arrangements because of financial distress (44) or third party coercion (49-50). Furthermore, “most surrogate mothers reported good relationships with commissioning parents and that they had few difficulties, if any, with relinquishing the child ... many [surrogates] said they would do it again”: at 49. Importantly, the evidence suggests that surrogate involvement in the process before conception and “a shared understanding of how the process will unfold” is crucial to surrogates’ feelings of satisfaction with the experience: at 63. A recent study of 61 British surrogates showed early emotional detachment “with little variation post-delivery”: at 68. Other studies have reported similar findings; in particular, long-term studies indicate that positive attitudes tend to remain stable over time: at 71.
assistance is provided to economically disadvantaged women, prohibiting private adoption will not address the situation of women who do not wish to parent their child for other reasons. This being said, recognition that the happiness of adoptive parents may have corresponding negative affects for relinquishing parents arguably imposes an ethical obligation on the former parties “to some commitment to change the conditions that have created that state of affairs”. 299

On a more direct (though ultimately related) level, it can also be argued that in cases where prospective adoptive parents meet the pregnancy-related expenses of a woman, her consent to the adoption is influenced in a manner that exploits her underlying economic disadvantage. Direct economic benefit has a stronger claim to vitiating the consent of a birth mother, but this can be ameliorated by caps on expenses, accountability provisions, 300 and minimum periods for the giving and revoking of consent. Furthermore, banning prospective parents from financially assisting a birth mother may have counter-productive impacts on her capabilities (and by extension those of the foetus) if she is in a parlous situation. Similarly, a focus on capacity and autonomy points to the benefits for all parties in the adoption triad of the structures that are offered by private adoption (which are made possible by the fees paid by prospective parents). In particular, the potential for birth parents to play a role in the decision of who will become a child’s parents, and the potential for future involvement in the life of the child, can be viewed as both capacity and autonomy enhancing because of the emphasis

299 Perry, supra note 290 at 144.
300 For example, § 8610(a) of the Cal Fam Code requires petitioners in a proceeding for adoption to file with the court “a full accounting report of all disbursements of anything of value made or agreed to be made by them or on their behalf in connection with the birth of the child”.

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placed on choice, affiliative capacity, and emotional wellbeing. Open adoption structures may also offer significant emotional benefits for all parties.

3. **Change of Position**

This section is concerned with the extent to which genetic parents, surrogates or gamete donors ought to retain the right to change their minds about a promise to renounce parental rights, if indeed such rights exist. I turn first to the law of adoption, where principles concerning change of position are well established.

In North America, most States and Provinces establish a period of time post-birth in which consent to adoption may not be given, as well as a further period in which consent may be revoked. In California, a private adoption agreement may not be signed until the mother (or the child) is discharged from hospital; birth parents must also have been advised of their rights (including legal counsel and counseling) at least 10 days prior to signing the agreement. The consent does not, however, become irrevocable until the 31st day after the signing of the agreement. In Ontario, consent to adoption may not be given "before the child is seven days old" and consent may be revoked within 21 days of it being given.

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301 Though issues of race and ethnicity may create troubling divisions: Perry, supra note 290 at 150. Sexuality may also play a political role, most likely in forms of discrimination against prospective gay and lesbian parents. Cf Savage, supra note 267.


303 Generally, this issue does not arise in the context of anonymous gamete donation; it may arise as an issue in cases of known donation: see the discussion in Parts 3 and 5.

304 See generally Child Welfare Information Gateway, Consent to Adoption (US Department of Health and Human Services, Children's Bureau, 2013).

305 Cam Fam Code §§ 8801.3, 8801.5.

306 Ibid § 8814.

307 Child and Family Services Act, RSO 1990, c C11, s 137(3) and (8).
Limitations around the timing and enforceability of consent are appropriate in adoption cases, in view of the potential for a post-birth reconsideration of one’s earlier decision and the trauma that would be inflicted upon birth parents if they were held to decisions they soon regret. Of course, prospective parents will also suffer trauma in the event that a birth parent changes her mind about relinquishing her parental rights, but the prospective parents’ lack of gestation, genetic linkage or involvement in conception suggests that in such a situation, the law ought to favour the autonomy of birth parents to renege on a previous representation.

The appropriate time periods for consent and revocation are open to debate. The development of affective bonds between children and their caregivers suggests that revocation periods ought to be brief to enable the child to bond with his or her (birth or adoptive) parents from the earliest possible opportunity. Equally, though, respect for the affiliative and emotional capacities of birth parents points towards a period roughly in accordance with the timeframes in California and Ontario. In open adoption cases, the same concerns may make it appropriate for birth parents to have the option of requesting a variation in the level of contact with the child, while still proceeding with the termination of parental rights.

In the surrogacy context, there is substantial force in Shalev’s autonomy-based view that surrogates and donors ought to be held to their promises for reasons associated with practical reason, self-determination and sex equality. A market-centered perspective is much less persuasive. For instance, Richard Posner’s concern for diminished incentives to enter into surrogacy contracts by reason of

\[\text{Cf Shalev, Birth Power, supra note 256 at 54-57 (criticizing the idea that “the expulsion of the baby from the womb signifies an end to the woman’s emotional turmoil and contributes, in some inherent way, to the rational resolution of her dilemma whether to keep the child” and suggesting that there is no “guarantee that a decision made within days of childbirth, with all its attendant physical and emotional effects, will be a better considered one”).}\]

\[\text{See further Child Welfare Information Gateway, Postadoption Contact Agreements Between Birth and Adoptive Parents (US Department of Health and Human Services, Children’s Bureau, 2011).}\]
uncertainty is insufficiently attentive to the needs and position of the surrogate. Indeed, that flaw points to perhaps the most cogent argument against holding surrogates to their contractual promise to relinquish parental rights: the (potentially) transformative experience of gestation and birth. If the surrogate and the foetus are, to use Mary Lyndon Shanley’s words, “beings-in-relationship during the pregnancy and she [the surrogate] perceives herself as (at least one of) its mother(s), then a law that denies her all custodial rights will deprive her of any lived expression of her relationship to that child for her entire lifetime”. From a similar perspective, Katherine Bartlett has argued that surrogacy contracts should be unenforceable for a period of time following birth to enable a surrogate to assert parental rights.

The potential trauma to surrogates of being held to their promise to relinquish parenthood suggests that blanket enforcement is not appropriate. However, at least in gestational surrogacy cases, I would also suggest that Bartlett’s

310 Posner, supra note 263.

311 Shanley, supra note 262 at 629-30. Shanley draws a useful analogy with the law of divorce, which has developed as a result of society’s recognition that holding people to their promises is, in some circumstances, unjust and antithetical to the exercise of autonomy. "Not to allow a woman to revoke her consent during pregnancy or at birth seems to ignore the possibility of a somewhat analogous change that simultaneously affects the self as an individual and as a person-in-relationship": ibid at 630. Shanley’s position does not appear to draw a distinction between traditional and gestational surrogacy, presumably because the determinative element is the relationship between surrogate and foetus, which may arise whether or not there is a genetic link between them. From a perspective that prioritizes autonomy, it is arguable that being held to a promise to relinquish parental rights over a child created using one’s own genetic material is intrinsically different to a situation involving gestation alone, though I am uncomfortable with drawing such a firm distinction because of the biological essentialism of this position.

312 Katherine T Bartlett, “Re-Expressing Parenthood” (1988) 98 Yale L J 293 at 335-37. Radin makes a similar argument in the event that her view on the market-inalienability of human life is not accepted as a basis for prohibiting commercial surrogacy: Radin, "Inalienability", supra note 260 at 146-47. See also Field, supra note 258 at 82, arguing that public policy supports making all surrogacy contracts “performable or not at the option of the mother”. This is the law in New Hampshire, where surrogates are given 72 hours post-birth to give notice of her intention to keep the child: NH Rev Stat § 168-B:25(IV).

313 Arguably, traditional surrogacy should be treated differently because the combined genetic and gestational link between mother and child makes it analogous to adoption,
position tilts too far in favour of the surrogate and pays insufficient regard to the reasoned decisions and intentions of the parties prior to conception, as well as the emotional and affiliative harm that would be caused to commissioning parents by denying them parentage of a child that, but for their intention and actions, would not exist.\textsuperscript{314} I suggest that an alternative in gestational surrogacy cases is enforcement of the contract alongside the crystallization of an option on the part of the surrogate to assert her right to visitation with the child on a regular basis.\textsuperscript{315} This option respects her bodily integrity, and emotional and affiliative capacities with respect to the child. Additionally, awareness of the potential for recognition of contractual visitation rights (subject, always, to the interests of the child) might lead the parties to enter into surrogacy arrangements with the requisite caution,\textsuperscript{316} and to develop a relationship of trust and confidence during gestation\textsuperscript{317} so that, in the event of a surrogate’s claim to visitation, all are in a better position to constructively address the situation rather than dissolving into conflict and acrimony.\textsuperscript{318}

\begin{footnotesize}

\textsuperscript{314} See Arneson, \textit{supra} note 254 at 157.

\textsuperscript{315} An alternative proposal would be to recognize both the surrogate and the commissioning parents as legal parents; however, this would necessitate development of the law relating to multi-parenting and, more importantly, would potentially introduce a degree of friction and uncertainty into the child’s life that could be ameliorated through a visitation regime.

\textsuperscript{316} This point has been made by Matthew H Baughman in arguing for the unenforceability of contracts for a period of time to enable a surrogate to assert legal parentage: Matthew H Baughman, “In Search of Common Ground: One Pragmatist Perspective on the Debate Over Contract Surrogacy” (2001) 10 Colum J Gender & L 263 at 304-05.

\textsuperscript{317} Busby and Vun’s analysis of existing data concerning the experiences of surrogates suggests that one of the most important factors for surrogate wellbeing and satisfaction with the experience is the development of a respectful relationship with the commissioning parents. Busby & Vun, \textit{supra} note 283 at 60-67.

\textsuperscript{318} Perhaps the most likely problem with this proposed system is the ability it confers on surrogates to claim visitation rights without any attendant parental responsibilities, thereby enabling surrogates to disrupt the intended family structure. This would be an area for future research in the event that a rights-to-visitation scheme is introduced.

\end{footnotesize}
The arguments in favor of giving donors rights to visitation are less persuasive. While I am conscious of positional difficulties associated with male opinions concerning women’s experiences of pregnancy, I am not sure that one needs to be capable of gestation to view that process as qualitatively different from gamete donation. My point is that the latter process would seem less likely to generate the sort of deep affective connection to a foetus and child that can develop on the part of a surrogate. This only goes some way towards answering the question, though, because affective connections, even deep ones, remain possible on the part of donors. In the context of anonymous donation, to the extent that this question even arises, the detriment to intending parents and children of having unknown and (potentially) unwanted persons thrust into their lives would seem to clearly outweigh the detriment to the donor; private arrangements may be reached but the law should not play a coercive role. The position is less clear with known donors, who may play a significant supporting role throughout a pregnancy. In this circumstance, a system that determines parentage on the basis of pre-conception statements of intention to parent – accepted by all parents – might be desirable. This system would not preclude future parentage claims by known donors who are not party to such an agreement, but the determination in a later case ought to be made in accordance with

Existing research, though, suggests that the majority of (usually gestational) surrogates do not experience the type of wrenching affective loss at relinquishing parentage that so concerns critics of the practice, and may not desire enforceable rights even of a limited nature. Ibid at 68-73.

There is also the question of whether donors ought to be compelled to accept parental or at least financial responsibility for children born using their donated HRM. In the context of male donation, Shalev has forcefully argued against this proposition on the basis that “[t]he law of donor artificial insemination thus posits the radical conception that a man may exercise autonomy as a moral agent in determining the normative consequences of his reproductive acts and that the legal definition of fatherhood is not necessarily a matter of biological predetermination but rather of rational human intention”: Shalev, Birth Power, supra note 256 at 84.

See, e.g., Cal Assembly Bill No. 2344 (introduced by Assembly Member Ammiano, February 21, 2014), s 1 (proposing statutory declarations of intention to parent in the context of assisted reproduction).
with the principles respecting second (or third) parent and stepparent adoption, or declarations of *in loco parentis* status.
PART 2

RECOGNITION OF SAME-SEX RELATIONSHIPS IN THE UNITED STATES

Introduction

Relationship recognition is within State regulatory power in the United States, subject to infirmity by reason of conflict with the United States Constitution. This being said, “Congress, in enacting discrete statutes, can make determinations that bear on marital rights and privileges.” The most obvious instantiation of this congressional power remains the Defense of Marriage Act, although in United States v Windsor, the Supreme Court struck down §3 of DOMA, which had precluded the recognition of same-sex marriage by the federal government. Section 2 of DOMA concerning recognition of same-sex marriages between the States remains in force. Following Windsor, the federal government is obliged to

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1 United States v Windsor, 133 S Ct 2675 at 2689-90 (2013) [Windsor] per Kennedy J: “By history and tradition the definition and regulation of marriage ... has been treated as being within the authority and realm of the separate States.” See also Sosna v Iowa, 419 US 393, 404 (1975), in which it was said that “regulation of domestic relations” is “an area that has long been regarded as a virtually exclusive province of the States”. See further United States v Lopez, 514 US 549 at 564-65 (1995).

2 US Const, art VI, § 2. See also Windsor, supra note 1 at 2691: “State laws defining and regulating marriage, of course, must respect the constitutional rights of persons” (citing Loving v Virginia, 388 US 1 (1967) [Loving]).

3 Windsor, supra note 1 at 2690.


5 Windsor, supra note 1.

6 For an overview of DOMA’s enactment and the case that led to it, Baehr v Lewin, 852 P 2d 44 (Haw 1993) see Andrew Koppelman, Same Sex, Different States (New Haven: Yale University Press, 2006).
recognize valid same-sex marriages conducted in the American States.\textsuperscript{7} The federal government still does not recognize valid State civil unions or domestic partnerships for the purposes of federal law.\textsuperscript{8}

At the State level, forms and levels of relationship recognition for same-sex couples vary greatly. Nineteen States and the District of Columbia now permit same-sex marriage and a further eight judgments that have struck down State bans on same-sex marriage are subject to appeal.\textsuperscript{9} A further eight States provide civil unions or domestic partnerships, although this number is likely to decrease as marriage becomes available in certain of those States.\textsuperscript{10} Virtually all States provide some form of contract-based or default recognition of same-sex relationships for limited purposes concerning, for instance, property distribution upon separation, though the criteria for judicial intervention or relief varies significantly between States.\textsuperscript{11}

This section is concerned with mapping the present constellation of laws governing recognition of same-sex relationships in the United States and critiquing those laws through a lens oriented towards capability maximization, relational autonomy and queer sexual ethics. It begins with consideration of same-sex relationship recognition at the federal level, in particular the judgment in \textit{Windsor} and its implications. It then considers the forms of relationship recognition offered at the State level, including marriage, civil unions and

\begin{itemize}
\item \textsuperscript{7} Although questions remain about the scope of the obligation to recognize evasive marriages: see \textit{infra} Section III(C)(1).
\item \textsuperscript{8} This is expressly included as a reason for the passage of Hawaii’s marriage equality bill: \textit{Marriage Equality Act of 2013} (Haw), s 1. See also United States Internal Revenue Service, \textit{Revenue Ruling 2013-17} (2013) (determining that state civil unions and domestic partnerships are not recognized for the purposes of federal taxation law); United States Office of Personnel Management, \textit{Benefits Administration Letter No. 12-203} (2013).
\item \textsuperscript{9} See \textit{infra} Section II(A).
\item \textsuperscript{10} See \textit{infra} Section II(B).
\item \textsuperscript{11} See \textit{infra} Section II(C).
\end{itemize}
domestic partnerships, and purposive recognition by default and/or contract. It concludes with consideration of the conflict of laws issues that arise by reason of different degrees of relationship recognition in the American States.

I. Federal Relationship Recognition

The law of domestic relations is “an area that has long been regarded as a virtually exclusive province of the States”.12 In Windsor, the Supreme Court affirmed “the constitutionality of limited federal laws that regulate the meaning of marriage in order to further federal policy”, but set strict limits on federal power in this area by striking down §3 of DOMA “as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution”.13 The most immediate effect of this finding was to make it incumbent upon the federal government to recognize same-sex marriages validly entered into under State law. The decision has not had the same effect on civil unions or domestic partnerships, which continue to be ignored at the federal level.

This section begins with an overview and doctrinal analysis of Windsor for the purpose of mapping the law as it currently is, followed by a critical reading of Windsor’s valorization of marriage. The section concludes with analysis of Windsor’s implications for federal recognition of same-sex relationships including but not limited to marriage.

A. The Background to Windsor

The story of Edie Windsor and Thea Spyer begins in the 1960s, when the two women first met and became lovers. In 1967, the year that the US Supreme

\[\text{\footnotesize{\cite{Sosna, supra note 1 at 404.}}}
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\[\text{\footnotesize{\cite{Windsor, supra note 1 at 2695.}}}
\]
Court in *Loving v Virginia*\(^{14}\) struck down laws banning interracial marriage, Spyer proposed to Windsor. To avoid uncomfortable questions, Thea presented Edie with a circle of diamonds on a brooch.\(^{15}\) In 2007, Edie and Thea were married in Toronto because their home State of New York did not, at that time,\(^{16}\) allow or recognize same-sex marriage. Thea died in 2009 following a 20-year battle with multiple sclerosis. Edie and Thea were together for 44 years; married for two. Thea left the entirety of her estate to Edie. In the brief period between their marriage and Thea’s death, courts in New York took the position that valid same-sex marriages performed out of State would be recognized in New York.\(^{17}\) Nevertheless, Edie was required to pay $363,053 in federal estate taxes\(^{18}\) because, pursuant to §3 of *DOMA*, she was not considered Thea’s “spouse”.\(^{19}\)

Section 3 of *DOMA* defined “marriage” as a “legal union between one man and one woman as husband and wife” and “spouse” as “a person of the opposite sex who is a husband or a wife”. The effect of this was to exclude same-sex couples

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\(^{14}\) *Loving*, supra note 2.

\(^{15}\) Ariel Levy, “The Perfect Wife”, *The New Yorker* (30 September 2013) 54 at 57.

\(^{16}\) Same-sex marriage became legal in New York in July 2011 pursuant to the *Marriage Equality Act* (NY 2011).

\(^{17}\) *Windsor v United States*, 699 F 3d 169 at 177-78 (2d Cir 2012) [*Windsor* (2d Cir)]. The Second Circuit found that it was entitled to predict the status of New York law as it existed in 2009 by reference to intermediate appellate judgments of State courts. By a margin of three to one, State courts favoured recognition; accordingly, the Second Circuit held that “Windsor's marriage would have been recognized under New York law at the time of Spyer's death”: at 178. It appears to have been assumed by all parties that Edie and Thea’s marriage was valid under Canadian law. In fact, it is arguable that until New York passed its *Marriage Equality Act*, Edie and Thea lacked essential capacity to marry under New York law, which cast the validity of their Canadian marriage into question by reason of Canada’s distinction between essential and formal validity. Amendments to Canada’s *Civil Marriage Act*, SC 2005, c 33 that came into force in 2013 conferred retrospective validity on same-sex marriages in which the parties lacked essential capacity by reason of the law of their state of domicile concerning same-sex marriage, but it is open to question whether the Court of Appeals was actually correct that New York would have (or ought to have) recognized the marriage if capacity for purposes of Canadian law had been raised.

\(^{18}\) Pursuant to 26 USC §2056(a).

\(^{19}\) Edie was also subject to a $275,528 tax bill from New York State: Levy, supra note 15 at 54.
from all benefits conferred on spouses under the *United States Code*. *DOMA* did not prevent the American States from recognizing same-sex marriages performed in their own or another jurisdiction; rather, it created a system wherein persons could be at once married and not married, ‘in’ but also ‘out’.

Edie sought assistance in challenging *DOMA* from mainstream gay rights organizations in 2009. In February 2011, between the filing of Edie’s case and its hearing, the US Attorney General “announced that the Department of Justice would no longer defend *DOMA*’s constitutionality because the Attorney General and the President believed that a heightened standard of scrutiny should apply to classifications based on sexual orientation, and that section 3 is unconstitutional under that standard”. Accordingly, the Bipartisan Legal Advisory Group of the US House of Representatives (BLAG) sought and was granted leave to defend the constitutionality of *DOMA*.

In June 2012, the District Court upheld Edie’s challenge and found that the definition of “marriage” in §3 of *DOMA* violated the Fifth Amendment’s Equal Protection Clause because it was not rationally related to a legitimate government purpose. The Court of Appeals for the Second Circuit affirmed the District Court’s grant of summary judgment in Windsor’s favor. However, the Second Circuit also held that heightened scrutiny should apply to homosexuals as a class because of historic persecution and discrimination, the absence of any

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20 Despite the present stridency of national marriage equality groups, Edie has stated that she was told by the organizations she approached that it was an inopportune time for a federal challenge to marriage inequality: *ibid* at 54. Soon after, she was introduced to Roberta Kaplan, a corporate lawyer who had been co-counsel in the 2006 challenge to New York’s marriage laws (*Hernandez v Robles*, 855 NE 2d 1 (NY 2006)). Kaplan agreed to represent Edie and in November 2010 the pair brought suit in the District Court for the Southern District of New York challenging the constitutionality of § 3 of *DOMA*.


22 *Windsor (SDNY)*, supra note 21 at 397.

relationship between homosexuality and the ability to contribute to society, the fact that homosexuals are a discernible group with non-obvious distinguishing characteristics, and homosexuals remain politically weak as a class. 24 BLAG’s proffered bases for DOMA’s constitutionality – uniformity, protection of the fisc, tradition, and responsible procreation, were neither exceedingly persuasive nor substantially related to important government interests. 25

B. Windsor in the Supreme Court

In light of the federal government’s decision not to defend DOMA, the first question that the Court had to consider was whether it had jurisdiction to consider the merits of the case; specifically, the Court asked whether the BLAG had standing to defend the constitutionality of §3. The majority found that the tax refund the federal government was required to pay pursuant to the findings of the District Court constituted a sufficient injury on the part of the government, despite its belief that the law was unconstitutional, so that the case presented a justiciable controversy within the meaning of Article III of the Constitution. 26 Prudential requirements of “concrete adverseness” were met by BLAG’s “sharp adversarial presentation”. 27

The majority affirmed DOMA’s unconstitutionality on due process and equal protection grounds. Justice Kennedy began from the premise that “recognition of civil marriages is central to State domestic relations law applicable to its residents and citizens” and the “definition of marriage is the foundation of the State’s broader authority to regulate [that] subject”. 28 DOMA, however, rejected

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24 Windsor (2d Cir), supra note 17 at 182-85.
25 Ibid at 186-88.
26 Windsor, supra note 1 at 2684-89.
27 Ibid at 2688.
28 Ibid at 2691.
“the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next”. 29 This line of reasoning appeared to be following a federalist thread, but Kennedy J quickly dispelled any such inference: “The State’s power in defining the marital relation is of central relevance in this case quite apart from principles of federalism”. 30 Rather, his concern in highlighting the role of the States in American marriage law was to demonstrate that DOMA took from couples in States that allowed or recognized same-sex marriage “a dignity and status of immense import”. 31 Thus, Kennedy J framed the issue as being “whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment”. 32 The relevant rights-holder was, therefore, the individual, not the State, 33 though Edie’s liberty right was grounded in New York’s power to make laws respecting marriage.

As a first step in resolving the due process question as posed, Kennedy opined that “marriage is more than a routine classification for purposes of certain statutory benefits”; rather, it constitutes “a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages”. By recognizing the marriages of same-sex couples validly conducted out of jurisdiction, New York “sought to give further protection and dignity to that bond”. 35 DOMA,

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29 Ibid at 2692.
30 Ibid.
31 Ibid.
32 Ibid.
33 Contra Shelby County v Holder, 133 S Ct 2612 (2013) [Shelby].
34 That is, in accordance with lex loci celebrationis (though there is a question as to whether a marriage conducted in accordance with the law of the place of celebration is valid if the intention of the parties is to evade the laws of their domicile): see supra note 17 and infra Section III(C)(1).
35 Windsor, supra note 1 at 2692
however, sought “to injure the very class New York seeks to protect”; its “deviation from the usual tradition of recognizing and accepting state definitions of marriage” was a deliberate deprivation motivated by moral disapproval and the desire to treat otherwise valid same-sex marriages as “second-class marriages for the purposes of federal law”.\footnote{Ibid at 2693-94. Indeed, one of the most delightful moments of the hearing came in response to Justice Kagan’s reading of the section of the House Report concerning DOMA stating “Congress decided to reflect an honor of collective moral judgment and to express moral disapproval of homosexuality”. BLAG’s attorney, Paul Clement, responded as follows: “Does the House Report say that? Of course, the House Report says that. And if that’s enough to invalidate the statute, then you should invalidate the statute.” United States v Windsor, Transcript of Proceedings (27 March 2013) at 74. Nevertheless, Roberts CJ obdurately maintained in his judgment that “without some more convincing evidence that the Act’s principal purpose was to codify malice, and that it furthered no legitimate government interests, I would not tar the political branches with the brush of bigotry”: Windsor, supra note 1 at 2696.}

\textit{DOMA} thus restricted the “freedom and choice” of same-sex couples, who were forced “to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect”.\footnote{Windsor, supra note 1 at 2694.} The implications of this in/out status demeaned same-sex couples, humiliated their children, and withheld important federal privileges and responsibilities. In conjunction with the absence of any legitimate justificatory purpose, these findings led the Court to hold “that DOMA is unconstitutional as a deprivation of the liberty of the persons protected by the Fifth Amendment”.\footnote{Ibid at 2695.}

The dissentients in \textit{Windsor} attacked the majority opinion for its federalist undertones and the absence of any discussion of the appropriate level of scrutiny for laws targeting homosexuals. Chief Justice Roberts claimed, “the majority goes off course … but it is undeniable that its judgment is based on federalism”.\footnote{Ibid at 2697.} Similarly, Scalia J labeled Justice Kennedy’s justifications for his finding “rootless and shifting”, and observed that “[t]he opinion does not resolve
and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality". Both judges also criticized the majority for its willingness to find that Congress acted out of animus in passing DOMA. Chief Justice Roberts required “more convincing evidence that the Act’s principal purpose was to codify malice”, while Scalia J sought “the most extraordinary evidence” to impute animus on the part of “our respected coordinate branches”.

Doctrinally, the minority’s criticisms are not without basis. It is true that Kennedy J leads the reader down a distinctly federalist path before abruptly veering into the territory of individual rights. It is also correct that the judgment does not clearly establish a particular standard of review for cases of this sort, although this may be a matter of form more than substance. Nevertheless, what Kennedy J achieves via his federalist/individual rights approach is a carefully calibrated judgment that struck down §3 of DOMA without taking the step of striking down State laws confining marriage to a man and a woman – yet.

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40 Ibid at 2706.
41 Ibid at 2696.
42 Ibid at 2707.
43 See further Bourke v Beshear, No 3:13-CV-750-H at 8 (WD Ky, 12 February 2014) [Bourke] (observing that “we are left without a clear answer” on the question of which level of scrutiny to apply in cases concerning laws classifying on the basis of sexual orientation); Kitchen v Herbert, No 2:13-CV-217 at 36-39 (D Utah, 20 December 2013) [Kitchen] (finding that the Supreme Court has “not yet delineated the contours” of an approach to animus-based laws based on heightened scrutiny or “how a court should determine whether a law imposes a discrimination of an unusual character”).
44 See especially SmithKline Beecham Corp v Abbott Labs, 740 F 3d 471, 481 (9th Circ, 2014): “In its words and its deed, Windsor established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review. In other words, Windsor requires that heightened scrutiny be applied to equal protection claims involving sexual orientation.” See also Whitewood v Wolf, No 1:13-cv-1861 at 33 (MD Pa, 20 May 2014): “in the tea leaves of Windsor and its forebears we apprehend the application of scrutiny more exacting than deferential”.
45 Justice Scalia argued “the real rationale of today’s opinion, whatever disappearing rail of its legalistic argle-bargle one chooses to follow, is that DOMA is motivated by ‘bare …
focus on animus means that it is open to lower courts to find that State bans are invalid because of a motivation similar to that undergirding DOMA;\textsuperscript{46} indeed, in all same-sex marriage cases since \textit{Windsor}, courts have found that laws based in the desire to exclude lesbians and gay men from civil marriage are constitutionally infirm, contrary to those such as Roberts CJ and Scalia J, who obdurately maintain that congressional approval of DOMA’s expression of “moral disapproval of homosexuality” does not amount to the requisite measure of animus.\textsuperscript{47} The important point, though, is that \textit{Windsor} leaves the resolution of that question to State and federal courts until such time as a State ban on same-sex marriage percolates up to the Supreme Court. In this regard, \textit{Windsor} lives up to the emphasis it places on federalist concerns because the resolution of State bans remains within the purview of State and district courts; however, the judgment also sets a new benchmark for resolving the legality of marriage bans through its focus on animus.\textsuperscript{48} In so doing, the Court eschewed the levels of scrutiny that ordinarily attend equal protection analysis in favour of an approach that looks to the more fundamental question of whether a law perpetuates desire to harm’ couples in same-sex marriages. ... How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status.” \textit{Windsor, supra} note 1 at 2709.

\textsuperscript{46} See, e.g., \textit{Bishop v Smith}, No 04-CV-848-TCK-TLW at 46 (ND Ok, 14 January 2014) [\textit{Bishop}]: “Exclusion of the defined class was not a hidden or ulterior motive; it was consistently communicated to Oklahoma citizens as a justification for SQ711 [the law restricting marriage to opposite-sex couples].”

\textsuperscript{47} According to the Court in \textit{Bishop, supra} note 46 at 66: “Supreme Court law now prohibits states from passing laws that are born of animosity against homosexuals”. Cf \textit{Kitchen, supra} note 43 (finding that the Court in \textit{Windsor} did not delineate with sufficient clarity the link between animus and levels of review to apply heightened scrutiny).

\textsuperscript{48} Young and Blondel argue that “[r]ather than choosing between federalism and rights-based approaches to the case, \textit{Windsor} demonstrated how federalism can become an integral part of the rights calculus”: Ernest A Young & Erin C Blondel, “Federalism, Liberty, and Equality in \textit{United States v Windsor}” (2013) Cato Supreme Court Review 117 at 119. See also \textit{Kitchen, supra} note 43 at 13: “The court agrees with Justice Scalia’s interpretation of \textit{Windsor} and finds that the important federalism concerns at issue here are nevertheless insufficient to save a state-law prohibition that denies the Plaintiffs their rights to due process and equal protection under the law.”
inequality of status. In this regard, the majority resurrects the type of reasoning that prevailed in *Brown v Board of Education*[^49] via its focus on the affective impact of laws singling out a class of persons for disparate treatment[^50]. This reasoning confers a measure of latitude concerning levels of scrutiny[^51] that respects the States’ power over marriage[^52], while also setting fairly exacting limits on the acceptable motivations for laws targeting the particular minority affected by a ban on same-sex marriage[^53].

From a strategic perspective, the outcome and the reasoning in *Windsor* can be seen as an instantiation of what William Eskridge has called “equality practice”, which takes seriously “the tension between liberal rights and pragmatic


[^50]: See Reva Siegel, “The Supreme Court - Foreword” (2013) 127 Harv L Rev 1 at 91-92: “By asking whether a law’s enforcement ‘tells’ minorities they are ‘unworthy’, or by asking whether a law’s enforcement ‘demeans’ and ‘humiliates’ them, Justice Kennedy reasons about equality in the tradition of *Brown*.”

[^51]: Arguably, rational basis review is incommensurate with Justice Kennedy’s application of *Romer v Evans*, 517 US 620 (1996) [*Romer*] to the effect that “[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision”: *Windsor*, *supra* note 1 at 2692. The requirement of “careful consideration” suggests that something more than rational basis review is required when laws target homosexuals as a class. This position is bolstered by the fact that in *Romer* the Court held that bare animus towards a class of persons, especially homosexuals, cannot withstand even rational basis review: *Romer* at 632-34. On the other hand, towards the end of his judgment in *Windsor*, Kennedy J asserts, “no legitimate purpose overcomes the purpose and effect to disparage and to injure”: *Windsor*, *supra* note 1 at 2696 [emphasis added]. The language of legitimate purpose is typically that of rational basis review rather than heightened or strict scrutiny: see *Romer*, *supra* note 51 at 632-34.

[^52]: In this regard, the judgment coheres with Martha Nussbaum’s view, expressed prior to *Windsor*, that “same-sex marriage is a good issue for federalism to handle, at least for a while …”: Martha C Nussbaum, *From Disgust to Humanity: Sexual Orientation and Constitutional Law* (New York: Oxford University Press, 2010) at 161.

[^53]: In *Bishop*, *supra* note 46 at 37, the US District Court for the Northern District of Oklahoma said of the Supreme Court’s judgment in *Windsor*: “A citation to *Loving* [v *Virginia*] is a disclaimer of enormous proportion. Arguably, the ‘state rights’ portion of the *Windsor* decision stands for the unremarkable proposition that a state has broad authority to regulate marriage, so long as it does not violate its citizens’ federal constitutional rights.”
remedies” in a democratic polity with heterogeneous views. Equality practice holds that “the process by which equal rights and respect are achieved is just as important as the rights themselves”, and incremental processes whereby citizens are permitted time to adjust to the rights claims of minorities are more likely to “stick” in the long term. By limiting the immediate scope of its decision in *Windsor* to federal recognition of valid same-sex marriages, the Court left it open to the States to move forward on this issue at the pace dictated by their own citizens, courts and legislatures. Equally, though, by affirming the principle that there are limits to federal power based on individual liberties rather than States’ rights, the Court provided a solid basis for State courts to strike down bans on same-sex marriage. Even if it is correct that the Court’s judgment inevitably leads to the striking down of State bans on same-sex marriage, such a decision will be made after the initial shock of *Windsor* has dissipated and additional States have reached the conclusion that there is no sustainable basis upon which to deny same-sex couples the right to marry.

C. *Windsor* Reconsidered

Insofar as *Windsor* strikes down §3 of *DOMA*, the judgment is to be welcomed as capability and autonomy enhancing for its requirement that the federal government must recognize valid same-sex marriages. Even from a more skeptical queer perspective, the eradication of statutory discrimination is a cause for praise, albeit in a more muted register. Nevertheless, it is important to be aware of *Windsor*’s limits. The judgment does not affect the entrenched inequality caused by the linking of marriage with a swathe of social and economic benefits; nor does it question the centrality of marriage as an organizing social form.

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From a positive perspective, the majority judgment accepts as an *a priori* truth that it is critical for lesbians and gay men to be able to choose the objects of their sexual and relational interactions and to act upon those needs and desires. It then goes on to affirm the dignity and equal worth of lesbians and gay men, same-sex relationships, and families headed by same-sex parents. This point alone is momentous when it is recalled that less than 30 years prior to *Windsor*, the Supreme Court labeled gay and lesbian claims to sexual liberty “at best, facetious”.56 The judgment reminds Congress and the citizenry that animus and moral disapproval towards lesbians and gay men is not a legitimate basis for law;57 accordingly, the federal government must recognize marriages entered into in those States that accept the equal dignity of marriages between two persons of the same sex. The removal of an institutional barrier is thus tied to a normative affirmation of the equal worth of lesbians and gay men and their equality under federal law. In this respect, the judgment in *Windsor* goes beyond a formalist, liberal58 affirmation of the equal basic liberties59 of lesbians and gay men, which holds that “once the state has made a policy decision to recognize and even encourage marriages (because they contribute to human flourishing), the state may not arbitrarily deny that recognition”.60 Formal equality, at least for


57 This point ought to have been clear following *Romer*, *supra* note 51 and *Lawrence v Texas*, 539 US 558 (2003) [Lawrence].

58 See, e.g., William N Eskridge, Jr & Darren R Spedale, *Gay Marriage: For Better for Worse*? (New York: Oxford University Press, 2006) at 13: “The gay-liberal argument for same-sex marriage primarily rests upon the norm of formal equality: The state ought to accord the same legal options for committed same-sex couples that different-sex couples now enjoy, including the rights and duties entailed in civil marriage”.


60 Eskridge, *Equality Practice*, supra note 54 at 129-30. The requirement that non-recognition is not arbitrary allows for restrictions based on what Rawls calls “public reason”, for example, prohibitions on child marriage and consanguinity, which are based on “overlapping consensus”: *ibid* at 129-31. Eskridge points out, “Rawlsian liberalism would reject outright the notion that the state can deny two women the right to marry simply because third parties consider lesbian relationships morally objectionable or desire
the purposes of federal law, is undoubtedly a critical part of the decision. So too, though, is the recognition that the harm caused by DOMA was not simply related to the absence of a particular ability (or liberty\textsuperscript{61}) to marry (and enjoy the perquisites of federal marital recognition) but also derived from what DOMA told lesbians and gay men, their families, and the wider community about the secondary worth and dignity of same-sex relationships. For this reason, Reva Siegel has characterized Windsor as giving “voice to perspectives of the minority, the historically excluded group … [t]he result is an equality opinion unlike any the Court has handed down in quite some time”\textsuperscript{62}.

Institutionally, the judgment takes a step towards realizing the state’s obligation to respond to citizens’ diverse relational needs and structures. For those lesbians and gay men who wish to marry in an American state (or overseas jurisdiction) that permits same-sex marriage, the judgment ensures correlative US federal recognition,\textsuperscript{63} subject to issues of capacity and evasion under the law of conflicts.\textsuperscript{64} In this respect, Windsor to some extent heeds the call of the capabilities and relational autonomy approaches to focus on the affiliative needs of individuals rather than matters of tradition. Of course, Windsor’s reach is limited. For persons resident in States with bans on same-sex marriage, the judgment only provides the possibility of federal recognition for marriages conducted out-of-state. As a matter of law, it is unresolved whether an evasive

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\textsuperscript{61} For a discussion of the logic equating marriage rights with freedom in campaigns for same-sex marriage see Carlos A Ball, “This is Not Your Father’s Autonomy: Lesbian and Gay Rights From a Feminist and Relational Perspective” (2005) 28 Harv JL & Gender 345.

\textsuperscript{62} Siegel, supra note 50 at 90.

\textsuperscript{63} See infra Section I(D).

\textsuperscript{64} See infra Sections I(D) and III.
marriage must be recognized under federal law; certain branches of the US Government appear to view such marriages as valid for federal purposes, others do not.\textsuperscript{65} This being said, every challenge to State same-sex marriage bans in the wake of \textit{Windsor} has been successful in rapidly if nevertheless incrementally extending \textit{Windsor}'s scope, suggesting the veracity of Justice Scalia's vituperative assertion of "[h]ow easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status".\textsuperscript{66} \textit{Windsor} may not positively mandate State recognition of same-sex marriage, but in requiring federal recognition of valid same-sex marriages, it has set American law on a path towards equal recognition of the rights of lesbians and gay men to marry the person of their choice.

An equality extension of the institutional and symbolic magnitude of \textit{Windsor} is not to be sniffed at. However, it is also important not to overstate the judgment's implications, legally or culturally. The judgment does little for those who are not or who do not wish to be married. It leaves in place the stratifying linkages between marriage and socioeconomic benefits. And it reinforces the normative significance of marriage and its role as the primary relational structure in American law and society. These issues were not directly before the Court and I do not mean to suggest that their eschewal amounts to a doctrinal failure. Rather, I want to emphasize the limited propositions for which \textit{Windsor} stands, and the terms upon which the form of equality recognized by the Court was granted.

At the most basic level, it is instructive to recall the couple at the centre of the case, Edie Windsor and Thea Spyer, who presented for the Court's consideration a long-term, apparently monogamous, relationship characterized by care and dependence. Moreover, as a case concerning "[t]wo women then resident in New

\textsuperscript{65} See infra Section I(D).

\textsuperscript{66} \textit{Windsor}, supra note 1 at 2709.
York [who] were married" in their late-70s, the Court, and society, was tacitly permitted to eschew the sexual aspect of the sexuality at the centre of the case; indeed, Windsor’s lawyer, Roberta Kaplan, has admitted that she played down Edie’s sexuality. The Court and the American public were thus able to imagine “that Edie Windsor had aged out of carnality”, instead of pondering “Edie and Thea’s butch-femme escapades”. Edie’s “femme-ness” certainly contributed to her being selected as a suitable challenger to DOMA, whether it also contributed to the Court’s (and the public’s) response to the case is (perhaps) more debatable.

What I mean to emphasize here is that vivacious, charming Edie Windsor, with her blonde hair, long nails, pink lipstick and pearls, catered very much to an image of the “good homosexual”. Together, Edie and Thea, in the monogamous longevity of their relationship, their affluence and their whiteness, instantiated a particular image of the acceptable lesbian/gay couple; an image that, in all but the sex of the parties, comported with traditional visions of marriage. Nancy Polikoff would thus seem to have been proven correct in her concern, expressed 20 years prior to Windsor, that advocacy for same-sex marriage would “require a rhetorical strategy that emphasizes similarities between our relationships and heterosexual marriages, values long-term monogamous coupling above all other relationships, and denies the potential of lesbian and gay marriage to transform the gendered nature of marriage for all

67 Ibid at 2682.
68 Levy, supra note 15 at 54.
69 Ibid.
70 For a discussion of the links between gay sexual practices and disgust towards lesbians and gay men see Nussbaum, supra note 52.
71 Levy, supra note 15 at 56.
72 He or she “is characterized by the focus on stability, monogamous relationships and financial independence, which inevitably produces the good homosexuals as affluent and middle-class”: Jon Binnie, The Globalization of Sexuality (London: Sage, 2004) at 13-14.
people".73 Putting it bluntly, it may be questioned whether the outcome would have been the same if, instead of Edie, the Court was presented with a young (therefore sexual), black (therefore racialized) gay man (therefore sodomitic and sexually excessive) whose husband of six months (therefore questionably committed) had died of AIDS (therefore invoking the politics of fear and disgust74). In posing this question, I intend no disrespect to Windsor, Spyer or their representatives. Rather, I want to cast attention on the particular narrative and cast of characters that it was deemed strategically necessary to present to the Court and the American population in order to advance a claim for equal protection. I would argue that this perceived need to frame Edie and Thea within the parameters of “acceptability” demonstrates the ongoing salience of Rubin’s sexual hierarchy and the pervasive influence of Foucauldian liberal power.

I suggested above that Windsor goes beyond merely formal equality in its focus on both the institutional and affective impact of same-sex marriage bans on lesbians and gay men. I now want to make a more critical foray into Windsor’s reinforcement of marriage at an institutional and normative level.

In the course of discussing the federal structure of power concerning marriage and family law, Kennedy J hits on a critical aspect of the critique of marriage: “The definition of marriage is the foundation of the State’s broader authority to regulate the subject of domestic relations with respect to the ‘[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.’”75 This statement is not so troubling if it is considered simply as reportage. However, the absence of any recognition that the foundational nature of marriage is itself structurally problematic functions to reinforce the circumscribed

74 See Nussbaum, supra note 52 at 1-30.
75 Windsor, supra note 1 at 2691.
epistemological field of sexual relations; a field so rigidly oriented towards the organizing institution of marriage that an alternative relational “foundation of the State’s broader authority to regulate the subject of domestic relations” is altogether absent.

At one point, Kennedy J details certain ways in which “same-sex married couples have their lives burdened, by reason of government decree”:

[DOMA] prevents same-sex married couples from obtaining government healthcare benefits they would otherwise receive. … It deprives them of the Bankruptcy Code’s special protections for domestic-support obligations. … It forces them to follow a complicated procedure to file their state and federal taxes jointly. … It prohibits them from being buried together in veterans’ cemeteries.

…

DOMA also brings financial harm to children of same-sex couples. It raises the cost of health care for families by taxing health benefits provided by employers to their workers’ same-sex spouses. … And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security.

Justice Kennedy is correct that each of these examples reflects the disparate and discriminatory impact of DOMA. The problem, though, is the absence of any acknowledgement that striking down DOMA only benefits those who are, or who become married. Those people, gay or straight, who do not (or cannot) accept the state’s offer, remain unable to provide healthcare benefits to their partners or other dependents. Veterans whose lives in the closet make them uncomfortable with marriage remain unable to be buried together. This continuing linkage between marriage and socioeconomic benefits means that in order for couples to obtain the benefits to which Kennedy J alludes, they must marry.  

77 Windsor, supra note 1 at 2691.
78 This marriage-centric view is also evident in Judge Friedman’s decision in DeBoer v Snyder, No 12-CV-10285 (ED Mi., 21 March 2014) [DeBoer] striking down Michigan’s ban on same-sex marriage. For example, after discussing the various benefits conferred
thus potentially forced to elect between adherence to their principled objections to marriage and the significant benefits that inure to the benefit of married couples and their children. Justice Kennedy’s examples thus actually function to demonstrate the veracity of Polikoff’s argument\(^79\) that the best means of achieving greater social justice and protection for diverse family and relational forms is not to reinforce the need to marry but rather to de-couple marriage and its benefits.\(^80\) Marriage could still be left as an option for those who agree with Kennedy J that it “is more than a routine classification for purposes of certain statutory benefits”,\(^81\) but those who do not adhere to this view, or who believe it is “more than a routine classification” because of flawed cultural assumptions and practices, would not be coaxed into the sort of orchestrated choice that Foucault saw as archetypal of modern liberal societies.\(^82\)

by the State as a result of marriage, Judge Friedman stated that “the MMA [Michigan Marriage Amendment] undermines the very aim of one of the central historical bases for civil marriage, namely, family stability” (at 10) by excluding same-sex couples from such benefits, without any apparent recognition that the instability of which he speaks could be addressed by de-linking marriage and critical socioeconomic benefits, rather than expanding the class of persons who are (in theory) able to take advantage of the State’s benevolence.

In the wake of *Windsor*, *supra* note 1 and *Shelby*, *supra* note 33, Polikoff drew attention to the race and class-based biases of marriage, and the fact that the judgment in *Windsor* did nothing to address the host of “legal consequences linked exclusively to marriage that ignore the vast number of family relationships in this country that are not based on marriage”: Nancy D Polikoff, "ALL children are as good as all other children...someone tell THAT to Justice Kennedy and the Prop 8 plaintiffs", *Beyond (Straight and Gay) Marriage* (26 June 2013), online: <http://beyondstraightandgaymarriage.blogspot.ca/2013_06_01_archive.html>.

See also Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (New York: New Press, 2005) at 123: “family as a social and legal category should not be dependent on having marriage as its core relationship”.

\(^79\) *Windsor*, *supra* note 1 at 2692.

\(^80\) From this perspective, the Supreme Court’s statement in *Loving*, *supra* note 2 at 12 that the right to marry is “essential to the orderly pursuit of happiness by free men” takes on a rather different resonance from its emancipatory (and sexist) language. Focusing on the word “orderly”, we can see that marriage is a technology of control designed to “order” the choices of ostensibly “free men”.

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Addressing the disjunction between State and federal law that formed the crux of the case, Kennedy J observes that certain States “concluded that same-sex marriage ought to be given recognition and validity in the law for those same-sex couples who wish to define themselves by their commitment to each other”. The extraordinary assumption in this assertion is that same-sex couples that marry do so out of a desire not to obtain the social and economic benefits of marriage, or even to express their love for one another, but rather to define their very existence through the lens of marriage. At the risk of hyperbole, I would suggest that this view of marriage takes a rather alarming step back to the discarded doctrine of coverture, albeit via a merger of same-sex flesh. Drawing from Cossman’s work on sexual citizenship, we might also ask about the terms of this putative commitment. It is of course a commitment of two people to one another, but it is also “an economic commitment to assume mutual rights and responsibilities … a sexual and emotional commitment to monogamy and fidelity”. Marriage is thus reproduced in Windsor as “a highly privatized, domesticated, normalized vision of human relationships”.

In an unfortunate nod to the rhetoric of “gay pride”, Kennedy J cast New York and the 11 other States, along with the District of Columbia that had, at that time, legalized same-sex marriage, as benevolent in their decision “that same-sex couples should have the right to marry and so live with pride in themselves”. In fairness to Kennedy J, this statement can be read as simply acknowledging that many people saw exclusion from marriage as an affront to the dignity of lesbians and gay men; conferring the right to marry thus enables one to live proudly as an equal citizen. A more skeptical reading, focusing on the cause-and-effect implicit in the words “marry and so live with pride”, leads to the inference that it is not possible to live “with pride” in oneself and in one’s relationship(s) unless one is

83 Windsor, supra note 1 at 2689 [emphasis added].
85 Windsor, supra note 1 at 2689 [emphasis added].
married. Marriage equality that comes packaged in a box that posits an intrinsic link between marriage and personal pride, in which relationships are “deemed … worthy of dignity” because of the state’s nuptial imprimatur, suggests the efficacy of queer concerns to resist structures of normalization and homogeneity, as well as the prescience of Michael Warner’s contention that the “ennobling” effect of marriage will continue in the same-sex context, thereby “demeaning” those who are not, or who refuse to be, virtually normal.

Perhaps the most alarming statement Kennedy J makes in the course of his judgment is that DOMA made it “even more difficult for the children [of same-sex couples] to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives”. In deference to Kennedy J, this statement can be read as a rejoinder to conservatives’ preferred argument against same-sex marriage (now that disgust is generally off the table as a valid justification), namely: marriage is intrinsically linked to procreation; children require the influence of both a mother and a father; ergo, same-sex marriage will negatively affect children. In the context of this “unfounded presumption”, Justice Kennedy’s statement can be seen as an affirmation that what actually harms children is mistreatment of their families by those conservatives who are so concerned for children’s welfare. The problem,

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86 Ibid at 2694. See also DeBoer, supra note 78 at 30 where Judge Friedman expressed the “Court’s fervent hope” that children of same-sex couples “will grow up to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”


88 In Bostic v Rainey, No 2:13cv395 at 32-33 (ED Va., 13 February 2014) [Bostic], Judge Allen said, “[t]he ‘for-the-children’ rationale rests upon an unconstitutional, hurtful and unfounded presumption that same-sex couples cannot be good parents” and “misconstrues the dignity and values inherent in the fundamental right to marry as primarily a vehicle for ‘responsibly’ breeding ‘natural’ offspring”.

89 This was the position taken by the Utah District Court in striking down that State’s ban on same-sex marriage in Kitchen, supra note 43 at 46: “If anything, the State’s prohibition of
though, is that his framing of this issue casts the children of unmarried couples as composite parts of families of less “integrity and closeness” than families headed by a married couple. In so doing, the judgment reflects a strong cultural bias towards marriage as the ideal family structure, as well as dyadic conceptions of parenting. Recalling Martha Fineman’s work on dependency, what is lacking here is any acknowledgement that more marriage is not necessarily the best solution to the harm experienced by the children of unmarried couples or individuals, particularly given that what children require is the care of their primary guardians; the state’s recognition (or lack thereof) of any relationship between the guardians is a separate issue ought to have no bearing on the lives of children.

_Windsor_ recognizes and to an extent enforces the state’s obligation “to purge itself of laws reflecting political judgments that a class of harmless citizens should not have the same opportunity as everyone else to pursue their conception of the good life”;\(^\text{90}\) and it does so in emotive language that emphasizes the minority’s experience of disaffection and exclusion. For married same-sex couples, the impact at the federal level has been swift, if a little patchy. However, the judgment also reinforces the centrality of marriage as an organizing principle of American law and culture, interpellates lesbians and gay men as “domesticated creatures” yearning for the imprimatur of the state, and ignores all of those persons – gay and straight – who believe it is, or should be, possible to live with pride and dignity without defining themselves through marriage.

Accordingly, to the extent that _Windsor_ removes one form of discrimination, it is to be applauded as autonomy and equality enhancing in the sense that it confers

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\(^{90}\) Eskridge, _Equality Practice_, supra note 54 at 129.
upon lesbians and gay men the equal capability to marry their partner of choice. But this is the extent of Windsor’s achievement. The case does not (nor was it asked to) fulfill the state’s broader obligation to recognize and support diverse relational, affiliative and emotional capabilities. It enhances the autonomy only of those who truly believe in the sanctity of marriage, or those who are willing to exercise their “choice” to marry in order to enjoy the benefits of state recognition. For all of the “sluts and drag queens and trannies and trolls and women who have seen a lot of life,” and all of the lesbians and gay men who have made it further up the sexual hierarchy but who refuse the state’s ultimate caress, Windsor means much less.

D. Windsor’s Impact on Federal Recognition of Same-Sex Relationships

For same-sex couples whose marriages are recognized in their State of residence, Windsor has the effect of mandating correlative federal recognition of those marriages. For example, reforms implemented by Attorney General Eric Holder in the wake of Windsor extend spousal privilege, visitation rights in federal prisons, and joint bankruptcy protections to married same-sex couples. Similarly, the Internal Revenue Service (IRS) has confirmed that validly married same-sex couples are permitted to file joint tax returns, and the Office of Personnel Management recognizes same-sex spouses for the purposes of federal employee benefits.

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92 Windsor’s impact on recognition between the States is less direct. It certainly does not require States to recognize interstate same-sex marriages, particularly since the judgment leaves in place §2 of DOMA. However, the reasoning in the case is being treated as influential in cases concerning interstate recognition, such as the Kentucky case of Bourke, supra note 43.


The situation is much less clear for couples whose state of residence does not recognize same-sex marriage. It is presently unresolved whether the federal government is obliged to recognize marriages entered into in another state or country by residents of states that do not permit same-sex marriage.\textsuperscript{95} For example, the Department of Labor currently takes the position that the \textit{Family and Medical Leave Act} only applies to same-sex couples that reside in States where their marriage is recognized.\textsuperscript{96} The Department of Defense takes the opposite position, recognizing “all marriages that are valid \textit{in the place of celebration}”\textsuperscript{97} and thus providing benefits to same-sex spouses irrespective of whether their marriage is recognized in their state of residence; indeed, personnel in domestic partnerships who are domiciled in a state that does not allow same-sex marriage will be offered leave to travel inter-state for the purpose of marrying.\textsuperscript{98} The Secretary of Defense has also rebuked Texas and a number of other States for directing their forces to deny same-sex couples enrollment access to federal healthcare and retirement benefits.\textsuperscript{99}

\textit{Windsor}’s impact at the federal level was immediately felt in the immigration sphere.\textsuperscript{100} On the day that judgment was handed down, the Secretary of

\textsuperscript{95} It is conceivable that the federal government might treat differently a so-called “evasive marriage” conducted by residents of a state that recognizes but does not permit same-sex marriage, as compared to an evasive marriage conducted by residents of a state that neither permits nor recognizes same-sex marriage. However, those few States that once took different positions concerning the right to marry and the right to marital recognition (New York, Maryland and New Mexico) have since shifted towards permitting same-sex marriage, meaning that this distinction would now seem to be otiose.

\textsuperscript{96} See 29 USC §28; United States Department of Labor, \textit{Wage and Hour Division (WHD) - Fact Sheet #28F: Qualifying Reasons for Leave under the Family and Medical Leave Act} (2013).

\textsuperscript{97} Secretary of Defense Chuck Hagel, \textit{Memorandum for Secretaries of the Military Departments under Secretary of Defense for Personnel and Readiness} (2013).

\textsuperscript{98} \textit{Ibid}.

\textsuperscript{99} \textit{DeLeon v Perry}, No SA-13-CA-00982-OLG at 43 (WD Tex, 26 February 2014) [\textit{DeLeon}]; “Chuck Hagel rebukes states that deny military benefits to same-sex spouses”, \textit{The Guardian} (1 November 2013).

\textsuperscript{100} In a clear example of the institutional power of marriage in the United States, deportation proceedings concerning the husband of a male American citizen that were in process on
Homeland Security announced that the Department would “implement today’s decision so that all married couples will be treated equally and fairly in the administration of our immigration laws”. Days later, she “directed US Citizenship and Immigration Services (USCIS) to review immigration visa petitions filed on behalf of a same-sex spouse in the same manner as those filed on behalf of an opposite-sex spouse”. Less than a month after Windsor was handed down, the Board of Immigration Appeals ruled that DOMA was no longer “an impediment to the recognition of lawful same-sex marriages and spouses if the marriage is valid under the laws of the State where it was celebrated”. Accordingly, the Board remitted the case before it to the Director for the day that Windsor, supra note 1, was handed down, were stayed upon the Immigration Court hearing the matter receiving news of the Supreme Court’s decision:

Gabe the intern handed over that ruling and in so doing, he stopped the man you see on the right side of your screen here from being deported. His name is Steven. He’s legally married to the man you see on the left side of your screen, his husband Sean. When Steven ran into a visa snafu of some kind, the fact that he was married to a U.S. citizen should have been enough for him to not have to worry about being deported while he sorted out the visa problem. But until Gabe the intern sprinted into that courtroom today in Lower Manhattan with news of what had just happened at the Supreme Court in Washington, that immigration judge in New York was not allowed to consider Steven to be a married man. His marriage was invisible to the court. And so, Steven was going to be deported until Gabe the intern arrived with this in hand and Steven’s marriage with the delivery of this ruling became legally visible and his deportation was stopped.

The Rachel Maddow Show, Transcript (New York, 26 June 2013), online: <http://www.nbcnews.com/id/52329504/ns/msnbc-rachel_maddow_show/#.UmKdBGTF2es>.


Matter of Oleg B Zeleniak, 26 I&N Dec 158, 159 (BIA 2013) [Oleg B].
consideration of whether the marriage was bona fide\textsuperscript{104} (the validity of the marriage under the laws of Vermont was affirmatively determined in an earlier proceeding\textsuperscript{105}).

The importance of this change for same-sex couples is manifest because no other form of relationship is recognized for the purpose of visas based on the intimate relationship between adults:\textsuperscript{106}

The recognition of a foreign national’s ‘marriage’ under US immigration law is essential to everything from eligibility for a family-based nonimmigrant or immigrant visa; to eligibility as the dependent of another foreign national who is a visa holder, immigrant, or refugee; to exceptions to, or eligibility for, waivers of deportability, inadmissibility, or benefit ineligibility.

Prior to \textit{Windsor}, questions were raised about the possibility that, even in a world without \textit{DOMA}, immigration petitions based on same-sex marriage could be denied by reason of state public policy.\textsuperscript{107} For example, a bi-national couple resident in Texas but married in Vermont could have the immigration petition for the non-American partner rejected based on Texas' non-recognition of same-sex marriage. However, United States Citizenship and Immigration Services has publicly stated that residence in a state that does not recognize same-sex marriage is no impediment to immigration based on a same-sex marriage that is

\begin{itemize}
  
  \item[\textsuperscript{104}] This requirement may disproportionately affect same-sex couples from countries that criminalize or stigmatize same-sex relations because couples from those countries may not be able to provide testimony attesting to the validity of their relationship or evidence of conjugality. See Janet M Calvo, "\textit{US v Windsor’s Impact on Immigration Law}", \textit{CUNY Law Review Footnote Forum} (28 September 2013), online at: <http://www.cunylawreview.org/prof-janet-calvo-on-u-s-v-windsors-impact-on-immigration-law/#fn-812-8>.
  
  \item[\textsuperscript{105}] \textit{Oleg B, supra} note 103 at 160 citing Vt Stan Ann Tit 15 §8.
  
  \item[\textsuperscript{106}] Scott C Titshaw, "The Meaning of Marriage: Immigration Rules and Their Implications for Same-Sex Spouses in a World Without DOMA" (2010) 16 Wm & Mary J Women & L 537 at 547-48 [citations omitted].
  
  \item[\textsuperscript{107}] \textit{Ibid} at 603-05.
\end{itemize}
validly performed in a recognizing jurisdiction. Thus, it may well be the case that a couple is now able to secure the right to remain in the United States under federal law, subject to meeting the criteria in the Immigration and Nationality Act and the Code of Federal Regulations, but their marriage is not recognized in the State in which they reside.

For same-sex couples who are in civil unions or domestic partnerships, Windsor changes nothing insofar as federal recognition of their relationship is concerned. For instance, despite its generosity towards married couples, the

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108 United States Citizenship and Immigration Services, Same-Sex Marriages, online: <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=2543215c310af310VgnVCM100000082ca60aRCRD&vgnextchannel=2543215c310af310VgnVCM100000082ca60aRCRD>.

109 This principle applies both to non-citizen spouses of US citizens seeking permanent residence and the spouses of persons who have been granted temporary residence through another visa channel. In a decision handed down soon after Windsor, the Board of Immigration Appeals observed: “This ruling is applicable to various provisions of the Act, including, but not limited to, sections 101(a)(15)(K) (fiancé and fiancée visas), 203 and 204 (immigrant visa petitions), 207 and 208 (refugee and asylee derivative status), 212 (inadmissibility and waivers of inadmissibility), 237 (removability and waivers of removability), 240A (cancellation of removal), and 245 (adjustment of status), 8 USC §§1101(a)(15)(K), 1153, 1154, 1157, 1158, 1182, 1227, 1229b, and 1255 (2012).” Oleg B, supra note 103 at 159.

110 See 8 USC §1151(b)(2) and 8 CFR §204.2(a). Titshaw has distilled the requirements to a three-step test that looks to the validity of the marriage where celebrated, the existence of any categorical public policy exceptions, and the whether the marriage is bona fide: Titshaw, supra note 106 at 550.

111 However, in Garden State Equality v Dow, 216 NJ 314 (2013) [Garden State], one of the first post-Windsor cases concerning State marriage laws, non-recognition of civil unions at the federal level formed the basis for the finding that New Jersey is required under its Constitution to permit same-sex couples to marry. By way of background, the New Jersey Supreme Court in Lewis v Harris, 188 NJ 415, 463 (2006) [Lewis] held that “the State must provide to same-sex couples, on equal terms, the full rights and benefits enjoyed by heterosexual couples”, but left it to the State to determine whether to implement this directive via marriage or civil unions. New Jersey chose the latter approach. Following Windsor, supra note 1, Garden State Equality and six same-sex couples submitted that the civil union scheme no longer satisfied the requirements of Lewis because federal agencies are “limiting the extension of benefits to only those [married] couples and excluding civil union couples” (at 12) meaning that “benefits that would be available to them if they were lawfully married are not available to them as partners in a civil union” (at 45). The Court agreed with this view of Windsor's impact on New Jersey's civil unions scheme, finding that it no longer comported with the requirements set forth in Lewis and accordingly infringed New Jersey's equal protection guarantee (at 50). The Supreme Court of New Jersey denied a subsequent motion to stay the judgment pending appeal,
Defense Department takes the view that “the extension of benefits to the same-
sex domestic partners of military members is no longer necessary to remedy the
inequity that was caused by section 3 of the Defense of Marriage Act”.\textsuperscript{112} While
the Department’s offer of leave to domestic partners to travel interstate and
marry is a remarkable shift from the days of Don’t Ask, Don’t Tell, it is also a
subtly coercive posture wherein the choice that is provided is heavily qualified
and structured towards expanding the marital form. Similarly, the IRS has
confirmed that \textit{Windsor} only affects those couples that are married, even in
cases where civil unions are functionally identical to marriages.

\section{II. State Relationship Recognition}

American law did not provide formal State-based recognition of same-sex
relationships until 1997, when Hawaii enacted its reciprocal beneficiary
scheme.\textsuperscript{113} (Municipal relationship recognition in the form of domestic
partnership was possible in Berkeley, California, from 1984.\textsuperscript{114}) The first State
civil union scheme emerged in Vermont in 2000 following the decision of the
Vermont Supreme Court in \textit{Baker v Vermont}.\textsuperscript{115} Same-sex marriage was first
recognized by Massachusetts in 2003 following \textit{Goodridge v Department of
leading Governor Christie to abandon an appeal from Judge Jacobson’s decision and
making New Jersey the fourteenth state of the Union to allow same-sex marriage: see
Kate Zernike & Marc Santora, “As Gays Wed in New Jersey, Christie Ends Court Fight”,

\textsuperscript{112} Secretary of Defense Chuck Hagel, \textit{supra} note 97.

\textsuperscript{113} A Bill for an Act Relating to Unmarried Couples, 1997 Haw Laws Act 383 (HB 118)
(codified at Haw Rev Stat Ann §572C).

\textsuperscript{114} Edward Stein, “The Topography of Legal Recognition of Same-Sex Relationships” (2012)
50:2 Family Court Review 181 at 185-86.

\textsuperscript{115} \textit{Baker v Vermont}, 744 A 2d 864 (Vt 1999) [\textit{Baker}].
In the sections that follow, I consider state recognition of same-sex marriage, civil unions and domestic partnerships, as well as default and contractual forms of relationship recognition.

A. Same-Sex Marriage in the American States

At present, 19 States and the District of Columbia permit same-sex marriage.\textsuperscript{117} In 11 States and the District of Columbia,\textsuperscript{118} this change came about as a result of legislative and/or constitutional amendments; in Maine, Maryland and Washington, the changes reflected the outcome of popular ballots. Eight States presently permit same-sex marriage as a result of judicial decisions.\textsuperscript{119} State bans on same-sex marriage have been ruled unconstitutional in a further eight States,\textsuperscript{120} though the judgments have been stayed pending appeal, either by the courts issuing the judgments\textsuperscript{121} or by appellate courts.\textsuperscript{122} Additionally, a court in

\textsuperscript{116} Goodridge v Department of Public Health, 440 Mass 309 (Mass 2004) [Goodridge].

\textsuperscript{117} All other States that do not permit same-sex marriage have passed constitutional and/or legislative amendments defining marriage as between one man and one woman to the exclusion of all others. Provisions of this sort are increasingly being found to violate the US Constitution.


\textsuperscript{120} Michigan: DeBoer, supra note 78; Oklahoma: Bishop, supra note 46; Texas: DeLeon, supra note 99; Utah: Kitchen, supra note 43; Virginia: Bostic, supra note 88; Idaho: Latta v Otter, No 1:13-cv-00482-CWD (D Id, 13 May 2014) [Latta]; Arkansas: Wright v Arkansas, No 60CV-13-2662 (Ar 2d, 9 May 2014) [Wright]; Wisconsin: Wolf v Walker, No 14-cv-64-bbb (D Wis, 6 June 2014) [Wolf].

\textsuperscript{121} Virginia: Bostic, supra note 88; Oklahoma: Bishop, supra note 46; Texas: DeLeon, supra note 99; Wisconsin: Wolf, supra note 120.

\textsuperscript{122} In Utah, Judge Shelby’s ruling came into effect immediately, but defendants swiftly sought a stay pending appeal. The Tenth Circuit denied the application but in January 2014, the US Supreme Court granted the stay application. The Tenth Circuit heard an appeal on the merits of Judge Shelby’s judgment in April 2014. Utah raised the possibility that the marriages of couples who wed in the interregnum between Judge Shelby’s ruling and the Supreme Court’s granting of the stay would be dissolved (see Jack Healy, “U.S. Court Seems Split on Utah Gay Marriage Ban", The New York Times (10 April 2014)) but in May 2014 the District Court ruled that those marriages must be recognized, subject to
Illinois declared that residents of Cook County must be permitted to marry prior to June 30 2014, when Illinois' marriage equality law comes into effect. Courts in Ohio and Kentucky have ruled that those States must recognize out-of-state same-sex marriages. The Ohio and Kentucky judgments are stayed pending appeal, although Judge Black in Ohio ordered the immediate recognition of four out-of-state marriages for the purpose of issuing birth certificates. In an earlier ruling, also subject to appeal, Judge Black ordered statewide recognition

a 21 day stay pending further appeal: *Evans v Utah*, No 2:14CV55DAK (D Utah, 19 May 2014).

A similar situation occurred in Michigan, where Judge Friedman in *DeBoer*, supra note 78 also did not order a stay of his judgment pending appeal. However, the next day, the Sixth Circuit granted the State’s application for a stay pending an appeal to that Court. The Governor of Michigan has stated that some 300 marriages that took place in the 24 hour period between Judge Friedman issuing his ruling and the Sixth Circuit’s grant of a stay will be recognized as valid marriages but the parties will not be eligible for any state benefits linked to marriage until such time as the stay is lifted. The American Civil Liberties Union of Michigan has since issued proceedings seeking to compel Michigan to recognize those marriages for all State purposes: American Civil Liberties Union, *300 Families for Marriage Equality*, online: <http://www.aclumich.org/300Families>. The Federal Government has indicated that it will treat those marriages as valid for the purposes of federal law: see Sari Horwitz, “Obama administration to recognize same-sex marriages in Michigan”, *The Washington Post* (28 March 2014).

In May 2014, a District Court judge ruled that Arkansas’ ban on same-sex marriage is unconstitutional and also refused to stay the order: *Wright*, supra note 120. However, the Supreme Court of Arkansas, in a one-line order, subsequently stayed the ruling pending appeal: “Arkansas Supreme Court stays ruling overturning same-sex marriage ban”, *Arkansas Times* (16 May 2014). See also *Latta, supra* note 120 in which Judge Dale stayed her order for three days, during which time the Court of Appeals issued a further stay pending appeal.

*Lee v Orr*, No 13-cv-8719 (ND III, 21 February 2014). The State’s ban on same-sex marriage was legislatively rescinded in November 2013, but the new marriage law does not come into effect until June 2014. Accordingly, *Lee v Orr*, which was filed prior to the enactment of amending legislation, proceeded to determine whether plaintiffs were required to wait until June 2014 to marry. While the answer to that question (“no”) strictly applied only to Cook County, Illinois, marriage clerks in other counties treated the decision as applying to them, also.

*Henry v Himes*, No 1:14-cv-129 (SD Ohio, 14 April 2014).

*Bourke, supra* note 43 at 8. The State’s Attorney General has refused to appeal the case, leading the Governor to appoint outside counsel to appeal the ruling: Trip Gabriel, “Kentucky Law Official Will Not Defend Ban on Same-Sex Marriage”, *The New York Times* (4 March 2014).
for the limited purpose of issuing death certificates.\textsuperscript{126} A judge in Tennessee has granted provisional recognition to three marriages between same-sex couples in a case pending before federal court.\textsuperscript{127} Similarly, a judge in Indiana has issued a temporary emergency injunction requiring recognition of the marriage of two women who married in Massachusetts because of the terminal illness of one of the women.\textsuperscript{128} State Attorneys General in three States\textsuperscript{129} with cases awaiting either first instance or appellate decision have also declined to defend their respective States’ bans on same-sex marriage.\textsuperscript{130} Appeals have been filed in federal appellate courts exercising jurisdiction over 30 States.\textsuperscript{131}

1. \textit{Hollingsworth v Perry}

\textit{Hollingsworth v Perry}\textsuperscript{132} is the first of the State cases concerning the right of same-sex couples to marry to reach the Supreme Court. While the Court did not reach the question of whether States may prohibit same-sex marriage because the petitioners, who were proponents of the Californian ballot initiative known as Proposition 8, did not have standing to appeal the judgment of the US District Court, the case is important for what it tells us about the ability of citizen

\textsuperscript{126} Obergefell v Wymyslo, No 1:13-cv-501 (SD Ohio, 23 December 2013) [Obergefell].
\textsuperscript{128} Baskin v Bogan, No 1:14-cv-00355. See further Lambda Legal, \textit{Baskin v Bogan}, online: <http://www.lambdalegal.org/in-court/cases/baskin-v-bogan>.
\textsuperscript{129} Kentucky, Nevada and Virginia. The Attorneys General of California, Illinois, Oregon and Pennsylvania also refused to defend their State’s bans. See Niraj Chokshi, “Seven attorneys-general won’t defend their own state’s gay-marriage bans”, \textit{The Washington Post} (20 February 2014).
\textsuperscript{130} This does not raise the same issue as the Supreme Court faced in \textit{Windsor, supra} note 1 and \textit{Hollingsworth v Perry}, 133 S Ct 2652 (2013) because the States appear to remain committed to litigating the constitutionality of their bans on same-sex marriage; the refusal is simply on the part of the States’ chief legal officers.
\textsuperscript{131} See Freedom to Marry, \textit{Marriage Litigation}, online: <http://www.freedomtomarry.org/litigation/>.
\textsuperscript{132} \textit{Hollingsworth v Perry}, 133 S Ct 2652 (2013) [Perry].
opponents of same-sex marriage to challenge State refusals to defend marriage bans.

The background to *Perry* is procedurally complex but factually quite straightforward. In 2000, Proposition 22 amended the *California Family Code* to define marriage as exclusively between a man and a woman. Proposition 22 was struck down by the California Supreme Court in 2008. The Court held that the amendment violated the Equal Protection and Due Process Clauses of the *California Constitution* and directed the State to issue marriage licenses to same-sex couples. Soon after, California amended its *Constitution* by popular vote to restrict marriage to a man and a woman – the infamous Proposition 8. A state challenge to Proposition 8 failed, although the Court affirmed the validity of the roughly 18,000 marriage licenses issued between the striking down of Proposition 22 in *In re Marriage Cases* and the coming into effect of Proposition 8. Accordingly, the plaintiffs commenced proceedings in federal court alleging infringement of the Due Process and Equal Protection clauses of the Fourteenth Amendment of the *US Constitution*. Presaging the position of the federal Attorney General and the President concerning *DOMA*, the California Attorney General admitted the unconstitutionality of Proposition 8. In 2010, the District Court

The following summary draws from the majority opinion in *Perry*, *supra* note 132; *Respondent’s Brief in Opposition before the Supreme Court in Hollingsworth v Perry*; and Kenji Yoshino, “The Paradox of Political Power: Same-Sex Marriage and the Supreme Court” (2012) Utah L Rev 527.

*Cal Fam Code* §308.5.


The amendment is found in art 1, §7.5 of the *Constitution of California* and codified in §308.5 of the *Cal Fam Code*. Proposition 8 passed with 52 percent of the vote: Yoshino, *supra* note 133 at 527. Following the passage of Proposition 8, California passed Bill SB 54, the *Marriage Recognition and Family Protection Act*, which declared that out-of-state same-sex marriages performed prior to Proposition 8 were to be recognized in California; same-sex marriages performed after Proposition 8 were to be accorded the same recognition as marriages without the privilege of the term “marriage”. See *Cal Fam Code* §308(b), (c).

*Strauss v Horton*, 207 P 3d 48 (Cal 2009).
declared Proposition 8 unconstitutional under the Equal Protection and Due Process limbs of the Fourteenth Amendment.\textsuperscript{138}

In a move that would ultimately be dispositive in the US Supreme Court, California elected not to appeal the District Court’s judgment. Instead, the proponents of Proposition 8 appealed to the Ninth Circuit, which, as an interim measure, certified a question to the California Supreme Court concerning the proponents’ standing. That Court held that “[i]n a postelection challenge to a voter-approved initiative, the official proponents of the initiative are authorized under California law to appear and assert the state’s interest in the initiative’s validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so.”\textsuperscript{139} Thereafter, the Ninth Circuit affirmed the judgment of the District Court, finding, on the standing point, that for the purposes of federal law, the “People [must] have an interest in the validity of Proposition 8 and that, under California law, proponents are authorized to represent the People’s interest”\textsuperscript{140}. In the Ninth Circuit’s view, the timing of Proposition 8 was critical; as a responsive measure to \textit{In re Marriage Cases}, it deprived gays and lesbians of pre-existing rights. Applying rational basis review, the Court asked whether there were legitimate reasons for the removal of a status and dignity previously accorded to their relationships. In this respect, the Ninth Circuit found \textit{Romer} to be controlling; accordingly, Proposition 8’s basis in animus towards the class it affected meant that it was unconstitutional.\textsuperscript{141}

\textsuperscript{138} \textit{Perry v Schwarzenegger}, 704 F Supp 2d 921 (2010). The Court indicated that while strict scrutiny was the appropriate standard under each limb, Proposition 8 failed even rational basis review on both counts.

\textsuperscript{139} \textit{Perry v Brown}, 265 P 3d 1002, 1007 (Cal 2011).

\textsuperscript{140} \textit{Perry v Brown}, 671 F 3d 1052, 1073 (9th Cir 2012).

\textsuperscript{141} See \textit{Romer}, supra note 51. The petitioner’s petition for a rehearing en banc by the Ninth Circuit was rejected: \textit{Appellants’ Petition for Rehearing En Banc, Perry v Brown}, 671 F 3d 1052 (9th Cir 2012) (Nos 10-16696, 11-16577), ECF No.402: Yoshino, \textit{supra} note 133 at 528.
Perry presented the Supreme Court with a host of options. The threshold issue was standing: if the Court decided the proponents were entitled to bring the case, four options arose, ranging from the denial of any constitutional right to same-sex marriage through to the affirmation of such a right (interim possibilities included confining the right either to California or States with civil union regimes that amounted to marriage in all but name\(^{142}\)); conversely, if the Court declined jurisdiction based on a lack of standing, the judgment of the District Court would be affirmed.\(^{143}\)

By a 5:4 majority,\(^ {144}\) the Supreme Court took the procedural option on the basis that the petitioners had no “direct stake”\(^ {145}\) in the defense of Proposition 8 beyond the general interest of every citizen of California. The petitioners’ distinct role in promulgating Proposition 8 did not confer upon them a particular interest beyond the time of its enactment.\(^ {146}\) Nor were the petitioners entitled to bring suit on California’s behalf.\(^ {147}\) The result is that US District Chief Judge Vaughn Walker’s first instance decision in Perry v Schwarzenegger controls because the

\(^{142}\) Yoshino, supra note 133 at 528-37.

\(^{143}\) If the proponents did not have standing to bring the case to the Supreme Court, they also did not have standing to appeal from the District Court judgment.

\(^{144}\) While it is beyond the scope of this paper to parse the reasoning of the Court on the jurisdictional issues in Perry, supra note 132 and Windsor, supra note 1, it is to be observed that only four Justices voted consistently across the cases (which is not to imply that their reasoning is necessarily inconsistent since the cases raised somewhat different questions). Roberts CJ and Scalia J held in each case that the Court did not have jurisdiction. Kennedy and Sotomayor JJ found jurisdiction in both cases. In Windsor, Ginsburg, Breyer and Kagan JJ held the Court had jurisdiction, while Thomas and Alito JJ dissented on this basis. The opposite result was reached in Perry, with Ginsburg, Breyer and Kagan JJ finding that the Court lacked jurisdiction, and Thomas and Alito JJ finding jurisdiction.

\(^{145}\) Perry, supra note 132 at 2662 citing Arizonaans for Official English v Arizona, 520 US 43, 64 (1997). The Court also referred to the absence of a “personal stake”: Perry, supra note 132 at 2661 citing Lujan v Defenders of Wildlife, 504 US 555 at 560-61 (1992).

\(^{146}\) Perry, supra note 132 at 2662-63.

\(^{147}\) Ibid at 2663-64. The California Supreme Court’s judgment was held to stand only for the narrow proposition that “so far as California is concerned, petitioners may argue in defense of Proposition 8”; it did not mean that the petitioners were agents of the State: at 2666.
Court of Appeals also lacked jurisdiction to hear the matter for the same reasons as the Supreme Court. This means that art 1, § 7.5 of the Constitution of California and § 308.5 of the California Family Code (being the provisions inserted by Proposition 8) are invalid and their enforcement is permanently enjoined. The Attorney General of California, relying on Lockyer v City and County of San Francisco, has advised the Governor that the District Court’s decision applies statewide and that officials at the Department of Public Health must issue marriage licenses to eligible same-sex couples. Necessarily, out-of-state same-sex marriages are recognized in California as a result of these findings, because § 308(a) of the Family Code states: “A marriage contracted outside this state that would be valid by the laws of the jurisdiction in which the marriage was contracted is valid in this state.”

For future litigants, Perry strongly suggests that in the event that a State (as opposed to its Attorney General) refuses to appeal a judgment requiring it to permit or recognize same-sex marriage, ordinary citizens, even those who have campaigned for the passage of laws that are struck down, do not have the requisite standing to appeal such a decision as a matter of federal law because they have no “personal stake” in defending its enforcement. That being said,

148 “Proposition 8 fails to advance any rational basis in singling out gay men and lesbians for denial of a marriage license. Indeed, the evidence shows Proposition 8 does nothing more than enshrine in the California Constitution the notion that opposite-sex couples are superior to same-sex couples. Because California has no interest in discriminating against gay men and lesbians, and because Proposition 8 prevents California from fulfilling its constitutional obligation to provide marriages on an equal basis, the court concludes that Proposition 8 is unconstitutional.” Perry v Schwarzenegger, supra note 138 at 1003.

149 Ibid at 1004. The provisions still appear in the California Constitution and the Cal Fam Code.

150 Lockyer v City and County of San Francisco, 95 P 3d 459 (Cal 2004).

151 Letter from California Attorney General, Kamala D Harris to Governor Edmund Brown (3 June 2013), online: <http://gov.ca.gov/docs/AG_Letter.pdf>.

152 Perry, supra note 132 at 2663-64. Thus, the National Organization for Marriage’s appeal in Oregon against the ruling in Geiger v Kitzhaber, No 6:13-cv-01834-MC (D Or, 19 May 2014) [Geiger] was appropriately struck out for lack of standing.
Windsor indicates that legislative advisory groups (such as the BLAG that was found to have standing in Windsor) may be found to have standing in the event of governmental refusal to appeal if the State is liable to suffer a real and immediate injury,\textsuperscript{153} such as the repayment of estate tax that was at issue in Windsor, and the entity seeking standing is capable of discharging the prudential requirements of its role (i.e., putting forth a substantial argument for the legality of their position).\textsuperscript{154}

Arguably, the fact that the Court did not reach the merits in Perry reinforces the federalist/individual rights logic of Windsor.\textsuperscript{155} Windsor requires the federal government to respect the decisions of the States to recognize same-sex marriages because of the individual's liberty interest in not having a previously conferred status rejected by a coordinate branch of government; Perry upholds the judgment of a lower federal court that struck down one State's ban on same-sex marriage, also based on the concern for individual liberty and equality. The threshold question of marriage recognition thus remains within the purview of the States, but once the institution is opened to same-sex couples, the federal government is now unable to deny correlative recognition.

2. Cases Post-Perry and Windsor

In each of the cases since Perry and Windsor that have directly engaged with the right of same-sex couples to marry\textsuperscript{156} (as opposed to the right to have an existing

\begin{itemize}
  \item \textsuperscript{153} Windsor, supra note 1 at 2684-89.
  \item \textsuperscript{154} Ibid.
  \item \textsuperscript{155} I do not mean to suggest that the Court acted with a view to producing this result, particularly given the differently constituted majorities in the cases.
  \item \textsuperscript{156} Utah, Oklahoma, Virginia, Texas and Michigan. The parties in the Illinois case (Lee v Orr, supra note 123) accepted that the law infringed the Fourteenth Amendment; accordingly, the Court did not engage with this question. Similarly, the Court in the Ohio cases (Obergefell, supra note 126; Henry v Himes, supra note 124) framed the claimed right as "the right to remain married"; I therefore consider that case, along with the Kentucky case (Bourke, supra note 43) (and relevant portions of DeLeon, supra note 99 and Bishop, supra note 46) in the context of interstate recognition and conflicts of law.
\end{itemize}
marriage recognized), courts have held that bans on same-sex marriage infringe either the Equal Protection Clause of the Fourteenth Amendment to the *United States Constitution*,\(^{157}\) or the Equal Protection Clauses in State constitutions.\(^{158}\) In most marriage equality cases in federal courts since *Windsor*, it has been held that the impugned laws fail even rational basis review; five courts have held that it was accordingly not necessary to determine whether a stricter standard of review is required.\(^{159}\) The District Court in Utah held that it is bound by precedent from the Tenth Circuit to apply rational basis review to laws classifying on the basis of sexual orientation; even on this most deferential level, though, Utah’s restriction did not pass constitutional muster. In contrast, the most recent cases striking down bans in Arkansas,\(^{160}\) Idaho\(^{161}\) and Pennsylvania\(^{162}\) applied heightened scrutiny (as did the Second Circuit in its *Windsor* (2d Cir) ruling\(^{163}\)). In the cases heard in State courts since *Windsor*, the New Mexico Supreme Court applied intermediate scrutiny,\(^{164}\) while the New Jersey Superior Court (in a judgment upheld on appeal) applied a standard requiring a “real and substantial relationship” between the impugned classification and the government purpose it purports to serve.\(^{165}\)

\(^{157}\) Utah, Oklahoma, Virginia, Texas, Michigan, Oregon, Idaho, Arkansas and Pennsylvania.

\(^{158}\) *Griego v Oliver*, 316 P 3d 865 (2013) [*Griego* considering *New Mexico Constitution*, Article II, s 18; *Garden State, supra* note 111, considering *New Jersey Constitution, Article I, par 1*).

\(^{159}\) Oklahoma, Virginia, Texas, Michigan and Oregon.

\(^{160}\) *Wright, supra* note 120 at 4 (noting further that the laws failed rational basis review).

\(^{161}\) *Latta, supra* note 120 at 46-51.

\(^{162}\) *Whitewood, supra* note 44 at 33.

\(^{163}\) *Windsor* (2d Cir), *supra* note 17 at 175.

\(^{164}\) “Because same-gender couples … are a discrete group which has been subjected to a history of discrimination and violence, and which has inadequate political power to protect itself from such treatment, the classification at issue must withstand intermediate scrutiny to be constitutional.” *Griego, supra* note 158 at 871.

\(^{165}\) *Garden State, supra* note 111 at 362.
Courts in Utah, Virginia, Texas, Idaho and Pennsylvania have also found that the impugned laws before them contravened the Due Process Clause of the Fourteenth Amendment. The reasoning in these cases followed the same pattern: marriage is a fundamental right that applies to all persons (definitional objections that sought to establish that marriage is inherently between one man and one woman were rejected on the basis of authorities such as Loving); strict scrutiny therefore applies; the State’s justifications for their restrictions failed for the same reasons as they were rejected in the context of equal protection.

In the federal cases thus far, and Griego in New Mexico, the States’ proffered rationales for their respective bans on same-sex marriage centered on arguments concerning tradition and morality, the allegedly intrinsic link between marriage and procreation, and optimal child-rearing environments. These justifications were categorically rejected as a basis for marriage restrictions. The Court in New Jersey was not called upon to determine the salience of these arguments because the case centered on whether disparate recognition of marriage and civil unions following Windsor necessitated the provision of same-sex marriage in New Jersey in accordance with the earlier decision in Lewis v Harris.

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166 Cf Obergefell, supra note 126 at 12: “most courts have not found that a right to same-sex marriage is implicated in the fundamental right to marry” at 10. However, the Court found that “[t]he right to remain married is … properly recognized as one that is a fundamental liberty interest appropriately protected by the Due Process Clause”. Despite this finding, the Court applied heightened rather than strict scrutiny based on the Supreme Court’s practice of analyzing laws concerning marriage, family and intimate relationships according to this standard: ibid at 12-13.

167 Griego, supra note 158 at 861, 877-80, 885-89.

168 See, e.g., Whitewood, supra note 44 at 25: “this Court is not only moved by the logic that the fundamental right to marry is a personal right to be exercised by the individual, but also rejects Defendants’ contention that concepts of history and tradition dictate that same-sex marriage is excluded from the fundamental right to marry”.

169 The Court in Lewis, supra note 111, rejected arguments based on public need and tradition: Garden State, supra note 111 at 363.
In much the same manner as Windsor, subsequent cases endorse not only the equal basic liberties of lesbians and gay men but also the normative good of same-sex relationships for the parties involved, their children, and society. They also tend to valorize marriage; prioritize it as the ideal relational and familial structure; and reinforce the idea that couples and children are harmed by marriage restrictions partly because of the linkage between marriage and socioeconomic benefits, without interrogating the desirability of such an inclusionary/exclusionary system.

Bostic v Rainey is a clear example of this trend. Judge Allen observed that “[g]ay and lesbian individuals share the same capacity as heterosexual individuals to form, preserve and celebrate loving, intimate and lasting relationships”. However, Judge Allen also imputed acceptance on the part of the plaintiffs for the Supreme Court’s characterization – in 1888 – of marriage as “the most important relation in life” and “the foundation of the family and society, without which there would be neither civilization nor progress”. She also referred to “the sacred principles embodied in our fundamental right to marry”, the “sacred values and dignity that other individuals celebrate when they enter into marital vows in Virginia”, and cast marriage as a “sacred social institution” that “enriches our society”. One might ask in response: Are those people and those relationships not consecrated by the state’s marital caress somehow profane? Do the unmarried not contribute to the enrichment of society?

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170 Bostic, supra note 88 at 22-23. See also Kitchen, supra note 43 at 44, finding that “[b]oth opposite-sex and same-sex couples model the formation of committed, exclusive relationships, and both establish families based on mutual love and support”, yet also casting the undesirable corollary of bans on same-sex marriage as the “norm that sexual activity may take place outside the marriage relationship”.

171 Maynard v Hill, 125 US 190, 205, 211 (1888) cited in Bostic, supra note 88 at 21.

172 Bostic, supra note 88 at 21.

173 Ibid at 38. See also Kitchen, supra note 43 (discussing the fundamental right to marry). The Court in DeBoer, supra note 78, engaged in a lengthy analysis of sociological evidence concerning child development. It found the evidence supporting the parenting abilities of lesbians and gay men persuasive, and dismissed evidence to the contrary as “entirely unbelievable and not worthy of serious consideration”: at 13.
The “fundamental right to marry” to which Judge Allen refers in Bostic has also been a feature of the cases in Texas and Utah, where, as in Virginia and Pennsylvania, bans on same-sex marriage have been found to infringe due process. It is of course doctrinally necessary to establish the fundamental nature of a right to find that its selective application constitutes a denial of due process for those not able to access the right.\textsuperscript{174} However, given that the majority in Windsor eschewed the question of whether the fundamental right to marry extends to same-sex couples (which is distinct from the idea that there is a fundamental right to same-sex marriage) under the Constitution, it is noteworthy that courts in subsequent cases have nevertheless felt it appropriate to emphasize the apparent centrality of this right. For instance, in Kitchen v Herbert, the Court stated: “The right to marry is intertwined with the rights to privacy and intimate association, and an individual’s choices related to marriage are protected because they are integral to a person’s dignity and autonomy.”\textsuperscript{175} Similarly, in DeLeon v Perry, the Court referred to Justice Kennedy’s statement in Lawrence v Texas that the right to marry is “central to personal dignity and autonomy”.\textsuperscript{176} In the current socio-legal framework in the United States, it is correct that the denial of the ability to marry impedes autonomy; this is the case, though, because of the existence of marriage as a form of socio-legal ordering and its inclusive/exclusive form. And this is the problem, since marriage should not be constitutive of autonomy at a legal level. To the extent that persons feel that there is an additional transcendence involved in marriage, they ought to be free to engage in whatever form of ceremony comports with their views; what is unacceptable, though, is the continuing promulgation and prioritization of the view that one form of civil relationship recognition has a nebulos additional component going beyond “classification for purposes of certain statutory

\textsuperscript{174} See, eg, Kitchen, supra note 43 at 17-18; DeLeon, supra note 99 at 31-36; Loving v Virginia, supra note 2 at 12.

\textsuperscript{175} Kitchen, supra note 43 at 23.

\textsuperscript{176} DeLeon, supra note 99 at 34 referring to Lawrence, supra note 57.
benefits”\textsuperscript{177} that justifies its status as “fundamental” and fundamentally more important than other forms of relationship recognition.

Echoing Justice Kennedy’s concern for the humiliation experienced by the children of unmarried same-sex couples, courts since \textit{Windsor} have (ironically, given that harm to children has supplanted disgust as one of traditionalists’ preferred arguments against same-sex marriage\textsuperscript{178}) made harm to children something of a leitmotif in justifying striking down same-sex marriage bans.\textsuperscript{179} Judicial recognition of the equal capacity of lesbians and gay men to parent, and the potential detriment to children of exclusionary policies towards their parents, is unquestionably positive. In the words of Judge Allen in \textit{Bostic}, “[t]he ‘for-the-children’ rationale rests upon an unconstitutional, hurtful and unfounded presumption that same-sex couples cannot be good parents”.\textsuperscript{180} However, marriage should not be the fulcrum upon which children’s sense of dignity swings. Taking the logic of non-harm to children to its conclusion, it is clear that adult relationships ought not to be classified in a hierarchical manner that privileges those whose parents have accepted the state’s offer. From this standpoint, Judge Allen’s subsequent characterization of the child of certain plaintiffs as “needlessly deprived of the protection, the stability, the recognition

\textsuperscript{177} \textit{Windsor}, supra note 1 at 2692.
\textsuperscript{178} See \textit{Geiger}, supra note 152 at 38.
\textsuperscript{179} See, e.g., \textit{ibid} at 39.
\textsuperscript{180} \textit{Bostic}, supra note 88 at 32. See also \textit{DeLeon}, supra note 99 at 26, finding that “[d]efendants’ preferred rationale [for restricting marriage to opposite-sex couples] presumes that same-sex couples cannot be good parents – this is the same type of unconstitutional and unfounded presumption that the Supreme Court held ‘cannot stand’”. See further \textit{Geiger}, supra note 152 at 38: “Although protecting children and promoting stable families is certainly a legitimate governmental interest, the state’s marriage laws do not advance this interest – they harm it.” Cf \textit{Bishop}, supra note 46 at 61-62, in which the Court assumed, for the purposes of summary judgment, that “the ‘ideal’ environment for children must include opposite-sex, married, biological parents” (finding that even if this were the case, restrictions on same-sex marriage fail rational basis review because “[e]xclusion from marriage does not make it more likely that a same-sex couple desiring children, or already raising children together, will change course and marry an opposite-sex partner”).
and the legitimacy that marriage conveys”, and her reference to “the stigma, humiliation and prejudice that would be visited upon these citizens' children, as they continue to wait for this possibility [marriage] to become realized”, is profoundly troubling.\textsuperscript{181} The language of legitimacy and prejudice is alarming because it suggests a return to the odious characterization of children of unmarried couples as illegitimate.\textsuperscript{182} Even if the prejudice of which Judge Allen speaks is of the economic, as opposed to the value-based, variety (to the extent that such a distinction is possible), there appears to be little recognition of the fact that marriage ought not to be the gateway to socioeconomic wellbeing; nor, as Polikoff argued in response to Windsor, the fact that “NO children should feel humiliated by their family structure. Children of unmarried parents should not feel humiliated. All children are equal and the families that raise them deserve equal respect.”\textsuperscript{183}

\section*{B. Civil Unions and Domestic Partnerships in the American States}

The first forms of relationship recognition for same-sex couples arose at the municipal level. In 1984, Berkeley City Council established a registry for public recognition of same-sex relationships; this was later amended to enable city

\textsuperscript{181} Bostic, supra note 88 at 28-29. See also DeLeon, supra note 99 at 25-26, finding that Texas' marriage restriction “denies the children of same-sex parents the protections and stability they would enjoy if their parents could marry” and “detracts from the State's goal of providing optimal environments for children” without any apparent recognition that “protections and stability” accrue only if their parents choose to marry, which in effect necessitates marriage for those who need the socioeconomic benefits that marriage brings. Indeed, there is no acknowledgement of the fact that the children of unmarried parents are equally worthy of the State’s protection irrespective of whether their parents are able to marry.

\textsuperscript{182} I wish to be very clear that I am not imputing an intention on the part of Judge Allen to reinvigorate illegitimacy in family law; rather, I am pointing to the troubling potential of reasoning processes that base rights to equal treatment under the law in the legitimacy of parental relationships. It should also be noted that Judge Allen was at pains to point out the equal capacity of gay and lesbian parents to provide appropriate environments for child development.

\textsuperscript{183} Polikoff, supra note 79.
employees to obtain health benefits for their (same-sex or opposite-sex) registered partners and to require hospitals to permit domestic partner visitation.\textsuperscript{184} Municipal recognition expanded throughout the 1990s in America’s larger cities.\textsuperscript{185} Employees of the States of Massachusetts and Vermont were able to access domestic partner benefits from 1992 and 1994, respectively.\textsuperscript{186} In the wake of \textit{Baehr v Lewin},\textsuperscript{187} Hawaii became the first State to offer benefits to same-sex couples irrespective of employment status. Its reciprocal beneficiaries scheme provided a limited subset of the benefits available to married couples to couples unable to marry under Hawaiian law.\textsuperscript{188}

In 2000, Vermont became the first State to offer civil unions following the decision of its Supreme Court in \textit{Baker}. In another example of “equality practice”,\textsuperscript{189} the Supreme Court found that the State’s refusal to issue marriage licenses to the plaintiffs infringed the equal protection principle implicit in the common benefits clause (ch I, art 7) of the \textit{Vermont Constitution}, but refused to order an immediate remedy. Instead, the Court held that the existing scheme was to remain in effect for a reasonable period “to enable the Legislature to consider and enact implementing legislation” correcting the discrimination involved in denying marriage licenses to same-sex couples, either by extending that right or by creating a parallel institution providing equal recognition of same-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{184} Eskridge, \textit{Equality Practice}, supra note 54 at 13.
\item \textsuperscript{186} \textit{Ibid}.
\item \textsuperscript{187} \textit{Baehr v Lewin}, supra note 6.
\item \textsuperscript{188} \textit{Reciprocal Beneficiaries Act} (Haw 1997); Stein, \textit{supra} note 114 at 186.
\item \textsuperscript{189} Eskridge, \textit{Equality Practice}, supra note 54 at 147-58. In particular, Eskridge argues that in the face of significant social, political and legal resistance to advances such as same-sex marriage, a liberal approach to rights coupled with a communitarian approach to remedies may be the most fruitful means of advancing the claims of minorities without causing backlash.
\end{itemize}
\end{footnotesize}
sex relationships. Following an intense period of legislative debate, in which proposals for same-sex marriage were met with proposals to amend the Vermont Constitution to circumvent Baker, the civil unions law was passed in April 2000. The law, which applied only to same-sex couples, provided that “Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.”

Numerous States followed Vermont’s lead on civil unions. California (enacted 2003, entered into force 2005), Colorado (enacted and entered into force 2013), Delaware (enacted 2011, entered into force 2012), Hawaii (enacted 2011, entered into force 2012), Illinois (enacted and entered into force 2011), New Jersey (enacted 2006, entered into force 2007), Oregon (enacted 2007, entered into force 2008) and Washington (enacted and entered into force 2007) each passed laws providing same-sex couples with the ability to enter into forms of recognition that conferred the same benefits and responsibilities as marriage. Nevada (enacted and entered into force 2009) and Rhode Island (enacted and entered into force 2011) passed laws substantially similar to Vermont’s civil union scheme, but included carve-outs concerning, respectively, health care for domestic partners, and non-recognition by religious organizations. Colorado (enacted and entered into force 2009, expanded to civil unions 2013), Maine (enacted and entered into force 2004), Maryland (enacted and entered into force 2008) and Wisconsin (enacted and entered into force 2009) passed limited forms

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190 Baker, supra note 115 at 886-89.
191 For discussion of the House and Senate debates that led to the enactment of the civil unions law see Eskridge, Equality Practice, supra note 54 at 57-82.
192 An Act relating to civil unions (Vt 2000), codified in Vermont Code, Title 15, ch 23, §1204(a).
193 Colorado originally passed a domestic beneficiary scheme akin to Hawaii’s 1997 initiative: Designated Beneficiary Agreements Act (CO 2009).
of recognition wherein the particular rights conferred by the relevant laws were specifically enumerated, as opposed to starting from a position of presumptive entitlement.\footnote{See generally Stein, \textit{supra} note 114 at 188.}

In some States, marriage equality has come at the expense of existing civil union or domestic partnership regimes. As of 30 June 2014, Delaware and Washington respectively ceased offering civil unions and domestic partnerships and are converting existing unions and partnerships into marriages. Vermont and Rhode Island have ended their civil union schemes, though existing unions continue to be recognized as such. Maryland continues to offer domestic partnerships but it no longer provides healthcare benefits to the domestic partners of state employees.\footnote{Michael Dresser & Carrie Wells, "With same-sex marriage now available, state to end benefits for domestic partners", \textit{The Baltimore Sun} (3 May 2013).} The retraction of civil union and domestic partnership schemes following the extension of marriage rights can, on one view, be defended on the ground that same-sex couples should not have additional relational options that are not offered to opposite-sex couples. However, a preferable approach to disbanding civil union schemes is to retain the form of recognition and bring opposite-sex couples within the criteria for eligibility. This approach enhances the autonomy and capacity of individuals to order their lives in ways that reflect their own reasoned decisions and affiliative needs. However, only Hawaii, Illinois and New Jersey (for the time being) offer both civil unions equivalent to marriage, and civil marriage, to same-sex and opposite-sex couples.\footnote{Maine also offers domestic partnerships and civil marriage to same-sex and opposite-sex couples, but its domestic partnership law does not offer the same benefits and responsibilities as marriage: Me Rev Stat Ann tit 22 §2710.} California’s domestic partnership law\footnote{\textit{Cal Fam Code} §297-297.5.} is only to same-sex couples and opposite-sex couples where at least one party is over the age of 62. Oregon’s domestic partnership
scheme\textsuperscript{198} is only open to same-sex couples, and it is too early to tell whether it will be retained following \textit{Geiger}.\textsuperscript{199}

The brief history of civil unions in the United States demonstrates a marked, if somewhat ironic, bias towards marriage. The majority of civil union schemes were intended to approximate marriage in all but name (thus reinforcing through “protection” the sacrosanct nature of the marital form), and there is a distinct trend towards dismantling civil union schemes when marriage becomes an option for same-sex couples. These moves are disrespectful and coercive, not only to same-sex couples but to all persons who do not share the state’s veneration of marriage. My point is not to deny the vital importance of the ability to marry in a society that continues to order its affairs and those of its citizens via that particular institution; rather, it is to critique the fact that even the apparent alternatives to marriage, while they remain available, essentially mirror that institution, providing in essence a choice of nomenclature rather than substantive difference. This was perhaps the best path while marriage remained unavailable to same-sex couples. However, in a post-\textit{Windsor} world, it is time to reconsider the merits of civil union schemes, but this time as true alternatives to marriage, perhaps even blending the rights and responsibilities of such partnerships with private agreement.\textsuperscript{200}

\section{C. Default and Contract-Based Recognition of Same-Sex Relationships}

Status-based default recognition of the relationship between parties is unusual in the United States.\textsuperscript{201} In contrast, as a result of the finding of the Supreme Court

\textsuperscript{198} \textit{Oregon Family Fairness Act} (Or 2007).

\textsuperscript{199} \textit{Geiger, supra} note 152.

\textsuperscript{200} See further Robert Leckey, “Must equal mean identical? Same-sex couples and marriage” (2014) 10:1 Int JLC 5.

\textsuperscript{201} William N Eskridge, Jr, “Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules” (2012) 100 Geo LJ 1881 at 1929 [Eskridge, “Pluralism”]: “For the large majority of states, the regulatory regime is a bare-bones,
of California in *Marvin v Marvin*, contract-based recognition of relationships is now reasonably prevalent. *Marvin* stands for the proposition that express or implied contracts between the parties to a relationship are enforceable, so long as the sexual acts that may form part of a relationship are not “an inseparable part of the consideration for the agreement”; in this respect, the Court rejected the previous hurdle to enforcement based on the inherently meretricious nature of unwed cohabitation. As a result, “almost every state will now recognize express contracts between cohabitants, especially if they are written”. A number of States also recognize implied agreements based on the parties’ ordering of their household responsibilities. As Eskridge notes, this “more or less creates a new default rule, where the partners in a longer term cohabiting relationship are presumed to be mutually supportive or to share property”. In those States that only recognize express cohabitation agreements, parties may have recourse to principles of unjust enrichment.

minimalist regime where most of the default rules are 'let the partners do what they want and the state will neither subsidize nor interfere’.

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202 *Marvin v Marvin*, 18 Cal 3d 360 (1976) [*Marvin*].
203 *Ibid* at 672. Thus, in *Jones v Daly*, 122 Cal App 3d 500 (1981), the Court of Appeals for the Second District of California rejected a same-sex partner’s claim against the estate of his deceased partner on the basis that the agreement between the men was indissolubly based on the plaintiff’s role as the deceased’s lover. In contrast, in *Whorton v Dillingham*, 202 Cal App 3d 447 (1988), the Court of Appeals for the Fourth District of California upheld the plaintiff’s claim to a share of alleged common property held by the defendant on the basis that their oral agreement comprised services (the plaintiff was to be the defendant’s chauffeur, bodyguard and secretary) that justified severing the offending sex-based portion of their agreement.

205 *Ibid* at 126. Illinois, Georgia and Louisiana are the exceptions to this rule: *ibid*.
207 *Ibid*. 
It appears that the only State that accords default relationship recognition on the grounds of status, as opposed to express or implied agreement, is Washington, where so-called “meretricious relationships” are recognized as giving rise to legal rights and obligations concerning property acquired by the parties as a couple.\footnote{Connell v Francisco, 898 P 2d 831 (Wash 1995).} In \textit{Vasquez v Hawthorne},\footnote{Vasquez v Hawthorne, 145 Wn 2d 103 (2001).} the Supreme Court of Washington recognized the property interests of the same-sex intimate partner of a decedent on the basis of the relationship between the men. In \textit{Olver v Fowler},\footnote{Olver v Fowler, 161 Wn 2d 655, 669 (2007).} the Supreme Court reiterated that “equitable distribution of property that would have been community” might be required under Washington law, irrespective of whether the relationship ended by agreement or because of the death of one or both parties.

Purposive recognition of a relationship may also occur in the context of claims involving third parties. While the California Supreme Court in \textit{Elden v Sheldon}\footnote{Elden v Sheldon, 758 P 2d 582 (Cal 1988).} refused the claim of a same-sex partner for damages for negligent infliction of emotional distress occasioned by witnessing the death of his cohabiting partner, there is a discernible trend towards recognition of the standing of cohabiting partners to bring wrongful death suits.\footnote{Eskridge, "Pluralism", supra note 201 at 1933.} Following the tragic case involving Diane Whipple, who was mauled to death by a dog outside her apartment in San Francisco, the exclusion of cohabiting partners from California’s wrongful death statute was ruled unconstitutional and the State has added domestic partners to the list of third parties entitled to bring tort claims against a wrongdoer.\footnote{The claim by Whipple’s partner was settled prior to appeal: Nancy D Polikoff, \textit{Beyond (Straight and Gay) Marriage} (Boston: Beacon Press, 2008) at 195 [Polikoff, \textit{Beyond Marriage}].} Nevertheless, as Polikoff notes, this “misses the point” since the statute still falls short of enabling compensation claims by cohabiting partners generally.\footnote{Ibid at 194-95.}
more inclusive approach is taken in Michigan, where anyone named in a
decedent’s will is able to claim in tort for compensation, irrespective of whether
other family members survive the deceased, although this presumes an ordering
of the parties’ affairs that may not actually exist. West Virginia allows anyone
“financially dependent” on the deceased to make a claim.

The ability of same-sex partners to claim workers’ compensation by reason of the
death of their partner also varies across jurisdictions. California’s dependency-
based statute permits claims by cohabiting partners in addition to spouses. The
male partner of murdered San Francisco supervisor Harvey Milk was thus able to
claim workers’ compensation in the late 1970s. In contrast, the Supreme Court of
New York held in 2005 that New York’s statute precluded a claim by the
registered same-sex partner of a man who was killed when an American Airlines
workers’ compensation law so that domestic partners (whether registered or
established via conduct) of those who died in the 11 September 2001 attacks on
the World Trade Centre are able to make compensation claims; however, for
all other domestic partners who are not legally married, the law remains out of
reach.

Default relationship recognition can be criticized as coercive and disrespectful of
people’s freedom to choose relational forms without the intervention of the state.
However, drawing on Fineman, I would suggest that this view fails to take
seriously the derivative and inevitable dependency that often arises in or through
long-term relationships. Ensuring the economic stability of partners who have
sacrificed their own earning capacity, and ensuring that children are adequately
provided for, comports with a focus on enhancing individual capabilities and a

215 Valentine v American Airlines, 17 AD 3d 38 (2005); see also Polikoff, Beyond Marriage,
supra note 213 at 196.
216 New York Workers’ Compensation Law §16 (1-4).
217 For criticism of this position see Polikoff, Beyond Marriage, supra note 213 at 201.
thicker form of socially embedded autonomy. For this reason, opt-out schemes such as that in Washington are preferable to opt-in, contract-based systems, for at least two related reasons: first, economically weaker parties are deemed to be entitled to a measure of protection; second, those parties are not forced to litigate to establish their entitlement, thereby relieving the courts of messy and often subjective determinations as to the agreement between parties and the meaning of their particular course of conduct. By the same token, principles of autonomy and capacity require the state to allow individuals to opt out of such rights and responsibilities vis-à-vis one another, although the rights of third parties, particularly children, and the responsibilities of parties towards third parties, should not be subject to contractual avoidance. Similarly, to the extent that parties do not fall within the parameters of default recognition, contractual agreements between them ought to be upheld (subject to the law of contract and the interests of children). In particular, agreements should not be rendered unenforceable simply because they are based in whole or in part on sexual services. Any other position fails to recognize individual autonomy and bodily integrity, as well as the intrinsic value of sex outside of a marital or procreative context.

III. Inter-Jurisdictional Relationship Recognition

In a federal structure such as the United States, inter-jurisdictional relationship recognition has both a horizontal and a vertical dimension. Horizontal recognition refers to recognition in one State of a marriage performed in another State. Vertical recognition refers to recognition by the federal government of State marriages. For overseas marriages, recognition may also differ according to the level of government in question: a Canadian same-sex marriage is now recognized by the US federal government, but not by Mississippi. My concern in this section is with horizontal recognition, particularly interstate recognition in the United States (although the principles discussed are relevant to State recognition of foreign same-sex marriages). Vertical recognition is canvassed in Section I(D)
above, which considers the impact of *Windsor* on federal recognition of same-sex marriage and (its minimal effect) on non-marital relationships.

The focus in this section on recognition of same-sex *marriages* is in no way intended to reflect a judgment on the normative worth of marriage versus other types of relationship status; rather, it is a reflection of the primacy of marriage within American family law, the corpus of private international law pertaining to inter-jurisdictional recognition of marriage, and the dearth of judicial consideration of claims for interstate recognition of non-marital relationships.\(^{218}\)

### A. Comity, Public Policy and §2 of DOMA

American conflict of laws takes the general position that a marriage is valid in any State if it was valid in the place of celebration (*lex loci celebrationis*).\(^{219}\) This principle of comity\(^{220}\) is subject to a public policy based exception\(^{221}\) that permits

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\(^{218}\) The question of inter-jurisdictional recognition of non-marital relationships is potentially more complicated because civil unions or domestic partnerships may not have an equivalent in the jurisdiction in which recognition is sought, although it may be appropriate to simply treat such relationships as marriages, at least for purposes of dissolution. See, e.g., *Salucco v Aldredge*, 17 Mass L Rep 498 (2004) (dissolving a Vermont civil union); *In re MG and SG*, No 02-D-292 (Fam Ct W Va, 3 January 2003). Contra *Rosengarten v Downes*, 802 A 2d 170 (Conn App Ct 2002) (refusing to dissolve a Vermont civil union); *Lane v Albanese*, 39 Conn L Rptr 2 (Conn Super Ct 2005) (refusing to dissolve a Massachusetts same-sex marriage at a time when Connecticut did not permit the same). See generally Brenda Cossman, “Betwixt and Between Recognition: Migrating Same-Sex Marriages and the Turn Towards the Private” (2008) 71:3 Law & Contemp Probs 153 at 158.


\(^{221}\) “The public policy exception is not unique to marriage law. It is invoked wherever a court has to decide an issue of conflict of laws – that is to say, any issue in which a court must
a court to disregard a foreign cause of action only where its recognition “would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal”.\textsuperscript{222} The exception has historically been justified on two grounds: vindication of a state’s legitimate interests, and the repugnancy of foreign laws.\textsuperscript{223} It fell into disrepute in the latter half of the 20\textsuperscript{th} century based on its perceived parochialism.\textsuperscript{224} However, in the wake of \textit{Baehr v Lewin},\textsuperscript{225} in which the Supreme Court of Hawaii held that Hawaii’s statutory ban on same-sex marriage was subject to strict scrutiny under

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decide ‘whether or not and, if so, in what way, the answer to a legal question will be affected because the elements of the problem have contacts with more than one jurisdiction.” Koppelman, “Public Policy”, supra note 219 at 934 citing Russell J Weintraub, \textit{Commentary on the Conflict of Laws} §1.1, at 1 (3rd ed, 1986). Larry Kramer has argued that the public policy exception infringes the FF&C Clause of the \textit{United States Constitution} irrespective of the rationale that underpins it: Larry Kramer, “Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception” (1997) 106 Yale L J 1965. See also Stanley E Cox, “Nine Questions About Same-Sex Marriage Conflicts” (2006) 40 New Eng L Rev 361 at 377-84 [Cox, "Nine Questions"]. This is, as Cox acknowledges, a minority view. Koppelman, for instance, has convincingly argued that “[t]he exception … sometimes merely facilitates a state’s ability to balance its own interest in governing in its own legitimate sphere of authority against the common interest in upholding the validity of marriages”: Koppelman, "Public Policy", supra note 219 at 941 note 60.
\end{quote}

\textsuperscript{222} \textit{Loucks v Standard Oil Co}, 120 NE 198 (NY 1918).

\textsuperscript{223} Koppelman, "Public Policy", supra note 219 at 937-44. Koppelman argues that while the first rationale is justifiable on the basis of a state’s legitimate interest in the family structures of its residents, the second rationale is unjustifiably parochial. While I find little to criticize in Koppelman’s take on the justifications for the public policy exception, I would stress the weakness of either justification in cases involving non-residents. I do not consider this to be at odds with Koppelman since his view is that so-called “visitor marriages” should always be recognized: Andrew Koppelman, “Recognition and Enforcement of Same-Sex Marriage” (2005) 153 U Pa L Rev 2143 at 2159 [Koppelman, "Recognition"].

\textsuperscript{224} Koppelman, "Public Policy", supra note 219 at 937. This being said, the exception was specifically retained in the \textit{Restatement (Second) Conflict of Laws} (1971) [\textit{Second Restatement}], § 283(2) of which provides: “A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage”.

\textsuperscript{225} \textit{Baehr v Lewin}, supra note 6.
Hawaii’s equal protection clause,²²⁶ fears over the prospect of queues of queers battering at the doors of state courthouses demanding recognition of their Hawaii marriages revived interest in the public policy exception²²⁷ and led to the passage of DOMA.

Section 2 of DOMA, which remains extant since it was not in issue in Windsor, provides that the States may (not must²²⁸) refuse recognition of an out-of-state or overseas same-sex marriage and any “right or claim arising from such relationship”. The reach of §2 is unresolved. On one view,²²⁹ the provision does little more than codify the existing position under the law of conflicts because the States already possess power to deny recognition to an interstate marriage on the grounds of public policy.²³⁰ Another view is that §2 extends the scope of the public policy exception by enabling States without “a significant contact or significant aggregation of contacts, creating state interests”,²³¹ to exercise jurisdiction in respect of a marriage.²³² Additionally, the reference to rights and

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²²⁶ The Supreme Court remitted the case for determination as to whether there were sufficiently compelling state interests to justify the ban. In Baehr v Miike, No 91-1394 (Haw Cir Ct 3 December 1996), the lower court concluded that no such justification existed.

²²⁷ See, e.g., Cossman, supra note 218 at 157-61.

²²⁸ For example, New York’s (imputed) recognition of Edie and Thea’s Canadian marriage prior to that State’s enactment of its own marriage equality laws (Marriage Equality Act, 2011 NY Laws 749 (NY Dom Rel Law Ann §§10-a, 10-b)) gave rise to the claim in Windsor, supra note 1. See Lewis v NY State Department of Civil Services, 872 NYS 2d 578 (App Div 2009).

²²⁹ See Mark Strasser, “Life After DOMA” (2010) 17 Duke J Gender L & Pol’y 399 at 406: “By specifying that the rights arising by virtue of the relationship would not have to be credited but not saying the same about rights reduced to judgment, the Act implicitly reinforces existing law rather than supplants it”. See also Koppelman, "Public Policy", supra note 219 at 971: “DOMA’s choice-of-law provision, even if it is construed broadly, has almost no effect upon existing law”.

²³⁰ See General Motors, supra note 220 at 233 (1998): “A court may be guided by the forum State’s ‘public policy’ in determining the law applicable to a controversy” [emphasis added].


claims arising from marriage could be interpreted as authorizing non-recognition of judgments “arising from such relationship”, such as dissolution orders or even money judgments involving same-sex spouses.\textsuperscript{233}

There is merit to each of these positions. On the one hand, the requirement of full faith and credit is “exact[ing]” only in respect of judgments, not state-conferred forms of recognition such as marital status.\textsuperscript{234} Thus, irrespective of §2, the States possess the power to refuse recognition of an interstate same-sex marriage based on public policy. On the other hand, §2 purports to operate without regard to the degree of contact between a State and the persons whose marriage is in issue, and by its reference to “judicial proceeding[s]” as well as “public act[s]” and “record[s]”, suggests that States can refuse recognition to judgments that implicate a same-sex marriage.\textsuperscript{235} Even if this latter interpretation of §2 is correct, though, these elements may be its undoing, since Congress cannot simply declare lawful an otherwise unconstitutional law.\textsuperscript{236} The “significant contact” requirement for the exercise of a State’s substantive law is a

does not merely recapitulate what states already had the power to do … DOMA suggests, in contravention of current legal norms, that a state may ignore a same-sex marriage even if that state has no real relationship with the couple or their marriage”.

\textsuperscript{233} Stanley Cox argues that “DOMA permits states to refuse full faith and credit to judgments of sister states when those states have applied the only law that constitutionally could be applied to the case”: Cox, “Nine Questions”, \textit{supra} note 221 at 405.

\textsuperscript{234} \textit{General Motors, supra} note 220 at 232 (1998). See also \textit{Finstuen v Crutcher}, 496 F 3d 1139 (10\textsuperscript{th} Cir 2007) \textit{[Finstuen]}, in which Oklahoma’s purported non-recognition of adoptions by same-sex couples completed interstate was held to violate the FF&C Clause of the \textit{US Constitution}.

\textsuperscript{235} See Koppelman, “Public Policy”, \textit{supra} note 219 at 971-74; Ruskay-Kidd, \textit{supra} note 232 at 1447-49.

\textsuperscript{236} \textit{Marbury v Madison}, 5 US (1 Cranch) 137. See also Ruskay-Kidd, \textit{supra} note 232 at 1453: “The Full Faith and Credit Clause does not constitute – as a matter of plain meaning and structural analysis – a delegation to Congress of the power to abrogate the operation of the Clause in particular types of cases”. Of course, Congress is permitted to make laws respecting full faith and credit that comport with the scope of the FF&C Clause: \textit{Sun Oil Co v Wortman}, 486 US 717, 729 (1988).
fundamental aspect of due process, meaning that, at the very least, §2 ought to be limited in scope to apply only to States with a sufficient interest in a particular marriage. In addition, Baker v Gen Motors Corp strongly suggests that, to the extent that §2 purports to enable States to disregard judicial proceedings that in any way involve a same-sex marriage, it infringes the Full Faith and Credit Clause (which expressly requires credit to be given to “judicial Proceedings of every other State”) and is invalid or at least likely to be read down.

B. A Cosmopolitan Approach to Public Policy

Assuming for the time being that States are empowered to limit entry into marriage to opposite-sex couples, and assuming further that the public policy exception to interstate marriage recognition permits non-recognition of same-sex marriages, at least where States have a sufficient relationship to the parties to impose their own law, it falls to be determined when the exception ought to apply. Recognition of an interstate same-sex marriage is not an all-or-nothing

237 Hague, supra note 220 at 302.

238 It has also been suggested that §2 is unconstitutional because it extends the public policy exception by enabling States without “the most significant relationship with the parties” to exercise jurisdiction: Ruskay-Kidd, supra note 232 at 1447-48 [emphasis added]. In my opinion, this view overlooks the fact that the “most significant relationship” requirement is not a mandatory limb of the FF&C Clause. It is certainly the rule under the Second Restatement, but insofar as Hague remains the authoritative statement on choice of law, a “significant contact” is all that is required. Furthermore, that argument rests on the assumption that a state to which a same-sex couple moves has little or no interest in regulating that marriage. In line with Silberman, I would argue that at least in cases involving same-sex couples who establish residence in a state that does not ordinarily recognize same-sex marriage, that state has an interest in applying its own law (which is not to say that on balance it ought to do so): Linda Silberman, “Same-Sex Marriage: Refining the Conflict of Laws Analysis” (2005) 153 U Pa L Rev 2194.

239 General Motors, supra note 220. In addition, the potentially absurd results of a finding that full faith and credit in respect of interstate judgments does not apply in the context of same-sex marriage militates against any such reading of the scope of § 2: see Strasser, supra note 229 at 407-08; Koppelman, “Public Policy”, supra note 219 at 973-74.
Conflicts scholars have identified various situations in which the courts of a state may be called upon to recognize (or not recognize) the validity of a marriage contracted elsewhere. Professor Koppelman usefully separates these situations into four categories: evasive marriages; migratory marriages; visitor marriages; and extraterritorial marriage cases. A distinction may also be drawn between a marriage and its incidents, so that recognition is limited and purposive (for example, to enable dissolution in one’s state of residence).

Principles of capacity and autonomy can assist in determining when it might be appropriate for the public policy exception to apply by focusing attention on the harm that may be caused by non-recognition of one’s relationship, and why certain forms of harm warrant legal redress. At the same time, it is important to take a realistic view and recognize that while laws against same-sex marriage are odious and legally unjustifiable, they still exist and constitute an obstacle that is based on public policy. For this reason, not every foreign same-sex marriage will have the same claim for recognition in the face of State policies against recognizing same-sex relationships. Accordingly, a balancing exercise between the interests of particular plaintiffs and a particular State’s public policy is appropriate. Such an approach may be termed “cosmopolitan”.

A cosmopolitan approach to conflicts of law draws on Kant’s juridical notion of *ius cosmopoliticum*, which refers to “[t]he constitution conforming to the law of world citizenship, so far as men and states are considered as citizens of a universal state of men, in their external mutual relationships”. Kant’s Third Article

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240 See, e.g., Koppelman, *supra* note 219 at 929: “Blanket nonrecognition of same-sex marriage, then, would be an extraordinary rule”.

241 On the varieties of Kantian cosmopolitanism see Georg Cavallar, “Cosmopolitanisms in Kant’s philosophy” (2012) 5:2 Ethics and Global Politics 95. Cavaller argues that legal cosmopolitanism falls within “the doctrine of right (governing external relations between humans)”: *ibid* at 100. He notes, though, that legal and moral cosmopolitanism are both situated within Kant’s practical philosophy, and “[c]ultural cosmopolitanism has to be systematically located near political or legal cosmopolitanism, as it reflects on and evaluates how the universal principle of right manifests itself and is interpreted and applied in cultures and historical epochs”: *ibid*. 
for a Perpetual Peace proposes that “The Law of World Citizenship Shall Be Limited to Conditions of Universal Hospitality”, which “means the right of an alien not to be treated as an enemy upon his arrival in another’s country. If it can be done without destroying him, he can be turned away; but as long as he behaves peaceably he cannot be treated as an enemy.” While Kant envisaged the application of the principles of cosmopolitanism and hospitality in the context of international commerce, their efficacy is not confined to 18th century European trade because as norms they stress the value of what might be termed ‘inter-jurisdictional respect’; that is, state and individual respect for persons who encounter the legal and political apparatuses of another jurisdiction. Benhabib, for instance, has described cosmopolitanism “as the emergence of norms that ought to govern relations among individuals in a global civil society”, while “hospitality is of interest because it touches on the quintessential case of an individual coming into contact with an organized and bounded political entity”. Jeremy Waldron has posited that “Kant’s phrase ‘cosmopolitan right’ does not

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242 Immanuel Kant, “To Perpetual Peace: A Philosophical Sketch” in Perpetual Peace and Other Essays (Hackett, 1983) at 118 [358]-[360]. States and individuals are thus possessed of the right to seek relations with other states and their citizens, though this right falls short of a right of entry unless refusal would lead to the destruction of the claimant: see, e.g., Pauline Kleingeld, “Six Varieties of Cosmopolitanism in Late Eighteenth-Century Germany” (1998) 60:3 Journal of the History of Ideas 505 at 513-514. It is to be noted, also, that Kant’s object was not the eradication of state borders but rather the creation of principles to smooth the foreigner’s encounter with the laws of another bounded political entity: Kant, supra note 242 at 115 [354]-[358]; Seyla Benhabib, The Rights of Others: Aliens, Residents and Citizens (Cambridge: Cambridge University Press, 2004) at 24 [Benhabib, Rights of Others].

243 See, e.g., Benhabib, Rights of Others, supra note 242 at 47 (discussing Kantian hospitality and cosmopolitanism in the context of forced migration and international refugee flows and arguing (at 47) that hospitality has the potential to smooth the edges of “the paradox of democratic legitimacy”, that is, the conflict between sovereignty and the recognition of the human rights of outsiders).

244 Seyla Benhabib, Another Cosmopolitanism (Robert Post, ed) (New York: Oxford University Press, 2006) at 20 [Benhabib, Cosmopolitanism]. See also Jeremy Waldron, “What is Cosmopolitan?” (2000) 8:2 The Journal of Political Philosophy 227 at 230: “Cosmopolitan right, for Kant, is the department of jurisprudence concerned with people and peoples’ sharing of the world with others, given the circumstance that this sharing is more or less inevitable, and likely to go drastically wrong, if not governed by juridical principles”.

245 Benhabib, Cosmopolitanism, supra note 244 at 20.
merely pick out a form, a topic or a level of legal analysis; it does also connote a kind of substantive view or attitude about the basis on which he thinks we ought to proceed when we are considering law and rights at a global level".246

Paul Schiff Berman has given a convincing exegetical account of what a cosmopolitan approach to conflict of laws might look like, and how such an approach, at least in the American context, draws on aspects of the dominant approaches to conflicts in 20th century American jurisprudence.247 Before considering Berman’s argument, though, it is necessary to unpack some of the terminology and history that is implicated in discussions of conflict of laws.

The dominant approach to conflict of laws in the early part of the 20th century in the USA was developed by Joseph Beale; in essence, Beale argued that “the physical location of the essential act” determined the relevant law governing the cause of action.248 On this view, a legal entitlement (usually to sue, though the doctrine was not confined to tortious or contractual disputes) “vested” in the locus delicti or place of entry into a contract or marriage; however, that right or status was able to be “carried” into different jurisdictions and enforced according to the law in which the right arose, as if it were tangible rather than an incorporeal chose in action or form of government recognition. 249

246 Waldron, supra note 244 at 230.
247 Paul Schiff Berman, “Choice of Law and Jurisdiction on the Internet: Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era” (2005) 153 U Pa L Rev 1819. While Berman’s work is focused on internet-based transactional disputes, his discussion of the principles of conflict of laws and cosmopolitanism is sufficiently broad to have application beyond the confines of the paper’s specific focus.
249 See Loucks v Standard Oil Co, supra note 222 at 110: “A foreign statute is not law in this state, but it gives rise to an obligation which, if transitory, ‘follows the person and may be enforced wherever the person may be found’ … ‘No law can exist as such except the law of the land; but … it is a principle of every civilized law that vested rights shall be protected’. … The plaintiff owns something, and we help him to get it.”
The vested rights approach fell out of favour in the latter half of the 20th century, in favour of an instrumentalist approach that focused on the social purpose of the relevant laws; the determining factor in conflicts cases thus shifted from a vindication of pre-existing rights to the interest of the forum in which a case was brought.\textsuperscript{250} Thus, “so long as the forum government [was] deemed to have an ‘interest’ in the dispute, its law should always govern, regardless of the multistate character of the events in issue”.\textsuperscript{251} This approach, consequentialist in its focus on the \textit{results} of a particular choice of law, is problematic, though, because “it is indifferent to what the parties deserve”.\textsuperscript{252} Interest analysis nevertheless remains dominant in American conflict of laws jurisprudence; in the arena of same-sex family law, this is most apparent in the application of the public policy exception to recognition of interstate same-sex marriages.

In making the case for a cosmopolitan approach to conflict of laws, Berman has observed that cosmopolitanism necessarily rejects “the territorialism of vested rights as well as the idea that only one state’s law could ever apply” to a dispute. However, “cosmopolitanism borrows from vested rights a willingness to make choice of law an a priori inquiry”. Berman’s point is that governments and societies do have a legitimate interest in determining which law ought to apply in a multi-state dispute; cosmopolitanism acknowledges this, but also rejects the parochialism of traditional interest analysis, which tends to prioritize the interests of the forum state as a default position.\textsuperscript{253} A cosmopolitan approach can, therefore, “recognize the possibility that norms of multiple states might apply to different parts of the dispute or that rules might ultimately be blended to account for the variety of normative systems implicated” in a particular situation.\textsuperscript{254} This is

\begin{itemize}
\item \textsuperscript{250} Brilmayer, \textit{supra} note 248 at 1248.
\item \textsuperscript{251} Berman, \textit{supra} note 247 at 1845 citing Currie, \textit{Selected Essays on the Conflict of Laws} (1963) at 65.
\item \textsuperscript{252} Brilmayer, \textit{supra} note 248 at 1291.
\item \textsuperscript{253} Berman, \textit{supra} note 247 at 1864.
\item \textsuperscript{254} \textit{Ibid} at 1843.
\end{itemize}
not to say that judges ought to engage in a process of adjudication governed by personal beliefs and unmoored from the positive laws of the jurisdictions implicated in a matter. Rather, because cosmopolitanism is ultimately “concerned with people and peoples’ sharing of the world with others”, it urges cognizance of multiple community affiliations and, by extension, the laws of those communities. Accordingly, the cosmopolitan approach to conflict of laws does not advocate blanket recognition by one state of the laws of another state, since to do so would prioritize the laws and undergirding norms of one state over another. Nor, however, does it endorse blanket non-recognition since the obligation under a cosmopolitan approach is to balance the interests of the interested parties and enable those parties “to come to terms with one another”. In this sense, as Karen Knop has argued, the law concerning inter-jurisdictional legal conflicts can be understood as falling within “Kant’s rubric of hospitality” because, according to Waldron, Kant “assumes that we are always likely to find ourselves alongside others who disagree with us about justice”. Private international law, based as it is on “the normality of encountering the foreign”, thus constitutes an attempt to smooth the edges of the foreigner’s encounter with the legal system of another jurisdiction.

With these principles in mind, the question becomes: how would a cosmopolitan approach deal with a conflicts case involving same-sex families? It is clear that

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255 This is the primary risk of the substantive system proposed by Arthur von Mehren: ibid at 1852-56.

256 Waldron, supra note 244 at 230.

257 Ibid at 242. This is not to suggest that non-recognition is necessarily antithetical to a cosmopolitan approach; rather, an assessment of the relevant interests is required which may lead to non-recognition of, for example, the status of marriage, but recognition of certain of its incidents.


259 Waldron, supra note 244 at 240-41.

260 Knop, supra note 258 at 319.
an absolutist approach in favor of or against inter-jurisdictional recognition fails the cosmopolitan imperative of hospitality. In my view, a hospitable approach to claims for recognition imposes an obligation on a state to assess the nature and import of the claim being made to determine whether or not refusal of recognition would constitute treatment likely to lead to the destruction of critical aspects of a person’s existence. That assessment implicates notions of capacity and autonomy, specifically, the extent to which a person’s capabilities and relational autonomy are infringed by non-recognition of a legal relationship. In this context, the parameters of inhospitable treatment must be extended to encompass those aspects of a person’s life that are fundamental to them, and the denial of which would significantly infringe that person’s capacity to function. In the context of same-sex family law, I would therefore argue that non-recognition of established parent-child relationships (which may arise presumptively by reason of marriage) constitutes a denial of status akin to the destruction of personhood enjoined by Kant, thus justifying at least a measure of recognition. On the other hand, non-recognition of an evasive same-sex marriage qua marriage might not amount to inhospitable treatment within the cosmopolitan framework, though denial of the incidents of marriage might impair a person’s capabilities to such an extent that non-recognition is destructive, or at least not outweighed by public policy.261

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261 Doctrinally, I would suggest that despite the risk of bluntness, an objective approach (based on the subjective position of particular claimants) to determining whether denial of a particular form of recognition constitutes destructive inhospitality is preferable to a purely subjective approach under which judges would be called upon to determine the particular importance of, for example, a marital bond, to a particular couple. Since an objective approach also requires consideration of broader social norms and developments, development of the law in a manner that favors equal treatment of lesbians and gay men potentially avoids some of the risk of backlash against perceived “special” treatment. See further Berman, supra note 247 at 1863.
C. Categories of Marriage

1. Evasive Marriages

An evasive marriage is one in which the parties seek to avoid restrictions on their capacity to marry in their place of residence or domicile by taking advantage of more permissive marriage laws in another jurisdiction.\textsuperscript{262} However, “it has long been recognized that individuals living in one state, who evade local marriage laws by going to another state to marry, will not then be able to force their domiciles to recognize their marriages”.\textsuperscript{263} This is not to say that evasive marriages \textit{must not} be recognized;\textsuperscript{264} rather, it is to say that there is an exception to the general principle of comity in this particular circumstance.

To the extent that an evasive marriage is valid within the State of celebration,\textsuperscript{265} the question of its recognition in the parties’ state of residence\textsuperscript{266} depends firstly

\begin{footnotesize}
\textsuperscript{262} The Ontario marriage between Edie Windsor and Thea Spyer, then residents of New York at a time when New York did not permit same-sex marriage, is an example of an evasive marriage. However, as noted at supra note 17, it is arguable that by the time Edie and Thea married in Canada, New York would have recognized the women’s marriage from the time that they returned to New York because courts in New York had found that recognition of same-marriages contracted elsewhere was not contrary to strong public policy in New York.

\textsuperscript{263} Mark Strasser, “What if DOMA Were Repealed? The Confused and Confusing Interstate Marriage Recognition Jurisprudence” (2010) 41 Cal W Int’l LJ 249 at 251-52 referring to \textit{In re Stull’s Estate}, [1898] 39 A 16. See also Koppelman, “Public Policy”, supra note 219 at 922: “There is ample precedent for states refusing to recognize marriages of their own residents who marry elsewhere in order to avoid their home states’ marriage restrictions”.

\textsuperscript{264} See Koppelman, “Public Policy”, supra note 219 at 925: “even though many state laws now prohibit same-sex marriage, no state’s law requires this result”.

\textsuperscript{265} A number of States prohibit non-residents from marrying under their laws if the marriage would be void if contracted in the parties’ state of residence. For example, New Hampshire provides that “No marriage shall be contracted in this state by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this state in violation hereof shall be null and void”: \textit{NH Rev Stat Ann} §457:44. Similarly, between 2003 and 2008, Massachusetts did not permit out-of-state residents to take advantage of its post-\textit{Goodridge} recognition of same-sex marriages. This position was based on a law hailing from 1913 that was designed to respect interstate anti-miscegenation laws. The law was repealed without controversy effective 31 July 2008: see generally Pam Belluck & Katie Zezima, “A 1913 Law Dies to Better Serve Gay Marriages”, \textit{The New York Times}\end{footnotesize}
on whether the state has a general statutory prohibition on the recognition of evasive marriages.\textsuperscript{267} If the answer is “yes”, recognition will be precluded (unless the provision is struck down as unconstitutional) and public policy does not arise. In states without evasion laws,\textsuperscript{268} public policy is likely to be dispositive in the sense that “[s]uch marriages will be considered invalid if they violate the strong public policy of the couple’s home state”.\textsuperscript{269} This implicates statutory and constitutional provisions that define marriage in exclusively heterosexual terms (the so-called “mini-DOMAs”).\textsuperscript{270} Every State that does not permit same-sex marriage is dealt with in Section III(C)(3) infra concerning visitor marriages.

(16 July 2008). Linda Silberman has suggested that from a conflict of laws perspective, this position can be justified because a State such as New Hampshire has no interest in applying its laws to non-residents in the context of marriage: Silberman, \textit{supra} note 238 at 2199.

Whether States in which the parties are not resident should recognize an evasive marriage is dealt with in Section III(C)(3) \textit{infra} concerning visitor marriages.

In respect of evasive marriage see, e.g., \textit{In re Estate of Toutant}, 633 NW 2d 692 (2001), in which an evasive marriage celebrated in Texas was held to be invalid for the purposes of Wisconsin law by reason of a Wisconsin statute prohibiting remarriage within six months of divorce “in this state, or elsewhere”. In respect of same-sex marriage see, e.g., \textit{Wilson v Ake}, 354 F Supp 2d 1298 (MD Fla 2005), which dealt with an application by Reverend Nancy Wilson and Paula Schoenwether, residents of Florida, for recognition in Florida of their Massachusetts marriage. Florida does not have a marriage evasion statute. It does, however, statutorily prohibit the recognition of any foreign same-sex marriage “for any purpose”: \textit{Florida Statutes} §741.212. The District Court found that neither DOMA nor the Florida statute was unconstitutional and dismissed the application.

The case of \textit{Wheelock v Wheelock}, 154 A 665 at 666 (Vt 1931) suggests that an “express statutory provision” providing for the avoidance of an evasive marriage is required. See also \textit{Reifschneider v Reifschneider}, 89 NE 255 at 257 (Ill 1909): “The general rule is, that unless the statute expressly declares a marriage contracted without the necessary consent of the parents, or other requirements of the statute, to be a nullity, such statutes will be construed to be directory, only, in this respect, so that the marriage will be held valid although the disobedience of the statute may entail penalties on the licensing or officiating authorities.” A similar point was made in \textit{In re Mortenson}, 316 P 2d 1106 at1107 (Ariz 1957) where a court in Arizona held that a marriage contracted in New Mexico between first cousins was void by reason of the express declaration of invalidity of such marriages under Arizona law.

Koppelman, “Recognition”, \textit{supra} note 223 at 2152.

The number of States that have either or both statutory and constitutional prohibitions on same-sex marriage is in considerable flux. At present, 32 States still have mini-DOMAs, although trial courts in a number of those States have held the laws unconstitutional.
marriage now has a mini-\textit{DOMA}. While it is eminently arguable that those States have a strong public policy against recognizing an evasive out-of-State same-sex marriage, it is also arguable that exclusionary marriage definitions do not or ought not to apply in the absence of a clear statement concerning extra-territorial marriage. Going one step further, courts in Ohio and Kentucky have recently taken the view that recognition is required even in the face of explicit statutory injunctions against recognizing out-of-state same-sex

\footnote{271 Until recently, some States, such as New York, which did not have a statutory or constitutional prohibition on same-sex marriage, nevertheless did not recognize same-sex marriage. In those States, there was a greater likelihood that an out-of-State same-sex marriage would be recognized within the State: see, e.g., \textit{Windsor} (2d Cir), \textit{supra} note 17 at 175.}

\footnote{272 See Koppelman, "Recognition", \textit{supra} note 223 at 2153: “Discerning public policy will be easy in the forty states that have legislation on the books, enacted after 1992, declaring that same-sex marriages are void or prohibited”. Strasser has argued that in circumstances where an evasive marriage is performed with a view to returning to one’s domicile or immediately moving to another domicile in which the contracted marriage would not be permitted, “in neither case would the domicile be viewed as acting beyond its power in refusing to recognize such a marriage if one of its own important public policies would be violated by recognizing the marriage”: Strasser, \textit{supra} note 263 at 258. For early authority invalidating an out-of-state marriage on public policy grounds see \textit{Lanham v Lanham}, 117 NW 787 (Wisc 1908) in which the Wisconsin Supreme Court held invalid a marriage between Wisconsin residents that was celebrated in Michigan on the basis that one of the parties had not satisfied Wisconsin’s waiting-period following divorce. Similarly, the court in \textit{In re Stull’s Estate}, \textit{supra} note 263 observed that the marriage in question “was contracted for the express purpose of evading the positive law of the domicile, and is therefore [to] be regarded as a fraud upon the government and people of the domiciliary residence”.}

\footnote{273 In Solimine’s view, “the better argument is to require mini-DOMAs to clearly state that they apply to marriages celebrated in another jurisdiction”: Solimine, \textit{supra} note 219 at 118-19 [citation omitted]. Wolff has also pointed the “significant number of courts [that] … have adopted clear-statement rules that have interpreted declarations of invalidity or voidness to apply only to locally celebrated marriages unless the legislature has made explicit its desire to extend those declarations to valid marriages from other jurisdictions”: Wolff, \textit{supra} note 220 at 2241. In the case of \textit{In re May’s Estate}, 305 NY 486 (1953) the New York Court of Appeals was content to confer probate benefits upon a spouse who had entered into an evasive some 35 years prior to the case in question. This effluxion of time, however, combined with the incidental recognition of the marriage, means that the case is not particularly persuasive authority in favour of the validity of evasive marriages.}

\footnote{274 Recognition was granted for limited purposes in \textit{Obergefell v Wymyslo}, \textit{supra} note 126. Complete recognition of extra-territorial same-sex marriages was ordered in \textit{Henry v Himes}, \textit{supra} note 124.}

\textit{Bourke, supra} note 43.
marriages, although the conclusions in those cases rested on the constitutional infirmity of non-recognition and so cannot be said to stand for recognition when underlying statutory non-recognition is constitutionally valid (or unchallenged). 276

From a cosmopolitan perspective, the question of whether evasive marriages should be recognized in States with mini-DOMAs invites a distinction between the marriage and its incidents, or the possibility of limited purposive recognition. 277 For instance, respect for _lex loci domicillii_ might require a finding that recognition of the marriage _qua_ marriage contravenes public policy to an extent that mandates non-recognition. However, it may be the case that the parties’ interests in having certain incidents of the marriage recognized, or having the marriage recognized for a particular purpose, outweighs public policy to an extent that makes blanket non-recognition sufficiently deleterious to warrant recognition. Thus, limited and/or purposive relief based on marital status might be appropriate where the consequences of non-recognition would be disproportionately dire, for instance, the inability to dissolve a marriage without establishing residence in the jurisdiction where the marriage took place. 278

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276 In Texas, the District Court in _DeLeon, supra_ note 99 at 41 also held that “Texas’ refusal to recognize Plaintiffs’ out-of-state same-sex marriage violates due process and implicates the associational rights discussed in cases like _Griswold_ and _Zablocki_”. This decision, however, was part of a broader finding that Texas’ ban on same-sex marriage is unconstitutional.

277 Wolff, _supra_ note 220 at 2243-44. Silberman, writing when New York did not permit (or expressly exclude) same-sex marriage, observed that in this scenario, “a proper conflict-of-laws analysis indicates that the relevant inquiry is for New York – whether through its judges interpreting statutes or the legislature defining the scope of benefits – to decide whether its law conferring particular benefits extends to these parties”: Silberman, _supra_ note 238 at 2204.

278 This has been a particular problem for couples that have taken advantage of Massachusetts’ pioneering same-sex marriage laws because the State imposes a one-year residency requirement in respect of divorce applications. In a recent case in Missouri, a court ordered the dissolution of a marriage between two women that was conducted in Massachusetts. However, the case is not reported and it is not clear from media coverage of the case whether the women were residents of Missouri or Massachusetts at the time of their marriage. See further Andrew Denney, “Boone County judge grants gay couple a divorce”, _Columbia Daily Tribune_ (4 May 2014). See also _In the Matter of the Marriage of JB and HB_, No 11-0024, in the context of a migrating same-sex marriage (awaiting judgment by Texas Supreme Court).
In Ohio, the District Court recently dealt with an application for marriage recognition for the specific purpose of issuing death certificates listing a decedent’s same-sex spouse. The case, Obergefell,\textsuperscript{279} concerned three applications: James Obergefell and John Arthur sought recognition of their Maryland marriage for the purpose of having it listed on John’s impending death certificate;\textsuperscript{280} David Michener sought a death certificate that accurately reflected the marriage between him and his late husband, William Ives;\textsuperscript{281} and funeral director Robert Grunn sought a declaration of his rights and duties with respect to death certificates and same-sex spouses.\textsuperscript{282}

The Court found that “[t]he right to remain married is … properly recognized as one that is a fundamental liberty interest appropriately protected by the Due Process Clause of the United States Constitution”. Accordingly, “Ohio’s marriage recognition bans violate this fundamental right without rational justification”.\textsuperscript{283} In respect of death certificates, the Court observed that they “are important not only for the dignity of the surviving spouse and his or her family, but also have evidentiary value for rights such as receiving life insurance payouts, claiming social security survivors benefits, administering wills, and title transfers”.\textsuperscript{284} Accordingly, it was held to be appropriate to grant recognition of the plaintiffs’

\begin{footnotes}
\item[279] Obergefell, supra note 126.
\item[280] John was terminally ill at the time of the men’s marriage, which took place in Maryland inside a medically equipped plane that had flown them from Ohio to an airport in Maryland. John had passed away by the time that the Court issued its final judgment; a temporary injunction was, however, granted while he was alive.
\item[281] Messrs Michener and Ives were married in Delaware in July 2013; Mr Ives died unexpectedly in August 2013.
\item[282] Obergefell, supra note 126.
\item[283] Ibid at 12.
\item[284] Ibid at 15.
\end{footnotes}
marriages, and out-of-state same-sex marriages generally, for the purpose of issuing death certificates.\footnote{285}

Admittedly, \textit{Obergefell} is not a perfect example of the application of an incidents-based cosmopolitan approach because the Court’s order rested on the unconstitutional nature of non-recognition and thus clearly points to recognition of same-sex marriages for all purposes. Indeed, this was confirmed in the subsequent case of \textit{Henry v Himes}.\footnote{286} Nevertheless, I suggest that \textit{Obergefell} is useful in thinking through how notions of capacity and autonomy converge with public policy in the context of evasive marriages. The plaintiffs in \textit{Obergefell} were not seeking general recognition of their spousal status but instead a specific, purposive form of recognition. Setting aside for a moment the Court’s finding that non-recognition is unconstitutional, it is debatable whether the facts justified the type of recognition afforded to the plaintiffs. On one view, inclusion of spousal status on a death certificate has tremendous affective importance and relatively little significance \textit{vis-à-vis} State public policy. Conversely, it is arguable that the evidentiary nature of death certificates warns against extending recognition in this context because of the attendant impact on a variety of State laws. To the extent that purposive recognition of this amounts to a form of stealth recognition of evasive marriages \textit{qua} marriages, it may not be justified because the degree of affective harm (or destruction) is outweighed by the impact on the future operation of a state’s laws and public policy.\footnote{287}

The conclusion may be different when children are involved. In a recent case in Alabama, \textit{In re Adoption of KRS}, the non-biological mother of a child, KRS,

\footnote{285 In \textit{Henry v Himes}, \textit{supra} note 124, this ruling was extended to apply to all out-of-State marriages for all purposes.}

\footnote{286 \textit{Ibid}.}

\footnote{287 To be clear, I am in no way advocating the maintenance of mini-DOMAs. However, to the extent that such laws remain extant, an approach that seeks to balance the interests of the individuals and the States concerned must draw a line against recognition at some point; the argument is simply that \textit{Obergefell} may have crossed that line.}
sought to adopt KRS as a stepparent based on her marriage to KRS’s biological mother.\textsuperscript{288} The Court of Civil Appeals rejected the claim on the basis that the women’s Californian marriage was not recognized in Alabama. The case presents a variation on the idea of purposive recognition of an evasive marriage – the women were not seeking Alabama’s recognition of their marriage for any purpose beyond the adoption of a child with the consent of her existing legal parent. A cosmopolitan approach to the case, focusing on the potential harm to the applicant and child as well as the impact on state public policy, enables a more nuanced analysis than that engaged in by the Court. Certainly, Alabama has a clear public policy against permitting or recognizing same-sex marriage. However, it is not axiomatic that limited, purposive recognition contravenes this particular policy in light of other policy interests: Alabama’s adoption law is concerned to ensure that married couples adopt children, which in turn suggests a deeper concern with stability and child welfare at least as much as a concern to exclude same-sex couples. On this basis, the harm that could be wrought by a failure to confer legal parentage on a functional parent may not be outweighed by the State’s policy against same-sex marriage.

2. Migratory Marriages

This class of case is concerned with marriages entered into by residents of a state that recognizes same-sex marriage who subsequently move to another state that does not recognize same-sex marriage.\textsuperscript{289} For example, a case filed in Pennsylvania in September 2013 challenges that State’s non-recognition of the

\begin{footnotesize}
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\textsuperscript{288} In re Adoption of KRS, 109 So 3d 176 (Ala Ct App 2012).

\textsuperscript{289} The right of US citizens to change their state of domicile is not infringed by the refusal of a person’s new State of residence to recognize his or her interstate marriage. As Weiss notes, this right “require[s] that once a citizen of the federal union legally resides in a new state, that state must treat him equally”: Adam Weiss, “Federalism and the Gay Family: Free Movement of Same-Sex Couples in the United States and the European Union” (2008) 41 Colum JL & Soc Probs 81 at 98. The right does not, however, require one State to treat new residents in a manner equal to their former State of residence, but rather as equals of those residents of their new State of residence. See Saenz v Roe, 526 US 489 (1999) [Saenz].
\end{footnotesize}
plaintiffs’ Massachusetts marriage that was celebrated while the plaintiffs were residents of Massachusetts.\textsuperscript{290} A variation on this theme awaits judgment in Texas, where two (former) same-sex couples seek limited recognition of their Massachusetts marriages for the purpose of dissolution.\textsuperscript{291}

As a matter of law, it is much less clear than in the case of evasive marriages that states may decline recognition of a marriage that was validly performed while persons were residents of another state.\textsuperscript{292} The general consensus among scholars in this area is that the extraterritorial validity of migratory marriages should be determined by reference to the law of the parties’ residence or domicile at the time of the marriage.\textsuperscript{293} This is also the position under the \textit{Restatement (Second) of Conflict of Laws}, which provides that a marriage that was valid where celebrated is valid everywhere “unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage”.\textsuperscript{294} However, this is not to say that recognition of non-evasive migratory marriages is the norm.

The dominant approach in the US to claims for interstate recognition of a migratory same-sex marriage involves consideration of the public policy\textsuperscript{295} of the

\textsuperscript{290} \textit{Palladino v Corbett}, No 2:2013cv05641. Oral arguments were heard in May 2014.

\textsuperscript{291} \textit{In the Matter of the Marriage of JB and HB}, supra note 278. Oral argument took place before the Texas Supreme Court in November 2013.

\textsuperscript{292} As far back as 1819, the Supreme Court of Massachusetts in \textit{Inhabitants of Medway v Inhabitants of Needham}, 16 Mass 157, 159 (1819) stated: “If the marriage takes place in a state whose laws allow it, the marriage is certainly good there; and it would produce greater inconveniences than those attempted to be guarded against, if a contract of this solemn nature valid in a neighboring state, could be dissolved at the will of either of the parties, by stepping over the line of a state, which might prohibit such marriages.”

\textsuperscript{293} Silberman, supra note 238 at 2204-07; Koppelman, “Recognition”, supra note 223 at 2153-59; Wolff, supra note 220 at 2237-40.

\textsuperscript{294} \textit{Second Restatement} §283(2) (1971) [emphasis added].

\textsuperscript{295} See generally Koppelman, “Public Policy”, supra note 219. See also Silberman, supra note 238 at 2208: “a state has been free to refuse to recognize the validity or incidents of a marriage where such recognition is manifestly incompatible with its public policy”.

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state in which recognition is sought and an assessment of its interests in governing the status of the relationship. In respect of public policy, similar considerations apply as those canvassed above concerning evasive marriages, though only in relation to the sex of the parties and not the fact of evasion. On the question of the interests to which a state may legitimately have regard in determining the validity of marriages validly celebrated elsewhere, Wolff has observed:296

[S]tates may not exclude gay relationships from their territory, may not attempt to dissuade those couples from migrating to the state, and may not subject them to disfavored treatment solely on the basis of moral disapproval – such that the range of interests that a state can offer in applying forum law to a bona fide out-of-state marriage is significantly constrained.

One such legitimate interest might be, ironically, equality of treatment between residents of a state, in the sense of not allowing "preferential" treatment of former residents of states that permit same-sex marriage. This issue was explored in a different context in Saenz v Roe,297 which concerned a Californian law that purported to condition the receipt of welfare payments at (higher than national average) Californian levels (as opposed to the amount given by the former state of residence) on a minimum 12 months' residency in California. The US Supreme Court affirmed that the right to travel confers upon citizens the right to alter their state of residence without discrimination.298 However, the relevant comparator group for determining the existence of discrimination was residents of the new state,299 not the state in which the parties were formerly resident. At least formally, then, it may not be discriminatory in the relevant sense (i.e., by reason of residence in different states) to refuse recognition to an interstate same-sex

296 Wolff, supra note 220 at 2244.
297 Saenz, supra note 289.
298 Ibid at 501-02. See also Shapiro v Thompson, 394 US 618 at 629 (1969) (holding that “the purpose of inhibiting migration by needy persons into the State is constitutionally impermissible”).
299 Saenz, supra note 289 at 500.
marriage because residents in the refusing state are also precluded from entering into such a marriage. That being said, the Court in Saenz affirmed its earlier finding in Shapiro v Thompson that it is “constitutionally impermissible” for states to enact laws for the purpose of deterring interstate migration by certain classes of person. On this basis, Strasser has argued that non-recognition of interstate same-sex marriages is constitutionally suspect because it involves discrimination between putative entrants to a State and has a significant “chill[ing]” effect on the right to travel. This view appears reasonable given that infringement of the right to travel invites heightened or even strict scrutiny.

If one approaches the migratory marriage issue as a competition between competing state and individual interests, it is difficult to see how the interests of States outweigh those of individuals. I do not mean to suggest that States have no interest in regulating marital recognition. Rather, the deleterious impact of non-recognition on persons who have relied upon their marital status for a

300 See also Toomer v Mitchell, 334 US 385, 395 (1948) (holding that Article IV, s 2 “was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy”).

301 Shapiro v Thompson, supra note 298.

302 Saenz, supra note 289 at 498-99.


304 Ibid at 573.

305 In United States v Guest, 383 US 745, 757-58 (1966) the Supreme Court averred that the “constitutional right to travel from State to another … occupies a position fundamental to the concept of our Federal Union” and “freedom to travel throughout the United States has long been recognized as a basic right under the Constitution”. These statements were cited with approval in Shapiro v Thompson, supra note 298 at 630. See further Joshua A Douglas, “Is the Right to Vote Really Fundamental?” (2008) 18 Cornell J L & Pub Pol’y 143 at 148.

306 This view is supported by Mae Kuykendall, “The Converging Logic of Federalism and Equality in Same-Sex Marriage Recognition”, Legal Studies Research Paper No 10-24, American Constitution Society for Law and Policy Issue Brief (2012) at 11 (“For the cancellation of a 10-year marriage that winds up located in a strong anti-gay marriage state, the disproportion between any state interest in declaring the marriage non-existent and the impact on the couple and their children, if any, of the harsh voiding dogma is large.”).
significant period of time and ordered their affairs accordingly is likely to outweigh the interests of the state in uniform recognition. The extensive links between marriage and socioeconomic benefits in American law and culture means that ‘switching off’ a marriage in a migratory context is likely to engender administrative confusion and emotional upheaval, particularly if children are involved.\(^{307}\) In this context, the reliance the parties have placed on their marital status may well mean that non-recognition has a destructive effect on critical capabilities. Conversely, from a State perspective, conditioning the right of recognition on residence in the State in which the marriage was conducted limits the number of marriages entitled to recognition and evinces proportionate respect for public policy by not presumptively entitling evasive marriages to recognition. This approach also pays due regard to the importance, in a federal structure, of precluding avoidance of obligations upon dissolution by opportunistic inter-state changes of residence.

In States where recognition is simply anathema, courts should adopt a cosmopolitan middle ground involving recognition of certain incidents of the marriage.\(^{308}\) This approach recognizes that “[a] second state to which the couple moves does have a relevant interest in conferring particular benefits under its own law”,\(^{309}\) while also paying due regard to the potentially disproportionate effects of blanket non-recognition. Koppelman has suggested that “[a] sensible approach would be to distinguish between those incidents that can be conferred by contract … from those that can only be conferred by operation of law”; on his view, incidents capable of contractual conferral ought to be recognized because doing so in no way undercuts state public policy. An important exception to this

\(^{307}\) See Strasser, supra note 263 at 256-57.

\(^{308}\) See generally Koppelman, supra note 219 at 984-87. Once again, though, this is subject to public policy. For instance, the comments accompanying §284 of the Second Restatement note that in respect of the “incidents of foreign marriage”, a “state will not give a particular incident to a foreign marriage when to do so would be contrary to its strong local policy”: Second Restatement, § 284, cmt. c (1971).

\(^{309}\) Silberman, supra note 238 at 2206.
approach, however, concerns the rights of third parties that have arisen out of the marriage, especially in relation to children.\(^{310}\)

Koppelman’s contractual approach has the benefit of prospective clarity – a couple could safely assume, for instance, that while their marriage might not be recognized, their right to visit one another in hospital and make medical decisions on each other’s behalf is protected. However, it is also too narrow because it does not admit the subjective needs of couples that are concerned with issues not amenable to contract, such as the right to sue for wrongful death, survivors’ benefits and workers’ compensation laws. As Polikoff has pointed out, the denial of benefits of this nature can have a devastating economic impact on same-sex couples and those partners left behind after unexpected death. In this circumstance, a cosmopolitan approach directs attention towards the particular needs and circumstances of the persons in question, rather than presumptively denying benefits that arise by operation by law. Accordingly, it may well be that the inability to file a joint tax return is not sufficiently detrimental to a person’s existence to warrant recognition, while denial of recognition for the purposes of bringing a wrongful death action is disproportionate to State public policy against same-sex marriage. Perhaps the greatest limitation of the contractual approach is that it appears to ignore dissolution, which cannot be achieved by contract alone.

A recent case in Texas, *In the Matter of the Marriage of JB and HB*,\(^{311}\) squarely confronts this issue.\(^{312}\) The case concerns a same-sex couple who married in Massachusetts in 2006 while residents of that State, but who subsequently, while still married, moved to Texas. After establishing residence in Texas, the men separated. The problem for the men arises out of the clash between, on the one

\(^{310}\) Koppelman, *supra* note 223 at 2159.

\(^{311}\) *In the Matter of the Marriage of JB and HB*, *supra* note 278.

\(^{312}\) See Dahlia Lithwick & Sonja West, “Texas Hold ’Em”, *Slate* (11 September 2013).
hand, Texas’ constitutional prohibition on same-sex marriage and its statutory prohibition on the recognition of same-sex marriage and civil unions, and on the other hand, Massachusetts’ residency requirement for divorce. This situation has effectively left the men involved “wedlocked”. While it is possible for the men to have their marriage declared void ab initio by Texas, this has negative repercussions for benefits accrued during and by reason of the marriage; more fundamentally, it impugns and delegitimizes the solemnity and worth of that relationship during the period in which it lasted.

On one view, the case need not implicate questions of cross-border marital recognition because marriage and divorce are separate questions, meaning that Texas’ marriage restrictions do not affect the jurisdiction of its courts to grant a divorce to same-sex couples. Indeed, declining jurisdiction would create the perverse situation of holding the men to a marriage that the Texas legislature refuses to recognize. Texas, however, takes the position that granting a divorce necessarily involves recognition of the marriage, contrary to its

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313 Texas Constitution, art 1 §32: “Marriage in this state shall consist only of the union of one man and one woman.”

314 Tex Fam Code §6.204. In particular, subsection (c) precludes state recognition of (1) “[a] public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction” and (2) “[a] right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction”.

315 Residency requirements for divorce were upheld by the Supreme Court in Sosna, supra note 1.


317 See Brief Amici Curiae of American Civil Liberties Union of Texas and Lambda Legal Defense and Education Fund, Inc in Support of Petitioner and Urging Reversal of the Court of Appeals (13 September 2013) [ACLU Brief, JB & HB].

318 The status of Texas’ ban on same-sex marriage and non-recognition of interstate same-sex marriages is in flux. In DeLeon, supra note 99 at 2, the District Court held that “Texas’ prohibition on same-sex marriage conflicts with the United States Constitution’s guarantees of equal protection and due process”. However, the case has been appealed to the Fifth Circuit and Judge Garcia of the District Court stayed his order pending appeal.
Constitution, legislation and public policy. Courts in other States that have considered dissolution of relational forms not known to their laws have reached mixed conclusions. Massachusetts and West Virginia have dissolved Vermont civil unions. Connecticut, however, refused to dissolve a Vermont civil union and, prior to the passage of its own law permitting same-sex marriage, a Massachusetts gay marriage.

While Texas’ position is not entirely unreasonable, at least within the framework of its existing law, I would argue that it ought to grant a limited measure of recognition sufficient to confer standing on parties such as JH and JB to seek a divorce. This is particularly important following Windsor, since same-sex marriages are recognized under federal law even if a couple’s State of residence does not recognize their union. Purposive recognition to enable dissolution would thus operate as an extension of Kantian hospitality because Texas would not be inflicting harm on its residents from out of state. Indeed, US law arguably

319 See Supplemental Response Brief Addressing Recent US Supreme Court Decisions (13 July 2013)
320 See Cossman, supra note 218 at 158.
321 Salucco, supra note 218.
322 In re MG and SG, supra note 218.
323 In Gonzalez v Greene, 831 NYS 2d 856 (Sup Ct 2006) a New York court refused to recognize a Massachusetts marriage, though this result is perhaps explicable on the basis that at the time of the marriage, Massachusetts’ law (Mass Gen Laws Ann Ch 207 § 11) prohibited evasive marriages. That provision was repealed in 2008. The Court did, however, enforce a separation agreement between the parties.
324 Rosengarten v Downes, supra note 218.
325 Lane v Albanese, supra note 218.
326 Paraphrasing Knop, supra note 258 at 318-19, private international law would enable the wedlocked men to consider themselves home in Texas regardless of their loyalty to another form of (homosexual) identity; a decision of this nature would also recognize the reality of “overlapping identities” within a federal nation and “different kinds of membership in the state”. Drawing on Knop’s discussion of the treatment of enemy aliens in times of war, it could be said that in the case of the wedlocked Texas residents, a decision to refuse their divorce application would cast them into a situation of legal impotence tantamount to the asymmetrical position of enemy aliens under English law; that is, necessarily ensnared by a system in which their rights to seek a correlative remedy have been removed: ibid at 322-23. Like the odd result of an “English national
already recognizes the distinct harm caused by the inability to dissolve a marriage by classifying the right to re-marry as fundamental and affirming the “freedom not to associate.” In this context, “greater cosmopolitanism [by] the courts … relative to the legislature” in the form of limited, purposive recognition of same-sex marriage, appropriately balances the public policy of the State while paying due regard to the infringement of autonomy and affiliative capacity caused by the inability to dissolve a legal union.

3. Visitor Marriages

This class of case concerns persons who spend a limited period of time in a state that does not, as a general rule, recognize same-sex legal relationships. A typical example of problems that can arise by reason of non-recognition involves a legal parent travelling interstate with their child, a subsequent car accident, and the death of the parent. The sequence of events for the spouse or partner of the deceased parent, if that person is a non-biological, non-adoptive parent of the

living in an enemy state … find[ing] himself unable to divorce his wife in England for the duration of the conflict”, the men in Texas would be bound to one another against their will for the duration of Texas’ stance against same-sex marriage, the removal of the residency requirement in Massachusetts, or their decision to change their state of residence: *ibid* at 327.


329 Knop, *supra* note 258 at 338.

330 Pragmatic steps of this nature have a respectable lineage in English law. The most apposite example is the recognition by English courts that adherence to the prohibition on polygamous marriage does not require a dogmatic refusal to recognize as valid any marriage performed in a jurisdiction that permits polygamy: *ibid* at 337.

331 See, e.g., Koppelman, "Recognition", *supra* note 223 at 2160-62; Koppelman, "Public Policy", *supra* note 219 at 925.
child, might involve denial of that person’s hospital visitation rights, parental status, and right to sue on behalf of the deceased estate.

From a public policy perspective, the justification for non-recognition in visitor marriage cases is extremely weak. It would seem to amount to parochial disapproval rather than a legitimate government interest.\footnote{332} In the example above, the State in which the parties were and are ordinarily resident clearly has a much greater interest in the ongoing care of the child than the state in which the accident occurred. The point is even clearer concerning hospital visitation rights, where denial achieves nothing more than the expression of state-imposed animus towards gay and lesbian couples. Admittedly, the \textit{locus delicti} has an interest in any ensuing litigation involving its own residents and also by virtue of the accident occurring within its borders,\footnote{333} but this need not involve a denial of standing on the part of a same-sex spouse. As Berman points out, a cosmopolitan approach permits a hybrid rule, wherein a surviving same-sex spouse might be permitted to sue while the substantive aspects of the case are subject to \textit{lex loci delicti}.

Non-recognition of visitor marriages is also constitutionally suspect from a jurisdictional perspective. Wolff has suggested that “if a state with no significant contacts with an out-of-state marriage sought to nullify the marriage on the basis of a transient exercise of jurisdiction … that act would seem to violate the constitutional limits on legislative jurisdiction set forth in \textit{Allstate v Hague} and

\footnote{332} Koppelman, \textit{supra} note 219 at 937-44. According to Silberman, \textit{supra} note 238 at 2208-09: “Depending upon the particular right or benefit in question, the state with such a limited nexus to the parties has little interest in what the formal relationship of the couple is. As in the scenario of the ‘mobile marriage,’ the forum state should look to the laws of the couple’s state of domicile to determine their status, and if the state of domicile would regard the couple as married, it should accord the rights and benefits to the couple that it would to its own domiciliaries” [citations omitted].

\footnote{333} See, e.g., \textit{Williams v State Farm Mut Auto Ins Co}, 229 Conn 359 (Conn 1994). However, the \textit{lex loci delicti} principle is subject to a potential finding that another state has a more significant relationship to the parties in accordance with \textit{Hague, supra} note 220.
This is a forceful argument. The Supreme Court in *Hague* made it patently clear that an exercise of jurisdiction by a state in the absence of a “significant aggregation of contacts with the parties and the occurrence, creating state interests” would potentially fall foul of the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause.

A cosmopolitan approach to visitor marriages also comports with the constitutional right to travel, which derives from the privileges and immunities clauses of the *Constitution*. Section 2 of Article IV provides: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States”. Section 1 of the Fourteenth Amendments states: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” In *Saenz*, the Court adopted a distinctly Kantian tone in stressing that Article IV, § 2, confers “the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State”. Beyond this, though, the scope of the right to travel is unclear. The early anti-miscegenation case of *Ex parte Kinney* indicates that criminal sanctions arising out of marital status ought not to apply in the case of visitor marriages.

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334 Wolff, supra note 220 at 2242.
335 While the circumstances in *Hague*, supra note 220, clearly differ from the visitor marriage scenario (indeed, Minnesota was held to have jurisdiction despite the fact that the deceased and his wife were residents of Wisconsin at the time of the relevant accident), the jurisdictional principle it sets forth is not confined to its facts.
336 See *Saenz*, supra note 289; *United States v Guest*, supra note 305.
337 For a discussion of the differences between these Clauses see *Saenz*, supra note 289.
338 *Ibid* at 500-01.
339 *Ex parte Kinney*, 14 F Cas 602 (CCED Va 1879) (No 7825). The case concerned an evasive marriage entered into by an interracial couple in the District of Columbia. Kinney sought to avoid conviction under Virginia law based on the argument that a marriage valid in the District of Columbia is valid throughout the United States. The Court denied that Virginia's anti-miscegenation laws contravened the Constitution.
340 *Ibid* at 606.
That such a citizen [who contravened Virginia’s anti-miscegenation law] would have a right of transit with his wife through Virginia, and of temporary stoppage, and of carrying on any business here not requiring residence, may be conceded, because those are privileges following a citizen of the United States, as given by the section of the constitution just quoted [Art IV, § 2], and by the clause of the fourteenth amendment previously considered [§ 1]. But it is equally true that such a citizen could not, by becoming a citizen of Virginia, bring here the privilege of exercising as such, a right legally enjoyed in the District but not given here.

Immunity from prosecution based on marital status is obviously not directly analogous to current situations in which a visiting same-sex couple seeks recognition of their marriage (although a claim for spousal immunity in a criminal proceeding would bear some relation). However, the underlying principle – that citizens carry with them, across State boundaries, certain privileges by virtue of their citizenship in a federal union – has broader application. In this vein, it is pertinent to recall the Supreme Court’s statement in Milwaukee County v White Co that the Full Faith and Credit Clause was designed “to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws by the judicial proceedings of the others, and to make them integral parts of a single nation”.\footnote{Milwaukee County v White Co, 296 US 268 at 277 (1935).} While countervailing state interests in regulating the status of their own residents suggests that federalism concerns alone may be insufficient to ground blanket recognition in all circumstances,\footnote{Cf Laurence Tribe, 142 Cong Rec S5932 (daily ed June 6, 1996), cited in Ruskay-Kidd, supra note 232 at 1465: “Such purported authority to dismantle the nationally unifying shield of Article IV’s Full Faith and Credit Clause, far from protecting states’ rights, would destroy one of the Constitution’s core guarantees that the United States of America will remain a union of equal sovereigns”.

\[\text{\footnotesize \S 341}\]
4. Extraterritorial Marriage Cases

Extraterritorial cases are those “in which the parties have never lived within the state, but in which the marriages are relevant to litigation conducted there”. The argument in favor of recognition can be made on two fronts: first, the harm that would be inflicted on persons by reason of jurisdictional happenstance; second, respect for the laws of another jurisdiction (which apply to the person whose interests are at stake) and setting appropriate limits on the application of a forum’s own law. In essence, it is unjustifiably parochial to deny a person’s legal capacity or privileges simply because aspects of the person’s life do not comport with the rules of the state in which a dispute is heard. This principle is well recognized in American law.

In the anti-miscegenation era, interracial marriages were routinely recognized for inheritance purposes on the death of one spouse on the basis that state laws were not intended to have extraterritorial effect. Thus, in Succession of Caballero (Mrs Conte) v Executor, the Louisiana Supreme Court recognized a Spanish interracial marriage for probate purposes:

[The law in question] could not and did not aim to affect elsewhere the validity of a marriage like that of the parents of the plaintiff. It was strictly personal to parties living in Louisiana who had anywhere contracted the kind of marriage not permitted by its policy, and did not, as in the plaintiff's case, affect the children of such parents legitimated in other countries and not incapacitated here on other grounds. The policy of this State had no broader extent, because there was no reason why it should have. Cessante ratione cessat et ipsa lex. Accordingly we find that there was not, at the period we have reference to, nor is there now, any law of Louisiana rendering Mrs Conte incapable of inheriting in this State.

343 Koppelman, supra note 223 at 2162-63.
344 Succession of Caballero (Mrs Conte) v Executor, 24 La Ann 573 at 575 (1872); Whittington v McCaskill, 65 Fla 162 at 164 (1913).
Similarly, in *Miller v Lucks*, the Mississippi Supreme Court held that recognition of an out-of-state interracial marriage for the purpose of probating a will did “no violence to the purpose” of the anti-miscegenation law. In cases outside of the anti-miscegenation context, courts across the United States have reached similar results. The California Court of Appeals in *In re Dalip Singh Bir’s Estate* upheld the claims of two Indian wives of the deceased, who died intestate in California, to equal shares in the California holdings. Crucially, the Court observed that the public policy against polygamous marriage “would only apply if decedent had attempted to cohabit with his two wives in California. Where only the question of descent of property is involved, ‘public policy’ is not affected”.

Soon after, the New York Court of Appeals in *In re May’s Estate* recognized the Rhode Island marriage of a Jewish uncle and niece for purposes of probate, despite New York’s prohibition on marriage between such relations.

These cases are easily applied in the context of same-sex relationships. For example, if a Louisiana resident’s will provided for his or her “grandchildren”, it would be unjustifiable for Louisiana to deny the entitlement of a child whose familial link to the grandparent arose out of a same-sex marriage conducted in the State where the child and his or her parents reside. Paraphrasing the Court in *Miller*, recognition in this context does no violence to Louisiana public policy and

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345 *Miller v Lucks*, 36 So 2d 140 (Miss 1948).
346 *In re Dalip Singh Bir’s Estate*, 188 P 2d 499 (Cal Dist Ct App 3d Dist 1948).
347 *Ibid* at 499-500. Other cases involving consanguineous or “incestuous” marriages where recognition was refused can be understood as turning on the illegality of the underlying conduct: see *Catalano v Catalano*, 170 A 2d 726 at 728 (Conn 1961); *Rhodes v McAfee*, [1970] 457 SW 2d 522 at 524 (Tenn 1970).
348 *In re May’s Estate*, supra note 273.
349 The Court treated the matter as one of degree – the consanguinity of the relationship between uncle and niece was not sufficiently contrary to New York law to warrant blanket non-recognition. The scope of this limited recognition was not, however, made clear. Additionally, the case is perhaps explicable on the basis of the time between the marriage and the death of the uncle/husband, and the couple’s longstanding residence in New York.
demonstrates an appropriately cosmopolitan regard for the differing laws of sister States that permit residents to realize their capabilities and autonomy in different ways.

Conclusion

The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.

– Baker v Nelson (Wisconsin Supreme Court, 1971)\textsuperscript{350} 

[T]he principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.

– United States v Windsor (US Supreme Court, 2013)\textsuperscript{351} 

Viewed through a lens that prioritizes marriage rights for same-sex couples, the statements above exemplify the tremendous progress made by American law in its treatment of lesbians and gay men. In the early 1970s, Jack Baker and Michael McConnell pursued their attempt to compel Wisconsin to grant them a marriage license all the way to the US Supreme Court, which peremptorily dismissed their appeal for “want of substantial federal question”.\textsuperscript{352} Four decades later, the Supreme Court in Windsor found not only that same-sex marriage presented a federal question worthy of its attention, but also that federal non-recognition of otherwise valid same-sex marriages infringed the Constitution. Since Windsor, not a single State ban on same-sex marriage has survived judicial scrutiny, and it appears inevitable that the Court will soon be called upon to determine the constitutionality of State bans. Legally speaking, it remains open

\begin{footnotes}
\item[350] Baker v Nelson, 191 NW 2d 185 at 186 (1971).
\item[351] Windsor, supra note 1 at 2695.
\end{footnotes}
to the Court to disagree with the various State and district courts that have interpreted *Windsor* as pointing towards the unconstitutionality of State same-sex marriage bans. However, the majority's reasoning, particularly its emphasis on the centrality of marriage in American culture, the equal dignity of lesbians and gay men, and its focus on the experience of persons who are excluded from marriage (to say nothing of the political and social chaos that would be caused by a finding in favor of State power to ban same-sex marriage) suggests that the remaining mini-DOMAs are not long for this world.

Viewed through a lens that prioritizes capabilities, autonomy and queerness, the developments in American law pertaining to relationship recognition since *Baker v Nelson* are less tremendous. To be sure, equal marriage rights contain a powerful anti-homophobia, anti-discrimination message, and extend to many lesbians and gay men a swathe of socioeconomic rights and protections. For this reason, they are, to borrow Gayatri Spivak's jarringly effective phrase, something we "cannot not want." Yet at the same time, marriage has cemented its position as the paradigmatic relational form in American law and culture, to the detriment of equivalent developments in the law regarding non-marital intimate relationships and non-conjugal relationships of care and dependence. Civil union and domestic partnership schemes, to the extent that they continue to exist, generally operate as functional equivalents to marriage rather than true alternatives. Relationships between cohabiting couples may be recognized if an express or implied contract is shown to exist, but default recognition remains unusual (though recognition of standing to bring claims against third parties is increasing). And recognition of non-conjugal relationships has barely shifted since Kath Weston characterized queer kinship networks as "families we choose". Indeed, Weston's warning that "legal recognition ... for some aspects

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354 Eskridge, "Pluralism", *supra* note 201 at 1933, note 225 and cases cited therein.

of gay families at the expense of others … could have the effect of privileging certain forms of family while delegitimating others” has been rendered prescient: a narrow “definition of gay families … incorporat[ing] only couples and parents with children” is no longer “the most likely scenario” but rather the incipient reality, with “attempts to achieve any corresponding recognition for families of friends” largely abandoned.356

Accordingly, while American law has progressed from a position in which “gay” was considered antithetical to “family”,357 the terms of legitimation remain rigidly oriented towards “domestic, economically interdependent, long-term, coupled and monogamous intimacy”.358 This system of relationship recognition, organized as it is around the marital form, fails to respect the differing capabilities, relational needs and choices of not only lesbians and gay men in intimate relationships but also the families of choice characterized by affective, but not sexual, intimacy.359 Even for those persons who are content to “define themselves by their commitment to each other” and who “aspire to occupy the same status and dignity as that of a man and a woman in lawful marriage”,360 a system that continues to view relationship recognition as an all-or-nothing proposition cannot be considered respectful of human capacity and relational autonomy because of the coercive nature of the “choice” that is presented. The point is not that there is anything intrinsically wrong with a choice to marry but that there is something lost when lesbians and gay men no longer realize that

356        Ibid at 209.
357        Ibid at 212: “the shift from the identification of gayness with the renunciation of kinship (no family) to a correspondence between gay identity and a particular type of family (families we choose) presents a kind of collective coming-out story”.
359        See further Weston, supra note 355 at 209: “Following the logic of chosen families, an individual should be able to pick any one person as a partner – domestic or otherwise – and designate that person as the recipient of insurance or other employment benefits, even when that choice entails crossing household boundaries.”
360        Windsor, supra note 1 at 2689.
this is, or ought to be, a choice; when “the state’s deep involvement in shaping our ideas of human intimacy and connection”\textsuperscript{361} are so successful that, per Butler, we can no longer see the alternatives, let alone grieve their loss.\textsuperscript{362} In a post-marriage equality world, attention must revert to destabilizing the centrality of marriage within American law and culture through the de-linking of socioeconomic benefits from marriage, and the provision of alternative forms of relationship recognition that respect the divergent relational preferences of a heterogeneous queer population.

\textsuperscript{361} Brown & Halley, \textit{supra} note 357 at 17.
\textsuperscript{362} Butler, \textit{supra} note 76 at 255.
PART 3
RECOGNITION OF RELATIONSHIPS BETWEEN GAY PARENTS AND CHILDREN IN THE UNITED STATES

Introduction

This Part considers the recognition of parent-child relationships involving lesbians and gay men along four axes: adoption; surrogacy; assisted reproduction involving artificial insemination and in vitro fertilization (IVF); and multi-parenting arrangements. Each section provides an overview of the current state of the law and considers the extent to which it comports with principles of capability maximization, autonomy and queer ethics. Custody issues for lesbians and gay men arising out of opposite-sex relationships are not specifically considered except where those scenarios touch on adoption, assisted reproduction or multi-parenting.¹

American law governing parent-child relationships is primarily state-based.² The federal laws that do exist in this area augment certain areas of State law pertaining to international adoption, interstate recognition of the laws and judgments of sister States, and immigration issues in international surrogacy and adoption. Accordingly, this Part does not separately consider State and federal law but rather consider the application of each in respect of particular issues and circumstances. Owing to the diversity between State laws concerning parent-child relationships, particular attention is paid to the laws of California because

¹ For a comprehensive overview of this area of the law see Courtney G Joslin & Shannon P Minter, Lesbian, Gay, Bisexual and Transgender Family Law (West, 2011) ch 1.
² This is a function of the Tenth Amendment of the United States Constitution, which reserves to the States powers not delegated to the federal government or prohibited by it to the States: see, e.g., Steven H Snyder, “United States of America” in Katarina Trimmings and Paul Beaumont (eds), International Surrogacy Arrangements: Legal Regulation at the International Level (Oxford: Hart, 2013) 387 at 388.
they are in many ways the most progressive in the country; however, attention is also drawn to the laws of other States to elucidate pertinent differences in approach.

I. Adoption

The analysis in this section proceeds along categorical lines for the sake of conceptual and jurisdictional clarity: joint or single party adoption of children where there is no pre-existing relationship between (prospective) parent(s) and child(ren); stepparent or second-parent adoption; interstate adoption; and international adoption by lesbians and gay men.

A. Single and Joint Party Adoption

In the United States, adoptions may be arranged either through a licensed agency (public or private) or via an intermediary, such as a lawyer (direct placement adoption). Public agency adoption involves children who have become wards of the state; often those children will have been in foster care prior to adoption. Fees for public adoption are generally minimal to non-existent. Private agency adoption may be for-profit or non-profit, open or closed. The traditional closed adoption involves a complete severing of any and all relationships and legal ties between the biological parents and the child. Open

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5 Child Welfare Information Gateway, Adoption Options (United States Department of Health and Human Services, Children's Bureau, 2010) at 3 [Child Welfare Information Gateway, Adoption Options].

6 See generally Joslin & Minter, supra note 1 at § 2:3 (83-84).

7 Deborah H Siegel & Susan Livingston Smith, Openness in Adoption: From Secrecy and Stigma to Knowledge and Openness, Evan B Donaldson Adoption Institute (2012) at 10 [Siegel & Smith, Openness in Adoption]. While it is generally considered “traditional”,
adoption, which has dramatically increased in popularity in the past three
decades, also involves a severing of the legal parentage relationship between
parents and children, but not necessarily of the relationship altogether;\(^8\) biological
parents have varying degrees of contact with children and in certain States may
even have enforceable contractual rights to contact and visitation.\(^9\) Generally, in
an open adoption, biological parents choose the adoptive parents for their
child.\(^10\) The fees for private adoption, and in particular open adoption, vary, but
tend to be much higher than the fees for public adoption.\(^11\) The benefits for
adoptive parents may include: a belief in the psychological benefits for all parties,
particularly adopted children;\(^12\) an increased chance of an infant placement;\(^13\)
and, for some parents, a physical resemblance between themselves and the
child.\(^14\)

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\(^8\) See generally *ibid*; Deborah H Siegel, “Open Adoption of Infants: Adoptive Parents’
Perceptions of Advantages and Disadvantages” (1993) 38:1 Social Work 15 [Siegel,
"Perceptions"]; Abbie E Goldberg, “Lesbian, Gay, and Heterosexual Couples in Open
Adoption Arrangements: A Qualitative Study” (2011) 73 Journal of Marriage and Family
502. For a Canadian perspective see Anne Marie McLaughlin et al, “Negotiating
Openness: A Qualitative Study of Adoptive Parents’ Experience of Contact in Open
Adoption” (2014) 30:1 CSWR 5.

\(^9\) Child Welfare Information Gateway, *Postadoption Contact Agreements Between Birth
and Adoptive Parents* (US Department of Health and Human Services, Children’s
Bureau, 2011) [Child Welfare Information Gateway, *Contact Agreements*].

\(^10\) See Siegel & Smith, *Openness in Adoption, supra* note 7 at 7. For an autobiographical
account of one of the first American open adoptions involving a gay male couple see Dan


\(^12\) Goldberg, *supra* note 8 at 507-08; Siegel, "Perceptions", *supra* note 8 at 18.

\(^13\) Goldberg, *supra* note 8 at 509.

\(^14\) Goodwin, *supra* note 4 at 66-67 referring to the difference in “fees” for white and black
children adopted through private agencies.
There is no legal restriction on lesbians or gay men adopting as individuals in the United States. Florida was the last bastion of intolerance in this respect, until the Florida Court of Appeals in 2010 struck down the State’s ban on adoption by “homosexuals.” The ability of same-sex couples to adopt does, however, vary by jurisdiction. Twenty-one States and the District of Columbia expressly permit joint adoption by same-sex couples. Mississippi statutorily prohibits adoption by “couples of the same gender.” Utah prohibits adoption by persons who are cohabiting with a person to whom they are not married, and case law in Michigan suggests that joint adoption by unmarried couples is not permitted in that State. Presumably, if federal courts of appeal uphold the findings in Kitchen v Herbert and DeBoer v Snyder that Utah and Michigan’s respective bans on same-sex marriage are unconstitutional, married same-sex couples will be able to jointly adopt in both of those States. Joint adoption by unmarried

15 Fla Stat Ann (2009) §63.042(3): “No person eligible to adopt under this statute may adopt that person is a homosexual.”

16 In re Matter of Adoption of XXG and NRG, 45 So 3d 79 (Fla Dist Ct App 3d Dist 2010). The first appellate decision to find that sexual orientation did not preclude an openly gay man from adopting was In re Adoption of Charles B, 552 NE 2d 884 (Ohio 1990); see further Carlos A Ball, The Right to be Parents (New York: NYU Press, 2012) at 151-55.


18 MS Code §93-17-3(5) (2013).


21 Kitchen v Herbert, No 2:13-CV-217 (D Utah, 20 December 2013) [Kitchen]; DeBoer v Snyder, [2014] No 12-CV-10285 [DeBoer]. Some same-sex couples who married in the period between the District Court’s judgment in Kitchen and the Court of Appeals’ stay order have lodged applications to enable the non-biological parent to adopt their child, since they now fall within the letter of Utah’s adoption law. The Utah Supreme Court has since stayed the orders of certain District Court judges that ordered the issuance of revised birth certificates, pending its ruling on the marriage equality issue. See Utah
couples is also prohibited in Louisiana and North Carolina; neither of those States permits same-sex marriage. Texas discriminates in a less direct manner by limiting the persons who can be listed on a supplementary birth certificate. In the remaining States, it is uncertain whether joint adoption by same-sex couples is permitted.

State law is not the only hurdle for lesbian and gay prospective adoptive parents. A recent survey of 309 American adoption agencies (277 private) found that only 60 percent of respondents reported accepting applications from lesbian and gay applicants, while 25 percent rejected applicants on the basis of their sexual orientation. Moreover, the agencies that were willing to work with lesbian and gay applicants made minimal efforts to make their inclusive stance known. On the other hand, research into the experiences of lesbian and gay applicants with the American adoption system found that “[w]hether voluntarily sharing information about one’s sexual orientation or providing it in response to direct questions, over
three-quarters of parents reported receiving a positive and accepting response from professionals".26

Restrictions on the ability of same-sex couples to adopt children constitute invidious discrimination based on irrational prejudice.27 More pertinently for present purposes, such laws also impede the exercise by lesbians and gay men of critical capabilities related to affiliation, reason and emotion, and constitute a denial of autonomy. Children are potentially denied the opportunity to fulfill their capacities by restricting the available pool of families into which they may be placed, thus potentially leading to extended periods of disruptive foster or state care. Adoption restrictions may also be viewed as a form of heterosexist preferencing designed to reinforce the primacy of opposite-sex dyadic coupling.

California is an example of a State with strong protections for lesbians and gay men seeking to adopt.28 Discrimination on the basis of actual or perceived sexual orientation and gender identity is prohibited in “any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or that receives any financial assistance from the

26 Brodzinsky, supra note 25 at 37. Although, “the low rate of overt resistance or rejection is a function of the parents generally being selective in choosing the professionals with whom they worked”: ibid at 36. The fact that the vast majority of respondents were white, college-educated, and affluent may also have influenced the response that they received: ibid at 18-19.

27 The literature on the parenting capacity of lesbians and gay men is voluminous and clearly establishes that there is no appreciable difference in child outcomes based on the sexual orientation of a child’s parent(s). For an in-depth judicial discussion of this literature, including studies that purport to show lesser outcomes for children raised by same-sex couples, see Brief of Amicus Curiae American Sociological Association in Support of Respondent Kristin M Perry and Respondent Edith Schlain Windsor (2013). See also DeBoer, supra note 21 at 30.

28 Prospective adoptive parents must be at least ten years older than the child in question, unless the child is a stepchild of the prospective parent: Cal Fam Code §8601(a). There is no residency requirement for adoption in California, though there are venue requirements for filing of petitions: §8802. Now that same-sex marriage is legal in California, §8603 of the Cal Fam Code is relevant to same-sex couples because it provides that a “married person, not lawfully separated from the person’s spouse, may not adopt a child without the consent of the spouse, provided that the spouse is capable of giving that consent”. By reason of §297.5(d), the provision also applies to registered domestic partners.
state” and foster family agencies must accept applications without regard to sexual orientation of gender identity. In respect of private adoption and foster agencies, §51 of the Civil Code prohibits discrimination on the ground of sexual orientation by businesses. Furthermore, §89317 of the California Code of Regulations provides:

Any adult shall be permitted to apply for a license or approval regardless of age, sex, race, religion, color, political affiliation, national origin, disability, marital status, actual or perceived sexual orientation, gender identity, HIV status, or ancestry.

This being said, anti-discrimination laws do not apply to the selection of parents in cases of independent adoption. While private agencies may not discriminate on the basis of sexual preference or identity, relinquishing parents who are involved in the selection of their child’s adoptive parents may exercise their own sub silentio forms of discrimination. However, State anti-discrimination laws come into play once the adoption is registered with the State, and the suitability of the adoptive parents is also subject to state approval.

Despite California’s strong anti-discrimination laws, there have been instances of institutional discrimination against prospective lesbian and gay adoptive or foster parents. In 2003, a lesbian couple sued the Olive Crest Foster Family and Adoption Agency based on the suspension of their fostering application based on the agency’s preference for “nuclear families”. The State of California

29 Cal Govt Code §11135(a),(f). The non-discrimination principle extends to contractors, grantees and local agencies: §11136, §11137.
30 Cal Code Regs, Title 22, §88030(a).
31 These agencies may also place children who are wards of the state, though generally they place children who have been voluntarily surrendered by their birth parents: Child Welfare Information Gateway, Adoption Options, supra note 5.
32 Cal Code Regs, Title 22, §89317.
33 See, e.g., Joslin & Minter, supra note 1 at 85.
34 Cal Fam Code §8807.
subsequently filed its own complaint against the agency.\textsuperscript{35} The women claimed violations of the \textit{California Civil Code}, the \textit{Regulations}, and violations of their rights to equal protection and due process under the \textit{US Constitution}.\textsuperscript{36} The case was dropped after the agency agreed to cease its discriminatory practices.\textsuperscript{37} Similarly, a case brought by a gay male couple against a national adoption advertising website was settled in 2007 after it was certified to proceed to trial,\textsuperscript{38} though rather than amend its discriminatory practices the company elected to withdraw from the Californian market.\textsuperscript{39}

\textbf{B. Stepparent and Second Parent Adoption}

Stepparent and second parent adoption arises in circumstances where the partner of a child’s biological parent seeks to become a legal parent in addition to the existing legal parent (or, in some States, the legal parents:\textsuperscript{40}) that is, the adoption does not involve a termination of the existing rights of the legal parent(s). The difference between stepparent and second parent adoption hinges

\begin{footnotesize}
\textsuperscript{35} American Civil Liberties Union, \textit{ACLU and NCLR Halt Legal Action After Promise from California Adoption Agency that It Won’t Discriminate}, online at: <https://www.aclu.org/lgbt-rights-hiv-aids/aclu-and-nclr-halt-legal-action-after-promise-california-adoption-agency-it-won>.

\textsuperscript{36} See \textit{Rose v Olive Crest Family Care and Adoption Agency}, Complaint, online: <https://www.aclu.org/files/FilesPDFs/olivecrest.pdf>.

\textsuperscript{37} American Civil Liberties Union, \textit{supra} note 35.

\textsuperscript{38} \textit{Butler v Adoption Media, LLC}, 486 F Supp 2d 1022 (ND Cal 2007). If the case had gone ahead, Californian law would have applied because applying the law of Arizona (where Adoption Media was registered) would have failed to remedy a violation of California’s \textit{Unruh Civil Rights Act}, whereas applying California law involved no significant impairment of Arizona’s interests.


\textsuperscript{40} See \textit{infra} Section IV concerning multi-parenting arrangements.
\end{footnotesize}
on the relationship status of the adults who are, and who are seeking to become, a child’s legal parents. Adoption of a child by the spouse (including registered partner) of his or her legal parent is classed as stepparent adoption. In contrast, adoption of a child by an unregistered (conjugal) partner of a legal parent is classed as a second parent adoption.

In the District of Columbia and the (presently) 19 States that permit same-sex marriage, as well as the few States that permit civil unions or domestic partnerships, the spouses or registered partners of legal parents are able to access stepparent adoption mechanisms. Approval of an adoption is not guaranteed, and the process for adoption may depend on the relationship status of the biological parent and the prospective adoptive parent at the time of the child’s birth. For example, a bill recently passed by the California Assembly will (if enacted) insert a new §9000.5 into the Family Code so that “where one of the spouses or partners gave birth to the child during the marriage or domestic partnership, including a registered domestic partnership or civil union from another jurisdiction”, home investigations (and associated expenses) and court hearings are no longer required. In contrast, adoption by a spouse or partner whose relationship with a child’s parent developed after the child’s birth is subject to investigation and approval by a “probation officer, qualified court investigator, licensed clinical social worker, licensed marriage family therapist, private licensed adoption agency, or, … the county welfare department in the county in which the adoption proceeding is pending”. A home study may be required if

41 See, e.g., Cal Fam Code §§8548, defining stepparent adoption as "an adoption of a child by a stepparent where one birth parent retains custody and control of the child".

42 For an overview of the early cases in which second parent adoption was granted see Ball, supra note 16 at 162-69. See also Nancy D Polikoff, Beyond (Straight and Gay) Marriage (Boston: Beacon Press, 2008) at 86-87.

43 See supra Part 2, Section II.

44 Cal Fam Code §9001(a).
ordered by the court;\textsuperscript{45} in that instance, the prospective adoptive parent is liable for expenses up to seven hundred dollars.\textsuperscript{46}

It is appropriate that a non-biological parent who has been involved in his or her child’s life from birth is not subject to invasive regimes to establish a legal relationship. It is also reasonable to impose a higher standard on prospective adoptive parents who have not been a parent to a child since his or her birth. It is not appropriate, however, to exclude unmarried and unregistered partners from the same regime that will apply to married and registered couples; while this move obviates the need for evidentiary inquiries into the parties’ relationship at the time of birth, it is outweighed by coercive nature of linking parental status to relationship status.

The link in California between relationship recognition and the requirements for a person to adopt his or her partner’s child casts attention on the fact that marriage equality and equivalent forms of alternative recognition for same-sex couples are important not only for the individuals in a relationship but also their children and dependants. This is not to say that marriage or formal relationship recognition should be the gateway to recognizing a legal relationship between a child and his or her caregiver; the point does, however, demonstrate the urgency of reform in many States and a partial reason for why so many of the litigants in marriage equality cases are couples with children. For instance, in a recent case in Alabama, the Court of Civil Appeals rejected a claim by the female partner of a child’s biological mother to adopt the child as a stepparent, on the basis that the women were married in California.\textsuperscript{47} The Court found that Alabama does not

\textsuperscript{45} \textit{Ibid.} §9001(c).

\textsuperscript{46} \textit{Ibid.} §9002.

\textsuperscript{47} \textit{In re Adoption of KRS}, 109 So 3d 176 (Ala Ct App 2012). A previous attempt by the woman to adopt the child prior to the marriage was rejected: "Alabama court rules woman cannot adopt same-sex partner’s child",\textit{ Jurist} (13 October 2012), online: <http://jurist.org/paperchase/2012/10/alabama-court-rules-woman-cannot-adopt-same-sex-partners-child.php#.U1LDOOZdXJg>.  

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recognize out-of-state same-sex marriages and therefore that the claim for adoption without termination of the existing parent’s rights failed. Decisions of this sort are fundamentally at odds with the best of the interests of children and have the potential to result in a child’s diminished capacity for development if that child is removed from a parent who is not legally recognized, for example, following the death of a legal parent. To the extent that adoption laws and decisions are based on the (flawed) notion that children perform best in households with opposite-sex married parents, they comprehensively fail to achieve their objective: gay and lesbian legal parents will not simply marry an opposite-sex partner in response to non-recognition by the state of a same-sex partner’s parental status. Instead, children are left in a position of reduced security and potentially liable to forms of care that are manifestly against their best interests and the full development of their capabilities in the event that their legal parent is rendered unable to care for them.

For unmarried and unregistered same-sex couples, or for those couples that reside in States that do not recognize their marriage or partnership, second parent adoption is a potential alternative to stepparent adoption. Lawyers attempting to protect the rights of non-biological lesbian mothers pioneered second parent adoption in the 1980s. Aside from prejudice towards same-sex couples, the principal obstacle to second parent adoptions was, and in some jurisdictions remains, statutory language that appears to require the termination

48 For examples of the protection afforded by second parent adoption in the event of one parent’s death see Polikoff, supra note 42 at 85; Ball, supra note 16 at 162-66.

49 For instance, during the period in which “homosexuals” were prohibited from adopting in Florida, the State’s Department of Children and Family was found to have “lost” track of some 1800 children in foster care: see Ball, supra note 16 at 174-75. While this figure speaks more to the absurdity of precluding lesbians and gay men from adopting children in the public system, it also points to the potentially disastrous consequences for children of being placed in the public care system, and hence the damage to children of being denied a legal relationship with non-biological functional parents.

50 The first Californian case granting a second parent adoption appears to be In re Adoption Petition of D.J.L, No A-28,345 (Super Ct San Diego County, 1988), in which a second parent adoption was granted to a child’s former stepfather after he and the child’s mother divorced.
of the rights of an existing legal parent. In an early case in the District of Columbia, Nancy Polikoff successfully argued that the District's statute, which included a provision that stated, “all rights and duties ... between the adoptee [and] his natural parents ... are cut off”, was to be understood as discretionary rather than mandatory, and ought not to be applied in cases where the same family unit intended to care for the child in question.\footnote{In Adoption of Minor T, No A-269-90 (Super Ct DC, 30 August 1991) in Ball, supra note 16 at 162-66.}

The DC Court of Appeals affirmed this position in a subsequent case involving two men.\footnote{In re MMD and BHM, 662 A 2d 837 (DC Ct App, 1995). In this case, the men became joint caregivers to the child from birth. One of the men first adopted the child; his partner then sought to do the same. The application was denied at first instance on the basis that, contrary to In re Adoption of Minor T, supra note 51, the law in the District of Columbia did not permit second parent adoption. On appeal, the Fourth Circuit overruled the District Court and permitted the adoption without termination of the first father's rights.}

In Sharon S v Superior Court,\footnote{Sharon S v Superior Court, 31 Cal 4th 417 (2003) [Sharon S]. The Court made the important point that second parent adoptions do not only occur when there is a pre-existing relationship between the adoptive parent and the child; they may also “involve children placed directly by their birth parents or private agencies with two unmarried adoptive parents”: at 441.} the Supreme Court of California observed that “[s]econd parent adoption can secure the salutary incidents of legally recognized parentage for a child of a nonbiological parent who otherwise must remain a legal stranger”,\footnote{Ibid.} thereby obviating the “variety of ‘costs’ if a legal relationship with a second parent is not established – costs that can be both financial and emotional”.\footnote{Ibid at 437 citing Emily Doskow, “The Second Parent Trap: Parenting for Same-Sex Couples in a Brave New World” (1999) 20 J Juv L 1 at 9.}

In the Court’s view:

\footnote{Sharon S, supra note 53 at 438.}

Our explicitly recognizing their validity will prevent uncertainty, conflict, and protracted litigation in this area, all of which plainly are harmful to children caught in the middle.\footnote{See generally Adoption of Michael H, 10 Cal 4th 1043, 1072 (1995).} Unmarried couples who have brought a child into the world with the expectation that they will raise it together, and
who have jointly petitioned for adoption, should be on notice that, if they separate, the same rules concerning custody and visitation as apply to all other parents will apply to them.

Critically, the Court also affirmed that second parent adoption does not require termination of the rights of the birth parent.\footnote{58}{Sharon S, supra note 53 at 427-30. The highest courts in New York, Vermont and Massachusetts have reached the same conclusion: Adoption of Tammy, 416 Mass 205 (Mass 1993); Matter of Jacob, 86 NY 2d 651 (1995); Adoption of BLVB and ELVB, 160 Vt 368 (1993).}

Second parent adoption has been approved by State Supreme Courts in California,\footnote{59}{Sharon S, supra note 53.} Maine,\footnote{60}{In re Adoption of MA, 2007 ME 123 (2007).} Massachusetts,\footnote{61}{Adoption of Tammy, supra note 58.} New York,\footnote{62}{Matter of Jacob, supra note 58.} Pennsylvania\footnote{63}{In re Adoption of RBF, 569 Pa 269 (2002).} and Vermont.\footnote{64}{Adoption of BLVB, supra note 58. See also 15A Vt Stat Ann §1-102(b).} Courts of Appeal have approved the procedure in the District of Columbia,\footnote{65}{In re Adoption of KSP, 804 NE 2d 1253 (Ind Ct App 2004); In re Adoption of MMGC, [2003] 785 NE 2d 267 (Ind Ct App 2003).} Illinois,\footnote{66}{Petition of KM, 274 Ill App 3d 189 (1st Dist 1995).} and Indiana.\footnote{67}{In re Adoption of KSP, supra note 65.} The National Center for Lesbian Rights reports that trial courts have approved second parent adoptions in Alaska, Delaware, Georgia, Hawaii, Iowa, Louisiana, Maryland, Minnesota, Oregon, Rhode Island, Texas, Washington and West Virginia.\footnote{68}{National Center for Lesbian Rights, Adoption by LGBT Parents (2013), online: <http://www.nclrights.org/wp-content/uploads/2013/07/2PA_state_list.pdf>. See also Polikoff, supra note 42 at 86: “Trial courts in counties in more than a dozen other states also issue second-parent adoption orders".} In addition, Colorado,\footnote{69}{Colo Rev Stat Ann §§19-5-203(1), 19-5-208(5), 19-5-210(1.5), 19-5-211(1.5).} Connecticut\footnote{70}{Conn Gen Stat Ann §45a-724(a)(3).} and Vermont\footnote{71}{Conn Gen Stat Ann §45a-724(a)(3).} expressly permit second parent adoption by statute.\footnote{72}{Conn Gen Stat Ann §45a-724(a)(3).}
In contrast, the Supreme Courts of Nebraska,\textsuperscript{73} North Carolina\textsuperscript{74} and Wisconsin,\textsuperscript{75} and Courts of Appeal in Kansas,\textsuperscript{76} Kentucky\textsuperscript{77} and Ohio\textsuperscript{78} have each ruled that their respective States do not permit second parent adoption. The cases in those States have generally taken the position that their State’s adoption laws do not permit a party to adopt a child without the termination of all existing parental rights. The restrictions in Utah,\textsuperscript{79} and Mississippi\textsuperscript{80} concerning adoption by same-sex couples also mean that second parent adoptions in those States are not possible, though married couples in Utah may soon fall within the scope of that State’s adoption law.

From a capabilities and autonomy perspective, second parent adoption unquestionably ought to be available to same-sex (and opposite-sex) couples (irrespective of the existence of a sexual relationship) because denying a child and his or her functional parent the protection of and responsibilities imposed by legal recognition of their relationship has the potential to impair or remove the ability of an adult to continue caring for a child in the event that a legal parent is

\begin{footnotesize}
\begin{enumerate}

\item[71] 15A Vt Stat Ann §1-102(b).
\item[72] It should also be noted that in States that permit same-sex marriage or registered partnerships, same-sex couples ought to be able to make use of stepparent adoption.\textit{In re Adoption of Luke}, 640 NW 2d 374 (Neb 2002).
\item[73] \textit{Boseman v Jarrell}, 704 SE 2d 494 (NC 2010). The Court observed that a non-biological parent who has raised a child with the consent and encouragement of a legal parent may be able to seek custody.\textit{In re Interest of Angel Lace M}, 184 Wis 2d 492 (1994).
\item[74] \textit{Adoption of IM}, 48 Kan App 2d 343 (2012).
\item[75] \textit{SJLS v TLS}, 265 SW 3d 804 (2008).
\item[76] \textit{In re Adoption of Doe}, 719 NE 2d 1071 (1998).
\item[77] \textit{Utah Code} §78B-6-117(3)(b) (2013) (prohibiting adoption by unmarried couples); §§78A-6-307(19), 78B-6-117(4) (giving preference to married couples over single prospective parents).
\item[78] \textit{MS Code Ann} §93-17-3(5) (2013) (prohibiting adoption by persons of the same gender).
\end{enumerate}
\end{footnotesize}
unable to do so.\textsuperscript{81} Such recognition also ensures the maintenance of the parent-child relationship in the event of a breakdown in the parents' relationship. As a matter of basic logic, it is also nonsensical to make the legal recognition of one parent-child relationship \textit{conditional} on the termination of another legal parent-child relationship because the enjoyment of one relationship does not depend on the absence of another such relationship.\textsuperscript{82}

\textbf{C. Interstate Adoption}

All States and the District of Columbia have enacted into their respective laws the Interstate Compact on the Placement of Children (ICPC),\textsuperscript{83} which provides a framework for the sending and receiving of children between American States. Critically, both sending and receiving ICPC offices must approve an adoption in accordance with the law their home State; accordingly, it may be difficult or not possible to conduct an interstate adoption when one State or both States do not permit (or approve of\textsuperscript{84}) adoption by persons in same-sex relationships.\textsuperscript{85} In such instances, marriage may actually impede prospective parents' chances of adopting from certain States because it will not be possible to proceed by way of a single-party interstate adoption (followed by a second parent or stepparent adoption in the parties' home State) without concealing one’s relationship status.

Jurisdiction and choice of law are significant issues in interstate adoptions. The ICPC provides that the sending agency retains jurisdiction over the child, even

\begin{itemize}
  \item \textsuperscript{81} See further Ball, \textit{supra} note 16 at 211-12.
  \item \textsuperscript{82} This is not to say that termination of an existing legal relationship is never appropriate; it almost certainly is in cases where the child will have little or no continuing relationship with his or her biological parents.
  \item \textsuperscript{83} Joslin & Minter, \textit{supra} note 1 at §2.5. For instance, the ICPC is incorporated into Californian law in §§7900 \textit{et seq} of the \textit{Cal Fam Code}.
  \item \textsuperscript{84} \textit{Ibid} referring to Ross Randall, "Adoption Options/Budgets", 38177 NBI-CLE 63 (2007) ("the Virginia ICPC office 'has a problem even with out-of-state adoptions by same-sex couples'").
  \item \textsuperscript{85} \textit{Ibid}.
\end{itemize}
when the child is outside the boundaries of the sending State, until such time as the child is adopted, reaches majority, becomes self-supporting or is discharged.\textsuperscript{86} Correlatively, receiving States attain jurisdiction over children upon the satisfaction of one of those events. What this does not resolve is which State has jurisdiction to grant the actual adoption.\textsuperscript{87} Specifically, does the sending or receiving State have subject matter jurisdiction to make an adoption decree?

The \textit{Restatement (Second) Conflict of Laws} provides that it is permissible for courts in either the sending or receiving State to exercise jurisdiction so long as they are possessed of subject matter jurisdiction over the adoption and have personal jurisdiction over "the adoptive parent and either the adopted child or the person having legal custody of the child".\textsuperscript{88} Jurisdictional questions are made easier in States such as California, where statutory guidance is provided. Section 9210(a)(2) of the \textit{California Family Code} states that a Californian court has jurisdiction over a proceeding for the adoption of a minor if "[i]mmediately before commencement of the proceeding, the prospective adoptive parent lived in this state for at least six consecutive months, excluding periods of temporary absence, and there is available in this state substantial evidence concerning the

\textsuperscript{86} \textit{Interstate Compact on the Placement of Children}, art 5(a) [ICPC]. A 2006 re-write of the ICPC clarifies that in independent and private adoptions, the substantive law of the state in which the adoption will be finalized is to apply: art IV. However, the 2006 ICPC does not come into effect until 35 States have enacted it. At present, only 11 States have enacted the revised version. See Association of Administrators of the ICPC, \textit{New ICPC}, online: <http://www.aphsa.org/content/AAICPC/en/NewICPC.html>. For criticism of the revised ICPC see, e.g., Vivek Sankaran, "Perpetuating the Impernanence of Foster Children: A Critical Analysis of Efforts to Reform the Interstate Compact on the Placement of Children" (2006) 40 Family Law Quarterly 435; Robert G Spector & Cara N Rodriguez, "Jurisdiction Over Children in Interstate Placement: the UCCJEA, Not the ICPC, Is the Answer" (2007) 41 Family Law Quarterly 145.

\textsuperscript{87} The \textit{Uniform Adoption Act 1994} attempts to resolve this lacuna by providing the circumstances in which the courts of a State have jurisdiction in an adoption proceeding: article 3-101. However, only Vermont has enacted the \textit{Uniform Adoption Act 1994}: Vt Stat Ann §15A-1-101 et seq (2013). See further Joan Heifetz Hollinger, 'The Uniform Adoption Act' (1995) 5(3) \textit{The Future of Children} 205.

\textsuperscript{88} \textit{Restatement (Second) Conflict of Laws} §78 (1971) [Second Restatement]. See also \textit{In re Baby Girl P}, 802 A 2d 1192 (NH 2002) (finding that New Hampshire courts had jurisdiction to determine the validity of an adoption by residents of New Hampshire of a child born in Arizona).
minor’s present or future care”. Proceedings may not be commenced if custody or adoption proceedings are on foot in the court of another state exercising substantially similar jurisdiction, unless that proceeding is stayed.\(^89\) Assuming, then, that sufficient information concerning the child is furnished by the sending state, Californian courts are empowered to grant adoptions of children from another state where the prospective residents have resided there for at least six months.\(^90\)

When jurisdiction is established, it is generally the case that “[a] court applies its own local law in determining whether to grant an adoption.”\(^91\) This position is consistent with the ICPC, which requires sending agencies to “comply with each and every requirement … [of] the applicable laws of the receiving state governing the placement of children”.\(^92\)

Once an adoption is finalized in the United States or overseas in a manner that comports with US law,\(^93\) there should be little question\(^94\) about the binding nature

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\(^89\) Section 9210(b). Subsection (c) provides exclusive circumstances in which a Californian court may exercise jurisdiction when a court of another state has issued a decree or order concerning the custody of the minor in question.

\(^90\) The *Uniform Child Custody Jurisdiction and Enforcement Act* does not apply to adoption proceedings: s 103.

\(^91\) *Second Restatement* §289. See further Ralph U Whitten, “Choice of Law, Jurisdiction, and Judgment Issues in Interstate Adoption Cases” (2003) 31 Cap U L Rev 803 quoting Luther L McDougal III et al, *American Conflicts Law* (5th ed, 2001) at §223, 786: “[t]he substantive law applied in adoption cases has always been the law of the forum, as in divorce cases”.


\(^93\) See *infra* Section I(D).

of the adoption. This is because, as a judicial order,\textsuperscript{95} it is entitled to interstate recognition under the Full Faith and Credit Clause pursuant to the Supreme Court’s statement in \textit{Baker v Gen Motors Corp}\textsuperscript{96} that the obligation to recognize interstate judgments is “exact” (subject to compliance with associated due process\textsuperscript{97} and jurisdictional\textsuperscript{98} requirements). However, the scope of the “recognition” obligation is subject to starkly divergent federal court authority, enabled in large part by the distinction drawn by the Supreme Court between the laws of a State and the judgments of its courts.\textsuperscript{99}

In 2004, Oklahoma passed a law that provided “this state, any of its agencies, or any court of this state shall not recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction”.\textsuperscript{100}

\footnotesize
\begin{itemize}
  \item See, e.g., \textit{Cal Fam Code} §8612(c): “If satisfied that the interest of the child will be promoted by the adoption, the court may make and enter an order of adoption of the child by the prospective adoptive parent or parents.”
  \item \textit{General Motors}, \textit{supra} note 94 at 233: “Regarding judgments … the full faith and credit obligation is exacting.” See 28 USC §§1738, 1738A.
  \item For example, notice to existing natural parents: \textit{Armstrong v Manzo}, 380 US 545 (1965). Notice is not required when a non-custodial parent has not established a relationship with the child: \textit{Lehr v Robertson}, 463 US 248 (1983).
  \item If a State court that was acting beyond the scope of its subject matter jurisdiction made an adoption decree, the adoption is not entitled to full faith and credit. That being said, “a judgment is impervious to collateral attack where the rendering court had jurisdiction but erred in making a finding of fact or conclusion of law that did not go to its jurisdiction”: \textit{Wasserman, supra} note 94 at 55. See also \textit{Whitten, supra} note 91 at 817-24.
  \item See \textit{General Motors}, \textit{supra} note 94 at 232-33: “Our precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments. In numerous cases this Court has held that credit must be given to the judgment of another state although the forum would not be required to entertain the suit on which the judgment was founded. The Full Faith and Credit Clause does not compel "a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." \textit{Pacific Employers Ins Co v Industrial Accident Comm’n}, 306 US 493, 501, 83 L Ed 940, 59 S Ct 629 (1939); see \textit{Phillips Petroleum Co v Shutts}, 472 US 797, 818-819, 86 L Ed 2d 628, 105 S Ct 2965 (1985). Regarding judgments, however, the full faith and credit obligation is exacting.”
  \item \textit{Okla Stat}, Tit 10, §7502-1.4(A). The genesis of the law was an attempt by a gay couple that resided in Washington to obtain an Oklahoma birth certificate for their Oklahoma-born child that listed both of the men as parents. In response to the men’s claim, the Oklahoma Attorney General issued an opinion that Oklahoma was required under the FF&C Clause to respect the validity of the adoption. Republican lawmakers subsequently
\end{itemize}
Finstuen v Crutcher, the Court of Appeals for the Tenth Circuit struck down the Oklahoma law as an infringement of the Full Faith and Credit Clause (FF&C Clause). Three families originally brought the suit, however, only one – the Doels – were found to have the requisite standing. Lucy Doel adopted child E in Oklahoma in 2002. Her partner, Jennifer Doel, subsequently adopted E in California via a second parent adoption. The Doels thereafter requested a revised birth certificate from the Oklahoma State Department of Health listing each of the women as E’s parents. The Department refused on the basis of the impugned statute.

Finstuen deals with the interaction between a State’s public policy and the exacting obligation to accord recognition to interstate judicial orders. The Court held that Oklahoma was attempting to impose a public policy exception to the full faith and credit requirement respecting judgments, contrary to established Supreme Court jurisprudence. The Court applied General Motors to the situation at hand, finding that the absence of a “roving ‘public policy exception’ to the full faith and credit due judgments” applies equally to judicial adoption orders; to hold otherwise would have instantiated “the very kind of parochial entrenchment on the interests of other States that it was the purpose of the Full Faith and Credit Clause and other provisions of Art IV of the Constitution to prevent”.

passed the discriminatory and unconstitutional statute. See Wasserman, supra note 94 at 16-19.

101 Finstuen v Crutcher, 496 F 3d 1139 (10th Cir 2007) [Finstuen].
102 Ibid at 1143-51.
103 Ibid at 1152-56. See also General Motors, supra note 94 at 232-33.
104 Thomas v Washington Gas Light Company, 448 US 261, 272 (1980); Finstuen, supra note 101 at 1152.
The Court in *Finstuen* also stressed that recognition of an interstate adoption order does not mean that the rights that flow from adoption also travel across state lines. Thus, the Doel’s rights concerning a birth certificate for their child “flow[ed] from an application of Oklahoma law, not California law”.105 This conclusion had no negative impact on the Doels because Oklahoma law provided the relief they sought (once the adoption decree was recognized). However, the principle points to the potential for differential treatment of the incidents of an adoptive relationship between States. This was the basis for the Fifth Circuit’s decision in *Adar v Smith*.106

Oren Adar and Mickey Smith adopted a Louisiana-born baby boy in New York. Both men were recognized as parents by the courts of New York. The men sought issuance of a supplementary birth certificate by Louisiana listing both men as the boy’s parents. At a threshold level, the Court held that Adar and Smith107 did not have standing to bring a claim in federal court under 42 USC §1983 in respect of an alleged breach of the full faith and credit requirement in 28 USC §1738. This specious conclusion108 was based on the idea that the FF&C Clause imposes a duty (only) on courts to recognize judgments rendered in sister states;109 accordingly, “it is incoherent to speak of vindicating full faith and credit

105 *Finstuen*, supra note 101 at 1154.
107 The Registrar against whom the case was brought was also named Smith.
108 The dissentients strenuously objected to the majority’s reasoning: *Adar*, supra note 24 at 165-81. Judge Wiener stated at 169: “I remain convinced (1) the FF&C Clause does create a federal right; (2) § 1983 does provide the appropriate federal remedy by which such a right may be vindicated against state actors – not just state judicial officers but executive and legislative officers as well; and (3) Appellees have brought a meritorious §1983 action against the Registrar for violating their rights under the FF&C Clause.”
109 The dissent points out that “the FF&C Clause says ‘in each State,’ not ‘by the Courts of each State’”. It then accuses the majority of “twisting” and “cherry-picking” from the Supreme Court’s judgment in *Thompson v Thompson*, 484 US 174 (1988) (which concerned two private parties, not an action by a citizen against the state) to support this construction: *Adar*, supra note 24 at 170. Contrary to the majority, the dissent reads *Thompson* as standing for the much narrower proposition that “there is no private remedy against private parties for violations of the FF&C Clause”: ibid at 171.
rights against non-judicial state actors”\textsuperscript{110} On this basis, the Court held that \textit{Finstuen} did not constitute persuasive authority because the Tenth Circuit did not consider the justiciability of private rights pursuant to the FF&C Clause.\textsuperscript{111}

The majority did not stop there, though. It expressly stated that the denial of a supplementary birth certificate did not infringe the FF&C Clause because it did not deny \textit{recognition} of the adoption. In effect, the Court characterized a birth certificate as an incidental benefit\textsuperscript{112} of a foreign judgment, meaning Louisiana was not obliged to adhere to New York law:

Louisiana does not permit any unmarried couples – whether adopting out-of-state or in-state – to obtain revised birth certificates with both parents’ names on them. Since no such right is conferred by either the full faith and credit clause or Louisiana law, the Registrar’s refusal to place two names on the certificate can in no way constitute a denial of full faith and credit.

This statement is incorrect at the most basic level. Subsection (C) of the relevant statute simply provides that:

Upon receipt of the certified copy of the [foreign adoption] decree, the state registrar shall make a new record in its archives, showing:

\textit{…}

\textsuperscript{110} The Court stated that even if this conclusion was too narrow, the only remedy was review by the US Supreme Court and that the case therefore ought to have been brought in state court: \textit{Adar, supra} note 24 at 158. The dissent argued that this approach “fails to appreciate or acknowledge the role – indeed, the raison d’	extsuperscript{etre} – of §1983 in providing a private remedy against state actors” and referred to the Supreme Court’s insistence that §1983 is “to be broadly construed, against all forms of official violation of federally protected rights”: \textit{ibid} at 172-73 citing \textit{Monell v Department of Social Services of City of New York}, 436 US 658, 701 (1978).

\textsuperscript{111} The dissent, in contrast, characterized the majority’s position as analogous to the position taken by Oklahoma in \textit{Finstuen, supra} note 101 at 177: “the en banc majority’s conclusion ‘improperly conflates [Louisiana]’s obligation to give full faith and credit to a sister state’s judgment with its authority to apply \textit{its own state laws} in deciding what state-specific rights and responsibilities flow from that judgment”. The dissent also devoted an entire section of its judgment to the split created by the majority’s decision: \textit{ibid} at 181-83.

\textsuperscript{112} For a discussion of the extent of the requirement to recognize the incidents of a foreign adoption see Wasserman, \textit{supra} note 94 at 71-82.
(3) The names of the adoptive parents and any other data about them that is available and adds to the completeness of the certificate of the adopted child.

Thus, as the dissent stressed, Louisiana’s birth certificate law required the Registrar to issue a new birth certificate showing “the names of the adoptive parents”.\(^{113}\) Re-issuing a birth certificate with each of the men’s names would therefore have been “entirely consistent” with State law.\(^{114}\)

The majority’s reasoning incorrectly expands the principle made clear in Finstuen that a state is not bound by the FF&C Clause to apply foreign law to the rights and obligations flowing from adoption. By classifying a birth certificate as a mere incident of adoption that it is within state power to withhold, the Court effectively gutted the essence of the obligation to accord full faith and credit to interstate judgments and, “under the guise of merely affecting the remedy, [denied] the enforcement of [a claim] otherwise within the protection of the full faith and credit clause”.\(^{115}\)

Even if the Court’s construction of the FF&C Clause in Adar is correct, the conclusion it reached as a result is normatively unjustified.\(^{116}\) A birth certificate is, by its very nature, a record attesting to the parent-child relationship; denying a parent’s presence on that record unequivocally undercuts the recognition of that

\(^{113}\) *La Rev Stat Ann* §40:76(C).

\(^{114}\) *Adar, supra* note 24 at 180.

\(^{115}\) *Broderick v Rosner*, 294 US 629, 643 (1935).

\(^{116}\) Indeed, the normative underpinnings of the majority’s judgment in *Adar, supra* note 24 were made clear in its treatment of the plaintiffs’ equal protection claim, where it was asserted, by reference to only one study, that marriage “is associated with better outcomes for children”, and, accordingly, Louisiana has a rational basis for its refusal: *ibid* at 162 citing Kristin Anderson Moore et al, *Marriage from a Child’s Perspective: How Does Family Structure Affect Children, and What Can We Do About It?*, Child Trends Research Brief (2002) at 6. None of the myriad reports attesting to the positive outcomes achieved by unmarried gay and lesbian adoptive parents, outcomes equal to those of married opposite-sex couples, were mentioned.
person’s status as a parent of the child and therefore of the adoption itself. The majority’s repeated assertion that its judgment did not affect the underlying validity of the adoption decree offers little comfort to parents such as Oren and Mickey, since the expansive view of the incidents of adoption, and the exceedingly narrow obligation to recognize an interstate adoption decree, renders uncertain the rights of adoptive parents in a suite of non-judicial contexts, for example, medical emergencies. If the ability to obtain a birth certificate showing both parents’ names is an incident of adoption, why not too the right to make medical decisions on a child’s behalf?\footnote{119}

State courts in jurisdictions with similarly restrictive policies towards gay and lesbian adoption have demonstrated a clear preference for the Finstuen approach. In Russell v Bridgens, the Nebraska Supreme Court held, in spite of its earlier ruling in In re Adoption of Luke, that second parent adoptions were not permitted under Nebraskan law, that a court in Nebraska was required to recognize a second parent adoption order issued in Pennsylvania. The Court of Appeal in Michigan has reached the same conclusion.\footnote{122} Even Florida, during

\footnote{117} Furthermore, as the dissent noted, Louisiana’s birth certificate law “nowhere distinguishes on the basis of the marital status of the adoptive parents”: Adar, supra note 24 at 167. Thus, in refusing to issue the birth certificate, the Registrar “refused to recognize Appellees’ nationwide, lawful status as ‘adoptive parents’ by denying them the ‘adoptive parent’ rights created in Louisiana’s birth certificate (not adoption) statute: ibid at 177.

\footnote{118} This was an animating concern in Finstuen, supra note 101 at 1147 because Jennifer Doel had been refused access to her adopted child in an Oklahoma hospital. The possibility of this occurring was also of concern to the appellants Hempel and Swaya, residents of Washington, however, the Court held that concern about future possibilities did not constitute a sufficient injury to give the couple standing: ibid at 1144.

\footnote{119} Adar, supra note 24 at 159: “no right created by the New York adoption order (i.e., right to custody, parental control, etc) has been frustrated” [emphasis added]. This, however, is a far cry from affirming that such rights could not be frustrated or defined in such a way that non-recognition would be found to infringe the full faith and credit obligation.

\footnote{120} Russell v Bridgens, 264 Neb 217 (2002).

\footnote{121} In re Adoption of Luke, supra note 73.

\footnote{122} Giancaspro v Congleton, 2009 Mich App Lexis 765 (2009): “The only relevant consideration in this matter is each individual party’s established relationship as an adoptive parent with the children, not their relationship with each other. As discussed, the
the pendency of its invidious statutory prohibition on gay adoption, was held by its Court of Appeal to be bound to accord recognition to interstate adoption decrees involving gay and lesbian parents. It would therefore seem that outside of the Fifth Circuit, it is virtually certain that adoption decrees involving gay and lesbian parents will be accorded full faith and credit.

Even in the absence of the exacting respect owed to the judgments of sister States under the FF&C Clause, the justification for non-recognition of an interstate adoption decree is extremely weak, resting as it does on an application of public policy that amounts to a parochial expression of distaste towards the laws of another forum. Drawing on the discussion of cosmopolitanism in Part 2, Section III(B), I would suggest that an appropriate response to the clash between one State’s conferral of legal parentage and another State’s disapproval of queer parenting is to consider the degree of harm or destruction that would be occasioned by non-recognition of either the adoption or its incidents. Reasoning from the premises that “[t]here is arguably no more important need than that of a child to be cared for by an adult nor a more important capability than that of an adult to care for a child”, and the provision of the requisite degree of care is contingent on recognition of the legal relationship between parent and child, it is apparent that denying the legal relationship between a parent and a child is likely

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123 In Adoption of XXG, supra note 16, the Court of Appeal affirmed a trial court’s finding that Fla Stat Ann §63.042(3) (“No person eligible to adopt under this statute may adopt if that person is a homosexual”) was unconstitutional. Single gay and lesbian persons are now able to adopt in Florida; joint adoption remains illegal.

124 Embry v Ryan, 11 So 3d 408, 410 (Fla Dist Ct App 2d Dist 2009): “[R]egardless of whether the trial court believed that the Washington adoption violated a clearly established public policy in Florida, it was improper for the trial court to refuse to give the Washington judgment full faith and credit.”

to be destructive for both parties, though the consequences may be particularly
dire for children by reason of their inherent vulnerability and dependence.  

[C]hildren can face severe emotional and financial harms when they lack a
legal relationship with one of their functional parent. In the absence of a
legally recognized parent-child relationship, a child may be permanently
cut off from his or her functional parent in the event that the adults’
relationship dissolves or the legal parent dies. In addition, in the absence
of a legally recognized relationship, children may be denied a host of
important financial benefits if the functional parent dies or becomes
disabled.

Accordingly, in a situation where the existence of a parent-child relationship is
called into question because a particular jurisdiction’s laws evince antipathy or
even hostility towards parenting by lesbians and gay men, cosmopolitanism
argues that it is incumbent upon the “bounded political entity” to demonstrate
respect for the child’s interests (i.e., hospitality) through the recognition of his or
her relationship with an adoptive parent or, at the very least, crucial incidents of
that relationship.

D. International Adoption

Residents of American States who wish to adopt a child from overseas must
comply with up to four layers of law: the law of their State of residence; US
federal law; the law of the country in which the child was born (in a federal
system this may add yet further layers of law); and, depending on whether the
sending state has ratified it, the Hague Convention on Intercountry Adoption.

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126 Courtney G Joslin, “Travel Insurance: Protecting Lesbian and Gay Parent Families
Across State Lines” (2010) 4 Harv L & Pol’y Rev 31 at 34 [citations omitted] [Joslin,
"Travel Insurance"].

127 For a favourable American perspective on international adoption and its history see
Policy 91.

128 Convention on Protection of Children and Co-operation in Respect of Intercountry
Adoption, 29 May 1993 (entered into force 1 May 1995) [Adoption Convention]. See
Joslin & Minter, supra note 1 at §2.8, 91.
In California, intercountry adoption services are “exclusively provided by private adoption agencies licensed by the department”. Intercountry adoptions may be finalized in either the sending state or in California. In either situation, prospective parents must submit to fingerprinting and criminal background checks. Agencies must provide prospective parents with a written report on the child’s medical background and, if available, the medical background of the child’s biological parents.

For adoptions that are to be finalized in California, licensed adoption agencies are required to provide assessment and placement services; the agency also “assume[s] all responsibilities for the child including care, custody, and control as if the child had been relinquished for adoption in this state” unless “the child’s native country requires and has given full guardianship to the prospective adoptive parents”. Prospective parents must lodge a petition to adopt the child within 30 days of placement.

Adoptions may also be completed in the sending state, in which case the Department of Homeland Security may require residents to readopt the child in California. Adoptive parents may also readopt a child in California even if the

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129 In the 2011 Financial Year, California had the highest number (676) of incoming intercountry adoptions in the United States: United States Department of State, *Intercountry Adoption* (Bureau of Consular Affairs, 2011).

130 *Cal Fam Code* §8900(a).

131 *Ibid*, §8904. The licensed adoption agency must provide certification to the Immigration and Naturalization Service that California’s intercountry adoption requirements have been met.


136 *Ibid*, §8903(b).


Department of Homeland Security does not require re-adoption. Adoptions conducted pursuant to the Adoption Convention are automatically recognized as valid in California; in contrast, Californian common law applies to non-Convention adoptions, such that a court may decline to extend recognition on procedural or jurisdictional grounds. That being said, the Family Code requires that licensed adoption agencies enter into agreements with foreign adoption agencies that comport with Californian law and US federal law; accordingly, it is unlikely that a Code-compliant non-Convention international adoption will be refused recognition in California. To ameliorate the possibility of non-recognition by sister States within the US, adoptive parents should nevertheless consider obtaining a Californian adoption order to mitigate cross-jurisdictional issues of parental authority. Parents of children whose adoption was finalized in a foreign state may obtain a Californian birth certificate for their child.

At the federal level, the Intercountry Adoption Act 2000 establishes overarching federal requirements in respect of Convention adoptions, primarily regarding

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139 Ibid, §8919(b). The State Department is required to certify whether the adoption standards in China, Guatemala, Kazakhstan, Russia and South Korea “meet or exceed those in this state”: §8919(d). Parents may also request a Californian birth certificate for their adopted child through submission of a re-adoption order issued by a Californian court: §8919(e).

140 The Cal Fam Code provides that a Hague adoption certificate “shall be recognized as a final valid adoption for purposes of all state and local laws”: §8925. This comports with federal law, which provides that Adoption Convention adoptions are entitled to full recognition throughout the United States: 42 USC §14931(b).


142 Cal Fam Code §8905.

143 See supra Section I(C).

144 Cal Fam Code §8919(e).

145 From a date 18 months after 14 January 2013 the provisions apply to all intercountry adoptions, not just Convention adoptions: 42 USC §14925.
the obligations of federal departments and adoption service providers.\footnote{146} From the perspective of prospective parents, 42 USC §14931(a)(1) relevantly provides:

The Secretary of State shall, with respect to each Convention adoption, issue a certificate to the adoptive citizen parent domiciled in the United States that the adoption has been granted or, in the case of a prospective adoptive citizen parent, that legal custody of the child has been granted to the citizen parent for purposes of emigration and adoption, pursuant to the Convention and this chapter, if the Secretary of State:

(A) receives appropriate notification from the central authority of such child’s country of origin; and

(B) has verified that the requirements of the Convention and this chapter have been met with respect to the adoption.

In addition, an adoption that is finalized in another signatory to the Adoption Convention and which is certified by the Secretary of State “shall be recognized as a final valid adoption for purposes of all Federal, State, and local laws of the United States”.\footnote{147} For persons moving to or travelling through the United States with a child adopted from another country prior to the United States’ accession to the Adoption Convention, the adoption will be recognized as valid in the United States so long as the adoption meets the requirements of art 23 of the Adoption Convention.\footnote{148} Non-Convention adoptions are not subject to the Intercountry Adoption Act; the question of recognition is therefore a matter of State law, though immigration and citizenship remains governed by federal law.

Lastly, if the relevant US State and federal laws are complied with, prospective parents in California and other American states may also need to comply with the requirements of the Adoption Convention.\footnote{149} In the United States, the procedural

\footnote{146} Providers must be accredited or approved in accordance with subchapter II of 42 USC Ch 143: 42 USC §14921(a). The duties of accrediting entities are set out in §14922(b). Standards for providing accreditation to agencies are set out in §14923.

\footnote{147} 42 USC §14931(b).

\footnote{148} 42 USC §14951.

\footnote{149} Adoption Convention, supra note 128. Convention adoptions are a much safer option for all parties because “an adoption carried out under the Convention must be recognized as valid for all purposes in all Convention countries, and in every US state under the
aspects of the Adoption Convention are incorporated into the Intercountry Adoption Act. The Adoption Convention itself is silent as to whether it requires, permits or prohibits adoption by lesbian and gay prospective parents. Its references to “the best interests of the child” and “family environment” are open to subjective interpretation.\textsuperscript{150} In any event, as the Explanatory Report notes, such cases “may be qualified as false problems, since the State of origin and the receiving State shall collaborate from the very beginning and they may refuse the agreement for the adoption to continue, for instance, because of the personal conditions of the prospective adoptive parents.”\textsuperscript{151} A state may only refuse recognition of a Convention adoption if “the adoption is manifestly contrary to public policy, taking into account the best interests of the child”.\textsuperscript{152} This is a matter of US federal law under the Intercountry Adoption Act.\textsuperscript{153}

If all of these hurdles are surmounted, adopted children from Adoption Convention countries are eligible to enter the United States under 8 USC §1101(b)(1)(G). Children from non-Adoption Convention countries must enter under the orphan provision in 8 USC §1101(b)(1)(F).\textsuperscript{154} Satisfaction of the criteria


\textsuperscript{152} Adoption Convention, supra note 128, art 24.

\textsuperscript{153} 42 USC §14951.

\textsuperscript{154} In Rogan v Reno, 75 F Supp 2d 63 (EDNY 1999), the District Court held that a Philippine child was not an orphan because her natural father had not abandoned her. If the child is
in either subsection (F) or (G) entitles the adopted child to US citizenship pursuant to 8 USC §1431(b).

Compliance with the law of the state in which a foreign child was born is the most significant hurdle facing gay and lesbian prospective adoptive parents. For example, China, which sends by far the greatest number of children to America (2589 in 2011), only allows adoption by married heterosexual couples. Ethiopia, which sent 1727 children to the United States in 2011, permits adoption by single unmarried women, though its laws prohibiting same-sex sexual activity suggest that adoption by openly lesbian women is unlikely to be allowed. Russia ceased international adoptions to the United States from 1 January 2013. South Korea only permits adoption by opposite-sex married couples that have been married for more than three years. Ukraine requires

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not an orphan for the purposes of 8 USC §1101(b)(1)(F), the prospective adoptive parent may need to live with the child in the foreign country and then apply for entry under 8 USC §1101(b)(1)(E), which entitles a child to citizenship if they were adopted while under the age of 16 and have been in the custody of and resided with the parent for at least two years. See Estin, supra note 141 at 271.

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155 United States Department of State, Intercountry Adoption - China, online: <http://adoption.state.gov/country_information/country_specific_info.php?country-select=china>.

156 United States Department of State, Intercountry Adoption – Ethiopia, online: <http://adoption.state.gov/country_information/country_specific_info.php?country-select=ethiopia>.

157 Criminal Code (Ethiopia), art 629.


159 United States Department of State, Intercountry Adoption - South Korea, online: <http://adoption.state.gov/country_information/country_specific_info.php?country-select=south_korea>.
foreign adoptive parents to be married and Ukrainian law does not recognize same-sex marriage. Thus, same-sex couples are largely excluded from international adoption. It is possible that one partner could apply individually to a country that allows single-parent adoption and then, once the international adoption is finalized, their partner could seek to adopt the child as a second parent in the United States. This, however, will only be possible if the couple is not married or in a civil union at the time of the international adoption. It is also risky for lesbians and gay men to conceal their sexuality, as this may place the adoption itself in jeopardy if discovered.

Restrictions on the ability of queer people to adopt internationally are contrary to the maximization of adult and child capabilities and autonomy, irrespective of whether they derive from the laws of sending or receiving states (or both). Obviously, cultural antipathy towards gay parents means that a change in the position of most sending states is unlikely; this, however, does not detract from the reality that gay parents are equally capable of raising children and may even have a greater understanding than opposite-sex parents of the challenges created by personal difference even in plural societies. Nor does it detract from the reality that a significant number of children are left languishing in situations that unquestionably impair their capabilities, which could otherwise be developed through the love and attention of same-sex parents. To the extent that international adoption per se raises questions about imperialism and cultural confusion, it may be the case that adoptive parents owe a moral obligation to

160 United States Department of State, Intercountry Adoption - Ukraine, online: <http://adoption.state.gov/country_information/country_specific_info.php?country-select=ukraine>.
161 Constitution of Ukraine, art 51.
162 Sharon S, supra note 53.
163 Joslin & Minter, supra note 1 at 92. Unsurprisingly, though, research has shown that many gay men and lesbians choose to take this path, often with the tacit acquiescence of adoption agencies: Brodzinsky, supra note 25 at 34-35.
164 See, e.g., Bartholet, supra note 127.
assist those countries in which their children were born to better care for those who remain. Concerning cultural confusion, it is perhaps incumbent upon parents to inculcate in a child a sense of their heritage and possibly even contact with his or her biological parents, though this will necessarily be factually specific. Neither of these moral obligations is in any way related to or impaired by the sexual preference of a child’s parents. Accordingly, to the extent that international adoption exists, principles of autonomy and capacity strongly supports its extension to lesbians, gay men, and same-sex couples.

II. Surrogacy

This section comprises three parts: it first surveys the law in America pertaining to surrogacy; this is followed by a detailed analysis of California’s surrogacy laws; lastly, it considers certain questions raised by inter-jurisdictional surrogacy. Throughout the section, the terms commercial and altruistic surrogacy are used to refer, respectively, to surrogacy with and without payment of a fee to the surrogate for her services, in addition to reimbursement of expenses. The nomenclature of traditional and gestational surrogacy is also used: the former term refers to instances of surrogacy involving the use of the surrogate’s own ova, whereas gestational surrogacy does not involve the use of the surrogate’s own human reproductive material.  

A. Overview of United States Laws

At present, Arizona, Indiana, Michigan, New York, North Dakota and the District of Columbia expressly prohibit or render void all surrogacy

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165 See further supra Part 1, Section III(B)(2)(a).
166 Ariz Rev Stat §25-218. The statute also provides that parentage of children born via surrogacy automatically vests in the surrogate and her husband, though the presumption is rebuttable. Note that the Arizona Court of Appeals held that the statute infringed the Equal Protection Clause of the United States Constitution in Soos v Superior Court of the
contracts. The District of Columbia’s law is one of the strictest, declaring surrogacy contracts not only void but also criminal:

(a) Surrogate parenting contracts are prohibited and rendered unenforceable in the District.

(b) Any person or entity who or which is involved in, or induces, arranges, or otherwise assists in the formation of a surrogate parenting contract for a fee, compensation, or other remuneration, or otherwise violates this section, shall be subject to a civil penalty not to exceed $10,000 or imprisonment for not more than 1 year, or both.

Nebraska prohibits commercial surrogacy without reference to form, which suggests that compensated traditional and gestational surrogacy contracts are prohibited. Louisiana prohibits commercial traditional surrogacy; Kentucky appears to do the same.

State of Arizona in and for the County of Maricopa, 897 P 2d 1356 (Ct App Div 1, 1994). Nevertheless, it remains part of the State’s revised statutes.

Ind Code §31-20-1-1.


NY Dom Rel Law §§122, 123.

ND Cent Code §14-18-05. As a result, the surrogate “is the mother of a resulting child”.

DC Code §16-402.

Joslin & Minter, supra note 1 at §4.2, 240.


La Rev Stat §9:2713.

Ky Rev Stat §199.590(4). The provision is included in a part concerned with adoption, but reads: “A person, agency, institution, or intermediary shall not be a party to a contract or agreement which would compensate a woman for her artificial insemination and subsequent termination of parental rights to a child born as a result of that artificial insemination. A person, agency, institution, or intermediary shall not receive compensation for the facilitation of contracts or agreements as proscribed by this subsection. Contracts or agreements entered into in violation of this subsection shall be void.”
Certain States permit surrogacy contracts in limited situations. Florida,\(^{176}\) New Hampshire,\(^{177}\) Texas,\(^{178}\) Utah,\(^{179}\) and Virginia\(^{180}\) provide that surrogacy agreements are only enforceable when the intended parents are married.\(^{181}\) The advent of same-sex marriage in certain of these States (New Hampshire in 2010; Texas, Utah and Virginia potentially in 2014, subject to the outcomes of federal appeals) does not necessarily mean that all married same-sex couples in those States are able to enter into their desired form of surrogacy agreement. For example, New Hampshire requires that the intended mother or the surrogate provide the ovum,\(^{182}\) meaning that gay male couples are unable to enter into gestational surrogacy agreements, whereas fertile lesbian couples do have this option (should they desire it), since “the intended mother or the intended father shall provide a gamete to be used to impregnate the surrogate.”\(^{183}\) In other jurisdictions, legislative amendment to remove gendered language, such as Virginia’s reference to “a man and a woman, married to each other”,\(^{184}\) may be necessary if surrogacy is to be extended to same-sex couples. Other States such

\(^{176}\) *Fla Stat Ann* §742.15(1). The statute only refers to gestational surrogacy.

\(^{177}\) *NH Rev Stat* §168-B:1(VII).

\(^{178}\) *Tex Fam Code* §160.754(4)(b).

\(^{179}\) *Utah Code* §78B-15-801.

\(^{180}\) *Va Code Ann* §20-156.

\(^{181}\) Defects in an agreement may also mean that parentage vests in the surrogate: see, e.g., *Fla Stat Ann* §742.11(1) (providing that unless a child is born pursuant to gestational surrogacy, which requires a valid agreement, there is an irrebuttable presumption of parentage in favor of the surrogate); *Va Code Ann* §20-158 (absence of an approved agreement vests parentage in the surrogate).

\(^{182}\) *NH Rev Stat* §168-B:17(IV).

\(^{183}\) *NH Rev Stat* §168-B:17(III) [emphasis added]. A restrictive reading of this provision could, however, lead to the inference that surrogacy involving female same-sex couples is impermissible.

\(^{184}\) *Va Code Ann* §20-156.
as Florida\textsuperscript{185} and Washington\textsuperscript{186} only permit uncompensated surrogacy agreements; Florida also requires that intended parents are married and it only permits gestational surrogacy.

Even if a surrogacy agreement falls within the scope of the statutes in the States listed above, intended parents generally need to obtain judicial confirmation of parentage. For example, Texas requires intended parents to “file a notice of birth with the court not later than the 300\textsuperscript{th} day after the date assisted reproduction occurred”. Upon receipt of the notice, “the court shall render an order that … confirms that the intended parents are the child’s parents”.\textsuperscript{187} Florida,\textsuperscript{188} Utah,\textsuperscript{189} Virginia\textsuperscript{190} and possibly Washington have similar requirements.\textsuperscript{191} New Hampshire provides that “[t]he effect of a judicial order validating the surrogacy arrangement shall be the automatic termination of the parental rights of the surrogate and her husband, if any”. However, the law also provides a surrogate with 72 hours in which she can change her mind and assert parentage to the exclusion of the intended parents.\textsuperscript{192}

Arkansas and Tennessee take a rather different approach. Instead of stipulating the enforceability of surrogacy agreements, the law in those States is concerned only with the parentage of a child born as a result of surrogacy. In Tennessee, “surrogate birth” is defined with reference to a contract between the surrogate and the intended parents, but the law also states that it is not to be construed as

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\textsuperscript{185} \textit{Fla Stat Ann} §742.15(4) (permitting “only reasonable living, legal, medical, psychological, and psychiatric expenses of the gestational surrogate that are directly related to prenatal, intrapartal, and postpartal periods”).


\textsuperscript{187} \textit{Tex Fam Code Ann} §160.760(a).

\textsuperscript{188} \textit{Fla Stat Ann} §742.16(1).

\textsuperscript{189} \textit{Utah Code} §78B-15-807(1).

\textsuperscript{189} \textit{Va Code Ann} § 20-160(D).

\textsuperscript{191} If both intended parents are genetically related to the child it may not be necessary to adopt the child: see Joslin & Minter, \textit{supra} note 1 at §4.8, 265.

\textsuperscript{192} \textit{NH Rev Stat Ann} §§168-B:23, 168-B:25.
authorizing “the surrogate birth process in Tennessee unless otherwise approved by the courts or the general assembly”. Nevertheless, where the requirements of a “surrogate birth” are met (either the “union of the wife’s egg and the husband’s sperm, which are then placed in another woman, who carries the fetus to term”, or artificial insemination of a surrogate using the husband’s sperm when the intention is that he and his wife will become parents), “[n]o surrender … is necessary to terminate any parental rights of the woman who carried the child to term … and no adoption of the child by the biological parent(s) is necessary”. Arkansas simply provides that “in the case of a surrogate mother”, parentage vests in:  

(1) The biological father and the woman intended to be the mother if the biological father is married;  
(2) The biological father only if unmarried; or  
(3) The woman intended to be the mother in cases of a surrogate mother when an anonymous donor’s sperm was utilized for artificial insemination.

The law in Tennessee effectively excludes same-sex couples from surrogacy. Practically, the law in Arkansas does the same, although the ability of unmarried biological parents to assert parentage means that one partner in an unmarried same-sex couple could claim parentage. It is unclear whether second parent adoption is possible in Arkansas.

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193 Tenn Code Ann §36-1-102(48).  
195 Ark Code Ann §9-10-201(b).  
196 Arkansas’ ban on same-sex marriage has been declared unconstitutional, though the ruling is stayed pending appeal: Wright v Arkansas, No 60CV-13-2662 (Ar 2d, 9 May 2014). If the ban is ultimately struck down, it is unclear whether subsection (1) of the Arkansas law concerning surrogacy would be read in such a way that non-biological same-sex spouses would also be presumed parents in a surrogacy situation.  
197 In Arkansas Department of Human Services v Cole, 380 SW 3d 429 (2011) the Supreme Court of Arkansas struck down the State’s ban on adoption by unmarried persons cohabiting with another person of the same or opposite sex. While this makes joint adoption by same-sex couples possible in Arkansas, it is not clear whether Arkansas will also permit adoption without terminating existing rights.
As shown in Part 1, gay and lesbian parents are equally capable of providing the requisite degree of care and support to develop a child’s capabilities and autonomy; such caregiving is also a critical aspect of the affiliative and emotional capacities of many gay and lesbian adults, and the denial of this ability is a fundamental incursion upon the relational autonomy of lesbians and gay men. Furthermore, commercial surrogacy is best viewed as a practice that is not inherently exploitative but rather one that has the potential for exploitation in the absence of proper regulations, including provisions concerning surrogates’ abilities to assert rights concerning the children they gestate. Outright, partial and indirect bans on surrogacy, and access to surrogacy by certain classes of people, are therefore antithetical to individual capabilities and principles of relational autonomy. From a queer perspective, such regimes can be seen as coercive invasions into the lives of sexual minorities, further entrenching the alterity of lesbians and gay men by casting them as unfit to parent.

California,\(^{198}\) Nevada\(^{199}\) and Illinois\(^{200}\) are the only jurisdictions that statutorily permit surrogacy in ways that are realistically accessible or desirable for most same-sex couples,\(^{201}\) although even in these States the option of traditional surrogacy is effectively foreclosed because agreements are only enforceable in gestational surrogacy cases.\(^{202}\) If a valid surrogacy agreement is made, Nevada provides that:\(^{203}\)

\(^{198}\) Cal Fam Code §7960 et seq.

\(^{199}\) Statutes of Nevada 2013, Chapter 213, AB 421.

\(^{200}\) 750 ILCS 47.

\(^{201}\) Same-sex couples are permitted to engage in surrogacy in Washington (Wash Rev Code §26.26.230), but the prohibition on compensation is likely to severely limit the ability of most intended parents to attract willing surrogates. It is possible that same-sex couples in States with appeals pending in marriage cases will also be able to access surrogacy regimes in the future.

\(^{202}\) Statutes of Nevada 2013, Chapter 213, AB 421, s 10 (definition of “gestational carrier”); 750 ILCS 47/10 (definition of “gestational surrogacy”); Cal Fam Code §7962 (requirements of “assisted reproduction agreement for gestational carriers”).

\(^{203}\) Statutes of Nevada 2013, Chapter 213, AB 421, s 24.
The intended parent or parents shall be considered the parent or parents of the resulting child immediately upon the birth of the child;

The resulting child shall be considered the child of the intended parent or parents immediately upon the birth of the child;

Parental rights vest in the intended parent or parents immediately upon the birth of the resulting child;

Sole legal and physical custody of the resulting child vest with the intended parent or parents immediately upon the birth of the child; and

Neither the gestational carrier nor her legal spouse or domestic partner, if any, shall be considered the parent of the resulting child.

Similar provisions exist in Illinois.\textsuperscript{204} In contrast, intended parents in California must obtain a judicial parentage declaration.\textsuperscript{205} A detailed overview of the law in California is provided below.

Of the States without legislated surrogacy regimes, it has generally been found that traditional surrogacy agreements are unenforceable, meaning that parentage has vested in the surrogate / biological mother and potentially the biological intending father.\textsuperscript{206} In Matter of Baby M, the New Jersey Supreme Court found that a traditional surrogacy agreement was unenforceable in part because of "[t]he contract’s basic premise, that the natural parents can decide in advance of birth which one is to have custody of the child, [which] bears no relationship to the settled law that the child’s best interests shall determine custody".\textsuperscript{207} The monetary component of the agreement, as well as the absence of any provision enabling the surrogate to change her mind, were also factors in the Court's decision.\textsuperscript{208} The Court also stated, however, that New Jersey law does not

\begin{itemize}
  \item \textsuperscript{204} 750 ILCS 47/15.
  \item \textsuperscript{205} Cal Fam Code §7962(f)(2).
  \item \textsuperscript{206} See, e.g., \textit{In re Marriage of Moschetta}, 25 Cal App 4th 1218 (1994).
  \item \textsuperscript{207} \textit{In re Baby M}, 537 A2d 1227 at 1246 (1988).
  \item \textsuperscript{208} Ibid at 1242.
\end{itemize}
prohibit uncompensated surrogacy when the surrogate is provided with the right to change her mind and assert parental rights. More recently, a court in Minnesota found that a surrogate who is genetically related to the child is a legal parent, in addition to the biological father. The father’s same-sex partner was found not to be a parent, despite the parties’ intention.

The critical importance of biological connections for many people makes it unsurprising that courts have been unwilling to deny traditional surrogates’ claims to parentage. Nevertheless, in view of the parties’ intentions in cases such as Baby M, the denial of relational autonomy to intended parents involved in vesting parentage in a surrogate, and the potential trauma to intended parents of being denied parentage of a child that would not exist but for their actions (and potentially their genetic contribution), I suggest that a better solution to these cases would have been to vest parentage in the intended parents with potentially significant visitation rights on the part of the surrogate, in recognition of her affective displacement at relinquishment of the child.

Gestational surrogacy agreements have tended to fare better than traditional surrogacy agreements in the courts. In the seminal case of Johnson v Calvert, the Supreme Court of California upheld a commercial surrogacy agreement in which both intended parents were biologically related to the child. The Supreme Court of Massachusetts has upheld entry of parentage orders consistent with the intention evinced in gestational surrogacy agreements; indeed, in Hodas v

\[^{209}\text{Ibid at 1264.}\]
\[^{210}\text{ALS ex rel JP v EAG, 2010 Minn App Unpub LEXIS 1091 (2010).}\]
\[^{211}\text{A notable exception to this is in New Jersey, where the Superior Court in In re TJS, 2011 WL 611624 (NJ Super Ct App Div 2011) held that an intended parent who lacks a genetic connection to a child can only establish legal parentage via adoption. The law is less clear in Pennsylvania. In JF v DB, 941 A 2d 718 (2008) the Superior Court of Pennsylvania held that a gestational surrogate lacked standing to seek parentage and accordingly awarded full legal and physical custody to the biological intended father of triplets. However, the Court also specifically declined to comment on the general enforceability of surrogacy agreements, finding that “t[that task is for the Legislature”: SN v MB, 935 NE 2d 463 (10 Dist Franklin County 2010).}\]
Morin\textsuperscript{212} and Culliton v Beth Israel Deaconess Medical Center,\textsuperscript{213} the Court upheld pre-birth judgments declaring that the intended (opposite-sex, genetically-related) parents are the legal parents of the children born pursuant to the impugned agreements. In an earlier case, RR v MH,\textsuperscript{214} the Supreme Court of Massachusetts invalidated a surrogacy agreement where compensation was beyond “pregnancy-related expenses”.\textsuperscript{215} Nevertheless, in Hodas v Morin, the Court stated that the finding in RR v MH “is not to the contrary” to the declaration of parentage granted in that case and affirmed that Massachusetts “recognizes gestational carrier agreements in some circumstances”.\textsuperscript{216}

Parentage orders have also been made in cases of gestational surrogacy where only one intended parent is genetically related to the child(ren). In Raftopol v Ramey,\textsuperscript{217} the Supreme Court of Connecticut upheld a surrogacy agreement for the purposes of issuing a birth certificate declaring the biological father and his male partner the parents of twin boys.\textsuperscript{218} In JF v DB,\textsuperscript{219} the Supreme Court of Ohio held that the absence of any existing public policy in Ohio concerning gestational surrogacy agreements meant that such agreements are enforceable.\textsuperscript{220} Notably, the agreement in that case was of a commercial

\footnotesize{\textsuperscript{212} Hodas v Morin, 814 NE 2d 320 (2004) [Hodas].
\textsuperscript{213} Culliton v Beth Israel Deaconess Medical Center, 756 NE 2d 1133 (2001) [Culliton].
\textsuperscript{214} RR v MH, 689 NE 2d 790 (1998).
\textsuperscript{215} Ibid at 797.
\textsuperscript{216} Hodas, supra note 212 at 324-25.
\textsuperscript{217} Raftopol v Ramey, 12 A 3d 783 (2010) [Raftopol].
\textsuperscript{218} It is to be observed that the Court assumed the validity of the gestational agreement, meaning that clear guidance on the scope of acceptable agreements is lacking in Connecticut: ibid at 793-794.
\textsuperscript{219} JF v DB, 879 NE 2d 740 (2007).
\textsuperscript{220} The Court noted that traditional surrogacy agreements “may have a different legal position”: ibid at 742.}
nature.\textsuperscript{221} Subsequently, the Ohio Court of Appeals upheld a commercial gestational agreement where neither the surrogate nor the intended parents bore a genetic relationship to the child.\textsuperscript{222} These cases evince appropriate respect for the reasoned decisions of the parties at the time of entry into the relevant agreements. However, the Ohio cases also involved surrogate claims to parentage and hence by vesting parentage in the intended parents to the complete exclusion of the surrogates arguably do not demonstrate sufficient respect for the potential trauma to the surrogate in being denied a role in the child’s life. Subject to procedural requirements, it may have been appropriate to make visitation orders in favor of the surrogate in the contested cases.

1. California

In this section, I provide a detailed analysis of Californian law concerning surrogacy, which is the most developed in the United States owing to its statutory provisions concerning gestational surrogacy agreements and the significant body of common law that arose prior to legislative intervention, which remains relevant to traditional surrogacy and non-binding gestational agreements.\textsuperscript{223}

The common law position, established in \textit{Johnson v Calvert},\textsuperscript{224} is that commercial gestational surrogacy is legal in California.\textsuperscript{225} Traditional surrogacy is

\begin{itemize}
\item Contra \textit{In re Roberto d B}, 923 A 2d 115, 130-31 (2007), where the Maryland Court of Appeals held that “surrogacy contracts, that is, payment of money for a child, are illegal in Maryland”. The Court relied on Maryland’s statutory prohibition on the payment for transfer of parentage in cases of adoption (\textit{Md Fam Law Code Ann} §5-3B-32), as well as its criminal prohibition on the sale of minors (\textit{Md Crim Law Code Ann} §3-603).
\item SN v MB, supra note 211.
\item See \textit{Cal Fam Code} §7962(f)(2).
\item \textit{Johnson v Calvert}, 5 Cal 4th 84 (1993) [\textit{Johnson}]. In a case that preceded \textit{Johnson}, \textit{Adoption of Matthew B}, 232 Cal App 3d 1239 (1991), the California Court of Appeals held that a surrogate’s purported revocation of consent to adoption following completion of surrogacy contract was invalid. The surrogate was estopped from attacking a paternity judgment to which she had stipulated consent; furthermore, the surrogate was not ignorant of her rights when she signed the contract and the child’s best interests were served by denying her petition to withdraw consent.
\end{itemize}
not illegal, but *In re Marriage of Moschetta* makes it clear that it is exceedingly risky from the perspective of intended parents (and potentially the surrogate if genetically unrelated intended parents decline parentage). *Johnson* also established that a child may not have more than two natural parents, meaning

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225 *Johnson* arose out of an agreement between an opposite-sex married couple, Mark and Crispina Calvert, and the surrogate, Anna Johnson. A written agreement between the parties provided that in return for Anna bearing a child and relinquishing all parental rights, the Calverts would pay Anna $10,000 in installments and purchase a $200,000 life insurance policy on Anna’s life. A zygote created using an egg from Crispina and Mark’s sperm was successfully implanted in Anna. During the pregnancy, relations soured between the parties to such an extent that the Calverts claimed a declaration of parentage prior to the birth of the child. Anna filed a separate claim to be declared the mother of the child.

226 *In re Marriage of Moschetta,* supra note 206. Robert and Cynthia Moschetta entered into an agreement with Elvira Jordan under which Elvira would be artificially inseminated with Robert’s sperm; it was further agreed that upon delivery of the child, Robert would assume sole custody of the child and Elvira would rescind her parental rights and assist Cynthia to adopt the child. Elvira was to be paid $10,000 for her services. Baby Marissa was born in 1990 and, despite initial refusal apparently based on the possibility that the Moschettas would separate, Elvira allowed the Moschettas to take Marissa home. Seven months later, the Moschettas did separate and Robert assumed custody of Marissa. Cynthia petitioned to establish her parental relationship with the child, a position with which Robert agreed; Elvira joined the proceedings claiming she was Marissa’s mother. There was no question concerning Robert’s status as parent. The Court of Appeal decisively rejected the argument that *Johnson* controlled the determination of maternal parentage; unlike *Johnson*, there was “no ‘tie’ to break” because Cynthia was “not ‘equally’ the mother of Marissa”: at 1224. The traditional nature of the surrogacy meant that Elvira was genetically related to Marissa and gave birth to her. The Court rejected the application of paternity presumptions found in the *Family Code* on the ground that the presumptions could be displaced by proof of genetic parenthood, which “trumps a presumption based on the cohabitation of a married couple”: 1225. In any event, the Court held that the provisions did not apply in the surrogacy context: 1226. The Court also considered the application of *Johnson* to the argument that the contract between the parties should be enforced in spite of the finding that Elvira was Marissa’s natural mother. It characterized *Johnson* as deciding not that gestational surrogacy contracts are per se enforceable but rather that such contracts are relevant in determining the parties’ intentions when the claims to parentage between the putative mothers are equal. Applying this framework, the Court held that because Cynthia could not be considered Marissa’s mother within the terms of the *Family Code*, no competition between Cynthia and Elvira arose; hence, the parties’ intentions were irrelevant, meaning that the contract was also irrelevant. Moreover, the agreement could not serve as an adoption agreement because of the requirement in the *Family Code* that birth parents specifically consent to an adoption in the presence of a social worker.

227 This position was argued for by the American Civil Liberties Union. The Court held that acknowledging Anna as the child’s mother in addition to Crispina would diminish Crispina’s role as mother: *Johnson,* supra note 224 at 92 note 8.
that in a situation involving gamete-providing intended parents, a dispute between the surrogate and the intended mother is resolved by looking to the parties’ intent,\textsuperscript{228} which may be evinced in a surrogacy agreement.\textsuperscript{229} Thus, in \textit{Johnson}, Crispina Calvert’s intention to parent the child ‘trumped’ the surrogate’s claim to parentage of the child. Adopting a causation-based approach, the Court held that “[b]ut for their [the Calverts’] acted-on intention, the child would not exist” and “[n]o reason appears why Anna’s later change of heart should vitiate the determination that Crispina is the child’s natural mother”. Critically, the Court made the following statement of principle:\textsuperscript{230}

We conclude that although the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child – that is, she who intended to bring about the birth of a child that she intended to raise as her own – is the natural mother under California law.

In the case of \textit{In re Marriage of Buzzanca},\textsuperscript{231} the Court of Appeals vested parentage in the genetically unrelated intended parents of a child born to a surrogate who made no claim to parentage.\textsuperscript{232} Referring to (rather than

\begin{itemize}
  \item \textsuperscript{228} Since, under the terms of §7003 of the \textit{Family Code} as it then stood, both women were able to prove maternity.
  
  \item \textsuperscript{229} \textit{Johnson}, supra note 224 at 93.
  
  \item \textsuperscript{230} \textit{Ibid}. The Court justified its intent-based position with reference to academic writing in favour of intentionality: \textit{ibid} at 93-94. The Court also noted that the approach propounded by Anna, that is, maternal parentage ought to be determined according to who gave birth to the child, would result in situations where surrogates who do not wish to establish a parental relationship with the child could nevertheless be forced to do so if the commissioning parents disclaimed responsibility: \textit{ibid}.
  
  \item \textsuperscript{231} \textit{In re Marriage of Buzzanca}, 61 Cal App 4th 1410 (1998).
  
  \item \textsuperscript{232} Luanne and John Buzzanca engaged an unnamed surrogate to gestate a zygote created from donated gametes. During the pregnancy, the Buzzancas separated. Before the trial court, Luanne claimed that both she and John were baby Jaycee’s parents; John disclaimed parentage (as did the surrogate). In what the Court of Appeal justifiably called an “extraordinary” conclusion, the trial court held that Jaycee had no legal parents. The Court of Appeal held that this was based on an erroneous interpretation of the \textit{Family Code}, specifically, that the statute provided that legal motherhood could only be established by giving birth or through a genetic link.
\end{itemize}
enforcing) the agreement between the parties, the Court held that “[j]ust as a husband is deemed to be the lawful father of a child unrelated to him when his wife gives birth after artificial insemination, so should a husband and wife be deemed the lawful parents of a child after a surrogate bears a biologically unrelated child on their behalf.” Reasoning from the statutory premise that a husband who consents to artificial insemination is treated in law as the father of the child “by virtue of his consent”, the Court found that “a married couple who consent to in vitro fertilization by unknown donors and subsequent implantation into a woman who is, as a surrogate, willing to carry the embryo to term for them”, are the legal parents of the child. By parity of reasoning, the

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233 As in Johnson, supra note 224, the relevance of the surrogacy agreement was its expression of intent; the question was not whether the agreement itself was enforceable: In re Marriage of Buzzanca, supra note 231 at 1423.

234 Ibid at 1413. In this respect, the Court drew on “the substantial and well-settled body of law holding that there are times when fatherhood can be established by conduct apart from giving birth or being genetically related to a child”, although quite how fatherhood would be established by giving birth was not explained.

235 The Court found the Family Code’s provisions concerning parentage in situations of artificial insemination were the “clearest expression of past legislative intent”: ibid at 1418.

236 Sperm donors who provide semen to a physician or sperm bank do not have parental rights or responsibilities unless it is their wife who is inseminated: Cal Fam Code §7613(b). The Court in Buzzanca also ruled out the possibility of anonymous egg donors being able to raise claims to parentage, albeit without adequate discussion of this principle: ibid at 1421.

237 As the Court noted, this reasoning applies concepts of causation and estoppel that are well known to the law. In particular, the Court referred to People v Sorensen, 68 Cal 2d 280 (1968) in which the Supreme Court of California held that an ex-husband was estopped from disclaiming responsibility for a child engendered by artificial insemination because of his role in causing the child’s birth: In re Marriage of Buzzanca, supra note 231 at 1420. It is also to be observed that the Court rejected John’s attempt to extricate himself from responsibility for Jaycee based on an allegation that he had not consented to the implantation. The mere fact that the surrogacy agreement had not been signed at the time of implantation did not displace his role in causing the implantation to take place. Nor was John able to rely on an alleged undertaking by Luanne that she would not hold him responsible for Jaycee’s upbringing, based on the principle that “parents cannot, by agreement, limit or abrogate a child’s right to support”: ibid at 1426.

238 Ibid at 1418. The problematic element in this facially sensible conclusion is the reasoning that led to the establishment of Luanne’s parentage. The Court analogized Luanne’s situation to that of a husband in an artificial insemination case and held that her consent to the implantation procedure established her motherhood under §7610 of the Family Code. However, Johnson, supra note 224, suggests that intent comes into play when the
same result ought to be reached in cases dealing married same-sex couples, and couples in domestic partnerships (by reason of the equivalency provision in §297.5(d) of the Family Code). The result in Buzzanca is an appropriate response to an unfortunate situation because it pays respect to the reasoned decisions of the parties at the time of the agreement; it would be manifestly inappropriate to impose parentage on a person who only agreed to provide bodily services to enable other people to parent a child. While this approach vis-à-vis intended parents might suggest that surrogates who change their mind ought to be treated as similarly bound by their previous intentions, for the reasons explored in Part 1 concerning the potential for affective bonds of attachment to develop in the course of gestation, it is appropriate that surrogates are not beholden to their pre-birth intention to the same degree as intended parents.

While a case involving same-sex commissioning parents has not yet been the subject of reported judicial attention in California, according to Joslin and Minter, “trial courts in California have applied this same intent-based parentage rule to cases in which the intended parents were unregistered gay male couples”.239 Furthermore, in a trio of cases decided in 2005, the Supreme Court clarified that,

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rights between two parties are equal; it does not assert that intent is relevant at the anterior stage of determining whether rights are equal. The Court in Johnson did suggest that in “the extremely rare situation in which neither the gestator nor the woman who provided the ovum for fertilization is willing to assume custody of the child after birth, a rule recognizing the intending parents as the child’s legal, natural parents should best promote certainty and stability”: Johnson, supra note 224 at 94-95. However, the facts in Johnson suggest that the Court was assuming that the woman providing the ovum is the intending mother, not a third (or more accurately fourth or fifth) party; the Court of Appeal arguably overlooked this when it declared, a little too emphatically, that the statement “quite literally describes precisely the case before us now”). In this respect, Buzzanca represents a rather dramatic extension, as opposed to a relatively straightforward application, of Johnson. This is not to impugn the result in Buzzanca – it would be perverse to impose parentage on an unwilling surrogate over commissioning parents; rather, it suggests the difficulties in applying statutes designed to cover one set of facts to unforeseen alternative situations.
for the purposes of Californian law, a child can have two natural parents of the same sex. However, in one of the cases that affirmed this principle, *KM v EG*, the Court also found, albeit in the context of IVF rather than surrogacy, that intent is only relevant when a “tie” between putative natural parents must be broken; thus, a woman who donated ova to her same-sex partner and who helped to raise the children over a number of years was held to be a natural parent in addition to the gestational mother, whose intention was to be a sole parent. This tends to confirm the primacy of genetic linkage over intention, though it is to be stressed that the non-biological mother took on a substantial parenting role towards the children and the case did not consider surrogacy or involve claims by multiple parties.

These cases must now be read in light of the surrogacy agreement provisions in the *Family Code*, which defines “Intended parent” as “an individual, married or unmarried, who manifests the intent to be legally bound as the parent of a child resulting from assisted reproduction”. The *Code* clearly contemplates surrogacy agreements involving only one intended parent – a significant clarification of what was unclear under the common law. The gender-neutral language of “intended parent” means that the position established in *KM v EG* and *Elisa B v Superior Court of El Dorado County* remains the law in California; that is, two persons of the same sex may be declared the natural parents of a child. On its face, the amendments appear to contemplate declarations of parentage in more than two intended parents; following the October 2013 amendments concerning multi-parentage, this is possible, although the relevant standard for the making of an order of parentage in respect of more

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241 *Cal Fam Code* §7960(c).
242 This position builds on the common law, which in California suggested a strong preference for imposing dual parentage where possible, but which also never dealt with a situation involving only one intended parent.
243 *Elisa B v Superior Court of El Dorado County*, 37 Cal 4th 108 (2005) [*Elisa B*].
than two adults is detriment to the child, not the existence of a valid competing claim by a putative parent.\textsuperscript{244}

A surrogacy agreement in California must include the following:\textsuperscript{245}

\begin{itemize}
  \item [(i)] the date upon which it was executed;
  \item [(ii)] the persons from which the gametes originated, unless anonymously donated; and
  \item [(iii)] the identity of the intended parent or parents.
\end{itemize}

A bill recently passed by the California Assembly will, if enacted, add the additional requirement of "[d]isclosure of how the intended parents will cover the medical expenses of the gestational carrier and of the newborn or newborns".\textsuperscript{246}

Prior to execution of the agreement, the surrogate and the intended parent(s) must have independent legal representation,\textsuperscript{247} and the agreement must be executed by the parties and notarized or witnessed.\textsuperscript{248} These requirements must be satisfied before commencing an embryo transfer procedure or injectable medication.\textsuperscript{249} An agreement executed in accordance with §7962 "is presumptively valid and shall not be rescinded or revoked without a court order".\textsuperscript{250}

From the perspective of establishing parentage, subsections (e) and (f) of §7962 are critical. Subsection (e) deals with pre-birth parentage orders.\textsuperscript{251} It provides that the intended parent(s) of a child conceived pursuant to a surrogacy

\textsuperscript{244} See \textit{infra} Section IV.

\textsuperscript{245} \textit{Cal Fam Code} §7692(a).

\textsuperscript{246} Assembly Bill No 2344 (introduced by Assembly Member Ammiano, February 21, 2014), s 2.

\textsuperscript{247} \textit{Cal Fam Code} §7962(b).

\textsuperscript{248} \textit{Ibid}, §7962(c).

\textsuperscript{249} \textit{Ibid}, §7962(d).

\textsuperscript{250} \textit{Ibid}, §7962(i).

\textsuperscript{251} Such orders were available prior to the recent amendments: see, e.g., \textit{Berwick v Wagner}, 336 SW 3d 805 (Tex 2011) (whether Californian parentage order constituted a custody determination requiring recognition in Texas).
agreement may file an action to establish the parent-child relationship in any county with a nexus to the agreement, the conception or the birth.\footnote{252} This requires lodgment of the agreement, which, crucially, operates to rebut the presumptions concerning paternity and maternity (contained in Division 12, Part 2 and §§7610(b), 7611 and 7613 of the \textit{Family Code}) “as to the gestational carrier surrogate, her spouse, or partner being a parent of the child or children.”\footnote{253} Upon the petition of \textit{any} party to a properly executed surrogacy agreement, “the court \textit{shall} issue a judgment or order establishing a parent-child relationship”.\footnote{254} This framework is a significant extension of the common law established in \textit{Johnson} and \textit{Buzzanca}, which stressed that judgments declaring parentage were not to be construed as enforcing any underlying agreement; rather, the agreement was relevant to determining the intent of the parties. The new law in California provides, to the contrary, that on the petition of any party a court “shall” (not “may”) issue a judgment establishing a parent-child relationship. Critically, subject to proof of compliance with the rest of §7962:

\begin{quote}
[T]he judgment or order shall establish the parent-child relationship of the intended parent or intended parents identified in the surrogacy agreement and shall establish that the surrogate, her spouse, or partner is not a parent of, and has no parental rights or duties with respect to, the child or children. The judgment or order shall terminate any parental rights of the surrogate and her spouse or partner without further hearing or evidence, unless the court or a party to the assisted reproduction agreement for gestational carriers has a good faith, reasonable belief that the assisted reproduction agreement for gestational carriers or attorney declarations were not executed in accordance with this section.
\end{quote}

Thus, the only situation in which a court may issue an order deviating from the terms of the assisted reproduction agreement is if it or a party to the agreement

\footnote{252}{Specifically, “the county where the child is anticipated to be born, the county where the intended parent or intended parents reside, the county where the surrogate resides, the county where the assisted reproduction agreement for gestational carriers is executed, or the county where medical procedures pursuant to the agreement are to be performed”: \textit{Cal Fam Code} §7962(e).}

\footnote{253}{\textit{Ibid}, §7962(f)(1).}

\footnote{254}{\textit{Ibid}, §7962(f)(2) [emphasis added].}
has a good faith, reasonable belief that it was not executed in accordance with §7962. Assuming that a surrogate obtains the requisite independent advice, she is not able to enforce a change of mind. Indeed, subject to certain limitations, the judgment or order may be issued before the birth.

These amendments significantly clarify the position of the key parties to a gestational surrogacy agreement in California. Assuming that a valid agreement is executed, an intending parent or intending parents can be certain of obtaining orders declaring her, him or them a natural parent or natural parents of a child or children born to a surrogate who bears no genetic link to the child or children. Crucially, there is no requirement that the intending parent or parents have a genetic link to the child. This is a significant endorsement of the intentionality principle insofar as gestational surrogacy is concerned. The law is less respectful of surrogates’ capacities for developing affective bonds with the children they carry. Given that the scheme enacted in California operates to enforce a surrogacy agreement, it would perhaps be preferable to require that such agreements are only valid if they include a provision conferring on the surrogate the ability to assert visitation rights within an appropriate period after birth.

If the requirements of §7962 are not met, the assisted reproduction agreement is not presumptively valid. Nevertheless, a court may declare that an intended parent is, or intended parents are, the parent or parents of the child if “sufficient proof entitling the parties to the relief sought” is adduced. It is appropriate that non-compliance with formal requirements does not automatically vest

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255 Enforcement of the order will be stayed until the birth of the child: Cal Fam Code §7633.
256 This is implicit within Cal Fam Code §7692(a)(2), which requires the inclusion of the names of the persons from which the gametes originated, unless anonymously donated” [emphasis added].
257 Ibid, §7962(i).
258 Ibid, §7962(f)(2).
259 Gross non-compliance with substantive requirements such as independent representation may justify orders contrary to the intention of the intended parents.
parentage in a surrogate, though it remains to be seen what level of proof will be required for courts to make orders conforming with the parties’ intentions. The intention undergirding the 2013 amendments respecting the rights and responsibilities of intended parents might be applied to defeat the claim of a surrogate in the absence of a complying surrogacy agreement, but this outcome is presently uncertain.

If courts have recourse to the common law in situations where agreements do not comply with the statute, Johnson tends to suggest that even if only one intended parent has a biological connection to the child, the non-biological intended parent’s claim would defeat that of the surrogate if she does not have a biological connection to the child. In situations where none of the parties have a genetic connection to the child, intention is likely to play a decisive role.\textsuperscript{260}\textsuperscript{260} In contrast, in cases of traditional surrogacy, Moschetta strongly indicates that the claim of the non-genetically related intended parent will be defeated. In the case of a single intending parent, the result may depend on whether he or she donated genetic material. If the answer is “yes”, it is almost\textsuperscript{261}\textsuperscript{261} certain on the authority of Johnson that he or she would be considered a natural parent. If the answer is “no” then Buzzanca can be read as suggesting that he or she will still be considered a parent, although this could become complicated if the surrogate is married by reason of paternity presumptions. In each case, whether the single intended parent is granted exclusive parentage may depend on the extent to which the 2013 amendments are applied purposively to non-complying agreements, given the California Supreme Court’s preference, expressed prior to

\begin{footnotesize}
\begin{enumerate}
\item \textit{In Re Marriage of Buzzanca, supra} note 231. Note, though, that \textit{KM v EG, supra} note 240 suggests that Buzzanca may have limited application beyond its own facts (though there is no reason to doubt that it would apply if a surrogate disclaimed parentage and the intended parents are a same-sex couple).
\item The presumption of fatherhood of a child born to a married woman in §7611(a) could conceivably be applied to vest parentage in both the surrogate and her husband if he claimed parentage, though the husband’s paternity could be challenged under §7551.
\end{enumerate}
\end{footnotesize}
the 2013 amendments respecting multi-parentage, for finding where possible that children have two natural parents.\textsuperscript{262}

In my view, it would be preferable for California to supplement its statutory regime to clarify the position regarding traditional surrogacy agreements in light of the law’s increasing shift towards intentionality since Moschetta. Perhaps the most significant amendment that ought to be considered is expanding the ability of gestational surrogates to assert the right to visitation with a child to which she has given birth. For the reasons explained in Part 1, it is not desirable to confer upon gestational surrogates an unfettered ability to assert parentage in respect of a child born pursuant to a gestational surrogacy agreement; nevertheless, the potential for affective connections between a surrogate and a child, and the emotional trauma of denying that connection, suggests equally that it may be appropriate to confer on surrogates the ability to claim some legal rights falling short of parentage and custody.

**B. Inter-Jurisdictional Surrogacy Questions**

This section first provides an overview of the law applicable to US residents who engage a surrogate within the US but outside of their State of residence, or who subsequently change their State of residence. It then considers the situation of non-US residents who engage a surrogate in the US, and vice versa.

Within the United States, a number of principles are relevant. First and foremost, the FF&C Clause of the \textit{US Constitution},\textsuperscript{263} as enacted at 28 USC §1738, requires that “Full Faith and Credit … be given in each State to the public Acts, Records, and judicial Proceedings of every other State”. In \textit{General Motors}, the Supreme Court clarified that the obligation to recognize the judgments or “judicial

\textsuperscript{262} Elisa B, supra note 243.

\textsuperscript{263} US Const, art IV, § 1.
Proceedings" of a sister State is “exacting”, whereas the “public Acts” of another State require significantly less deference (although a significant contact or aggregation of contacts is required for an exercise of jurisdiction). In addition, 28 USC §1738A provides that a state must “enforce according to its terms, and shall not modify except as provided … any custody determination or visitation determination made consistently with the provisions of this section by a court of another State”. Second, constitutional principles and state laws protect the right to travel and establish residence in a new State. The Fourteenth Amendment of the US Constitution prohibits States making or enforcing “any law which shall abridge the privileges or immunities of citizens of the United States”. California, for example, also recognizes the right of parents to change the residence of a child unless doing so would prejudice the rights or welfare of the child.

These principles mean that the judicially recognized parent or parents of a child born via surrogacy in, for instance, California are permitted to return home with their child and can be sure of their parentage or custody being recognized throughout the United States, irrespective of the legal status of surrogacy in the State of residence. In New York, where surrogacy is illegal, courts have recognized and enforced Californian parentage orders arising out of

264 General Motors, supra note 94 at 233.
265 Cal Fam Code §7501(a).
266 See Prashad v Copeland, 635 SE 2d 199, 204 (Va Ct App 2009), for an application of General Motors’ “exacting” requirement of credit for judgment in the context of custody and visitation. See also Finstuen, supra note 101, in which Oklahoma’s purported non-recognition of adoptions by same-sex couples completed interstate was held to violate the FF&C Clause of the Constitution.
267 For example, in In the Matter of John Doe, Settlor, 793 NYS 2d 878 (NY Surr Ct 2005), a court in New York held that children born via surrogacy were entitled to inherent under the terms of a trust established by their grandfather that prevented inheritance by adoptees. The Court emphasized that surrogacy is not to be equated with adoption and found that in spite of New York’s prohibition on surrogacy contracts (Dom Rel Law §122), New York must accord full faith and credit to parenting declarations made in other states irrespective of countervailing New York public policy; in any event, recognition would not involve enforcement of the underlying contract, contrary to New York public policy, but rather a declaration of parentage by the courts of a sister state.
surrogacy. While recognition of rights arising out of evasive surrogacy arrangements arguably undercuts the public policy of States such as New York, the detriment to parents and children of not recognizing their relationships, as well as the alarming precedent of permitting States to deny parent-child relationships based on shifting policy grounds, strongly favors the approach taken thus far. In the more unusual scenario of Californian parents engaging in surrogacy in another US State, parentage or custody orders made by the courts of the State in which the child was born will be accorded full recognition in California by reason of federal full faith and credit laws and Californian law implementing the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).

A recent Texas Court of Appeals case dealt with the implications of Texan residents accessing California’s gay-friendly surrogacy laws, in particular, whether parentage orders in favor of a non-biological parent constitute enforceable child custody determinations. Berwick v Wagner arose out of a successful surrogacy arrangement between two men, the litigants, and a Californian surrogate. Pre-birth parentage orders were made in favor of Berwick and Wagner and, upon the child’s birth, they assumed custody and brought the boy home to Texas. When Berwick and Wagner’s relationship ended, Wagner, the non-biological father, filed a Suit Affecting the Parent-Child Relationship in Texas, in which he sought joint custody (managing conservatorship in Texas

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268 Matter of Support Proceeding, NYLJ 1202474012528 (NY Fam Ct 2010); In re Doe, 793 NYS 2d 878 (Sur Ct 2005). See also Davis v Kania, 836 A 2d 480 (Super Ct 2003) (upholding Californian parentage order for purposes of Connecticut law).

269 Principles of cosmopolitanism also lead to this position. See the discussion in Part 2, Section III(B).

270 For example, Connecticut, where parentage orders in favor of non-biological intended parents have been upheld on the basis of a law providing for the issuance of a birth certificate listing intended parents under a gestational agreement as the legal parents of a child (Conn Gen Stat §7-48a); Raftopol, supra note 217.

271 US Const, art IV, §1. See also 28 USC §§1738, 1738A, 1738B.

272 Berwick v Wagner, supra note 251.
parlance) of the child. Berwick counter-claimed that Wagner did not have standing to seek custody because he was not a biological parent. In a separate proceeding, Wagner also sought to have the California judgment establishing his parentage registered in Texas as a child custody determination (CCD) under the Texas Family Code. The appeal related to this latter proceeding; specifically, whether the California judgment qualified as a CCD. The question of whether the Californian parentage order was entitled to full faith and credit was not before the Court.

The Court of Appeals affirmed that the California judgment did qualify as a CCD on the basis of the UCCJEA, which both Texas and California have enacted. The Court found that an express declaration of custody is not necessary for a judgment to be valid under the UCCJEA; accordingly, the Californian judgment declaring Wagner to be a legal parent of the child was in effect a CCD because the nature of the declaration of parentage inherently involved matters of custody as between the surrogate, her husband, and the intended fathers. Thus, at least for the purposes of custody disputes in Texas, an interstate judgment concerning parentage can be relied upon by a non-biological parent of a child born via surrogacy if the interstate judgment raises the issue of custody between presumptive and intended parents.

The Court’s conclusion in Berwick v Wagner is to be welcomed as an affirmation of the importance of function over biology: Wagner took on and performed the role of parent to his son in precisely the same manner as Berwick – which father’s sperm was used to conceive the boy may have had some consequence

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273 The phenomenon of gay parents using another parent’s lack of a biological connection to a child against them is not new: see, e.g., Ball, supra note 16 at ch 4.
274 Tex Fam Code, ch 152; Cal Fam Code, Div 8, Pt 3.
275 “While custody was not disputed between Berwick and Wagner in that proceeding, it was very much at issue with relation to [the child’s] surrogate mother and her husband vis a vis [the child’s] biological father and domestic partner”: Berwick v Wagner, supra note 251 at 811.
as between the men, but it appears to have had no relevance whatsoever to the child in question, whose interest lay with maintaining a legal relationship to both of his parents. That interest arose not because of any intrinsic benefit derived from two parents (of any gender configuration) but because of the harm that would be caused by removing or diminishing the role of a central figure in a child’s life for no greater reason than the absence of a biological connection.

Cases from Massachusetts and Minnesota show that residents of States with public policies against surrogacy may also declare that another State’s law is to apply to a surrogacy agreement. In Hodos v Morin,\(^{276}\) the Supreme Court of Massachusetts held that (heterosexual) intending parents (residents of Connecticut) were entitled to a pre-birth parentage order\(^{277}\) based on a contractual stipulation between the intending parents and the surrogate (a resident of New York) that birth ought, if possible, to take place in Massachusetts. The Supreme Court determined that despite the jurisdictional links to New York and Connecticut, the parties' choice of the law of Massachusetts was to be respected, in accordance with Massachusetts’ “functional” choice of law principles, reflected in the Second Restatement §187(2).\(^{278}\) The Court held that it had subject matter jurisdiction because the relevant statute imposed no residency requirement, and personal jurisdiction over the hospital. Massachusetts was found to have a “substantial relationship” to the transaction\(^{279}\) by reason of the parties' negotiated agreement and the

\(^{276}\) Hodos, supra note 212.

\(^{277}\) In this regard, the Court followed its earlier decision in Culliton, supra note 213, in which it held that the State family court had jurisdiction to make a pre-birth parentage order declaring that genetically-related intending parents of a child due to be born via surrogacy were the legal parents of that child. It is to be noted, though, that both intended parents were related to the child, the surrogate consented to the order, and the application was not subject to third-party intervention. Accordingly, the same result cannot be guaranteed in a different factual matrix.

\(^{278}\) It was also relevant that Massachusetts’ Probate Court is not subject to residency requirements.

\(^{279}\) As required under Second Restatement §187(2)(a).
surrogate’s receipt of prenatal care at a Massachusetts hospital. The Court held that it was “a close question” whether applying the parties’ choice of law would be “contrary to a fundamental public policy” of another State with a “materially greater interest”, given the parties’ respective States of residence and New York’s clearly expressed policy on the issue. The Court nevertheless held that even if New York had a greater policy interest in the matter than Massachusetts and Connecticut, the parties’ negotiations and clear desire to avoid submission to the jurisdiction of New York meant that its law would not apply because the parties had made an effective choice not to be governed by the law of New York.

A somewhat similar situation came before the Minnesota Court of Appeal in In re Paternity and Custody of Baby Boy A. In that case, a New York resident, PGM, entered into a surrogacy agreement with his niece, JMA, a resident of Minnesota. The contract stipulated that Illinois law would control. JMA was implanted with an anonymously donated egg fertilized with PGM’s sperm in Illinois. During the pregnancy, the relationship between uncle and niece broke down and JMA returned to Minnesota, where she gave birth and subsequently refused to relinquish the baby to PGM. The Minnesota District Court held that the choice of law clause governed, meaning that Illinois law applied and the contract was enforceable. The absence of any statutory or common law prohibition on surrogacy agreements in Minnesota dispensed with an argument that the contract was unenforceable for being against Minnesota public policy. The Court of Appeal affirmed.

In the international context, the immediate question facing parents of children born via surrogacy in a foreign country is how to get the child back to their home state. Children born in the United States are automatically US citizens and are

280 A determination required by Second Restatement §187(2)(b).
282 The ius soli principle is entrenched in US Const, am. XIV.
therefore able to leave the United States with their legal parents. The child’s entry to the state of his or her parent or parents’ residence is a matter for the law of that state. In respect of children born outside of the US and whose intended parents are American citizens, federal immigration law provides that a child born overseas to a married couple automatically obtains citizenship if at least one parent is a US citizen. However, the US considers that children born via surrogacy are born “out of wedlock”, meaning that they must satisfy the requirements of 8 USC §1409. Assuming the additional hurdles in that provision are surmounted, and subject to satisfying the procedural requirements for children born abroad, those children will be permitted to enter the US as citizens. Nevertheless, the fact that there are different standards for children’s

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283 Obtaining a parentage order pursuant to Cal Fam Code §7630 or other relevant state statute is therefore advisable.

284 See, e.g., Part 5, Section II concerning Canadian law.

285 There are also minimum residency requirements for the parents of the child: see 8 USC §1401 (c), (d), (g).

286 Lisa Vogel, Documenting US Citizenship and Getting a US Passport for Children Born Abroad to US Citizen Parents Through Assisted Reproductive Technology (Paper presented to American Bar Association, International Law Meeting, 2013) at 3. Accordingly, a child claiming citizenship through his or her biological father must provide “clear and convincing evidence” of a blood relationship and meet certain other criteria set out in 8 USC §1409(a). A child claiming through his or her biological mother obtains citizenship at birth if the mother had previously been present in the US for at least one year: 8 USC §1409(c). If the State Department changes its position on this issue and treats such children as having been born to married parents for the purposes of 8 USC §1401, there may be a question as to the treatment of the children of legally married same-sex couples, since those children will not be biologically related to both parents. The Department of Homeland Security’s position thus far following United States v Windsor, 133 S Ct 2675 (2013) suggests that no distinction would be drawn between the children of married opposite-sex and same-sex couples.

287 Parents may obtain a Consular Report of Birth Abroad of a Citizen of the United States (CRBA) from the US Embassy or Consulate in the relevant country. The CRBA proves US citizenship; it does not demonstrate legal parenthood or custody of a child. The parent through whom citizenship is being transmitted is listed on the CRBA; a non-biological parent may also be listed if they have legal parentage under the law of the country of birth or via adoption: Vogel, supra note 286 at 4.

288 Obtaining a US passport may be more problematic because both of the child’s custodial parents or guardians must sign the passport application. Thus, in a country that deems the surrogate to be the child’s mother irrespective of the absence of a genetic relationship, it will be necessary to obtain either the surrogate’s consent, or a court order
entry to the US based on their parents’ relationship status is utterly without legitimate justification. The different standards in this context reinforce the primacy of marriage in American law and culture as well as the notion that the children of married parents are somehow more legitimate and worthy of institutional respect than children of unmarried parents.

If only one intending parent is recognized as the child’s legal parent in the country of birth and that (biologically-related) parent is a US citizen, the best option would appear to be to obtain a Consular Report of Birth Abroad of a Citizen of the United States, which enables a child to travel with his or her legal parent as listed on the Report\(^\text{289}\) (the surrogate generally need not be listed\(^\text{290}\)), followed by a second parent adoption by the non-biologically related parent in the US. The child will not be eligible to receive a CRBA if the genetically related parent is not a US citizen (even if the other intending parent is a US citizen), or if neither parent is genetically related to the child. This is a troubling reification of the primacy of biological connection that does not reflect the reality of cross-border family formation, particularly where same-sex couples are involved. If automatic citizenship is not granted, an international adoption by one or both non-biological US citizen parent(s) would appear to be the best option (if it available\(^\text{291}\)) since the relevant visa\(^\text{292}\) automatically confers US citizenship upon granting sole custody to the biological parent, a declaration of legal parenthood in respect of the non-biological parent, or court authorization allowing the child to travel internationally with the recognized parent(s).

\(^{289}\) 22 USC §2705.

\(^{290}\) Vogel, supra note 286 at 4-5.

\(^{291}\) See supra Section I(D).

\(^{292}\) If the adoption took place in a Convention country, the relevant visa is an IH-3. If the adoption took place in a non-Convention country, the relevant visa is an IH-4. See United States Citizenship and Immigration Services, Before your child immigrates to the United States, online: <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/>
the child.\footnote{293}{This in turn suggests the absurdity of not simply conferring citizenship at the outset.) Once the child is in the US, the adoptive parent(s) will be automatically recognized if the adoption was formalized in a country party to the \textit{Adoption Convention};\footnote{294}{adoptions formalized in non-Convention nations are not automatically recognized throughout the US and therefore re-adoption in accordance with State law is advisable.\footnote{295}{For a non-citizen biological parent who is recognized as a parent under the law of the country of birth, the \textit{UCCJEA} ought to confer reciprocal recognition of parentage because it provides that state courts must “treat a foreign country as if it were a state of the United States” for the purposes of child custody recognition unless the custody law of the foreign country violates fundamental principles of human rights.\footnote{296}{Notwithstanding, it may behove parents to obtain a declaration of parentage to avoid confusion if re-adoption is also being sought.\footnote{297}{}}}} Once the child is in the US, the adoptive parent(s) will be automatically recognized if the adoption was formalized in a country party to the \textit{Adoption Convention};\footnote{294}{adoptions formalized in non-Convention nations are not automatically recognized throughout the US and therefore re-adoption in accordance with State law is advisable.\footnote{295}{For a non-citizen biological parent who is recognized as a parent under the law of the country of birth, the \textit{UCCJEA} ought to confer reciprocal recognition of parentage because it provides that state courts must “treat a foreign country as if it were a state of the United States” for the purposes of child custody recognition unless the custody law of the foreign country violates fundamental principles of human rights.\footnote{296}{Notwithstanding, it may behove parents to obtain a declaration of parentage to avoid confusion if re-adoption is also being sought.\footnote{297}{}}}}

\footnote{293}{8 USC §1431. Children who are adopted from a country that has not ratified the Convention must qualify as orphans under the \textit{Immigration and Nationality Act} before they are eligible to be considered for citizenship or permanent residence: see 8 USC §1101(b)(1)(F)(i). Satisfaction of this condition entitles the child to citizenship under 8 USC §1431(b). See also 8 USC §1101(b)(1)(e), which entitles a child adopted while under the age of 16 who has been in the custody of and resided with the adoptive parent for at least two years to citizenship.\footnote{294}{42 USC §14951. In the event of irregularities or procedural difficulties, the Director may, in “the interests of justice or to prevent grave physical harm to the child”, waive certain procedural requirements, to the extent permitted by the Convention: 42 USC §14952.\footnote{295}{For example, \textit{Cal Fam Code} §8912(a).\footnote{296}{See, e.g., \textit{Cal Fam Code} §3405. Forty-nine states have adopted the \textit{UCCJEA}. Massachusetts, the only state which has not yet adopted the \textit{UCCJEA}, introduced Bill HB31/SB711 in 2013 to do so.\footnote{297}{For example, pursuant to \textit{Cal Fam Code} §7630 or §7650. This may also avoid potential problems concerning parentage and custody in future international travel: see Estin, \textit{supra} note 141 at 130-31.}}}}
III. Artificial Insemination and In Vitro Fertilization

Single women and lesbian couples in the United States may encounter discrimination at the very outset of the assisted reproduction process. While constitutional principles probably preclude differential treatment of single women who seek to access ART, practically speaking, access to assisted reproduction may depend on whether a clinic is public or private. Denial of state services to lesbian women, where ART services are provided to women in opposite-sex relationships, is likely to fall foul of the Fourteenth Amendment by reason of the prohibition on laws based on moral disapproval, as enunciated in *Romer v Evans* and confirmed in *Lawrence v Texas*. On the other hand, there is little to prevent private clinics in States that lack sexual orientation antidiscrimination laws from discriminating on the basis of sexual orientation or relationship status.

If artificial insemination or IVF is successful, the next hurdle may be parentage, which for children born via these methods tends to operate by way of presumption. For example, in California, §7613 of the *Family Code* provides:

> If, under the supervision of a licensed physician and surgeon and with the consent of her husband, a wife is inseminated artificially with semen

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301 For example, there is little to prevent private clinics in Texas from discriminating on the basis of sexual orientation or relationship status, since the state has no antidiscrimination laws protecting LGBT people and ordinances in Austin, Dallas, Fort Worth, Houston, El Paso and San Antonio are restricted to matters of employment and access to housing. See, e.g., *Dallas City Code*, art 1, s 46. In California, medical clinics may not refuse assistance based on a prospective patient’s sexual orientation: *North Coast Women’s Care Medical Group, Inc v Superior Court*, 189 P 3d 959 (Cal 2008), applying §51 of *California Civil Code (Unruh Civil Rights Act)* (rejecting an argument that the First Amendment to the US Constitution accords such a right of refusal based on the free exercise of religion as well as a claim under art I, § 4 of the *California Constitution* because there was no less restrictive means of achieving California’s legislative aim of non-discrimination).
donated by a man not her husband, the husband is treated in law as if he
were the natural father of a child thereby conceived.

Similarly, §7611 stipulates situations in which a man is presumed to be the
natural father of a child, including where “[h]e receives the child into his home
and openly holds out the child as his natural child”. Conversely, a sperm donor is
absolved from parental responsibility if the semen is provided to a physician,
unless otherwise agreed to in writing and signed by the donor and the woman
prior to conception.302 Many other States have substantially the same303 or
similar laws;304 more recent enactments have tended to apply to both married
and unmarried couples,305 though few States have gender-neutral laws in this
area.306 The common law has also tended to presume parentage on the part of a
woman’s husband.307

For same-sex couples, the law also operates presumptively, though not
necessarily in favor of non-biological parents. In States that recognize same-sex
marriage or a legal equivalent, the female spouse or partner of a woman who
conceives via artificial insemination is, or is likely to be, a presumed parent of the
resulting child. For instance, California has confirmed that “[t]he rights and

302  Cal Fam Code §7613(b).
303  Colorado, Illinois, Minnesota, Missouri, Montana, New Jersey and Wisconsin.
304  Alabama, Alaska, Arizona, Arkansas, Connecticut, Florida, Georgia, Idaho, Kansas,
      Louisiana, Massachusetts, Michigan, New York, North Carolina, Ohio, Oklahoma,
      Oregon, Tennessee, Texas, Utah and Washington also have statutory provisions that
      presumptively vest parentage in the husband of a woman who bears a child as a result of
      artificial insemination. The formal requirements for the presumption (concerning matters
      such as written consent from the husband and medical supervision) differ from State to
      State. See Joslin & Minter, supra note 1 at §3:3, 144-50.
305  Delaware, New Mexico, North Dakota and Wyoming.
306  The District of Columbia is one jurisdiction with gender-neutral parentage presumptions in
      cases of artificial insemination.
307  See Joslin & Minter, supra note 1 at §3:3, 151 cases cited at n 54 therein.
obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses”.  

In *Elisa B*, the California Supreme Court considered the responsibilities of a woman with respect to children born to her former partner during an unregistered relationship. The Court held:

[A] woman who agreed to raise children with her lesbian partner, supported her partner’s artificial insemination using an anonymous donor, and received the resulting twin children into her home and held them out as her own, is the children’s parent under the Uniform Parentage Act and has an obligation to support them.

The Court thus confirmed that its “statement in *Johnson* that a child can have ‘only one natural mother’ does not mean that both Elisa and Emily cannot be parents of the twins”. It was irrelevant that the relationship between the women was not formalized with the State; this strongly suggests that the same principles would be applied to married and registered same-sex couples. In reaching its conclusion concerning parentage, the Court looked to its earlier decision in *Sharon S*, in which it upheld the validity of a second-parent adoption “in which the mother of a child that had been conceived by means of artificial

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308 Cal Fam Code §297.5(d). Following *Hollingsworth v Perry*, 133 S Ct 2652 (2013), same-sex marriage is now possible throughout California; accordingly, the presumption in §7613 ought to be read as if it were gender-neutral.

309 *Elisa B*, supra note 243.

310 *Ibid* at 113. The result in *Elisa B* seems to overrule the earlier decision in *Georgia P v Kerry B*, Nos, A059817 and A060829 (Cal Ct App Jan 31, 1994). In that case, the appellant, Georgia, relied on *Johnson* to enforce a parenting agreement with her former partner, Kerry, the biological (and birth) mother of a child born as a result of an agreement between the women. Georgia did not adopt the child but cared for her as a parent for the first five years of the child’s life. After the women separated, Kerry attempted to constrain Georgia’s relationship with their child. The Court of Appeal affirmed the trial court’s rejection of Georgia’s parenthood claim and interpreted *Johnson* as standing for the narrow proposition that “intent should only be invoked when more than one woman fits the statutory definition of natural mother”. The case is unreported; accordingly, the summary in this paper is drawn from Nicole Berner, “Intent-Based Parenthood Held Inapplicable in Case of Lesbian Mothers” (1994) Berkeley Women’s LJ 213.

311 *Elisa B*, supra note 243 at 117.
insemination consented to adoption of the child by the mother’s lesbian partner”. 312

In order to fit the facts within the legislative scheme provided by the Uniform Parentage Act, the Court relied on §7650, which provides that provisions applicable to determining a father and child relationship shall be used to determine a mother and child relationship “insofar as practicable”. Thus, the presumption that a man who receives a child into his home and “openly holds out the child as his natural child” is the child’s father, applies equally to women. The Supreme Court found that Elisa had received the twins into her home and held them out to be her natural children; accordingly, she fell within the requirements of §7611(d) as applied to women in accordance with §7650. The absence of genetic connection did not rebut the presumption313 in this case because of Elisa’s role in Emily’s insemination, combined with the facts of receiving the twins into her home and in all respects acting as a mother to them.314

312 Ibid at 119. A similar conclusion was reached by the Supreme Court of Vermont in Miller-Jenkins v Miller-Jenkins, 912 A 2d 951 (2006) [Miller-Jenkins (Vt S Ct)], where the Court held that each of the women, who had been in a civil union, were the legal parents of a child conceived during the union using artificial insemination. It should be noted, though, that the Court reached this conclusion based on Vermont’s then requirement of equal treatment of civil unions and marriages, rather than an extension of the marital presumption to civil unions: ibid at 966, 970. See also Debra H v Janice R, 930 NE 2d 183 (2010), where the Court of Appeals of New York held that both female parties to a civil union were the legal parents of a child born using artificial insemination.

313 In this respect the Court relied on its previous decision in In re Nicholas H, [2002] 28 Cal 4th 56 (2002), where it was held that a man who had held out Nicholas to be his son from the time of his birth was the boy’s father, despite having met Nicholas’s mother while she was pregnant with the boy. The Court clarified that the presumption in Cal Fam Code §7611 is not automatically displaced by an absence of genetic connection; rather, it may be displaced. The Court also referred to the Court of Appeal’s judgments in In re Karen C, 101 Cal App 4th 932 (2002) and In re Salvador M, 111 Cal App 4th 1353 (2003). In the Karen C case, the Court applied Nicholas H to the effect that a woman with no biological connection to a child could be a presumed mother under Cal Fam Code §7611(d) if the woman takes the child into her home and holds the child out as her natural child. In Salvador M, a woman who had raised her half-brother as her son was held to satisfy §7611(d).

314 In this vein, the Court implicitly applied estoppel principles to preclude Elisa’s denial of parental responsibility: Elisa B, supra note 243 at 123-25.
The situation is potentially more complex in cases of egg donation, at least where the donor is the partner of the birth mother. In *KM v EG*, the Supreme Court of California was called upon to resolve a dispute between the gestational and legal mother of twins, EG, and the mother’s former partner, KM, who had provided the ova that were implanted in EG. At the time of donation, KM signed a donation form that expressly relinquished any claim to parentage of children created using her ova. However, a factual dispute arose concerning the women’s intentions: EG gave strong evidence that she made clear her intention of being the sole parent of any children born as a result of the donation; KM’s evidence to the contrary was found by the trial court and the Court of Appeal to be less persuasive than that of EG. Nevertheless, the Supreme Court overruled the Court of Appeal and held that KM was a parent of the twins. Relying on the domestic partnership equivalency provision in §7650, the Court applied the *Family Code*’s provisions concerning father and child relationships. Pursuant to the finding in *Johnson* that “‘genetic consanguinity’ could be the basis for a finding of maternity just as it is for paternity”, the Court held that KM’s genetic relationship to the twins was sufficient evidence of a mother and child relationship. The Court disapproved of the Court of Appeal’s application of the provision concerning sperm donors (which relieves from liability a man who provides semen to a physician to inseminate a woman who is not his wife), reasoning that in this case, the women had intended to raise the children in their home together. Thus, the situation was not that of a “true ‘egg donation’ situation” because “KM did not intend to simply donate her ova to EG, but rather provided

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315 *KM v EG*, supra note 240.
316 *Ibid* at 139. The fact that there was no potential third parent meant that it was not necessary to break the “tie” between KM’s and EG’s respective genetic and birth-derived rights: *Ibid* at 143.
her ova to her lesbian partner with whom she was living so that EG could give birth to a child that would be raised in their joint home".  

The majority’s approach in effect extends the parentage presumption to same-sex couples in cases of IVF even when the parties may intend for only one partner to be a parent. As Justice Werdegar in dissent pointed out, “at least in some cases, women who wish to donate ova without becoming mothers, serve as gestational surrogates without becoming mothers, or accept ovum donations without also accepting the donor as a coparent would be well advised to proceed with the most extreme caution”. This can be seen as a substantial incursion into the autonomy of women to decide on the most appropriate family form for their particular circumstances, especially in view of the majority’s stated desire to avoid, where possible, leaving children without two parents. From the perspective of the obligation to provide financial and developmental support to children, there is little to criticize in this goal. However, it also prioritizes a particular dyadic conception parenthood that may not, in all circumstances, be the most appropriate model for the parties.

If one places less emphasis on the (disputed) intention of the parties, and looks instead to the conduct of the women and the law concerning opposite-sex parentage, the result in KM v EG is less troubling. Indeed, the result arguably

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317 The Court referred to the fact that the women were registered partners, though it is not clear that anything turned on this fact beyond that it indicated the women’s commitment to one another: ibid at 141-42.

318 Ibid at 153.

319 Ibid at 122-23.

320 While consistency in the law is an insufficient reason basis for reform if the underlying principles are unsound, it is to be observed that imposed parentage of this sort brings the law concerning same-sex couples into conformity with the presumed parentage of husbands who donate sperm that is used to impregnate their wives; given that KM and EG were domestic partners, KM’s parentage is thus consistent with the law of presumed parentage concerning married couples, which now also extends to married same-sex couples. (See also Debra H v Janice R, supra note 312, in which the Supreme Court of New York held that a child born to a lesbian couple through artificial insemination was the legal child of both women.) This being said, the judgment goes further by providing that
coheres with the general emphasis in same-sex family law on functional parenting, given the central role played by KM in the children’s lives. The Court’s reasoning may be criticized for its emphasis on biology at the expense of intention, but the result tends to comport with a view that children’s best interests are served by preserving connections with their functional as well as their biological parents.\textsuperscript{321}

A more recent decision, \textit{Charisma R v Kristina S},\textsuperscript{322} deals with presumed parentage following a brief period of post-birth cohabitation. The Court of Appeals extended the findings in \textit{Elisa B} and \textit{KM v EG} by granting a presumption of parentage to the same-sex partner of a biological mother despite the women having co-parented for only 13 weeks and the absence of a biological connection on the part of the applicant. The Court observed that “[a]lthough cohabitation for

\begin{quote}
"when partners in a lesbian relationship decide to produce children in this manner, both the woman who provides her ova and her partner who bears the children are the children’s parents": \textit{Elisa B, supra} note 240 at 134. The presumption here is broader than for unmarried or unregistered opposite-sex couples in most States. At present, four States (Delaware, New Mexico, North Dakota, and Wyoming) and the District of Columbia apply statutory paternity presumptions to unmarried couples (and New Mexico and DC do so in gender-neutral terms that apply to same-sex couples); courts in Illinois, California and Tennessee have also declared paternity in cases where unmarried couples have accessed artificial insemination. In other States, paternity is established by voluntary declaration and inclusion on the child’s birth certificate. (In \textit{Herman v Lennon}, 776 NYS 2d 778 (Sup 2004) the Superior Court of New York refused to apply the paternity presumption in the case of an unmarried couple who accessed artificial insemination, in spite of the man executing a form consenting to the procedure.) In effect, though, the result may not be substantially different because a father who does not admit paternity can have parentage imposed if a genetic link is established. In an analogous situation to that in \textit{KM v EG}, a male parent would also be likely to have parentage imposed by estoppel; although the Court in \textit{KM v EG} did not reach this question because of its conclusions concerning presumed parentage.
\end{quote}

See also Ball, \textit{supra} note 16 at 140: “Even if [EG], while she permitted [KM] to function as a parent, still held fast to the view that she was the only legal parent, the important point is that the twins, because of that permission, came to view [KM] as a parent. The law should not allow a parent to rely on original intent to sever a later-established parental bond between her then partner and the children, any more than it should permit a parent to rely on the absence of a biological link between her former partner and the children to achieve the same goal”.

\textsuperscript{321} See also Ball, \textit{supra} note 16 at 140: “Even if [EG], while she permitted [KM] to function as a parent, still held fast to the view that she was the only legal parent, the important point is that the twins, because of that permission, came to view [KM] as a parent. The law should not allow a parent to rely on original intent to sever a later-established parental bond between her then partner and the children, any more than it should permit a parent to rely on the absence of a biological link between her former partner and the children to achieve the same goal”.

\textsuperscript{322} \textit{Charisma R v Kristina S}, 175 Cal App 4th 361 (2009).
an extended duration may strengthen a claim for presumed parent status, §7611(d) does not require that cohabitation or coparenting continue for any particular period of time.\textsuperscript{323} To the extent that the parties intended to co-parent the child, this conclusion is correct because it prioritizes intention and functional parenting capacity over genetics. The decision can also be viewed as autonomy enhancing because of the respect it evinces for parties’ reasoned joint decisions concerning parentage of children.\textsuperscript{324}

For intended parents using ART (not including surrogacy), the law in California concerning parentage is likely to become somewhat simpler as a result of amendments to the \textit{Family Code} that were passed by the Assembly in May 2014.\textsuperscript{325} If passed by the Senate, a new §7613.5 will enable parties to declare their intention to parent a child using one of three statutory forms for assisted reproduction, depending on the sex of the parties and their relationship status. As presently drafted, the forms apply to: married spouses or registered partners where one party will be giving birth; unmarried intended parents where “one of you will give birth to a child conceived through assisted reproduction using the intended parent’s sperm”; and intended parents “conceiving a child using the eggs from one of you and the other person will give birth to the child”. The forms do not rebut the potential parentage of a known sperm donor unless sperm was provided to a licensed physician, surgeon or clinic pursuant to §7613(b) of the \textit{Family Code}. For lesbian couples, the amendments have the potential to clarify parentage in the sort of situation that arose in \textit{KM v EG}, although the absence of a declaration under the new law will not preclude a claim by a non-biological parent. The forms do not apply to unmarried or unregistered lesbian couples.

\textsuperscript{323} \textit{Ibid} at 374. See also \textit{Chambers v Chambers}, 2005 WL 645220 (Del Fam Ct 2005).

\textsuperscript{324} The argument that a biological parent’s autonomy is impaired can be rebutted because post-birth, parentage is, or ought to be, joint, meaning that the biological parent does not have sole decision-making authority that is amenable to infringement by a non-biological parent.

\textsuperscript{325} Assembly Bill No 2344 (introduced by Assembly Member Ammiano, February 21, 2014), s 1.
unless both women will have a physical connection to the child (gestational for one woman and biological for the other woman). The amendments may thus be seen as a prioritization of registered relationships and biology over what might be called a ‘pure’ intention to parent, although the amendments do not preclude a parentage claim by a non-biological parent who was not married to or in partnership with the child’s biological parent at the time of birth.

Outside of California, courts in Indiana\textsuperscript{326} and New Jersey\textsuperscript{327} have applied parenting presumptions to unregistered same-sex couples, and courts in Delaware\textsuperscript{328} and Vermont have relied on the post-birth conduct of a non-biological parent in a same-sex relationship to impose, respectively, parental obligations and legal parentage. The Vermont case, \textit{Miller-Jenkins v Miller-Jenkins},\textsuperscript{329} also demonstrates the potential dangers for non-biological parents in States that do not recognize same-sex marriage or civil unions.

The \textit{Miller-Jenkins} litigation arose out of a custody dispute between the same-sex parents of a child born to one of the women. In 2000, Lisa Miller and Janet Jenkins, residents of Virginia, entered into a civil union in Vermont and became the Miller-Jenkins'. In 2002, Lisa gave birth to Isabella and the family moved to

\begin{footnotesize}
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\item In \textit{In re AB}, 818 NE 2d 126 (Ind Ct App 2004), the Court of Appeals held that common law parentage by estoppel applied equally to a woman who consented to her same-sex partner’s artificial insemination. The decision was not based on the non-biological parent holding the child out as her own but rather applied by reason of the relationship between the parents and the consent of the non-biological mother. Note, however, that the decision was ultimately vacated on procedural grounds: \textit{King v SB}, 837 NE 2d 965 (Ind 2005).
\item Prior to New Jersey’s enactment of civil unions, the Superior Court held in \textit{In re Parentage of Robinson}, 890 A 2d 1036 (Ch Div 2005) that the statutory parentage presumption concerning married opposite-sex couples had to be applied equally to a child born to a same-sex couple. However, the Court relied in part on the “significant” fact that the women had married in Canada.
\item \textit{Chambers v Chambers}, supra note 323 (holding that a woman who participated in the IVF process that led to her former partner’s pregnancy, and who parented the resulting child for approximately two years after his birth, was a legal parent for the purposes of child support).
\item \textit{Miller-Jenkins} (Vt S Ct), supra note 312.
\end{enumerate}
\end{footnotesize}
Vermont. In 2003, Lisa and Janet separated. Janet stayed in Vermont while Lisa moved back to Virginia with Isabella, and filed dissolution proceedings in Vermont. The family court held that Janet was a legal parent to Isabella because of the women’s civil union at the time of Isabella’s birth, and issued temporary orders granting legal and physical custody of Isabella to Lisa, and visitation rights to Janet. Lisa refused to comply with the Vermont orders and obtained judgment in Virginia that she was Isabella’s sole legal parent on the basis of Virginia’s non-recognition of same-sex marriage or civil unions. The Supreme Court of Vermont subsequently affirmed that Vermont had jurisdiction over the matter and was not bound to accord full faith and credit to the Virginia court’s judgment. The Virginia Court of Appeals reached the same conclusion concerning jurisdiction.

The Vermont Miller-Jenkins cases appropriately affirm that non-biological parents in registered same-sex relationships with the biological parent of a child are legal parents for the purposes of Vermont law. The Virginia cases demonstrate the pitfalls of interstate non-recognition of same-sex unions; while the Court of Appeals in Virginia affirmed Vermont’s jurisdiction, it is not clear that Janet’s rights would have been upheld if proceedings had been commenced in Virginia. In another case concerning same-sex partners who entered into a civil union in Vermont, Jones v Barlow, the Utah Supreme Court refused to recognize the union or the legal parentage of the non-biological mother. These cases suggest that non-biological parents in States that do not recognize same-sex relationships (and, per Miller-Jenkins, potentially even persons resident in States that do accord such recognition if there is the possibility that one or both of the

330 Ibid.
332 See further Ball, supra note 16 at 103-11.
333 Jones v Barlow, 154 P 3d 808 (Utah 2007), in which the Utah Supreme Court held that the former partner of a biological mother was a legal stranger to the child that the women had jointly decided to raise.
parties will move interstate) ought to obtain the protection of a parentage order or second parent adoption to the extent that such orders are available, since court orders are recognized throughout the United States pursuant to the FF&C Clause and the UCCJE.

In cases where a same-sex couple accesses ART, the extension of presumed parentage to non-biological spouses, registered partners, and functional or intended parents, is certainly to be welcomed. However, the cases above also demonstrate the flaws in a system that determines parentage in part by reference to the relationship between a child’s parents. In Elisa B, the non-biological mother ought to have been (and was) considered a parent of the child irrespective of the fact that the women’s relationship was not formalized under Californian law because of their joint intention to have and raise a child, and the parenting role that was played by the non-biological mother throughout the child’s life. As Miller-Jenkins shows, though, favorable determinations of this sort are jurisdictionally specific and can depend on which party files suit first. A better system would be one that places intention and action at the forefront of the determination, across-the-board, irrespective of the relationship status of a child’s parents and certainly without any consideration of the sexual preference of the parties involved. In such a system, it would not have mattered if Lisa Miller had filed suit in Virginia before Janet Jenkins instituted proceedings in Vermont; nor would the trial court in Virginia have made the error of considering that the State’s relationship recognition laws precluded recognition of Janet’s parentage.

334 In Adoption of Sebastian, 879 NYS 2d 677 (Surr Ct 2009), the Surrogate’s Court of New York granted a second parent adoption to the biological mother of a child born to her wife, despite the fact that New York recognized the women’s Netherlands marriage and accordingly, in New York, also recognized their shared parentage. The Court observed that “the only remedy available here that will accord the parties full and unassailable protection is a second parent adoption pursuant to New York Domestic Relations Law [§ 110 et seq].”

335 For example, §3443(a) of the Cal Fam Code states: “A court of this state shall recognize and enforce a child custody determination of a court of another state if the latter court exercised jurisdiction in substantial conformity with this part or the determination was made under factual circumstances meeting the jurisdictional standards of this part and the determination has not been modified in accordance with this part.”
California’s recent legislative amendments go some way towards affirming the parentage of lesbian and gay non-biological intended parents, although the provisions are oriented towards those persons in registered relationships or situations in which both parties have a physical connection to a child. The scope of recognition for intention thus remains circumscribed by reference to prevailing notions of familial propriety centered on the nuclear, dyadic family. Nevertheless, as the next section shows, the law is beginning to take note of and make provision for queer families that transgress these norms.

IV. Multi-Parentage

American family law is, for the most part, resolutely dyadic when it comes to parentage. In a 1989 judgment concerning the rights of a biological father of a child born to a woman married to another man, the US Supreme Court said of the law in California at that time, "like nature itself, [it] makes no provision for dual fatherhood". In 1993, the Supreme Court of California rejected the possibility of three legal parents in Johnson. More recently, the same Court, in the course of affirming dual parentage of two persons of the same sex, rejected the possibility of a child having three or more parents.

There are, however, reports of discrete instances in which trial courts have granted adoptions without terminating the rights of existing legal parents. Polikoff has pointed out that a 1985 case in Alaska, which is typically considered a second-parent adoption case, is in fact a very early instance of third-parent adoption, since the adoption decree in favor of a woman’s partner did not terminate the rights of either biological parent. Polikoff has also pointed to a

337  Elisa B, supra note 243.
similar case in Louisiana in the 1980s.\textsuperscript{339} Trial courts in California, Massachusetts, Washington and Oregon have reportedly made third parent adoption orders involving lesbians and gay men.\textsuperscript{340}

In Pennsylvania, the Superior Court in \textit{Jacob v Shultz-Jacob} took steps towards recognizing tripartite parentage.\textsuperscript{341} The case concerned three adults – former partners Jodilynn Jacob and Jennifer Shultz-Jacob, and semen donor Carl Frampton – and four children, two of whom were born to Jodilynn using Carl’s semen and two of whom were Jodilynn’s adopted nephews. Jennifer was intimately involved in the children’s lives; Carl was also involved in the lives of his biological children, albeit to a lesser degree than Jennifer. Upon the women’s separation, Jennifer unsuccessfully sought custody of the four children, though Jodilynn later relinquished one of the children to her care. Jodilynn then sought child support from Jennifer. In an inversion of the cases in which gay parents have sought to undermine a non-biological parent’s status,\textsuperscript{342} Jennifer sought review on the basis that Carl was essentially a third parent who should not be able to escape his child support obligations in spite of the women’s stated intentions pre-conception that Carl would not have a parental role in their children’s lives.

\begin{footnotes}
\item[339] Nancy D Polikoff, "Three parents (or more) okay in California – by adoption or otherwise", \textit{Beyond (Straight and Gay) Marriage} (5 October 2013), online: <http://beyonddstraightandgaymarriage.blogspot.ca/search/label/defining%20parentage.%20more%20than%20two%20parents>.
\item[340] Nancy D Polikoff, "Where can a child have three parents?", \textit{Beyond (Straight and Gay) Marriage} (14 July 2012), online: <http://beyonddstraightandgaymarriage.blogspot.ca/search/label/defining%20parentage.%20more%20than%20two%20parents>. See also Polikoff, "Parentage Laws", \textit{supra} note 338 at 243 referring to correspondence with lawyers in California, Washington and Massachusetts.
\item[341] \textit{Jacob v Shultz-Jacob}, 923 A 2d 473 (Pa Super Ct 2007). See also \textit{LaChapelle v Mitten}, 607 NW 2d 151 (Minn Ct App 2000), in which the Minnesota Court of Appeals awarded legal custody of children to their mothers, and visitation rights to their biological father, but specifically denied that the children had three legal parents.
\item[342] See, e.g., \textit{Berwick v Wagner, supra} note 251; \textit{Miller-Jenkins (Vt S Ct)}, \textit{supra} note 312.
\end{footnotes}
At trial, the Court awarded shared legal custody of all four children to both Jodilynn and Jennifer. Carl was granted partial physical custody of his biological children but was found not to have child support obligations because such a result would have “create[d] a situation in which three parties/parents would be liable for support”. This finding was the relevant point on appeal. Contrary to the trial court, the Superior Court held that equitable estoppel is available to impose pecuniary obligations on a biological parent who has accepted a role in a child’s life, even if he or she is not granted legal custody of a child, and irrespective of whether such an obligation means that more than two parties bear financial obligations towards a child. Strictly, the case is limited to financial obligations; indeed, the Court affirmed that persons standing in loco parentis (in this case, Shultz-Jacob) do not have the same presumptive entitlement to custody as natural parents. Nevertheless, the case can be viewed as part of a gradual acceptance of the idea that more than two adults can have rights and responsibilities in respect of a child.

From one perspective, Shultz-Jacob can be seen as a positive development for its recognition that a child’s interests (and the interests of his or her parents) may be best served by vesting legal parentage in more than two parents. At the same time, as Ball has argued, the result on the facts “was unwarranted” because the mothers specifically indicated to Carl that he would not be considered a parent of the children, and Carl made minimal efforts to establish a relationship with the children post-birth. In this regard, the judgment can be seen as clinging to an outdated notion of biological primacy.

In 2009, Delaware enacted a law recognizing de facto parents that clearly envisions parentage orders in respect of more than two parents. Section 8-201(c) of Title 13 of the Delaware Code provides:

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343 Ball, supra note 16 at 130.
De facto parent status is established if the Family Court determines that the de facto parent:

(1) has had the support and consent of the child's parent or parents who fostered the formation and establishment of a parent-like relationship between the child and the de facto parent;

(2) has exercised parental responsibility for the child as that term is defined in § 1101 of this title; and

(3) has acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature.

The reference to “the child’s parent or parents” in subsection (1) means that a court may declare that a child with two parents has a third parent if that person has the support and consent of the extant parents and satisfies the criteria in subsections (2) and (3).344

A narrower precursor to Delaware’s law is the District of Columbia’s law concerning de facto parents. That statute provides that in the event of a relationship breakdown, a de facto parent may seek custody of a child (that is, unlike in Delaware, de facto parentage cannot be established without relationship breakdown) if that person held himself or herself out to be the child’s parent “with the agreement of the child’s parent, or if there are 2 parents, both parents”345. The DC law is similar to that which was proposed by the American Law Institute (ALI) in its 2002 Principles of the Law of Family Dissolution, in which it recommended that States establish a category of de facto parentage in cases of relationship breakdown in which a child had developed a relationship with a non-biological parent. The ALI took a more liberal approach to consent of biological parents than the District of Columbia, arguing that the consent of one parent alone to the establishment of a relationship of de facto parentage ought to be

345 DC Code §16-831.01. See also ibid at 245-46.
In 2011, the California Court of Appeals in *In re MC* held that the law in California did not permit legal parentage of a child, MC, to vest in more than two adults. The case concerned a child who was conceived during a brief relationship between biological parents Melissa and Jesus. Prior to and after her relationship with Jesus, Melissa was romantically involved with Irene. The relationship between the women was troubled by domestic violence and substance abuse, and Melissa’s relationship with Jesus took place in 2008 in a period of separation between Melissa and Irene, after the women’s registration as domestic partners but prior to their subsequent marriage. Jesus was aware of the pregnancy and his paternity, and assisted Melissa with prenatal care and financial support in the first months of her pregnancy. MC was born after Melissa and Irene reconciled and married; the child was given both Melissa’s and Irene’s surnames, though Melissa was the only parent listed on MC’s birth certificate. Soon after MC’s birth, Melissa and Irene separated once again. Melissa filed for an order to change MC’s surname; Irene subsequently filed for joint legal and physical custody of MC. Melissa also sought a restraining order against Irene on the basis of domestic violence, and Melissa’s lawyer contacted Jesus, who agreed to sign a paternity declaration and consented to MC’s change of surname. The name change was ordered in June 2009. In July 2009, a restraining order was issued against Irene in respect of Melissa; Irene was also granted supervised weekly visitation with MC.

Soon after, Melissa’s new boyfriend, Jose, stabbed Irene in an attempt to

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348 The following discussion of the case is drawn from both *In re MC*, supra note 347 at 203-206 and Nancy D Polikoff, “And baby makes ... how many? Using *In re MC* to consider parentage of a child conceived through sexual intercourse and born to a lesbian couple” (2012) 100:6 Geo LJ 2015 at 2016-23 Polikoff, [“And baby makes”].
persuade her to drop her action concerning custody of MC. Melissa was arrested, charged as an accessory to the attempted murder of Irene, and sentenced to prison. At the first court hearing after Melissa’s arrest, Irene was held to be a presumed parent and Jesus an alleged parent. After a protracted series of temporary orders, the trial court eventually found that: Melissa was MC’s biological mother; Irene was her presumed mother based on her marriage to Melissa and her conduct in receiving MC into her home and holding her out as her own child; and Jesus was MC’s presumed father on the basis that he had (apparently) promptly stepped forward to assume full parental responsibility. MC was placed with Melissa’s parents, and Melissa was granted visitation during her time in jail. Irene was granted supervised visitation with MC. Jesus and his mother were granted unsupervised visitation with MC.349 Melissa and Irene appealed the finding of Jesus’ presumed parentage, while Jesus appealed the trial court’s refusal to place MC in his care.

On appeal, the Court relevantly found that it was bound by earlier California Supreme Court precedent (Elisa B350 and Johnson351) to overrule the tripartite parentage order made by the court below. The Court of Appeals remanded the case to the trial court to determine which of Melissa, Irene and Jesus were MC’s parents; notably, Melissa was found to be a presumed parent, placing her alongside both Irene and Jesus in the hierarchy of preference.352 This particular finding, which Polikoff has characterized as “an error of constitutional proportion”, was made possible by a previous amendment to §7612(b) of the California Family Code that extended the “policy and logic” standard for determining parentage to conflicts between presumed parents and birth mothers.353 The trial

349 In re MC, supra note 347 at 210.
350 Elisa B, supra note 243.
351 Johnson v Calvert, supra note 224.
352 In re MC, supra note 347 at 223.
353 Polikoff, "And baby makes", supra note 348 at 2025, 2029.
court’s orders on remand have not been made public.

In 2013, in response to the decision in In re MC, California passed the first State law in the United States that expressly allows a court to find that more than two persons are parents, without adopting the language of de facto parentage.\textsuperscript{354} Revised §7601 of the California Family Code now stipulates that “[t]his part does not preclude a finding that a child has a parent and child relationship with more than two parents”,\textsuperscript{355} and “any reference to two parents shall be interpreted to apply to every parent of a child where that child has been found to have more than two parents under this part”.\textsuperscript{356} Accordingly:\textsuperscript{357}

In an appropriate action, a court may find that more than two persons with a claim to parentage under this division are parents if the court finds that recognizing only two parents would be detrimental to the child. In determining detriment to the child, the court shall consider all relevant factors, including, but not limited to, the harm of removing the child from a stable placement with a parent who has fulfilled the child’s physical needs and the child’s psychological needs for care and affection, and who has assumed that role for a substantial period of time. A finding of detriment to the child does not require a finding of unfitness of any of the parents or persons with a claim to parentage.

\textsuperscript{354} Senate Bill No 274 (2013) and Assembly Bill No 1403 (2013). The Senate Bill notes that the purpose of the amendments "is to abrogate In re MC (2011) 195 Cal App 4th 197 insofar as it held that where there are more than two people who have a claim to parentage under the Uniform Parentage Act, courts are prohibited from recognizing more than two of these people as the parents of a child, regardless of the circumstances": s 1(b).

\textsuperscript{355} Cal Fam Code §7601(c) as inserted by s 1.5 of Assembly Bill 1403 (2013) and s 5.5 of Senate Bill 274 (2013). Section 1(a) of Senate Bill No 274 (2013) explains that “[m]ost children have two parents, but in rare cases, children have more than two people who are that child’s parent in every way. Separating a child from a parent has a devastating psychological and emotional impact on the child, and courts must have the power to protect children from this harm.”

\textsuperscript{356} Cal Fam Code §7601(d) as inserted by s 1.5 of Assembly Bill 1403 (2013) and s 5.5 of Senate Bill 274 (2013).

\textsuperscript{357} Cal Fam Code §7612(c) as inserted by s 4.5 of Assembly Bill 1403 (2013) and s 6.5 of Senate Bill 274 (2013).
It is somewhat ironic that the sordid circumstances of *In re MC* were the catalyst for progressive reform of California’s parentage laws. At the same time, it is also not entirely surprising, given that MC’s biological mother, Melissa, was in prison for her role in an attempted murder, and her presumed mother by marriage, Irene, was subject to restraining orders for physical violence against Melissa. In the circumstances, the trial court’s finding may be seen as influenced by a desire to minimize Melissa’s role in MC’s life\textsuperscript{358} and enable a parental role for Jesus,\textsuperscript{359} leading to a strained reading of Jesus’ attempts to assume parental responsibility in order to cast him as a presumed parent.\textsuperscript{360} The Court of Appeals’ ruling effectively created a contest between three adults, each of whom in their own way had demonstrated a questionable degree of ability and/or commitment with respect to MC; it also cast Melissa, who for all her faults is MC’s biological mother, as entitled to no greater deference than Irene and Jesus in the ensuing parentage contest. As California recognized, it is preferable to simply provide by legislation that a child may have three parents in order to forestall the judicial backbends seen at trial and on appeal, and to allow a realistic and honest assessment of where the best interests of children such as MC lie. Unfortunately, the record does not disclose sufficient information about Irene’s visits with MC or Jesus’ life in Oklahoma to suggest whether it would have been to MC’s benefit for the original order of the trial court to stand.

\textsuperscript{358} No published court judgment has declared Melissa an unfit parent; the orders of the trial court on remand have not been made publicly available: Polikoff, "And baby makes", *supra* note 348 at 2049. However, it is difficult to escape the inference that anything more than visitation by Melissa would not be in MC’s best interests, which is not to say that the Court of Appeals was correct in placing Melissa on par with Irene and Jesus as a presumed parent, which she clearly was not.

\textsuperscript{359} *Ibid* at 2049.

\textsuperscript{360} While Jesus cared for Melissa in the early months of her pregnancy, sent her money after her separation from Irene, and evinced a desire to care for MC, he also left California during Melissa’s pregnancy and established residence in Oklahoma. He also made no effort to contact Melissa after the birth and only sought custody of MC once she had been placed in foster care.
Beyond the specific circumstances of *In re MC*, California’s amendments enabling more than two legal parents are to be welcomed as a recognition of the wrenching affective displacement that children and adults may suffer if an existing relationship between a child and a parental figure is not recognized in law. As noted in Part 1, this is a particularly salient concern for gay and lesbian families for biological reasons as well as queer kinship structures that do not conform to dyadic norms. It is contrary to the full development of children’s capabilities and autonomy to deny them the opportunity of fully developing relationships with those who play a central, parental role in their lives, whether those adults were involved in the planning of the child’s birth, or have functioned as a parent to the child for a sufficient period of time that the child views the adult as a parent. Equally, adults’ affective and relational capabilities are reduced, and their autonomy is severely impaired, by refusing to accord legal recognition to the existence of an established relationship of a parental nature with a child.

It is important to note that the discussion in the preceding paragraph, and the law in California, is backward-focused. This is also the case in Delaware and the District of Columbia. That is, the laws look to the detriment that would be suffered by denying recognition of an *already existing* relationship. None of the laws appear to envisage the making of forward-looking parentage orders in respect of more than two parents. Thus, in a situation where, for example, a lesbian couple and a male friend decide to share genetic material to create a child with a view to collectively parenting that child, it will only be possible to obtain a parentage order securing the status of all three adults once a relationship between the child and the non-legal parent has developed to a sufficient degree that denying legal parentage would cause detriment to the child.\(^{361}\) While this is better than not having the option of multi-parentage at all, it remains disrespectful of the intentions of prospective parents, the interests of children in legal recognition of

\(^{361}\) If a judicial order of parentage is made in favour of a third parent, principles of full faith and credit ought to ensure recognition of parentage throughout the United States: see generally the discussion at *supra* Section I(C).
all of their parental relationships, and overly wedded to a dyadic vision of parenthood and family that is only willing to admit the possibility of more than two legal parents where detriment would otherwise ensue. Recognition that a child might flourish\textsuperscript{362} if multi-parentage is granted from birth remains absent from American law.

**Conclusion**

In exercising a choice between homosexual and heterosexual households for purposes of child custody a trial court could conclude that permanent residence in a homosexual household would be detrimental to the children and contrary to their best interests.

– *Chaffin v Frye* (California Court of Appeals, 1975)\textsuperscript{363}

The Florida legislature could rationally conclude that homosexuals and heterosexual singles are not "similarly situated in relevant respects." It is not irrational to think that heterosexual singles have a markedly greater probability of eventually establishing a married household and, thus, providing their adopted children with a stable, dual-gender parenting environment. Moreover, as the state noted, the legislature could rationally act on the theory that heterosexual singles, even if they never marry, are better positioned than homosexual individuals to provide adopted children with education and guidance relative to their sexual development throughout pubescence and adolescence.

– *Lofton v Secretary of the Department of Children and Family Services* (US Court of Appeals for the 11\textsuperscript{th} Circuit, 2004)\textsuperscript{364}

The fact that nearly 30 years elapsed between the statements above, and that it took a further six years for Florida’s ban on adoption by single gay men and


\textsuperscript{363} *Chaffin v Frye*, 45 Cal App 3d 39 (1975).

\textsuperscript{364} *Lofton v Secretary of the Department of Children and Family Services*, 377 F 3d 1275 (11\textsuperscript{th} Cir 2004).
lesbians to be struck down,\textsuperscript{365} is indicative of the incremental nature of change in American law’s attitudes towards parenting by lesbians and gay men. Queer singles may no longer be formally excluded from public adoption, but in all other areas of adoption and ART, American law is a rather threadbare tapestry, with haphazard degrees of protection and support for queer families, particularly those who challenge the dyadic norm.

The development of laws enabling second parent and stepparent adoption by spouses and partners of biological parents is tremendously important. The law is also increasingly adopting a functional approach to parentage that prioritizes intention and action over biology and tradition. Nevertheless, the general lack of protections for unmarried non-biological parents is troubling, not only because of the potential harm to children, but also because of the subtly coercive nature of linking protection of parent-child relationships to the relationship status of a child’s parents. Even California, with its comparatively progressive laws in this area, has not seen fit to extend its statutory declarations of intention to parent to unregistered couples unless both parties have a physical connection to the child. For gay men, commercial surrogacy is a viable option in only three States, although courts in gestational cases have generally upheld the parentage of intended parents. And while the notion that a child may have more than two legal parents is slowly gaining credence and limited legislative acknowledgement, American law on the whole remains enamored with the two-parent model, preferably married. Accordingly, it may be said that despite crucial developments, on the whole American law concerning relationships between lesbian and gay parents and their children demonstrates at best a hesitant, faltering respect for the capabilities, autonomy and queerness of its citizens.

\textsuperscript{365} Florida Department of Children and Families v Adoption of XXG, supra note 123. For discussion of the impact of the ban’s repeal on lesbian and gay prospective parents in Florida see Abbie E Goldberg et al, “What Changed When the Gay Adoption Ban Was Lifted?: Perspectives of Lesbian and Gay Parents in Florida” (2013) 10:2 Sexuality Research and Social Policy 110.
PART 4
RECOGNITION OF SAME-SEX RELATIONSHIPS IN CANADA

Introduction

Canada’s federal and constitutional structure demarcates spheres of federal and provincial authority with respect to relationship recognition. However, unlike the United States, with its labyrinthine jurisdictional differences in matters of family law, key aspects of Canada’s laws pertaining to relationship recognition are relatively uniform, largely as a result of the division of federal and provincial powers in ss 91 and 92 of the Constitution Act, 1867,¹ the existence of the Canadian Charter of Rights and Freedoms,² and a series of Supreme Court cases mandating equal treatment of same-sex couples under federal and provincial laws.

This Part comprises two sections. The first section provides an overview of the cases and legislation that have brought formal equality for same-sex couples to Canada’s relationship recognition laws through a lens informed by principles of capability-maximization, relational autonomy and queer ethics. The second section draws together the cases and statutes canvassed in the first section, and additional relevant laws, for the purpose of mapping and critiquing the present forms of relationship recognition that are (and are not) available to same-sex couples in Canada.


I. We Are Family

A combination of provisions in the Constitution Act, 1867 provide the overarching legal framework for relationship recognition in Canada. Section 91(26) of the Constitution Act, 1867 confers on the federal Parliament exclusive power with respect to “Marriage and Divorce”. Concurrently, s 92(12) confers on the provinces power to make laws with respect to “[t]he Solemnization of Marriage in the Province”. The Constitution Act, 1867 thus creates a division between (federal) powers concerning marriage capacity and (provincial) powers concerning marriage performance.¹ Divorce is a matter of federal competence, though provincial laws govern attendant matters concerning property distribution.² In addition, s 92(13) of the Constitution, which confers on the provinces power with respect to property and civil rights, enabled the recognition, crucial for developing the law of civil unions, “that some conjugal relationships are based on marital status, while others are not”.³ While this recognition was initially for limited purposes⁶ (and applied only to opposite-sex relationships), it has since expanded to encompass rights and obligations akin to marriage, in registered and unregistered forms,⁷ and for same-sex as well as opposite-sex

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² By reason of s 92(13) of the Constitution Act, 1867, supra note 1, which confers on the provinces power with respect to property and civil rights.
³ Marriage Reference, supra note 3 at 714. The Court also observed at 715: “Marriage and civil unions are two distinct ways in which couples can express their commitment and structure their legal obligations. Civil unions are a relationship short of marriage and are, therefore, provincially regulated. The authority to legislate in respect of such conjugal relationships cannot, however, extend to marriage.”
⁴ See Brenda Cossman & Bruce Ryder, The Legal Regulation of Adult Personal Relationships: Evaluating Policy Objectives and Legal Options in Federal Legislation (Law Commission of Canada, 2000) 17: “As early as 1919, and accelerating in the 1950s, the marital model was expanded to include unmarried cohabiting couples in pension laws”.
⁵ Nova Scotia, Manitoba and Alberta offer registered partnerships in addition to marriage; Quebec offers civil unions. The remaining provinces and territories rely on common law
couples.\(^8\) In addition to these provisions concerning division of powers, section 15\(^9\) of the Charter has played a transformative role in lesbian, gay and bisexual advocacy in Canada,\(^10\) and the understanding of what it means to be a spouse (married or unmarried).\(^11\) Within this framework, relationship recognition equality occurred through a process of private litigants challenging discriminatory aspects of Canadian law;\(^12\) a process that suggests the efficacy of Waaldijk’s view that marriage equality comes through a process of incremental recognition.\(^13\)

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and statutory definitions of non-marital spouses, for example, s 29 of the Family Law Act, RSO 1990, c F3 [FL Act (On)].

\(^8\) M v H, [1999] 2 SCR 3.

\(^9\) Subsection (1) provides that “[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability”.

\(^10\) This is not to suggest that s 15 has remedied discrimination against lesbian, gay, bisexual and transgender people on all fronts. For example, the attempt to hold Canada Customs to account for its discriminatory practices in relation to gay and lesbian literature and erotica failed in Little Sisters Book and Art Emporium v Canada (Minister of Justice), [2000] 2 SCR 1120: see Brenda Cossman, “Lesbians, Gay Men, and the Canadian Charter of Rights and Freedoms” (2002) 40:3 & 4 Osgoode Hall LJ 223 at 238-42 [Cossman, "Charter”]; John Fisher, “Outlaws or in-laws?: Successes and Challenges in the Struggle for LGBT Equality” (2004) 49 McGill LJ 1183 at 1194-1200.


\(^12\) Of course, relationship recognition is only one front in the battle advocates have waged for equality. For example, a critical victory was achieved in the field of employment discrimination in Vriend v Alberta, [1998] 1 SCR 493 [Vriend]. For an overview of efforts to combat sexual orientation employment discrimination in Canada see Wintemute, supra note 11.

A. The Pre-Marriage Cases

The first claim for equal marriage access in Canada came from a gay male couple in the 1970s.\textsuperscript{14} Unsurprisingly, the Manitoba County Court rejected the couple’s bold claim by reference to the traditional conception of marriage put forth by Lord Penzance in *Hyde v Hyde and Woodmansee*.\textsuperscript{15} Early Charter-based cases also fared poorly. This was, in part, due to the fact that sexual orientation is not expressly included in s 15 of the *Charter*\textsuperscript{16} and was not recognized as an analogous ground until the Supreme Court’s decision in *Egan v Canada*\textsuperscript{17} in 1995. However, it is doubtful whether the inclusion or recognition of sexual orientation in s 15 prior to 1995 would have led to alternative outcomes in the early years of the *Charter* given prevailing conceptions of marriage and

\begin{itemize}
  \item of s 159 of the *Criminal Code*, RSC 1985, c C-46, which criminalizes anal sex if engaged in with a person under the age of 18 years, though it has been found to infringe s 15(1) by Courts of Appeal in Quebec (*R v Roy*, [1998] RJQ 1043) and Ontario (*R v M(C)*, (1995) 98 CCC (3d) 481). While this provision undoubtedly has the potential to disproportionately impact on gay men, it is important not to compartmentalize anal sex as an exclusively gay practice. As American sex columnist Dan Savage has repeatedly pointed out, the actual number of heterosexuals who engage in anal sex far exceeds the number of gay men who engage in the practice, though the percentage in respect of gay men exceeds that of heterosexuals: see Dan Savage, *Wiggle Room* (2010), online: <http://www.thestranger.com/seattle/SavageLove?oid=3489193>. For more recent American data see United States Center for Disease Control, *Sexual Behavior, Sexual Attraction, and Sexual Identity in the United States: Data From the 2006-2008 National Survey of Family Growth*, National Health Statistics Reports No 36 (2011).

\textsuperscript{14} *Re North and Mathieson*, (1974) 52 DLR (3d) 280.

\textsuperscript{15} *Hyde v Hyde and Woodmansee*, [1866] LR 1 P&D 130.

\textsuperscript{16} A proposal to include sexual orientation in s 15 was decisively rejected in 1981: Wintemute, *supra* note 11 at 1136. In 1985, the Parliamentary Committee on Equality Rights recommended that the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA] be amended to include sexual orientation as a prohibited ground of discrimination: Canada, *Equality for All: Report of the Parliamentary Committee on Equality Rights* (Ottawa: Queen’s Printer, 1985). The Government pledged to take measures to effect this recommendation, but it was not until 1996 that the *CHRA* was amended to include sexual orientation, despite the fact that in 1992, the Ontario Court of Appeal in *Haig v Canada*, [1992] 9 OR (3d) 495 ruled that sexual orientation was to be read in to the *CHRA*. See Fisher, *supra* note 10 at 1191.

\textsuperscript{17} *Egan v Canada*, [1995] 2 SCR 513 [*Egan*].

family. For example, in *Andrews v Ontario (Minister of Health)*, the Ontario High Court of Justice upheld the exclusion of same-sex couples and their children from the Ontario Health Insurance Program based on a narrow, biologically determinist view of family and sexuality. Similarly, in *Layland v Ontario (Minister of Consumer and Commercial Relations)*, the “biological limitations” of same-sex unions were found to justify the exclusion of same-sex couples from marriage.

In the first same-sex relationship case to reach the Supreme Court, *Canada (Attorney General) v Mossop*, the complainant argued that denying same-sex partners the status of “immediate family” for the purposes of a federal employment award constituted discrimination based on family status, contrary to the *Canadian Human Rights Act*. The Court rejected Mossop’s claim on the basis that it constituted a veiled attempt to base equality claims on sexual orientation, which at the time of the impugned conduct was not a protected ground in the *CHRA* (or an analogous ground for the purposes of s 15 of the *Charter*). In the majority’s view.

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19 *Layland v Ontario (Minister of Consumer and Commercial Relations)*, [1993] 14 OR (3d) 658 [Layland].
21 *CHRA*, supra note 16. The applicant, Mossop, challenged his employer’s refusal to grant him bereavement leave to attend his partner’s father’s funeral. It was not open to Mossop to challenge the refusal based on sexual orientation as a discrete category because it had not then been recognized as an analogous ground under s 15 of the *Charter*.
22 Between the time of Mossop’s initial complaint to the Canadian Human Rights Tribunal and the Supreme Court’s judgment, the Ontario Court of Appeal in *Haig*, supra note 16 decided that sexual orientation is a protected ground under s 3 of the *CHRA*, supra note 16. However, Mossop declined to amend his claim to incorporate this development and relied solely on the argument that his situation fell within the definition of “family status”: *Mossop*, supra note 20 at 579 (Lamer CJ).
23 This extension of the ambit of s 15 occurred some two years later in *Egan*, supra note 17.
24 *Mossop*, supra note 20 at 580 (Lamer CJ, Sopinka and Iacobucci JJ agreeing; La Forest J agreeing in the result in a separate opinion).
Mossop's sexual orientation is so closely connected with the grounds which led to the refusal of the benefit that this denial could not be condemned as discrimination on the basis of "family status" without indirectly introducing into the CHRA the prohibition which Parliament specifically decided not to include in the Act, namely the prohibition of discrimination on the basis of sexual orientation.

The message, given explicit voice in the concurring opinion of La Forest J, was that same-sex relationships and forms of kinship were not “family”.

Two years after Mossop, the Supreme Court gave judgment in Egan v Canada, which concerned a claim by plaintiffs Egan and Nesbit against the federal government’s refusal to grant them a spousal pension benefit under the Old Age Security Act. In a “groundbreaking victory within a defeat”, the Court held that sexual orientation is an analogous ground for the purposes of s 15 of the Charter. However, four Justices held that the definition of “spouse” in the Act did not infringe s 15, and Sopinka J found that while s 15 was violated, the provision was justified under s 1. Justices L’Heureux-Dubé, Cory, Iacobucci and McLachlin would have struck down the provision as an infringement of s 15 that could not be saved under s 1.

With respect to the analogous nature of sexual orientation discrimination, the split in the Court’s reasoning is telling. Justices Cory and Iacobucci (Sopinka and McLachlin JJ concurring on this point in separate judgments) focused on the past and present social, political and economic disadvantage experienced by gay and

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25 According to La Forest J (joined by Iacobucci J), “[w]hile some may refer to [Mossop’s] relationship as a ‘family’, I do not think it has yet reached that status in the ordinary use of language”: ibid at 586.

26 Egan, supra note 17.

27 Old Age Security Act, RSC 1985, c O-9 [OAS Act].


29 Egan, supra note 17 at 572. Three years later, the Court not only recognized sexual orientation discrimination as a breach of s 15 but also held that it was not justified under s 1 of the Charter: Vriend, supra note 12.
lesbian people.\textsuperscript{30} Justice L’Heureux-Dubé preferred to “analyze the problem from the point of view of the group actually affected by the distinction”.\textsuperscript{31} On the other hand, La Forest J (with whom Lamer CJ, Gonthier and Major JJ agreed) looked to the question of immutability, observing that irrespective of cause, sexual orientation “is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs”.\textsuperscript{32} The fact that those latter four Justices then held that Egan and Nesbit’s rights had not been violated because of the apparently intrinsically heterosexual and thus reproductive nature of marriage\textsuperscript{33} (a view that was comprehensively rejected in subsequent same-sex marriage litigation\textsuperscript{34}) suggests the potential of the immutability argument to descend into a vision of same-sex attraction as akin to impairment and providing a sufficient basis for laws that differentiate on the basis of sexual orientation, rather than sexual preference being a matter of fundamental importance worthy of equal respect regardless of mutability.\textsuperscript{35}

\textit{Egan} is particularly interesting as an exemplar of shifting notions of family, the meaning of “spouse”, and the nature of conjugal relationships and marriage. The four Justices who found that s 2 of the \textit{OAS Act} did not breach s 15 relied on a

\begin{itemize}
\item \textsuperscript{30} \textit{Egan}, \textit{supra} note 17 at 604.
\item \textsuperscript{31} \textit{Ibid} at 566.
\item \textsuperscript{32} \textit{Ibid} at 528.
\item \textsuperscript{33} Why the begetting of children justifies the provision of government assistance in old age was not adequately explained. One is left with the impression that La Forest J viewed the \textit{OAS Act}, \textit{supra} note 27, as a reward for a lifetime of fecundity, rather than a means of supporting the needy.
\item \textsuperscript{34} See, \textit{e.g.}, \textit{Halpern v Canada (Attorney General)}, [2002] 60 OR (3d) 321 [\textit{Halpern} (Sup Ct)] at 355, 361 (Blair RSJ); \textit{EGALE Canada Inc v Canada (Attorney General)}, [2003] 225 DLR (4th) 472 [\textit{EGALE}] at [82]-[96] (Prowse JA).
\end{itemize}
traditional, procreative view of marriage and heterosexual coupling, and a biologically determinist view of sexuality.\footnote{In \textit{Miron v Trudel}, [1995] 2 SCR 418 \cite{Miron} McLachlin J (Sopinka, Cory and Iacobucci JJ agreeing) criticized this aspect of Justice La Forest’s reasoning and stated, “we must go beyond biological differences and examine the impact of the impugned distinction in its social and economic context to determine whether it, in fact, perpetuates the undesirable stereotyping which s 15(1) aims to eradicate”: at [135]-[136].} Justice La Forest opined:\footnote{\textit{Egan}, supra note 17 at 536.}

[M]arriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long-standing philosophical and religious traditions. But its ultimate \textit{raison d’être} transcends all of these and is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship. In this sense, marriage is by nature heterosexual. It would be possible to legally define marriage to include homosexual couples, but this would not change the biological and social realities that underlie the traditional marriage.

Upon this basis, La Forest J considered that “there is nothing arbitrary about the distinction supportive of heterosexual family units” because “[i]t is the social unit that uniquely has the capacity to procreate children and generally cares for their upbringing, and as such warrants support by Parliament to meet its needs.”\footnote{\textit{Ibid} at 537.} Quite how this goal was furthered by the support of heterosexual couples that are past the age of procreation – to the exclusion of lesbian and gay couples – was not adequately explained; it would seem that the spousal benefit was conceived as a future reward for propagating the species, although it was by no means contingent on having had or cared for children. The decision fails to see the reality and possibility of assisted reproduction involving same-sex couples, or adoption by lesbians and gay men, which in turn amounts to a denial of the capabilities of lesbians and gay men to form affiliative relationships of care and dependence not only with a conjugal partner but also with children, irrespective of genetic linkage. This sort of reasoning implies that lesbian and gay-headed families and the children of same-sex couples are less worthy of state recognition.
and protection; more fundamentally, it constitutes an active denial and erasure of the existence of queer families.

In contrast, Justice Iacobucci (Cory, L’Heureux-Dubé and McLachlin JJ agreeing) noted: 39

The spousal allowance is provided to heterosexual couples regardless of the existence of a dependency pattern in their relationships while all same-sex couples, including all those sharing economic interdependence, are excluded. Whereas there is a presumption of interdependence in heterosexual relationships, there is a presumption against interdependence in same-sex relationships. The latter presumption is not only incorrect, but it is also the fruit of stigmatizing stereotype.

While this analysis is entirely accurate, it is also itself somewhat limited, albeit necessarily so in light of the facts before the Court: even if Egan and Nesbit had prevailed, spousal pension benefits would have remained limited to “spouses”, meaning persons who have or had a relationship of conjugality. Drawing from Nancy Polikoff 40 and Martha Fineman, 41 though, we might ask why pension benefits should be determined by reference to whether or not a couple have or once had a sexual relationship, when other relational forms that do not involve a sexual component may be characterized by just the same degree of care and dependence.

In the same year as the Court decided Egan, it gave judgment in Miron v Trudel. 42 The majority found that the exclusion of unmarried cohabiting couples from the ambit of a provincial law concerning insurance benefits violated s 15 of

39 Ibid at 610. See also Justice Cory’s statement at 604: “The definition of ‘spouse’ as someone of the opposite sex reinforces the stereotype that homosexuals cannot and do not form lasting, caring, mutually supportive relationships with economic interdependence in the same manner as heterosexual couples. The appellants’ relationship vividly demonstrates the error of that approach.”


42 Miron, supra note 36.
the Charter. Critically, McLachlin J for the majority (L'Heureux-Dubé J concurring in the result in a separate opinion) framed the question as whether “marriage can be used to deny equal treatment to people on grounds which have nothing to do with their true worth or entitlement”. The answer was in the negative, finding that marital status is an analogous ground for the purposes of s 15 because: “discrimination on the basis of marital status touches the essential dignity and worth of the individual in the same way as other recognized grounds of discrimination … it touches the individual’s freedom to live life with the mate of one’s choice in the fashion of one’s choice”, unmarried couples constitute a historically disadvantaged group; and, crucially, “marital status often lies beyond the individual’s effective control”. In respect of this last point, McLachlin J noted that “[i]n theory, the individual is free to choose whether to marry or not to marry. In practice, however, the reality may be otherwise.” In contrast, Gonthier J (Lamer CJ, La Forest and Major JJ agreeing) dissented in part on the basis that “marriage in itself is not discriminatory as it is a matter of choice and a basic institution of society”.

While Miron was not directly concerned with the position of same-sex couples, the case is important for gay and straight unmarried couples alike because it affirms the equal dignity and worth of those persons who choose not to marry (and, at the time, those same-sex couples who were unable to marry). Justice McLachlin’s reasoning comports with a capabilities-based approach to human development because she refuses to prioritize marriage as a legal basis for

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43 Ibid at [158].
44 Ibid at [151].
45 Ibid at [153].
46 Ibid.
47 Ibid at [26]. Justice Gonthier also found that “marital status is an example of a ground which, while analogous in certain respects, cannot be so with respect to those attributes and effects which serve to define marriage itself, which include the rights and obligations necessarily incident to the institution, and distinguish it from a state of absence of marriage”: Ibid.
differential treatment, thereby emphasizing the normative worth of non-marital relationships. Similarly, her judgment upholds the autonomy of individuals to arrange their affiliative lives in the manner they deem to be most appropriate; while it could be said that imposing rights and obligations on parties who elect not to marry is contrary to the exercise of autonomy, unmarried parties remain free to agree on certain matters between themselves by private contract. From a queer perspective, the Court’s refusal to prioritize marriage for the purpose of determining who is entitled to claim benefits under an insurance contract can be seen as an opening up of the field of relational possibilities; critically, it suggests that the state ought to be responsive to the needs of diverse groups, rather than requiring citizens to fit within narrow, traditional norms in order to protect themselves and their families.

In light of Egan and Miron, it was only a matter of time before same-sex couples again challenged the continuing denial of relationship recognition. British Columbia\(^49\) and Quebec\(^50\) preempted this to an extent by enacting legislation recognizing same-sex de facto relationships for certain purposes. Ontario, however, did not. Thus, in \(M \text{ v } H\),\(^51\) the Supreme Court considered an application by M for spousal support from her former same-sex partner, H, under s 29 of the \textit{Family Law Act}.\(^52\) The challenge rested on the definition of “spouse” in the Act, which included opposite-sex but not same-sex couples who had cohabited for 

\(^{48}\) For example, s 53(1) of the \textit{FL Act (On)}, \textit{supra} note 7, provides that cohabitation agreements may be made in respect of property, support obligations, education and moral training of children, and “any other matter in the settlement of their affairs”. Similarly, married couples may enter into a marriage contract under s 52 of the \textit{FL Act (On)} in respect of the same matters as cohabiting couples, although limitations on a spouse’s right to the matrimonial home are unenforceable: s 52(2).


\(^{50}\) \textit{An Act to amend various legislative provisions concerning de facto spouses}, SQ 1999, c 14.

\(^{51}\) \textit{M v H}, \textit{supra} note 8.

\(^{52}\) \textit{FL Act (On)}, \textit{supra} note 7.
three or more years. This time, in addition to finding a breach of s 15 of the Charter, the Court also held that the violation was not justified under s 1. Justice Cory held, in respect of the equality claim, that the exclusionary definition perpetuated a view of same-sex relationships as “less worthy of recognition and protection”.53 In a perceptive acknowledgement of the history of animosity towards lesbians and gay men, he also found that the definition “perpetuate[d] the disadvantages suffered by individuals in same-sex relationships and contribute[d] to the erasure of their existence”.54

Concerning the s 1 limb of the claim, Iacobucci J deployed economic concerns to reach the opposite conclusion to that of Sopinka J in Egan: the policies underpinning spousal support, being “the equitable resolution of economic disputes that arise when intimate relationships between individuals who have been financially interdependent break down”,55 as well as minimization of “the burden on the public purse” caused by relationship breakdown,56 would be furthered by extending the ambit of the FL Act (On) to same-sex couples in conjugal relationships. While this is correct, there is also something unsettling about justifying the right to be free from discrimination based on the benefit to the fisc of enforcing that right.57

The Court in M v H suspended its declaration for six months to allow the provincial government to enact amending legislation. The Ontario Government responded with legislation amending 67 statutes to include, in addition to

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53 M v H, supra note 8 at [73].
54 Ibid.
55 Ibid at [93].
56 Ibid.
57 In this regard, “[t]he ruling is consistent with the politics of reprivatization – a process in which the costs of social reproduction are being shifted from the public to private spheres and the family is being reconstituted as the natural site of economic dependency”: Cossman, "Charter", supra note 10 at 237.
spouses, “same-sex partners”. The federal government soon followed suit with the *Modernization of Benefits and Obligations Act*, which amended swathes of federal legislation to recognize both opposite-sex and same-sex “common law partners”. Nova Scotia, Manitoba, Alberta and Quebec introduced registration schemes for opposite-sex and same-sex couples that conferred on registered couples many of the rights and obligations of married spouses.

Cossman and Ryder have observed that:

Together, *Miron* and *M v H* are powerful statements of the normative commitment to freedom of intimate association and to the equal treatment and respect of the choices that adults make in structuring their personal lives. The once legitimate government objective of privileging the marital relationship over all other relationships in the allocation of rights and responsibilities has given way to a recognition of the different ways in which individuals enter into adult personal relationships. The constitutional decisions are both limited, however, to individuals living in ‘conjugal’ or ‘marriage-like’ relationships.

In a sense, the Supreme Court’s subsequent decision in *Nova Scotia (Attorney General) v Walsh* can be seen as a further “recognition of the different ways in

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59 *Modernization of Benefits and Obligations Act*, SC 2000, c 12 [*MBOA*].
60 However, the *MBOA* also ‘ clarified’ that it did “not affect the meaning of the word ‘marriage’, that is, the lawful union of one man and one woman to the exclusion of all others”: s 1.1.
63 *Adult Interdependent Relationships Act*, SA 2002, c A-45 [*AIR Act*]. Unlike other registration schemes, Alberta’s law enables persons in non-conjugal relationships to register their relationship for legal and economic reasons.
which individuals enter into adult personal relationships". The decision is noteworthy for what it says about provincial non-recognition of unmarried cohabiting couples (gay or straight). In essence, the Court held that the definition of “spouse” in s 2(g) of Nova Scotia’s Matrimonial Property Act, which applied only to married couples, did not infringe s 15 of the Charter because the dignity of common law partners was not compromised by their exclusion from the property division regime. The majority took the view that common law partners ought not to have regimes corollary to marriage imposed upon them by reason of their personal choices (i.e., living together in committed relationships without marrying); should those couples wish to avail themselves of the provisions of the Act, it was open to them to do so by marrying or entering into a registered domestic partnership. The majority was concerned to uphold the principle of individual autonomy:

To ignore the[] differences among cohabiting couples presumes a commonality of intention and understanding that simply does not exist. This effectively nullifies the individual’s freedom to choose alternative family forms and to have that choice respected and legitimated by the state.

The problem with this view lies in its formal aridity. Certainly, if autonomy is understood in a classical liberal sense, then it is incumbent upon the state to refrain from imposing obligations on those parties who apparently elect not to enter into the forms of relationship recognition offered by the state. However, as feminist critique has made clear, individual autonomy is a much thicker concept than the mere freedom to be left alone. Just as we are all located in webs of interpersonal connection, our decisions and positions vis-à-vis our intimate partners are influenced and inflected by myriad factors. As Justice McLachlin

67 Cossman & Ryder, supra note 6 at 26.
68 Matrimonial Property Act, RSNS 1989, c 275.
69 Walsh, supra note 66 at 356.
recognized in *Miron*, not marrying is often a product of structural and personal factors beyond the control of the individual; it is therefore insufficient to imply a fully reasoned decision to decline state involvement in one’s affairs by reason of the absence of a marriage certificate. The same logic can be applied in respect of *Walsh*. Indeed, it can be argued that the majority’s reasoning in *Walsh* is disrespectful of relational autonomy because it effectively requires couples in intimate relationships to enter into a form of state recognition in order to obtain protection in matters that ought not to require the state’s imprimatur; in this sense, the decision potentially undercuts personal autonomy for at least some couples by forcing them to elect between formal registration and financial protection. The choice, then, resembles the limited understanding of the concept evident in Justice Gonthier’s dissent in *Miron* – that is, marriage is not discriminatory because it involves choice. In this vein, as L’Heureux-Dubé J noted in dissent in *Walsh*, refusal to accord the same benefits to unmarried cohabiting couples instantiates the lesser dignity and worth of those relationships in the eyes of the state.

B. The Logic of Marriage Equality

In the same year as the Supreme Court gave judgment in *Walsh*, the Superior Court of Ontario in *Halpern v Canada (Attorney General)* declared the common law, opposite-sex definition of marriage unconstitutional. Soon after, the Superior Court of Quebec reached a similar conclusion in *Hendricks v Quebec (PG)*. In

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70 *Miron*, *supra* note 36 at [153].
71 While Nova Scotia provides an alternative to marriage in the form of domestic partnerships, it is effectively an equivalent status to marriage: see s 54(2) of the *Vital Statistics Act*, RSNS 1989, c 494 (detailing the statutes under which domestic partners are deemed to be spouses).
72 *Miron*, *supra* note 36 at [26].
73 *Walsh*, *supra* note 66 at 379, 387.
74 *Halpern* (Sup Ct), *supra* note 34.
75 *Hendricks v Quebec (PG)*, [2002] RJQ 2506 [*Hendricks*].
2003, the British Columbia Court of Appeal overruled a 2001 decision of Pitfield J of the Superior Court and, like the courts in Halpern (Sup Ct) and Hendricks, declared the common law definition of marriage unconstitutional. The Ontario Court of Appeals in Halpern v Canada (Attorney General)\(^7\) subsequently affirmed the judgment of the Superior Court in Halpern (Sup Ct), but made its declaration of invalidity effective immediately. In the discussion that follows, I focus on the Halpern cases because they bookend the positive provincial findings concerning same-sex marriage.

At first instance in Halpern (Sup Ct), the Superior Court held that the common law definition of marriage infringed the applicants’ rights under s 15(1) of the Charter in an unjustifiable manner. The Court suspended its declaration for two years to allow legislative amendments, failing which the definition would have automatically been amended. The Court of Appeal in Halpern (CA) unanimously affirmed the finding in respect of breach and non-justifiability. As a threshold matter, the Court of Appeal noted that s 1.1 of the MBOA “simply affirms that the Act does not change the common law definition of marriage”, that is, it was not a bar to expanding that definition.\(^7\) With reference to this provision, the Court found that the common law of Canada did exclude same-sex couples from marriage, and \(M v H\)\(^7\) had not displaced that exclusion.\(^7\) Crucially, though, the Court rejected the argument that this common law definition is immutable and that Parliament does not have power under s 91(26) of the Constitution Act, 1867\(^8\) to make laws regarding capacity to marry.

\(^7\) Halpern v Canada (Attorney General), [2003] 65 OR (3d) 161 [Halpern (CA)].
\(^7\) Ibid at [28].
\(^7\) M v H, supra note 8.
\(^7\) Halpern (CA), supra note 76 at [37].
\(^8\) Constitution Act, 1867, supra note 1.
From a doctrinal perspective, the Court of Appeal affirmed the *Constitution*’s dynamism by reference to Lord Sankey’s arboreal metaphor of the “living tree”.  

Concerning the s 15(1) claim, the Court found that the common law definition:

- created a formal distinction between opposite-sex and same-sex couples;  
- the differential treatment created by that distinction was based on enumerated or analogous ground; and
- the relevant group (gay, lesbian and bisexual persons) were subject to discrimination, as demonstrated by:
  - pre-existing disadvantage and stereotyping;
  - the disjunction between the needs of the claimants and the existing state of the law;
  - the under-inclusive nature of the common law definition from an ameliorative point of view; and
  - the detrimental effects of excluding same-sex couples from an important societal institution, which “perpetuate[d] the view that same-sex relationships are less worthy of recognition than

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81 *Halpern (CA)*, *supra* note 76 at [42] *et seq.*

82 *Ibid* at [69]. It was irrelevant that this distinction arose from common law conceptions of marriage that predated its application in Canada: *ibid* at [68]-[70].

83 *Ibid* at [73]-[76] referring to *Egan, supra* note 17 at 528.

84 *Halpern (CA)*, *supra* note 76 at [82]-[87] referring to the judgment of Cory J in *Egan, supra* note 17 at 601-02: “Homosexual couples as well as homosexual individuals have suffered greatly as a result of discrimination. Sexual orientation is more than simply a "status" that an individual possesses. It is something that is demonstrated in an individual's conduct by the choice of a partner . . . [S]tudies serve to confirm overwhelmingly that homosexuals, whether as individuals or couples, form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage.”

85 *Halpern (CA)*, *supra* note 76 at [88]-[95].

86 *Ibid* at [96]-[99].
opposite-sex relationships ... [thereby offending] the dignity of persons in same-sex relationships".\(^{87}\)

At the section 1 level of the analysis, the Court rejected outright the submission that the historically heterosexual nature of marriage justified the continuing exclusion of same-sex couples.\(^{88}\) The Court also rejected justifications based on the concern of uniting persons of the opposite sex, encouraging procreation and care of children,\(^{89}\) and companionship. In each case, the Court found that there was no basis for prioritizing heterosexual relationships since doing so perpetuated the lesser status of same-sex relationships. In its proportionality analysis, the Court rejected the Attorney General’s patronizing submission that the exclusion of same-sex couples from marriage minimally impaired their rights because of the availability of “commitment ceremonies” and the extension of benefits under the MBOA. The Court held that those amendments did not confer equal access to government benefits because of the waiting periods involved in

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87 \textit{Ibid} at [97]-[107]. The decision in \textit{Walsh, supra} note 66, was relevant to this point because the exclusion of common law partners from certain regimes meant that same-sex couples were entirely excluded from the type of protection sought in that case while marriage remained a solely heterosexual institution: \textit{Halpern (CA), supra} note 76 at [104].

88 \textit{Halpern (CA), supra} note 76 at [117].

89 On this point, the Court observed (\textit{ibid} at [123]): “[A] law that restricts marriage to opposite-sex couples, on the basis that a fundamental purpose of marriage is the raising of children, suggests that same-sex couples are not equally capable of childrearing. The AGC has put forward no evidence to support such a proposition. Neither is the AGC advocating such a view; rather, it takes the position that social science research is not capable of establishing the proposition one way or another. In the absence of cogent evidence, it is our view that the objective is based on a stereotypical assumption that is not acceptable in a free and democratic society that prides itself on promoting equality and respect for all persons.” The Attorney General’s position that social science research is not capable of establishing the capacity of homosexuals to parent in a manner at least equal to heterosexuals was, and remains, patently wrong. Soon after \textit{Halpern (CA)}, Bala noted that “[t]he overwhelming preponderance of psychological research findings serves to alleviate the fear that children who are reared in these [same-sex] relationships are worse off than children reared by opposite-sex parents”: Nicholas Bala, “The History & Future of Marriage in Canada” (2005) 4 JL & Equality 20 at 33. Research in the intervening years has only strengthened the case in favour of parenting by gays and lesbians: see, e.g., \textit{Brief of Amicus Curiae American Sociological Association in Support of Respondent Kristin M Perry and Respondent Edith Schlain Windsor} (2013).
establishing cohabitation; more pointedly, “the benefits of marriage cannot be viewed in purely economic terms”. 90 From a remedial perspective, the Court re-formulated the common law definition of marriage as “the voluntary union for life of two persons to the exclusion of all others”, and declined to suspend its declaration. This had the effect not only of immediately enabling same-sex marriage, but also conferring retrospective validity on the marriages of the applicants, including two couples who had taken advantage of the Metropolitan Church of Toronto’s willingness to publish the banns of marriage of those couples and officiate at religious ceremonies. 91 Thus, Canada’s first same-sex marriage actually took place on 14 January 2001, some two and a half years prior to Halpern (CA).

The Court in Halpern (CA) appropriately recognized that as a matter of equality between lesbians, gay men, bisexuals and heterosexuals, the exclusion of same-sex couples from civil marriage constituted impermissible discrimination contrary to the spirit of s15 of the Charter. Indeed, the Court demonstrated its awareness of the potential relationship in modern Western societies between laws governing personal relationships and the full realization of human capabilities and autonomy by asking, “whether the law takes into account the actual needs, capacities and circumstances of same-sex couples”. 92 Exclusion from marriage, it found, “perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships”. 93 Similarly, the Superior Court recognized that “same-sex couples can and do live in long-term, caring, loving and conjugal relationships – including those involving the rearing of children (and, in a modern context, even the birth of children)”. 94 This statement is striking

90 Halpern (CA), supra note 76 at [136].
91 Ibid at [11]-[14], [155].
92 Ibid at [91].
93 Ibid at [107].
94 Halpern (Sup Ct), supra note 34 at [65].
when it is recalled that less than ten years prior to *Halpern* (CA), La Forest J in *Mossop* felt compelled to opine that gay men in long-term conjugal relationships could not be considered family.

Nevertheless, it is important to recognize the limits of the *Halpern* judgments. The Court of Appeal, in the opening paragraphs of its judgment, said, “this case is ultimately about the recognition and protection of human dignity and equality in the context of the social structures available to conjugal couples in Canada”.95 The Court thus made it clear that it would not (nor was it asked to) consider the broader question of whether the state should be involved in the business of relationship recognition, or whether the benefits that presently attend state recognition ought to be de-linked from conjugality. The Court accurately observed that “[t]he societal significance of marriage, and the corresponding benefits that are available only to married persons, cannot be overlooked”.96 The decision to extend the option of entering into marriage to lesbians and gay men was certainly the correct one based on the material before the Court, but at a broader level, the judgment serves to extend and reinforce the centrality of marriage as an organizing institution for the conferral of social approval and economic benefits. In fairness, the Court of Appeal generally eschewed the type of breathless valorization of marriage seen in certain American cases, notably *United States v Windsor*.97 However, it also accepted that:98

Marriage is, without dispute, one of the most significant forms of personal relationships. For centuries, marriage has been a basic element of social organization in societies around the world. Through the institution of marriage, individuals can publicly express their love and commitment to each other. Through this institution, society publicly recognizes expressions of love and commitment between individuals, granting them respect and legitimacy as a couple. This public recognition and sanction of

95 *Halpern* (CA), *supra* note 76 at [2] [emphasis added].
96 *Ibid* at [107].
97 *United States v Windsor*, 133 S Ct 2675 (2013).
98 *Halpern* (CA), *supra* note 76 at [5].
marital relationships reflect society’s approbation of the personal hopes, desires and aspirations that underlie loving, committed conjugal relationships. This can only enhance an individual's sense of self-worth and dignity.

This view is also evident in the Superior Court’s judgment, in which Blair RSJ positioned marriage as “society’s highest acceptance of the self-worth and the wholeness of a couple’s relationship, … [which] thus touches their sense of human dignity at its core”, and Laforme J averred that marriage is an “institution that accords to a union the profound social stamp of approval and acceptance of the relationship as being of the highest value”.

Read together, the Courts’ pronouncements in the *Halpern* cases tend to suggest that while gays and lesbians are unquestionably equal citizens, those (gay or straight) persons who do not or cannot marry are not quite “of the highest value”; that an unmarried “individual's sense of self-worth and dignity” must be less than that of a married spouse because he or she is not worthy of the same degree of “respect and legitimacy” as married couples. In this sense, the Court’s statements about equality and relational hierarchies appear to apply only as between those persons willing and able to enter into the available and (still) stratified forms of recognition.

A related issue touched in the *Halpern* cases is the extent to which the right to marry can be understood as a question of choice. At first instance, Laforme J approved the statement of Greer J in *Layland* that “the right to choose is a fundamental right and applies to the context of marriage in our society” and “[i]t is a basic theory in our society that the state will respect choices made by individuals and the state will avoid subordinating these choices to any one

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99 *Halpern* (Sup Ct), *supra* note 34 at [83].

conception”. Of course, Justice Laforme’s point in making this statement is that same-sex couples who would choose to marry should not be excluded from that right by reason of their sexual preference. However, the invocation of choice raises the point made by McLachlin J in *Miron* that while “[i]n theory, the individual is free to choose whether to marry or not to marry … the reality may be otherwise”.102 The imperfect nature of the choice concerning marriage is indirectly made clear in the Court of Appeal's judgment, with its emphasis on the “the corresponding benefits that are available only to married persons”.103 While the Court subsequently claimed that the reason gay people wish to have access to marriage is because it “is an important and fundamental institution in Canadian society”,104 I would suggest that for many same-sex couples, the reasons are equally related to the less lofty but practically vital “corresponding benefits" acknowledged by the Court to exist.105 The point that I am seeking to draw out is that while the Courts in the *Halpern* cases reached the laudable conclusion that same-sex couples cannot as a matter of law be denied access to marriage, the judgments do little to challenge the view that there is an intrinsic link between conjugal relationship recognition and socioeconomic benefits; indeed, the cases highlight the very falsity of the choice said to inhere in the decision to wed.

One week after the Court of Appeal delivered its judgment in *Halpern* (CA), on 17 June 2003, Prime Minister Jean Chretien announced that the federal government would not appeal *Halpern* (CA) or *EGALE*;106 rather, it would introduce federal

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102 *Miron*, supra note 36 at [153].
103 *Halpern* (CA), supra note 76 at [107].
104 Ibid.
105 Ibid.
106 *EGALE*, supra note 34. Consequently, the British Columbia Court of Appeal lifted the suspension of its judgment on 8 July 2003: (2003) 228 DLR (4th) 416 at [6]-[8]. The government also announced that it would abandon its appeal against *Hendricks*, supra note 75, though an appeal against the decision was nevertheless brought by the Ligue
legislation in accordance with those decisions.\textsuperscript{107} On 16 July 2003, the Governor in Council requested that the Supreme Court hear a reference on the federal government’s \textit{Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes}.\textsuperscript{108}

On 9 December 2004, the Supreme Court issued its opinion in \textit{Reference re Same-Sex Marriage}. In a nutshell, the Court found that s 1 of the proposed Act, which defined “[m]arriage, for civil purposes” as “the lawful union of two persons to the exclusion of all others”, was within the exclusive legislative competence of the federal Parliament by reason of s 91(26) of the \textit{Constitution Act, 1867}; this definition was also found to comport with the \textit{Charter}. Section 2 of the proposed Act, concerning “the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs”, was found to be a matter within provincial competence under s 92(12) and therefore ultra vires the federal Parliament. However, the Court also found that the \textit{Charter} protects religious officials in this respect. The Court declined to answer the fourth question put to it, concerning the constitutionality of an opposite-sex requirement for civil marriage.

The Court’s reasoning on the question of federal competence to legislate for same-sex marriage echoed the findings in \textit{Halperm (CA)}, \textit{EGALE} and \textit{Hendricks} that s 91(26) of the \textit{Constitution Act, 1867} does not entrench an opposite-sex definition of marriage into the \textit{Constitution} and hence does not preclude the

\textsuperscript{107} Wintemute, \textit{supra} note 11 at 1166-67.

\textsuperscript{108} \textit{Marriage Reference}, \textit{supra} note 3 at [1]. Wintemute has criticized the reference to the Supreme Court on the basis that it unnecessarily delayed the introduction of the federal legislation: Wintemute, \textit{supra} note 11 at 1171.
development of the term “marriage” at common law. The Court rapidly dismissed the notion that “marriage” as a linguistic, social and legal construct is constrained by its history.

Hyde spoke to a society of shared social values where marriage and religion were thought to be inseparable. This is no longer the case. Canada is a pluralistic society. Marriage, from the perspective of the state, is a civil institution. The “frozen concepts” reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life.

Thus, the Constitution (as a document and a concept) and marriage (as a word and an institution) are each invested with a vitality rendering them capable of change and adaptation. Limits to this dynamism inhere in each, but same-sex marriage did not cross those legal, cultural and linguistic boundaries.

In its findings concerning consistency with the Charter, the Court, perhaps wisely, avoided wading into normative debate concerning same-sex marriage. It found the purpose of the proposed Act was to respond to the judgments in Halperrn (CA), EGALE and Hendricks, as “embodie[d]” in s 1. This, in conjunction with the Preamble’s stated desire to enact Charter-compliant legislation, “point[ed] unequivocally to a purpose which, far from violating the Charter, flow[ed] from it”.

Arguments that s 1 violated ss 15(1) and 2(a) of the Charter were given

109 This was strengthened by the finding that neither s 92(12) or (23) of Constitution Act, 1867, supra note 1, extend to conferring power in respect of same-sex marriage; accordingly, since the Constitution precludes a legislative void, s 91(26) “most aptly subsume[d]” the power: Marriage Reference, supra note 3 at [33]-[34].

110 Ibid at [21]-[22].

111 While the Court perhaps relied too strongly on the judgment of Lord Sankey in Edwards v Attorney-General for Canada, [1930] AC 124 (PC), it deployed his words to pertinent effect with the observation that “[c]ustoms are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared”: Marriage Reference, supra note 3 at [25].

112 Marriage Reference, supra note 3 at [26]-[29]. Nor could same-sex marriage be said to fall within provincial competence under s 92(12) and (13): ibid at [32]-[34].

113 Ibid at [43].
similarly short shrift. The odious contention that the equality rights of religious groups and opposite-sex couples would be infringed by the mere existence of same-sex marriage was dismissed with the appropriately peremptory observation that “mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another”. 114 Similar reasoning underpinned the rejection of the argument that same-sex marriage would “limit the freedom to hold religious beliefs to the contrary”. 115 The purported collision of rights conferred by s 1 of the proposed Act and s 2(a) of the Charter was found to be too abstract to ground the claim; in any event, “such conflict will be resolved within the Charter”. 116

The brevity of the Court's judgment is initially surprising in view of the contested status of same-sex marriage, particularly in 2004. It becomes less so, however, when viewed in the context of what preceded it; indeed, its crispness appears rather sensible. 117 Canada had been debating the rights and status of gay and lesbian persons for well over ten years. The Court had already recognized sexual orientation discrimination as a basis for s 15 claims and, accordingly, had

114 Ibid at [46].
115 Ibid at [47].
116 Ibid at [52].
117 Contra FC DeCoste, “Courting Leviathan: Limited Government and Social Freedom in Reference Re Same-Sex Marriage” (2005) 42 Alta L Rev 1099. DeCoste asserts that the Court’s “large and liberal interpretation” of the federal power over marriage violates “commitments constitutive of the liberal state, the commitment, on the one hand, to leave alone those subject to its rule provided only they cause no harm, and the commitment, on the other hand, that follows ineluctably from this, namely, the commitment to limited and moderate government”. This argument would perhaps have merit if it were allied to an argument against the imposition of a system of marriage per se. However, in the context of an extant civil institution that operated in an exclusionary manner by reason of a protected ground under the Charter, it is clear that the argument is not in fact concerned with leaving citizens alone in any philosophical sense but rather with entrenching the privilege of one group by excluding another. The accusation that the Court “trivialize[d], reject[ed] and erase[d] the people’s past” suggests that gays and lesbians are not part of “the people” whose past warrants respect, unless, perhaps, such respect is to be accorded in the form of continuing discrimination. Thus does DeCoste himself “trivialize, reject and [attempt to] erase” the history of discrimination against gay and lesbian persons and prevent their flourishing through a specious distortion of liberal principles.
required that same-sex cohabiting couples be afforded the same rights as their heterosexual counterparts. In each of those decisions, the Court (albeit not unanimously), delivered strong normative justifications for the recognition of the dignity and rights of gays and lesbians. In addition, provincial appellate courts in two provinces, and a trial court in a third province, had delivered carefully reasoned arguments for expanding the common law definition of marriage to include same-sex couples. The federal government had, furthermore, made clear its desire to pass legislation recognizing same-sex marriage. By this point, the roadblocks were legal, not normative. What was required was precisely what the Supreme Court delivered: direct confirmation that marriage is a civil institution, and that same-sex marriage is within federal competence and is Charter-compliant.

This latter point bears emphasizing. What the Supreme Court did was confirm the constitutional validity of federal legislation; it did not hold that the *Charter requires* that same-sex couples be allowed to marry (though its reasoning clearly indicates that this conclusion would have been reached had the question been framed in this way). Accordingly, the Court cleared the way for Parliament to proceed with implementation of the *Civil Marriage Act*, as opposed to ordering an immediate remedy enabling same-sex marriage, as occurred in Ontario.

Bill C-38 was introduced to the House of Commons on 1 February 2005. By that time, nearly 90% of the Canadian population resided in provinces and territories

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118 *Civil Marriage Act*, SC 2005, c 33 [Civil Marriage Act].

119 The merits of this approach are debatable. Bala has argued that “the added time for debate allowed more opportunity for the public to become engaged and educated about the issues”: Bala, supra note 89 at 33. Wintemute, on the other hand, has argued that the process “ended up providing a good example of how not to conduct a Charter dialogue with the Supreme Court”, because of the delay occasioned by the Court hearing the reference, which in turn delayed the introduction of the legislation: Wintemute, supra note 11 at 1171.

120 In response to Halpern (CA), supra note 76, the Ontario Government eventually passed the *Spousal Relationships Statute Law Amendment Act*, SO 2005, which amended provincial laws to apply to both opposite-sex and same-sex married couples.
that allowed same-sex marriage.\textsuperscript{121} Nevertheless, the passage of the Bill and the coming into force of the \textit{Civil Marriage Act} on 20 July 2005 affirmed the nation’s commitment to marriage equality and arguably conferred on same-sex marriage an institutional validity it would have lacked if achieved by litigation alone.

The Supreme Court’s most recent foray into matters of relationship recognition, \textit{Quebec (Attorney General) v A},\textsuperscript{122} deals with the rights and obligations of de facto couples upon dissolution of a relationship. While the decision is concerned with Quebec’s strict separation between de facto and married couples (or those in civil unions), it has potential implications for regulation by other Provinces of the rights and obligations of former cohabiting partners. The case centers on former (opposite-sex) de facto partners “Eric” and “Lola”\textsuperscript{123} who had a roughly ten-year relationship, resided together for some seven years, and who had three children together. Lola had wanted to marry Eric, but he refused, apparently on the basis that he did not believe in marriage.\textsuperscript{124} After the couple separated, Lola challenged the constitutionality of Quebec’s exclusion of de facto partners from provisions of the \textit{Civil Code of Quebec} dealing with family residence, family patrimony, compensatory allowances, and partnership of acquests.

A majority of the Court (McLachlin CJ, Deschamps, Abella, Cromwell and Karakatsanis JJ) found that the impugned provisions infringed s 15(1) of the \textit{Charter}. However, McLachlin CJ held that the violations were justifiable under s 1, and Deschamps, Cromwell and Karakatsanis JJ held that all provisions other

\textsuperscript{121} EGALE Canada and Canadians for Equal Marriage, \textit{Submissions to the Bill C-38 Legislative Committee} (2005). Between July and December 2004, courts in Yukon Territory, Manitoba, Nova Scotia, Saskatchewan, and Newfoundland and Labrador held that the \textit{Charter} does not permit the exclusion of same-sex couples from civil marriage.

\textsuperscript{122} \textit{Quebec (Attorney General) v A}, [2013] 1 SCR 61 [\textit{Quebec v A}].

\textsuperscript{123} See, e.g., “Unmarried Quebec couples have no right to alimony, court rules”, \textit{CBC News} (25 January 2013).

\textsuperscript{124} While it is not relevant to the legal issues before the Court, it would seem likely that the suit came about in part at least because of Eric’s vast wealth, which it would seem reasonable to assume played some role in his refusal to marry Lola, and her pursuit of legal redress.
than art 585 of the *Civil Code* (concerning spousal support) were justified. Only Justice Abella would have struck down all offending provisions as unjustified under s 1. The minority Justices on the equality question (LeBel, Fish, Rothstein and Moldaver JJ), whose opinion combined with that of McLachlin J to uphold the provisions, did not consider it necessary to address the justification issue.

Autonomy played a critical role for the five Justices who upheld the provisions in their entirety, as well as the three Justices who upheld all but the support provision. The minority on the s 15 question (LeBel, Fish, Rothstein and Moldaver JJ) placed significant emphasis on *Walsh*, observing that it was “based on a principle of freedom to choose between different marital statuses that had different consequences for spouses, and that principle … continues to be valid in the circumstances of the case at bar”.\(^{125}\) In their view, couples that elect not to marry or enter into a civil union still have the option of entering into a cohabitation agreement in order to create particular rights and obligations that accord with their own desires. Therefore, the existence of “different frameworks for private relationships between spouses does not indicate that prejudice is being expressed or perpetuated, but, rather, connotes respect for the various conceptions of conjugality”\(^{126}\), nor could it be said, in their view, that the distinction drawn between married and de facto couples perpetuated stereotypical prejudice towards unmarried couples.

Justice McLachlin also applied principles of autonomy to uphold the provisions, though at the s 1 stage of analysis. In her view, the provisions infringe s 15 because they perpetuate historical prejudice towards unmarried couples, and rest “on a false stereotype of choice rather than on the reality of the claimant’s situation”.\(^{127}\) Despite this false stereotype of choice, McLachlin J found that the exclusion of de facto couples was animated by a desire to “promote choice and

\(^{125}\) *Quebec v A*, supra note 122 at [219].

\(^{126}\) *Ibid* at [266].

\(^{127}\) *Ibid* at [423]. See also *Miron*, supra note 36 at [153].
autonomy for all Quebec spouses with respect to property division and support", which justified the infringement of equality.

Justices Deschamps, Cromwell, and Karakatsanis also found that the provisions infringe s 15. At the s 1 stage, however, they distinguished between the property division and support provisions in the Civil Code. In their view, the property provisions were justified under s 1 for similar reasons to those given by McLachlin J. However, they argued that the exclusion of support obligations to former de facto spouses failed the minimal impairment test because that “interest is vital to persons who have been in a relationship of interdependence” and the rationale for imposing support obligations is the same irrespective of one’s formal relationship status. In their view, the possibility of choice does not truly exist for economically dependent partners, meaning that the law disproportionately affected their interests.

Justice Abella, in her majority opinion concerning s 15, emphasized the point made in Miron that: 129

[W]hile in theory an individual is free to choose whether to marry, there are, in reality, a number of factors that may place the decision beyond his or her effective control. This was a recognition of the complex and mutual nature of the decision to marry and the myriad factors at play in that decision. It was also an acknowledgement that the decision to live together as unmarried spouses may, for some, not in fact be a choice at all.

Accordingly, Abella J observed that “[h]aving accepted marital status as an analogous ground, it is contradictory to find not only that de facto spouses have a choice about their marital status, but that it is that very choice that excludes them from the protection of s 15(1) to which Miron said they were entitled”. 130 On the question of justification, Abella J found that the provisions in the Civil Code failed

128 Quebec v A, supra note 122 at [395].
129 Ibid at [316].
130 Ibid at [335].
the minimal impairment and proportionality limbs of the *R v Oakes* test.\(^{131}\) In particular, she was of the view that an opt-out system, as opposed to Quebec’s opt-in system of registration, would enable respect for the principle of individual autonomy without subjecting those left vulnerable by structural or personal factors to the absence of protection simply because of a lack of formal relationship recognition:\(^{132}\)

Many couples – married or *de facto* – simply “do not turn their minds to the eventuality of separation or divorce”. This lack of awareness of a great number of *de facto* spouses, confirmed by the evidence, speaks to the relative merit of a system of presumptive protection, under which they would be protected whether aware of their legal rights or not, while leaving *de facto* spouses who wish to do so the freedom to choose not to be protected.

*Quebec v A* is a hard case because it pits autonomy against state intervention in the context of personal decisions and economic protection. However, I suggest that once autonomy is properly understood as relational rather than individualist, and choice in matters of relationship recognition is recognized as a product of forces that are often beyond the individual’s control, the correct conclusion is that reached by Abella J. For the reasons explored in respect of *Walsh*,\(^{133}\) the position of LeBel, Fish, Rothstein and Moldaver JJ takes an overly formal view of choice and autonomy that fails to properly recognize that a system where marriage comes wrapped in a box with benefits, and where unmarried couples are left to fend for themselves upon dissolution (and potentially during the course of the relationship if they are unable to satisfy the criteria for recognition at common law), creates a false choice for many people, and has the potential to severely disadvantage those who do not or who are unable to “choose” marriage (or a civil union). Contrary to the invocation of choice, reasoning of this sort continues to operate “within a governing logic of inclusion and exclusion, [where]


\(^{132}\) *Quebec v A*, *supra* note 122 at [374] [citation omitted].

\(^{133}\) *Walsh*, *supra* note 66.
marriage remains the privileged inside. Other forms of relationship are either assimilated to marriage or left alone.”¹³⁴

Justice McLachlin’s view that the provisions of the *Civil Code* are justified under s 1 by reason of Quebec’s concern for individual autonomy is problematic for similar reasons. Like Justice Abella’s view that it is contradictory to cast marital status as a protected ground but then use choice as a reason to deny protection, I would suggest that it is inconsistent to find that the choice exercised by de facto couples is “false”, yet their exclusion from dissolution regimes is justified by concern for individual choice. I would also respectfully suggest that the division of spousal support and property provisions in the opinion of Deschamps, Cromwell and Karakatsanis JJ is problematic, ironically for the reasons given by LeBel, Fish, Rothstein and Moldaver JJ: “[s]uch a distinction disregards the character of an ‘economic partnership … the obligation of support is tied to the other effects of marriage and of the civil union, such as the obligation to contribute to household expenses, rights and obligations with respect to the family residence, and the creation of a family patrimony”. Having found that support obligations are “vital to persons who have been in a relationship of interdependence”, those Justices ought to have applied the same logic to the property division regime.

Lest it be thought that my preference for the opinion of Abella J is simply by default, I would point to her recognition of the need to “look at the content of the relationship’s social package, not at how it is wrapped”.¹³⁵ Justice Abella (along with McLachlin CJ, Deschamps, Cromwell and Karakatsanis JJ on this point) recognized the complexity of the choice that is involved in a person’s relationship status, and the falsity of thin conceptions of autonomy in this context. In my view, Abella J (alone on this point) is correct that once this particular finding is made, it is difficult to see how it could be justifiable to exclude de facto spouses from the

¹³⁵ *Quebec (Attorney General) v A*, supra note 122 at [285] [emphasis in original].
benefits of spousal protection. Furthermore, her alternative opt-out system pays due regard to the importance of not forcing all relationships into the arms of the state where parties together elect not to partake of certain rights and obligations. A regime of this sort is respectful of individual autonomy (understood in a relational context) because it allows people to choose their preferred relational form (or at least not to be disadvantaged by an inability to obtain a particular form of recognition) while not subjecting them to the disastrous consequences of separation without financial adjustment. Critically, this position also contributes to an erosion of the primacy of marriage and formal means of relationship recognition as a system of public and private ordering.

From a slightly different perspective, Quebec v A\textsuperscript{136} and Walsh\textsuperscript{137} also suggest the limitations of the Charter. Drawing on Robert Leckey’s call for a reconsideration of family law’s fundamental basis in private law, it is important to recall that the Charter is not the only or necessarily the best way of addressing family law’s shortcomings: a finding that a law is Charter-compliant does not mean that it is normatively justified or even insulated from principles drawn from other areas of the law, such as unjust enrichment. As Leckey notes, “it is difficult under the Charter to reflect on appropriate regulation for nonconjugal long-term cohabitants, such as siblings. Such persons are unlikely to prove historical disadvantage suffered as members of a marginalized group, but they may well generate interdependence and reliance interests calling for legal recognition.”\textsuperscript{138} Indeed, in a case soon after Walsh, the Quebec Court of Appeal recognized that de facto unions raise a presumption that there is a “correlation between impoverishment and enrichment and that the enrichment is unjustified”.\textsuperscript{139} The point is that while the Charter has been, and remains, a powerful tool,

\textsuperscript{136} Ibid.
\textsuperscript{137} Walsh, supra note 66.
\textsuperscript{138} Leckey, supra note 134 at 78.
\textsuperscript{139} Ibid at 90 referring to L(L) v B(M), [2003] RDF 539.
II. Are We Family (At Law)?

This section provides an overview of the present forms of relationship recognition that are available to same-sex couples in Canada. Part A considers marriage. Part B addresses non-marital relationships, including civil unions, domestic partnerships, and common law and de facto relationships. Part C draws certain conclusions about the present forms of recognition.

A. Marriage

1. Entry

As a result of provincial litigation, the Supreme Court’s findings in the Marriage Reference, and the federal Civil Marriage Act, same-sex couples are legally permitted to marry throughout Canada. Section 2 of the Civil Marriage Act defines civil marriage as “the lawful union of two persons to the exclusion of all others”. Section 3 “recognize[s] that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs”.

140 Marriage Reference, supra note 3.
141 Civil Marriage Act, supra note 118.
142 The change between this wording and the proposed s 2 considered by the Supreme Court ("Nothing in this Act affects the freedom of religious officials to refuse to perform marriages that are not in accordance with their religious beliefs") responds to the Court’s finding that the proposed section trenched on provincial jurisdiction over solemnization, but also takes advantage of its statement that "Parliament has exclusive jurisdiction to enact declaratory legislation relating to the interpretation of its own statutes": Marriage
Somewhat unfortunately, the Preamble stresses the “fundamental” nature of marriage in Canadian society, though it also appropriately observes that, “in order to reflect values of tolerance, respect and equality consistent with the Canadian Charter of Rights and Freedoms, access to marriage for civil purposes should be extended by legislation to couples of the same sex”.

The procedural requirements for a valid marriage remain a matter of provincial law, pursuant to s 92(12) of the Constitution Act, 1867. No Province imposes a residency requirement, although waiting periods may apply between the issuance of a license and the performance of a marriage. This lacuna enables foreign couples to marry in Canada (and allows Canadian residents to marry throughout the country irrespective of their Province of residence), although until recently the validity of marriages entered into by residents of foreign jurisdictions that do not permit or recognize same-sex marriage was questionable.

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Reference, supra note 3 at 716. Of course, such declarations are not determinative in matters of interpretation. In any event, the inclusion of the provision was legally unnecessary given the Court’s confirmation that state compulsion upon religious officials to perform same-sex marriages “would almost certainly run afoul of the Charter guarantee of freedom of religion”: ibid at 722. It is to be observed that the Saskatchewan Court of Appeal has stated that “the Court’s use of the words ‘religious officials’ in this context was a reference to those individuals, such as priests or rabbis, who hold formal positions in faiths or religious organizations. It was not a reference to civil officials who happen to have religious beliefs which do not embrace same-sex marriage”: Re Marriage Commissioners Appointed Under the Marriage Act, [2011] SKCA 3 at [49].

Civil Marriage Act, supra note 118, Preamble at [10].


Marriage Reference, supra note 3 at 709.

For example, Manitoba and Yukon have 24-hour waiting periods, Newfoundland has a four-day waiting period, and Quebec requires a couple to post a public intent-to-marry 20 days before the ceremony.

See, e.g., Cameron French, “Canada to close loophole on foreigner gay marriages”, Reuters (13 January 2012), online: <http://www.reuters.com/article/2012/01/13/us-marriage-idUSTRE80B20U20120113>. The validity in England of a marriage entered into in British Columbia by English residents was tested in England in Wilkinson v Kitzinger, [2006] EWHC 2022 (Fam). President Potter upheld the lex domicilii aspect of the essential validity requirement, meaning that because of the parties’ incapacity to marry
The validity of evasive same-sex marriages\textsuperscript{148} conducted within Canada came to a head in 2012 when VM and LW, non-residents who married in Canada in 2005, asked the courts of Ontario to grant them a divorce.\textsuperscript{149} The difficulty for the women initially arose out of the \textit{Divorce Act}'s requirement that applicants must have been resident in Canada for at least one year to obtain a divorce in Canada.\textsuperscript{150} Accordingly, the women applied for relief under the \textit{parens patriae} jurisdiction of the Ontario Superior Court; in the alternative, they sought relief under s 15 or s 7 of the \textit{Charter}. The Attorney General sought to undercut the Court's jurisdiction to hear the matter by arguing that the marriage was void \textit{ab initio} because the jurisdictions in which the women were domiciled at the time of the marriage (Florida and England) did not permit same-sex marriage; accordingly, they lacked the requisite capacity to marry in Canada.

\textsuperscript{148} An evasive marriage is one in which the parties seek to avoid restrictions on their capacity to marry in their place of residence or domicile by taking advantage of more permissive marriage laws in another jurisdiction. See further Part II, Section III(C)(1).

\textsuperscript{149} See Brenda Cossman, "Exporting Same-Sex Marriage, Importing Same-Sex Divorce - (Or How Canada's Marriage and Divorce Laws Unleashed a Private International Law Nightmare and What to Do About It)" (2013) 32 CFLQ 1 [Cossman, "Exporting, Importing"]. See also\textit{Answer of the Attorney General to Claim FS 11-36793} (17 June 2011), online: <http://s3.documentcloud.org/documents/283173/l-and-m-answer.pdf>.

\textsuperscript{150} \textit{Divorce Act}, RSC 1995, c 3, s 3.
Strictly speaking, the Attorney General was entirely correct because of the distinction in Canadian law between essential and formal validity.\textsuperscript{151} Essential validity, which is within federal power under s 91(26) of the Constitution Act, 1867,\textsuperscript{152} refers to a person’s capacity to marry.\textsuperscript{153} Formal validity, a matter of provincial competence pursuant to s 92(12), concerns the procedural requirements for entry into marriage.\textsuperscript{154} In the case of Canadian residents, Canadian federal and provincial laws govern both essential and formal validity. Accordingly, so long as a Canadian resident complies with applicable laws concerning capacity (for example, federally-prohibited consanguineous relationships\textsuperscript{155}) and formality (for example, provincial marriage licensing requirements\textsuperscript{156}), a marriage conducted in Canada will be valid. However, in the case of non-residents, the position at common law is rather different. In essence, essential validity is determined by reference to the law of the parties’ domicile (\textit{lex domicilii}), while formal validity is determined by reference to the place of celebration (\textit{lex loci celebrationis}).\textsuperscript{157} This is potentially complicated by the fact that \textit{lex domicilii} may be determined either by the dual domicile test, which looks to the essential capacity of both parties in their respective places of residence (if different), or by reference to the parties’ intended matrimonial home.\textsuperscript{158}

\textsuperscript{151} See \textit{Brook v Brook}, (1861) 9 HL Cas 193.
\textsuperscript{152} Constitution Act, 1867, supra note 1.
\textsuperscript{153} Marriage Reference, supra note 3 at 709; Stephen GA Pitel & Nicholas Rafferty, Conflict of Laws (Irwin, 2010) at 385.
\textsuperscript{154} Marriage Reference, supra note 3 at 709; Pitel & Rafferty, supra note 153 at 381.
\textsuperscript{155} Marriage (Prohibited Degrees) Act, SC 1990, c 46.
\textsuperscript{156} See, e.g., Marriage Act, RSO 1990, c M3.
\textsuperscript{157} Quebec takes a more relaxed approach, providing that the formal validity of a marriage “is governed by the law of the place of its solemnization or by the law of the country of domicile or of nationality of one of the spouses”: Civil Code of Quebec, art 3088.
\textsuperscript{158} This test was applied in Feiner v Demkowicz, (1973) 2 OR (2d) 121 and Canada (Minister of Employment and Immigration) v Narwal, [1990] 2 FC 385. See further James Fawcett & Janeen Carruthers, Cheshire, North & Fawcett, Private International Law, 14th ed (Oxford: Oxford University Press, 2008) at 896.
Generally, Canada adheres to the dual domicile test.\footnote{159} Thus, in the case of the two women at the centre of the abovementioned controversy, the laws of both England and Florida were relevant. The fact that same-sex marriage was not permitted in either jurisdiction at the time of the marriage meant, as the Attorney General submitted, that the marriage, while formally in accordance with Canadian law, lacked essential validity.

These principles also apply to marriages conducted in other jurisdictions by Canadian residents.\footnote{160} Thus, gay or straight Canadian residents who travel to another country to marry must have the capacity to marry under Canadian law and comply with the formal requirements of the place of celebration.\footnote{161} Similarly,

\begin{enumerate}
\item \textit{Brook v Brook, supra note 151; Reed v Reed, [1969] 6 DLR (3d) 617; Uppal v Canada (Minister of Employment and Immigration), [1986] FCJ No 804. This point was also made by the Supreme Court in the unusual case of \textit{Schwebel v Ungar}, [1965] SCR 148. The case concerned a marriage entered into in Hungary in 1945 between the defendant and one W. The couple left Hungary that year for Israel, but did not arrive there until 1948. En route, the couple obtained a divorce in Italy pursuant to Jewish law; a divorce under Italian law was not obtained. Soon after, the defendant arrived in Israel, where she established residence. The divorce was recognized as valid in Israel. Ungar subsequently married the plaintiff, who later sought to impugn the validity of the marriage on the basis that her previous marriage had not been validly dissolved under Italian law. The Supreme Court held that Ungar had sufficiently demonstrated her intention to establish residence in Israel, meaning that the recognition of her divorce in that country conferred upon her the capacity to re-marry under Israeli law, thereby conferring capacity in respect of the Canadian marriage. In respect of the divorce, the unusual circumstances of the case displaced the ordinary requirement then extant in Ontario that a divorce was not valid unless obtained under the laws of the husband’s domicile at the time of application; instead, the governing consideration was the defendant’s status under the law of her domicile at the time of the second marriage.}
\item Capacity is therefore determined by reference to Canadian law, while formal validity is determined according to the \textit{lex loci celebrationis}: see \textit{Berthiaume v Dastous}, [1930] AC 79 (PC), in which a marriage between residents of Quebec, conducted in France, was held to be invalid because there had been no civil ceremony, as required under French law.
\item Indeed, as Pitel has noted, "a marriage will be recognized as valid even if no formalities have been followed provided that no formalities are required by the law of the place of celebration": Pitel & Rafferty, \textit{supra note} 153 at 382. It has even been held that a marriage conducted in a place that denies the capacity of the parties will be valid if the law of their place of domicile confers capacity and the marriage was performed in conformity with the formal requirements of the \textit{lex loci celebrationis}. The Supreme Court of British Columbia held in \textit{Reed v Reed, supra note} 159, that a marriage between first cousins who were residents of British Columbia was valid despite the fact that it was formalized in Washington, where marriage between first cousins was prohibited. The
\end{enumerate}
a marriage conducted in a foreign jurisdiction when the parties were resident in that jurisdiction will not subsequently be recognized in Canada if it was invalid under the laws of the former domicile.  

The furor that erupted in response to the putative invalidity of the marriage of VM and LW led to rapid, mollifying legislative action in the form of Bill C-32. The Opposition introduced an alternative measure, Bill C-435, which differed only in providing that the corollary relief provisions of the Divorce Act applied to dissolutions granted to non-residents. Bill C-32, An Act to amend the Civil Marriage Act, received Royal Assent on 26 June 2013.

Section 5(1) of the amended Civil Marriage Act now provides:

A marriage that is performed in Canada and that would be valid in Canada if the spouses were domiciled in Canada is valid for the purposes of Canadian law even though either or both of the spouses do not, at the time of the marriage, have the capacity to enter into it under the law of their respective state of domicile.

Thus, for non-residents domiciled in jurisdictions that do not recognize same-sex marriage, lex loci celebrationis now applies in respect of both formal and essential validity. Section 5(2) retrospectively validates all marriages “that would have been valid under the law that was applicable in the province where the

Court reasoned that because British Columbia imposed no such capacity-based impediment and the formal requirements of the lex loci celebrationis (Washington) were met, the marriage met both the essential and formal requirements of validity.

See, e.g., McColm v McColm, [1969] OJ No 1391, in which a marriage between former residents of Scotland, conducted pursuant to an irregular, customary form of ceremony under Scots law, was found to be invalid because, at the time it was conducted, legislation had been passed in Scotland banning the particular form of the marriage.

Divorce Act, supra note 150.

For a discussion of the differences between the proposed bills see Cossman, "Exporting, Importing", supra note 149 at 7-13.

An Act to Amend the Civil Marriage Act, SC 2013, c 30.

Or, for that matter, marriage between cousins: see, e.g., Reed v Reed, supra note 159.
marriage was performed but for the lack of capacity of either or both of the spouses to enter into it under the law of their respective state of domicile". Of course, these provisions only validate a non-resident marriage for the purposes of Canadian law; recognition (or not) by foreign states remains firmly a matter determined by the law of the place of residence.

While it is arguable that non-residents who married in Canada prior to 2012 (and who subsequently found themselves wedlocked) should have exercised greater caution (‘caveat emptor’, some might say), the Government’s reliance on principles of private international law in response to the application by VM and LW has justifiably been called “[h]ypocritical, in light of the luring of gay tourist dollars to the same-sex wedding industrial complex emerging in major Canadian cities”. In view of the Government’s silence regarding the possible invalidity of foreign same-sex marriages, and the potentially significant consequences for the roughly 5000 foreign same-sex couples that married in Canada between 2003 and 2012, it is appropriate that a retrospective carve-out from the lex domicillii principle concerning essential capacity was passed for persons who married in accordance with Canadian provincial law prior to the amendment of the Civil Marriage Act.

Unfortunately, Parliament did not see fit to extend the application of lex loci celebrationis to marriages conducted outside of Canada. As Cossman observed prior to the enactment of Bill C-32, its recognition provisions do not resolve the potential problem of a couple who reside in a non-recognizing forum but marry in a jurisdiction that allows same-sex marriage. Canadian rules of private

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167 In the event that dissolution of a marriage entered into by non-residents prior to the enactment of Bill C-32 occurred, s 5(3) confirms that such an order, whether made in Canada or elsewhere, is considered to have validly dissolved the marriage.


170 Cossman, “Exporting, Importing”, supra note 149 at 17.
international law would, in such a situation, still look to the parties' place of residence for the purpose of determining essential validity, meaning that a Californian marriage between residents of Mississippi might not be recognized in Canada. While there is a legitimate argument against recognizing evasive marriages, Canada now considers evasive same-sex marriages valid if they are conducted within its borders; it is therefore inconsistent and frankly parochial to leave open the possibility that such marriages, if conducted elsewhere, are invalid because of essential (sexuality-based) incapacity. Potential conflicts with fundamental requirements of Canadian law concerning capacity (for instance, concerning age or consanguinity) could be dealt with through the application of the public policy exception to recognition of foreign marriages. Another solution would be to apply an exception to the dual domicile test for same-sex couples based on Canadian public policy and constitutional principles of equality.

2. Exit

In contrast to the Civil Marriage Act and provincial Marriage Acts, the Divorce Act creates a one-year residency requirement for the commencement of dissolution proceedings. Until the recent amendments to the Civil Marriage Act, which conferred jurisdiction on provincial courts to grant dissolution of marriages entered into by non-residents whose home states do not recognize the marriage, this requirement effectively left foreign same-sex couples whose

\[171\] See Part 2, Section III(C)(1).

\[172\] Martha Bailey, "Same-Sex Relationships Across Borders" (2004) 49 McGill LJ 1005 at 1018. This exception could possibly have been applied to resolve the issue in relation to Canadian marriages and avoid the hysteria caused by the Attorney General’s response to the claim by VM and LW: Cossman, "Exporting, Importing", supra note 149 at 16-17.

\[173\] Divorce Act, supra note 150, s 3(1).

\[174\] Civil Marriage Act, supra note 118, ss 6 and 7.
home states refused to grant them a divorce, “wedlocked”. Canadian residents who are in a same-sex marriage remain subject to the Divorce Act. 175

A divorce granted in Canada is recognized throughout the country. 176 A foreign divorce will be recognized in Canada:

• “if either former spouse was ordinarily resident in that country or subdivision for at least one year immediately preceding the commencement of proceedings for the divorce”; 177
• if it was granted pursuant to the wife’s independent domicile; 178 or
• where the divorce was granted pursuant to any other rule of law respecting foreign divorces. 179

If it is established that a foreign court had jurisdiction to grant a divorce, 180 Canadian courts do not generally inquire into the substantive merits of the order.

175 Section 7(1)(b) of the Civil Marriage Act, supra note 118, requires that “neither spouse resides in Canada at the time the application is made”.
176 Divorce Act, supra note 150, s 13. Even in the absence of this provision, Canada’s federal structure means that a divorce granted in one province would be recognized throughout Canada: see De Savoye v Morguard Investments, [1990] 3 SCR 1077 at [38]-[39]. Parallel proceedings within Canada are dealt with by ss 3(2), 3(3) and 6(1) of the Divorce Act. Section 3(2) establishes the priority of the first proceeding unless it was discontinued within 30 days of filing. In the event that proceedings are filed in different jurisdictions on the same day, s 3(3) vests jurisdiction in the Federal Court. Section 6(1) provides that an application for divorce may be transferred to another province if corollary relief involves children who are “most substantially connected” with another province.

177 Divorce Act, supra note 150, s 22(1).
178 Ibid, s 22(2).
179 Ibid, s 22(3). Generally, foreign divorces are recognized under the common law by reference to domicile, reciprocity, or a real and substantial connection: see Pitel & Rafferty, supra note 153 at 411-14. See also Orabi v El Qaoud, (2005) 12 RFL (6th) 296.

180 In the event that parallel proceedings are instituted in Canada and a foreign state, a Canadian court should, under the principle of forum non conveniens, decline jurisdiction under the Divorce Act, supra note 150, if there is “some other forum more convenient and appropriate for the pursuit of the action and for securing the ends of justice”: Amchem Products Inc v British Columbia (Workers’ Compensation Board), [1993] 1 SCR 897 referring to Antares Shipping Corp v The Ship “Capricorn”, [1977] 2 SCR 422. See also Jenkins v Jenkins, [2000] OJ No 1631 in which the Court found that Ontario was the most appropriate forum because of the presence of children who were the subjects of potential custody and support orders; and Tower v Tower, [2008] 52 RFL (6th) 455, in which the
That being said, the failure to provide notice to an affected party\textsuperscript{181} or fraud\textsuperscript{182} could lead to non-recognition.

The jurisdictional threshold for corollary relief pursuant to the \textit{Divorce Act} is less stringent than for divorce, requiring either ordinary residence in the province at the commencement of the proceeding or acceptance by both former spouses of the court’s jurisdiction.\textsuperscript{183} Upon satisfaction of either requirement, the provincial court hearing the matter may make child support,\textsuperscript{184} spousal support\textsuperscript{185} and custody orders\textsuperscript{186} as part of the divorce proceeding.\textsuperscript{187} Such orders are recognized throughout Canada.\textsuperscript{188} Property distribution orders can be made in the same proceedings in accordance with provincial law.\textsuperscript{189} With the exception of courts of Florida were held to be a more convenient forum in respect of property because the majority of matrimonial assets were located there. Thus, where children reside in a foreign country, Canadian courts may decline to make custody and support orders: \textit{Cheng v Liu}, [2010] OJ No 1557; \textit{Folwell v Holmes}, [2006] OJ No 4287. In \textit{Alexiou v Alexiou}, [1996] 41 Alta LR (3d) 90 (QB), Greece was held to be the appropriate forum because of the preponderance of witnesses in Greece who could give evidence as to the children’s best interests. The \textit{Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children}, HC 96, RS 0211231011 provides that jurisdiction should be determined by reference to the child’s “habitual residence”. Canada is not a signatory to the Convention.

\textsuperscript{181} See, e.g., \textit{Bavin v Bavin}, [1939] 2 DLR 278, aff’d on this point [1939] 3 DLR 328 (Ont CA); \textit{Orabi v El Qaoud}, supra note 179.


\textsuperscript{183} \textit{Divorce Act}, supra note 150, s 4(1).

\textsuperscript{184} \textit{Ibid}, s 15.1.

\textsuperscript{185} \textit{Ibid}, s 15.2.

\textsuperscript{186} \textit{Ibid}, s 16.

\textsuperscript{187} Defined in s 2(1) of the \textit{Divorce Act} as “a proceeding in a court in which either or both spouses seek a divorce alone or together with a child support order, a spousal support order or a custody order”.

\textsuperscript{188} \textit{Ibid}, s 20(2).

\textsuperscript{189} For example, Parts I and II of the \textit{FL Act} (On), \textit{supra} note 7. This is a function of the constitutionally entrenched provincial power over property and civil rights: \textit{Constitution Act, 1867}, \textit{supra} note 1, s 92(13).
Quebec,\textsuperscript{190} provincial law also enables married couples to preemptively specify certain of their respective rights and obligations to one another in a marriage contract.\textsuperscript{191} Upon separation, married couples may also enter into a separation agreement concerning division of property, spousal and child support, and custody,\textsuperscript{192} such an agreement prevails over otherwise applicable legislation governing the rights of the parties,\textsuperscript{193} although the courts retain supervisory jurisdiction to vary inequitable agreements.\textsuperscript{194}

While not necessarily arising out of divorce, it is to be noted that foreign custody orders are enforceable in Canada if they meet the requirements for recognition under relevant provincial law. For example, s 41(1) of the \textit{Children’s Law Reform Act} provides:\textsuperscript{195}

Upon application by any person in whose favour an order for the custody of or access to a child has been made by an extra-provincial tribunal, a court shall recognize the order unless the court is satisfied,

(a) that the respondent was not given reasonable notice of the commencement of the proceeding in which the order was made;

(b) that the respondent was not given an opportunity to be heard

\textsuperscript{190} See Robert Leckey, “Must equal mean identical? Same-sex couples and marriage” (2014) 10:1 Int JLC 5 at 7-11 (detailing the “onerous” effects of marriage in Quebec).

\textsuperscript{191} See, e.g., \textit{FL Act} (On), supra note 7, s 52 and attendant provisions in Part IV. Provisions concerning custody of children are not enforceable: s 52(1)(c). Provisions concerning child support may be disregarded “where the provision is unreasonable having regard to the child support guidelines”: s 56(1.1). When child support orders are made under the \textit{Divorce Act}, the Court may take into account an agreement between the parties where doing so would benefit the child: \textit{Divorce Act, supra note 161}, s 15.1(5).

\textsuperscript{192} See, e.g., \textit{FL Act} (On), supra note 7, s 54. Separation agreements must be written (s 55) and they are subject to override in specific circumstances: s 56.

\textsuperscript{193} \textit{Puopolo v Puopolo}, [1986] 2 RFL (3d) 72.

\textsuperscript{194} \textit{Miglin v Miglin}, [2003] 1 SCR 303.

\textsuperscript{195} Section 18(1) of the \textit{Children’s Law Reform Act}, RSO 1990, c C12 [CLRA] defines “extra-provincial tribunal” as “a court or tribunal outside Ontario that has jurisdiction to grant to a person custody of or access to a child”.
by the extra-provincial tribunal before the order was made;

(c) that the law of the place in which the order was made did not require the extra-provincial tribunal to have regard for the best interests of the child;

(d) that the order of the extra-provincial tribunal is contrary to public policy in Ontario; or

(e) that, in accordance with section 22, the extra-provincial tribunal would not have jurisdiction if it were a court in Ontario.

The requirement in subsection (e) means that an order of a foreign court or tribunal must have been made while the child was habitually resident in the forum of the relevant court, or the order was made in circumstances comporting with the requirements of s 22(1)(b). Foreign support orders may also be enforceable in Canadian courts.\(^\text{196}\)

Foreign same-sex couples that marry in Canada are able to obtain a divorce in Canada if they satisfy the following criteria:\(^\text{197}\)

(a) breakdown of the marriage established by the spouses living apart for at least one year before the application;\(^\text{198}\)

(b) neither spouse is resident in Canada at the time of the application; and

(c) each of the spouses resides in, and has resided in for at least one year prior to the making of the application, a state where a divorce cannot be granted because the state does not recognize the validity of the marriage.\(^\text{199}\)

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\(^{197}\) *Civil Marriage Act*, supra note 118, s 7(1).

\(^{198}\) The clarification in s 8 of the *Civil Marriage Act*, supra note 118, that the *Divorce Act*, supra note 150, does not apply to dissolution under the *Civil Marriage Act* means alternative grounds for divorce, such as adultery and cruelty, are not available. Cossman has pointed out that the evidentiary requirements of those grounds means their preclusion in this context is reasonable: Cossman, "Exporting, Importing", *supra* note 149 at 8.

\(^{199}\) The Canadian Bar Association criticized this requirement in its submission on Bill C-32, noting that one spouse could prevent a divorce by continually moving between jurisdictions within the space of one year: Letter from Canadian Bar Association to Minister of Justice and Attorney General of Canada (22 March 2012), online: <http://www.cba.org/cba/submissions/pdf/12-21-eng.pdf>. 
Given that no Canadian province imposes a residency requirement for entry into marriage, it is appropriate that Canada now permits non-resident same-sex former partners to approach its courts for purposes of divorce. It is arguable that divorce is otiose for persons who reside in jurisdictions that do not recognize their marriage. However, this view overlooks two important points. First, the number of jurisdictions that permit and/or recognize same-sex marriage is increasing at an astonishing rate, meaning that a legally redundant marriage in one jurisdiction may suddenly become legally valid in the same jurisdiction. Presumably, parties could at such time seek a divorce in the courts of their own state, but the effluxion of time between physical and legal separation could create problems, particularly if parties are involved in new relationships with their own legal obligations; determining the point at which financial obligations begin, claims to assets cease, and the availability of retrospective relief, could also complicate matters. Secondly, there is, as with marriage, great affective significance involved in bringing a relationship to a formal conclusion and enjoying what the United States Supreme Court has called the “freedom not to associate.” Accordingly, as a matter of respect for affiliative capacity and autonomy (which even in its relational form must encompass the ability to sever relational ties), a state that does not impose a residency requirement for marriage is obliged to offer persons who married under its laws the ability to divorce under its laws, if that option is not available in their jurisdiction of residence.

Non-resident spouses can make a joint application for dissolution or one spouse can apply with the consent of the other spouse. In the absence of such consent, it will be necessary to obtain an order from a court located in the state where one of the spouses resides declaring that the other spouse:

(a) is incapable of making decisions about his or her civil status by reason of mental disability;

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200 See, e.g., Windsor (2d Cir), supra note 147.
(b) is unreasonably withholding consent; or
(c) cannot be found.

The requirement of a court order in the absence of the consent of one spouse is problematic. In submissions concerning Bill C-32, the Canadian Bar Association criticized the requirement as “unreasonable” because of the likely difficulties that a spouse who resides in a state that does not recognize the marriage will encounter in obtaining the orders necessary to effect dissolution. In this respect, the requirement potentially undercuts the utility of s 7(1) and thus impedes the ability of individuals to instantiate their (relational) choice to terminate a relationship.

Section 8 of the Civil Marriage Act specifies that the Divorce Act does not apply to a divorce granted under the Civil Marriage Act and clarifies in the marginal note that corollary relief is precluded. While this may leave residents in states that are hostile to same-sex marriage without relief in matters of property distribution and custody, the tenuous jurisdictional link between Canada and overseas property and custody matters suggests that it would have been improper for Canadian courts to assert jurisdiction over corollary relief; for the same reason, foreign states may have refused to recognize the validity of such

This is not to dismiss the seriousness of this potential remedial lacuna for non-residents. However, respect for principles of sovereignty requires that limits be drawn and respected concerning the extent to which courts of one state will grant relief to non-residents. Where an assertion of jurisdiction is simply in personam, it is not improper for a state such as Canada to grant a remedy such as dissolution. In contrast, remedies that touch on persons and property located in another jurisdiction potentially disrespect state sovereignty. Putting it bluntly, there also comes a time when personal responsibility must come into play. Persons who wish to take advantage of alternative legal regimes but remain resident in less congenial jurisdictions (recognizing that inter-jurisdictional relocation may be difficult or impossible) must, at some point, accept the limitations occasioned by the conflict between the different legal systems in which they are operating.

Arguably, the Civil Marriage Act could have taken the approach in the Divorce Act, which allows provincial courts to make corollary relief orders if both parties accept the jurisdiction of the court. However, the residency requirement for at least one spouse in respect of divorce orders under the Divorce Act means that corollary matters pertaining to property and children are more likely to have a jurisdictional nexus to Canada and therefore subject to enforcement. If that is not the case, private international law rules enable a court to decline jurisdiction over those matters.
orders, thereby creating a thorny conflict between courts of different states. Assertion of jurisdiction over non-residents in matters beyond dissolution would also have created tension between the treatment of non-residents and residents because, as detailed below, Canadian courts may decline jurisdiction to order corollary relief under the Divorce Act in cases with an international aspect when property and/or children are located outside of Canada.

B. Non-Marital Relationships

The federal government is constitutionally precluded from offering an alternative form of relationship recognition to marriage. In the Marriage Reference, the Court observed:

The provinces are vested with competence in respect of non-marital same-sex relationships, just as they are vested with competence in respect of non-marital opposites-sex relationships (via the power in respect of property and civil rights under s 92(13)). … Marriage and civil unions are two distinct ways in which couples can express their commitment and structure their legal obligations. Civil unions are a relationship short of marriage and are, therefore, provincially regulated.

This being said, it is within federal competence to recognize couples as common law partners for specific purposes. For example, federal immigration law

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204 In the Canadian context, courts have refused to recognize the validity of dissolution proceedings where doing so would be contrary to Canadian public policy: see Marzara v Marzara, [2011] BCJ No 579.

205 See Cheng v Liu, supra note 180, in which jurisdiction over divorce was established but the Court held that custody and support issues were to be determined in China because that was where the children resided. Similarly, in Folwell v Holmes, supra note 180, the Superior Court of Ontario determined that the action should proceed in Nicaragua because the wife and children lived there, it was the parties’ last place of common habitual residence, and joint property was located there. Conversely, the presence of children in Canada may incline courts to exercise jurisdiction even if substantial marital assets are in a different jurisdiction: see Jenkins v Jenkins, supra note 180. While the proposed corollary relief provisions in Bill C-435 did not mandate the making of such orders, meaning that Canadian courts could presumably still have declined jurisdiction based on principles of private international law, the clear intention of the provision was that courts would exercise jurisdiction when “the state or states where the former spouses reside decline to make such an order”: Bill C-435, s 3, proposing to insert new s 8(1).

206 Marriage Reference, supra note 3 at 714.
recognizes two persons as common law partners if they have cohabited in a
conjugal relationship for at least one year.\textsuperscript{207} In addition, the Superior Court of
Ontario recently found that same-sex civil union partners who register their
relationship in a country that does not recognize same-sex marriage are to be
treated as married for the purposes of the \textit{Divorce Act}.\textsuperscript{208}

At the provincial level, the options available to same-sex couples that do not wish
to marry vary by jurisdiction. Quebec is the only Province that provides the option
of civil unions in addition to marriage. Manitoba and Nova Scotia allow couples to
register as domestic partners. Alberta provides the cumbersomely named option
of Adult Interdependent Partnerships. All Provinces with the exception of Quebec
recognize certain rights and obligations arising out of conjugal cohabitation,
though the extent of this recognition varies from effective equivalency to marriage
(British Columbia\textsuperscript{209}) through to recognition that is limited to support obligations
(Ontario\textsuperscript{210}). The following sections provide a brief overview of these forms of
recognition.

1. \textbf{Civil Unions in Quebec}

Article 521.6 of the \textit{Civil Code of Quebec} provides that “[t]he effects of the civil
union as regards the direction of the family, the exercise of parental authority,
contribution towards expenses, the family residence, the family patrimony and
the compensatory allowance are the same as the effects of marriage, with the
necessary modifications”. Civil union partners are also subject to the spousal
support regime pursuant to art 585 of the \textit{Civil Code}.

\textsuperscript{207} See, e.g., \textit{Immigration and Refugee Protection Regulations}, SOR/2002-227, r 1.1
(definition of “common law partner”).

\textsuperscript{208} \textit{Hincks v Gallardo}, (2013) 113 OR (3d) 654.

\textsuperscript{209} \textit{Family Law Act}, SBC 2011, c 25, s 3(1)(b)(i) \textit{[FL Act (BC)]}.

\textsuperscript{210} \textit{FL Act (On)}, supra note 7, ss 1 and 29 (definitions of “spouse”).
There are differences, however, between civil unions and marriage, notably in respect of entry into and dissolution of a civil union. A civil union in Quebec “is governed with respect to its essential and formal validity by the law of the place of its celebration”.\textsuperscript{211} Thus, a civil union validly entered into in Quebec by a foreign same-sex couple that resides in a state that does not recognize civil unions will be valid for the purposes of Quebec law. This treatment of validity is akin to the \textit{Civil Marriage Act}’s conferral of essential validity on Canadian same-sex marriages entered into by residents of foreign states that do not recognize same-sex marriage. It differs, however, from the general position under Canadian law that essential capacity to marry is determined by the law of a party’s domicile. A further difference arises in respect of dissolution, which may be achieved by a notarized joint declaration “provided they settle all the consequences of the dissolution in an agreement”.\textsuperscript{212}

The number of civil unions in Quebec is small in comparison to the number of married couples.\textsuperscript{213} In 2011, 22,903 marriages were contracted in Quebec, but only 240 civil unions. Same-sex couples entered into 493 marriages and 59 civil unions. These figures indicate that while same-sex couples in Quebec who wish to formalize their relationship overwhelmingly choose marriage, lesbians and gay men choose civil unions at a significantly higher rate than opposite-sex couples.\textsuperscript{214} Nearly 10\% of same-sex couples in Quebec in 2011 elected for a civil union, while only approximately 0.8\% of opposite-sex couples chose a civil union. This being said, figures from the period since civil unions were adopted in

\begin{footnotesize}
\begin{itemize}
\item[211] \textit{Civil Code of Quebec}, art 3090.1.
\item[212] \textit{Ibid}, art 521.13.
\item[213] The following figures are drawn from Institut de la statistique du Québec, \textit{Le bilan démographique du Québec} (2013) at 91, Fig 5. The percentages are my own calculations based on the data in the Report.
\item[214] This trend is possibly related to the “onerous” nature of marital obligations in Quebec and the higher preference rate amongst same-sex couples for a measure of economic independence: see Leckey, \textit{supra} note 190 at 8; \textit{Civil Code of Quebec}, art 423. However, the advent of same-sex marriage in Quebec has also seen a significant drop in the number of civil unions.
\end{itemize}
\end{footnotesize}
Quebec suggest that the introduction of same-sex marriage contributed to a significant reduction in the attractiveness of civil unions: in 2003, 274 same-sex couples entered into civil unions, whereas in 2004 the number dropped to 79, while 245 same-sex couples were married. This trend has continued, with the number of same-sex marriages in recent years hovering between 450-550, whereas the number of civil unions has stuck to around 60 per year.

While the motivations of particular couples are unclear from basic statistical data, the legal equivalence of marriage and civil unions within Quebec could suggest that a majority of the lesbian and gay community view marriage as normatively preferable to civil unions, at least insofar as formal recognition is desired.  

Couples may also view marriage as a more stable status in cross-border situations, given that the federal government and other Provinces do not recognize civil unions as equivalent to marriage, meaning that civil union partners may be subject to the laws concerning domestic partnership (where available and assuming the civil union meets the requirements for a valid domestic partnership) or the common law when they are outside of Quebec.

2. Domestic Partnerships and Adult Interdependent Partnerships

Alberta, Manitoba and Nova Scotia provide couples with the option of registering their relationship outside of marriage. The primary difference between the

215 Same-sex common law partners in Quebec (29,560) far outnumber married same-sex couples (7310): Statistics Canada, Data Table: Quebec, Conjugal Status and Opposite/Same-sex Status (7), Sex (3) and Age Groups (7A) for Persons Living in Couples in Private Households of Canada, Provinces, Territories and Census Metropolitan Areas, 2011 Census, Catalogue No. 98-312-X2011045 [Data Table: Quebec].

216 By default, the relationship is considered to be a common law partnership in Manitoba and an Adult Interdependent Relationship in Alberta after three years’ continuous cohabitation or, if there is a child of the relationship by birth or adoption, in a relationship of some permanence: AIR Act, supra note 63, s 3(1); The Common-Law Partners’ Property and Related Amendments Act, supra note 62. The same presumptions do not apply in Nova Scotia (see Walsh, supra note 66) or Quebec (see Quebec v A, supra note 122).
registration regimes in these Provinces is that domestic partners in Manitoba and Nova Scotia are subject to the property distribution regime that applies to married couples, whereas Adult Interdependent Partners (AIPs) in Alberta do not have this right/obligation. In all other respects, though, an AIP stands in the same position as a spouse. For example, post-relationship liability may involve the grant of exclusive possession to the family home\textsuperscript{217} and household goods;\textsuperscript{218} orders for support may be made in specified circumstances;\textsuperscript{219} spouses and AIPs are subject to the same consideration concerning support orders;\textsuperscript{220} and spouses and AIPs are treated equally for the purposes of succession.\textsuperscript{221} In respect of child support, a person who was in a relationship of interdependence of some permanence with the parent of a child is as liable to a child support order as a former spouse, if that person "demonstrated a settled intention to treat the child as the person's own child".\textsuperscript{222}

3. Unregistered Cohabitation

The most recent census figures for Canada as a whole indicate that in 2011, there were 87,120 same-sex couples in common law relationships, slightly more than double the number of married same-sex couples (42,035), and an increase of 15% from 2006.\textsuperscript{223} Cohabitation without marriage or civil union is particularly common in Quebec. In 2011, some 37.8% of all couples in Quebec were in a

\begin{footnotes}
\item[217] AIR Act, supra note 63, s 68)1).
\item[218] Ibid, s 73(1).
\item[219] Family Law Act, SA 2003, c F-45 [FL Act (Alberta)], s 57(2)(b).
\item[220] Ibid, s 58.
\item[221] Intestate Succession Act, SA 2000, c I-10.
\item[222] FL Act (Alberta), supra note 219, s 48.
\item[223] Statistics Canada, Data Table: Canada, Conjugal Status and Opposite/Same-sex Status (7), Sex (3) and Age Groups (7A) for Persons Living in Couples in Private Households of Canada, Provinces, Territories and Census Metropolitan Areas, 2011 Census, Catalogue No. 98-312-X2011045.
\end{footnotes}
common-law relationship. The proportion is much higher (80%) for same-sex couples. Couples in Quebec are considered to be de facto spouses after they have resided together in a conjugal relationship for a specified period of time that varies according to the law in question. For example, de facto spouses must have cohabited for at least three years in order to consent to adoption, whereas “a person who has been living with the lessee for at least six months, being the de facto spouse or blood relative of the lessee or a person connected to the lessee by marriage or a civil union, is entitled to maintain occupancy and becomes the lessee if he or she continues to occupy the dwelling after the cessation of cohabitation”. The law in Quebec presumes no rights and obligations on the part of de facto spouses towards one another upon the dissolution of a de facto relationship. As noted above, the Supreme Court in Quebec v A upheld the Civil Code’s distinction between married and de facto spouses.

Neither British Columbia nor Ontario provides the option of registering a relationship other than by marriage. However, each Province does impose (differing) rights and obligations upon parties who have cohabited for (differing) periods of time. The British Columbia Family Law Act provides that couples who have cohabited in a marriage-like relationship for a continuous period of at least two years are spouses for the purposes of the Act, meaning that they are subject to the full range of rights and obligations that attend marriage. In contrast, cohabiting partners in Ontario only incur obligations with respect to one another upon continuous cohabitation for at least three years or, in the case of natural or

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224 Statistics Canada, Portrait of Families and Living Arrangements in Canada, online: <http://www12.statcan.gc.ca/census-recensement/2011/as-sa/98-312-x/98-312-x2011001-eng.cfm>. The figure was slightly lower as a percentage of census families (31.5%): ibid.

225 Statistics Canada, Data Table: Quebec, supra note 215.

226 Civil Code of Quebec, art 555.

227 Ibid, art 1938.

228 FL Act (BC), supra note 209.
adoptive parents, when a couple has cohabited “in a relationship of some permanence”. Furthermore, recognition is purposive rather than general, meaning that support obligations arise upon the satisfaction of statutory criteria, whereas no length of cohabitation presumptively entitles parties to distribution of property, although principles of unjust enrichment may assist certain individuals.

Alberta’s AIP scheme also operates by default in a manner that blends elements of the laws in British Columbia and Ontario. For instance, like the presumption of common law spousal status in BC, cohabiting couples in Alberta are deemed to AIPs upon three or more years’ continuous cohabitation. However, like the Ontario system, AIPs are subject to a reduced range of obligations vis-à-vis one another. Specifically, in both Ontario and Alberta, common law partners do not have automatic rights to property accumulated during the relationship and must instead rely on private agreements (AIP agreements in Alberta, cohabitation agreements in Ontario) or principles of private law concerning constructive trusts and unjust enrichment.

229 FL Act (On), supra note 7, s 29.
230 This is not the case in Saskatchewan, where common law partners are automatically included in the marital property distribution regime after two years of cohabitation: Family Property Act, SS 1997, c F-63, s 2.1 (definition of “spouse”).
231 AIR Act, supra note 63, ss 7 and 8.
232 FL Act (On), supra note 7, s 53(1) provides:
Two persons who are cohabiting or intend to cohabit and who are not married to each other may enter into an agreement in which they agree on their respective rights and obligations during cohabitation, or on ceasing to cohabit or on death, including,
(a) ownership in or division of property;
(b) support obligations;
(c) the right to direct the education and moral training of their children, but not the right to custody of or access to their children; and
(d) any other matter in the settlement of their affairs.
If the parties subsequently marry, s 53(2) converts a cohabitation agreement into a marriage contract.
Conclusion

While some may refer to … [Mossop’s] relationship as a ‘family’, I do not think it has yet reached that status in the ordinary use of language.

– Canada (Attorney General v Mossop) (Supreme Court of Canada, 1993)233

[S]ame-sex couples can and do live in long term, caring, loving and conjugal relationships – including those involving the rearing of children (and, in a modern context, even the birth of children).

– Halpem v Canada (Attorney General) (Superior Court of Ontario, 2002)234

In the roughly 10-year period between Mossop, the Halpem cases and the Marriage Reference,235 Canadian law and society underwent an extraordinary change in its attitude towards, and acceptance of, the dignity and worth of lesbians and gay men, and the relationships of same-sex couples. Discrimination on the grounds sexual orientation was established as an infringement of the Charter’s guarantee of equality; unmarried same-sex couples were found to be subject to the same rights and obligations as unmarried heterosexual couples; civil union schemes were passed at the provincial level; and same-sex marriage was approved by the courts and subsequently the federal legislature. From an equality perspective, these developments were crucial recognitions of the rational-emotional and affiliative capabilities of lesbians and gay men, as well as the fundamental nature of human inter-connection to the development of personal autonomy.

From a more critical perspective, though, the changes to Canadian law still reflect a resolutely dyadic and marriage-centric view of relationality. To be sure,
the rights of unmarried couples were upheld in *Miron*\textsuperscript{236} and *M v H*,\textsuperscript{237} but ostensibly because the relationships in question resembled marriage.\textsuperscript{238} A thin, de-contextualized version of decisional autonomy in relational matters was upheld in *Walsh*,\textsuperscript{239} which ironically serves to reinforce the privileged status of registered two-person coupling and further undercuts the “choice” allegedly involved in not entering into formalized recognition. This trend continued in *Quebec v A*,\textsuperscript{240} in which the Supreme Court applied an inadequate, classically liberal understanding of choice and autonomy to the question of de facto partners’ rights and obligations on separation. The same-sex marriage cases tend to emphasize the inequality of excluding same-sex couples from a civil institution, but they also condescend to affirm the normative good of marriage, suggesting in turn the lesser worth of those who choose not to or cannot marry or at least cohabit in a manner deemed worthy of recognition by the state. Those cases, and the *Civil Marriage Act*, also do little to destabilize the fact that some form of registration of a conjugal relationship remains the fulcrum upon which eligibility for socioeconomic benefits and potentially protection upon dissolution is determined.

It has been said that “[t]he recognition of same-sex couples may provide … an occasion for revising the understanding of family law”.\textsuperscript{241} So far, reconsideration along these lines has not taken place, at least outside of the legal academy. The extension of marriage to same-sex couples appears to have solidified its position

\textsuperscript{236} *Miron*, supra note 36.
\textsuperscript{237} *M v H*, supra note 8.
\textsuperscript{238} Responsibility for this framing cannot be solely ascribed to the Supreme Court. Cossman has noted that the arguments made by the litigants in *Miron* and *M v H* “were decidedly more assimilationist” than those put forward by the litigants in *Mossop* and *Egan*, and represented “a resignation to the unreconstructed discourses of sameness”: Cossman, "Charter", *supra* note 10 at 235.
\textsuperscript{239} *Walsh*, supra note 66.
\textsuperscript{240} *Quebec v A*, supra note 122.
\textsuperscript{241} *Ibid* at 20.
in Canadian law and society: no Province has enacted an alternative form of relationship recognition since the passage of the Civil Marriage Act, and recent Supreme Court authority has taken the view that Quebec's all-or-nothing approach to relationship recognition and the benefits thereof is respectful of individual autonomy. While most Provinces offer some or all of the rights and obligations of marriage for couples in common law relationships (and their provincial analogues), it is apparent that conjugality remains an ordering principle in Canadian family law, and "marriage remains the privileged inside". Certainly, for some same-sex couples this system is sufficient to meet their practical needs, even if they are uncomfortable with the subtly coercive nature of state recognition. However, for the queers who reject marriage, for the singles and the polyamorous, and those people in relationships of care and dependence that do not comport with the conjugal norm, the benefits that come with recognition of one's relationship remain just as obscure as when the notion of gay families was considered oxymoronic.

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242 Of course, Quebec offers the alternative of civil unions, but such unions are functionally identical to marriage and remain predicated on the existence of a conjugal, marriage-like relationship.

243 Leckey, supra note 134 at 78.
PART 5
RECOGNITION OF RELATIONSHIPS BETWEEN GAY PARENTS AND CHILDREN IN CANADA

Introduction

This Part approaches Canadian recognition of parent-child relationships involving lesbian and gay parents in two sections. The first section is concerned with adoption; the second focuses on assisted reproduction, including surrogacy. Multi-parentage is considered in each of these sections, rather than separately, because the relevant legislation and cases are also pertinent to issues in adoption and assisted reproduction. Custody issues arising out of opposite-sex relationships are not considered. Jurisdictionally, the focus is on federal regulation and the laws of Alberta, British Columbia and Ontario, owing to the divergent approaches taken in these Provinces, particularly with respect to parentage.

I. Adoption

This section is principally concerned with the question of who can become a parent through adoption.¹ Structurally, it is split between consideration of (a) provincial laws governing domestic adoption; (b) provincial and federal laws concerning international adoption; and (c) the limitations of formal equality for lesbians and gay men in the adoption context. The forms of adoption are addressed cohesively, which is to say that individual and joint adoption are not

¹ The detailed procedural requirements to effect adoption are not considered; nor are questions concerning the rights of adopted children to know their genetic parents. For a discussion of these issues in British Columbia see Pratten v British Columbia (Attorney General), [2012] BCJ No 2460 [Pratten]. In Ontario see Marchand v Ontario, [2007] ONCA 787.
considered separately from stepparent and second parent adoption, because the structure of provincial adoption laws and the measure of formal equality between same-sex and opposite-sex couples in Canada means that a distinction of this sort is not helpful.

A. Provincial Regulation of Domestic Adoption

Adoption in Canada is a matter within provincial competence. There has never been an express prohibition on adoption by single gay and lesbian persons in Canada.

While amendments to adoption legislation over the years since its first introduction in 1921 have, at times, required "special circumstances" before an individual unmarried person could adopt, a restriction that was removed in 1984, at no time has there ever been an absolute bar to an individual person applying for adoption because of sexual orientation.

Nevertheless, discriminatory attitudes towards lesbians, gay men, single parents and the “family values” nightmare of single gay parents limited the extent to which single gay and lesbian people were realistically able to adopt.

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3 Re K, [1995] OJ No 1425 at [16].

4 For instance, in a 1988 paper analyzing the passage of Ontario’s Bill 7 (Equality Rights Statute Law Amendment Act), which amended the Human Rights Code, RSO 1990, c H.19 [Human Rights Code] to prohibit discrimination against homosexuals, David Rayside observed: “the grass roots campaign [against the Bill] … depended on arousing fears based on gross stereotypes, one of the most persistent and odious being the characterization of male homosexuals as pedophiles and child molesters. These images remain very widespread, their power and tenacity owing much to the institutionalized validation they so often receive by police forces, educational authorities, and some media.” David Rayside, “Gay Rights and Family Values: The Passage of Bill 7 in Ontario” (1988) 26 Studies in Political Economy 109 at 116 [emphasis added]. See also Michael P Sobol & Kerry Daly, “Adoption practice in Canada: Emerging trends and challenges” (1995) 74:3 Child Welfare 655: “gay, lesbian, older, and single persons are increasingly applying to become adoptive parents by arguing that their suitability should not be judged
Furthermore, joint adoptions by same-sex couples and second parent adoptions by same-sex partners were not possible in Canada until 1995, when Nevins J in *Re K* reformulated the definition of “spouse” in Ontario’s *Children and Family Services Act*, which had adopted the exclusively opposite-sex definition in the Ontario *Human Rights Code*, to include “a person of the same or opposite sex [who] is living in a conjugal relationship outside marriage”.

All Canadian provinces and territories now permit gay and lesbian individuals and same-sex couples to adopt. Ontario was the first Province to permit second parent adoption by a same-sex partner, while British Columbia was the first Province to enact neutral legislation that permits joint and second parent adoption by same-sex couples. A combination of litigation and legislation subsequently extended adoption rights to same-sex couples in Alberta.

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5 Unmarried opposite-sex couples who fell within the definition of “spouse” in the *Human Rights Code*, supra note 4 have been permitted to adopt in Ontario from 1984 following the passage of the *Child and Family Services Act*, RSO 1990, c C.11 [CFSA].

6 *Re K*, supra note 3.

7 CFSA, supra note 5.


10 *Re K*, supra note 3.

11 *Adoption Act*, RSBC 1996, c 5, s 5(1) [Adoption Act (BC)].

12 *Miscellaneous Statutes Amendment Act*, SA 1999, c 26, s 4, inserting s 64(3) into the *Child Welfare Act*. Note that this amendment was limited to second parent adoption. In *Re A*, (1999) 253 AR 74, the Alberta Court of Queen’s Bench found that the term “step-parent” in the amended Act included unmarried cohabiting same-sex couples.
Manitoba, Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Quebec, Saskatchewan, New Brunswick, and Prince Edward Island.

In *Re K*, Nevins J of the Ontario Superior Court concluded that the exclusion of same-sex couples in conjugal relationships from the adoption provisions of the CFSA violated s 15(1) of the *Canadian Charter of Rights and Freedoms* because it denied such couples the equal benefit of the law solely because of

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14 *Adoption Act*, SNL 1999, c A-21, s 20, as amended by *An Act to Amend the Adoption Act*, SNL 2002, c 13, s 10.
16 *Re Nova Scotia Birth Registration No 1999-02-004200*, [2001] 194 NSR (2d) 362. In 2007, the *Birth Registration Regulations* under the *Vital Statistics Act*, RSNS 1989, c 494 were amended to authorize the inclusion of same-sex partners/spouses on birth certificates as “other parent[s]” thereby precluding the need to undertake costly adoption proceedings to attain legal parental status.
17 *Civil Code of Quebec*, art 546 (art 555 provides that de facto couples may only adopt after cohabiting for at least three years).
19 In 2004, the New Brunswick Board of Inquiry under the *Human Rights Act*, RSNB 1973, c H-11 heard a claim by same-sex parents of a child born via artificial insemination concerning the Province’s refusal to register the non-biological as a parent, or to allow the women to jointly adopt the child. On the adoption question, the Tribunal referred to *Re K*, supra note 3 and held that the exclusion of same-sex couples infringed s 5(1) of the *Human Rights Act*. Despite these findings, the legislature did not amend the *Family Services Act* until 2007. See Mary C Hurley, *Sexual Orientation and Legal Rights*, PRB 08-49E (Parliament of Canada, Social Affairs Division, 2010).
20 Prince Edward Island removed the opposite-sex definition of spouse in 2008, which affected the eligibility of same-sex couples to adopt. It is doubtful, though, that the exclusion of same-sex married couples would have withstood challenge following the enactment of the *Civil Marriage Act*, SC 2005, c 33; while the trend in courts in other Provinces prior to the enactment of same-sex marriage suggests that the exclusion of unmarried same-sex couples would also have been found to breach the equality guarantee in the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11 [*Charter*].
21 *Charter*, supra note 20.
their sexual orientation; following *Haig v Canada*, sexual orientation was a protected ground under s 15(1) in Ontario. Justice Nevins characterized the exclusion as a “blatant example of discrimination” which could not be justified under s 1 of the *Charter* because there was no rational connection between the exclusion and the goals of the legislation.

For there to be a rational connection with a provision that says that homosexual couples may never apply to adopt, there would have to be evidence that homosexual couples could never provide a stable, secure and caring environment for a child. But there is no evidence at all to support such a proposition.

In this respect, Justice Nevins’s reasoning comports with a capabilities and autonomy-based approach to family law by looking to the best interests of children outside of the narrow confines of “traditional” Western family structures. Indeed, Nevins J held that the law as it stood created “truly irrational results” because under the CFSA, the non-biological parent plaintiffs in the case would have been considered “parents” for the purpose of relinquishing their children for adoption, if such a situation arose; “yet they [were] not permitted even to apply to adopt that very child themselves.” Justice Nevins’ findings and his re-formulation of the definition of “spouse” enabled the plaintiffs to adopt the biological children of their same-sex partners. The judgment also enabled joint adoption by same-sex couples within the terms of s 146 of the CFSA. However, the effects of legal exclusion lingered on in the bureaucratic and cultural memory: the first joint same-sex adoptions did not occur in Ontario until after the release in

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23 *Re K*, *supra* note 3 at [75].
24 *Ibid* at [90]
25 See *supra* Part 1, Section III.
26 *Re K*, *supra* note 3 at [100].
2000 of a memo by the Ministry of Community and Social Services clarifying that sexual orientation did not constitute a barrier to adopting in Ontario.27

The CFSA as it now stands provides that an adoption application may (only) be made by any one individual or “jointly, by two individuals who are spouses of one another”.28 “Spouse” has been redefined in the Human Rights Code to refer to “the person to whom a person is married or with whom the person is living in a conjugal relationship outside marriage”.29 Family adoption orders may be made in the best interests of the child on the application of a relative of the child, the child’s parent, or the spouse of the child’s parent.30 In such cases, s 158(2)(b) of the CFSA provides the exception to the principle that existing parental rights are terminated. However, it is also clear that s 158(2) of the CFSA does not permit third parent adoption, because the exception only operates in favour of the spouse of a prospective adoptive parent. Thus, in a situation such as that which came before the courts in AA v BB,31 where the parties did not wish to terminate the parentage of either biological parent, the adoption mechanisms under the CFSA are of limited assistance.32 In MAC v MK,33 Cohen J discussed the possibility of third parent adoption, but orders to this effect were not made.34

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28 CFSA, supra note 5, s 146(4).
29 Human Rights Code, supra note 4, s 10.
30 While it does not appear to have been judicially tested, there is scope for an argument that the CFSA ought to be read as allowing adoption of a child by the spouse of one of the child’s parents, without terminating the parental rights of either parent. Alternatively, it is arguable that the parens patriae jurisdiction of the Superior Court could be invoked to make a three (or even four) party adoption order, if doing so would be in the best interests of the child. See infra, Section II(B)(2).
32 Ibid at [13].
34 See further infra Section II(B)(2).
The non-recognition of third (or even fourth) parent adoption in the CFSA reflects an increasingly outdated, dyadic vision of parenting structures that operates in an especially exclusionary manner for queer families.\footnote{See supra Part 1, Section III(B)(1).} As the Court in AA v BB recognized, a child’s best interests (and those of his or her parents) may best be served by recognizing the legal parentage of more than two parents. This position is congruent with a capacity-based focus on individual flourishing and the variegated circumstances that best meet the needs of particular persons in their own relational contexts.

British Columbia was the first jurisdiction in Canada to pass legislation enabling same-sex adoption. During debate over Bill 51, which introduced the Adoption Act,\footnote{Adoption Act (BC), supra note 11.} the Minister of Social Services, Joy MacPhail, confirmed that at the time of its introduction, no joint adoption by a same-sex couple had been completed in British Columbia.\footnote{British Columbia, Legislative Assembly, Official Report of Debates (Hansard), 35th Parl, 2nd Sess, No 14 (26 June 1995) at 16132 (D Mitchell) (referring to statement of Joy MacPhail).} Opposition in the House to the expansion of adoption rights for same-sex couples varied between arguments based on personal and community “discomfort”, and (self-fulfilling) concern about the likelihood that children adopted by gay parents will be subject to future ill-treatment and stigma.\footnote{Ibid at 16129 (R Neufeld), 16134 (J van Dongen). In response to reasoning of this sort, MLA Sawicki asked: “Where did the children who would harass the children of same-sex couples learn the kinds of attitudes where they think it’s okay to humiliate and reject children because they happen to have parents of the same sex? Surely it would be much better for us all as a society to remove the biases and prejudices we have on sexual orientation rather than to suggest that a good reason not to allow it is because public opinion doesn’t think same-sex parents can be good parents.” Ibid at 16133 (J Sawicki). See also at 16144 (J Tyabji): “The child will only learn shame if we teach that child shame, and will only learn to be afraid if we teach that child fear and if we judge”.} Nevertheless, the Legislative Assembly passed the Bill following its third reading by a vote of 50:6.\footnote{British Columbia, Legislative Assembly, Official Report of Debates (Hansard), 35th Parl, 2nd Sess, No 14 (4 July 1995) at 16542.}

\begin{thebibliography}{9}
\bibitem{footnote} See supra Part 1, Section III(B)(1).
\bibitem{footnote} Adoption Act (BC), supra note 11.
\bibitem{footnote} Ibid at 16129 (R Neufeld), 16134 (J van Dongen). In response to reasoning of this sort, MLA Sawicki asked: “Where did the children who would harass the children of same-sex couples learn the kinds of attitudes where they think it’s okay to humiliate and reject children because they happen to have parents of the same sex? Surely it would be much better for us all as a society to remove the biases and prejudices we have on sexual orientation rather than to suggest that a good reason not to allow it is because public opinion doesn’t think same-sex parents can be good parents.” Ibid at 16133 (J Sawicki). See also at 16144 (J Tyabji): “The child will only learn shame if we teach that child shame, and will only learn to be afraid if we teach that child fear and if we judge”.
\end{thebibliography}
The law in British Columbia is interesting because it appears not to be limited to persons in conjugal relationships. Section 5(1) provides: “A child may be placed for adoption with one adult or 2 adults jointly.” In principle, this definition permits persons in non-conjugal relationships to jointly adopt children, although it would seem unlikely that applicants would be approved without demonstrating a significant commitment towards a shared existence. Census figures do not indicate the extent of non-conjugal adoption. The putative availability of adoption for persons who are not in a conjugal relationship but who nevertheless share a commitment to raising a child is a welcome acknowledgement not only of the rich variety of relational forms through which (queer and non-queer) people meet their affiliative needs, but also of the reality that persons in non-normative relational structures have the same basic capacity as opposite-sex, married couples to meet the needs of children.

The changes to Alberta’s adoption system are indicative of the potential disjunction between public and private adoption, as well as the problems caused by opaque legislative drafting. A crucial, if unintended, first-step was the Province’s move towards private adoption placements in the late 1980s. In turn, private agencies moved towards an open adoption model. In 1999, the former Child Welfare Act was amended so that adoption of a child by his or her stepparent did not terminate the relationship between the child and the custodial parent. However, the term ‘stepparent’ was not defined. In Re A, a case filed

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41 Capacity is not to be understood here as synonymous with entitlement, which is to say that an assessment of parenting capacity still needs to be made. The point is that an absence of conjugality should not disqualify persons from jointly adopting a child if other relevant criteria are satisfied.


43 Re A, supra note 12.
prior to the amendment to the *Child Welfare Act* that challenged the unavailability of second parent adoption by same-sex partners on *Charter*, s 15 grounds, the Court found that the Alberta legislature intended for the amendments to encompass adoption by same-sex partners to the extent that those partners have “made a commitment to fulfill the role of a parent to that child by virtue of a significant pre-existing relationship with the child”.

This ruling was treated by private adoption agencies as enabling same-sex couples to jointly adopt unrelated children. Public agencies, however, did not share this view, and the enactment of the *Child, Youth and Family Enhancement Act*, which contains no mention of sexual orientation, did not affect the unavailability of joint adoption for same-sex couples. Indeed, it was not until the abolition of a departmental “protocol” in 2007 that joint same-sex adoption became feasible through the state system.

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44 *Ibid* at [32]-[36].


46 The Alberta Law Reform Institute observed in a 2002 report that the law in Alberta affirmatively precluded joint adoption by same-sex couples. However, the Institute appears to have considered the wrong legislation in reaching this conclusion, looking at the *Adult Adoption Act* rather than the *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12 [*CYFE Act*]: Alberta Law Reform Institute, *Recognition of Rights and Relationships in Same Sex Relationships*, Research Paper No 21 (2002) at 18-19.

47 *CYFE Act*, supra note 46.

48 Adoption from public agencies was possible via a two-step process where one partner would individually adopt the child (through a public or private adoption agency) and their partner could subsequently adopt the child as a second parent. This was of course a protracted, expensive process that left all parties unprotected until the second parent was able to establish his or her status as a stepparent for the purpose of obtaining approval of the adoption.

49 “Gay couples leaps ‘walls’ to adopt son”, *Edmonton Journal* (19 February 2007). Section 63 of the *CYFE Act* sets out the requirements for an application for an adoption order in cases where the child is: subject to a permanent guardianship agreement or has been granted entry to Canada for permanent residence (subsection (1)); in the guardianship of a licensed agency (subsection (2)); or in the custody of one existing parent (subsection 3). In the first two scenarios, the application must be accompanied by an affidavit from, respectively, the director or an officer of the agency, attesting that the applicant is a fit and proper person to have care and custody of the child (subsections 63(1)(a)(iv) and 62(2)(a)(ii)); a home study report concerning the suitability of the applicant is also required (ss 63(1)(d) and 63(2)(d)). A further affidavit from “any person acceptable to an officer” of the agency is also required in the case of private agency adoptions. These
The jurisdictional requirements for courts to make adoption orders vary according to provincial law.\textsuperscript{50} Jurisdiction in Ontario is based on the residence of both the applicant and the adoptee.\textsuperscript{51} A child's residence may be established by evidence that a child has taken on the domicile of his or her having lawful custodian.\textsuperscript{52} British Columbia requires that each prospective parent is a resident of the Province.\textsuperscript{53} Alberta requires that prospective parents maintain their usual residence in Alberta or did so at the time he, she or they received custody of the child. In addition, “[n]o application for an adoption order shall be filed in respect of a child unless the child is a Canadian citizen or has been lawfully admitted to Canada for permanent residence.”\textsuperscript{54} In Quebec, jurisdiction is established if either the prospective parent or the child is a resident of Quebec.\textsuperscript{55} Manitoba imposes the stricter requirement that a “child being adopted shall reside in Manitoba with the prospective adoptive parent before an application for adoption is made.”\textsuperscript{56}

In cases where prospective parents and adoptees are not residents of the same Province, a court invested with jurisdiction may nevertheless be faced with the

\textsuperscript{50} For an overview of this area see Janet Walker & Jean-Gabriel Castel (founding author), \textit{Canadian Conflict of Laws}, 6th ed (2005) at §20.5.
\textsuperscript{51} CFSA, \textit{supra} note 5, s 146(5). This is to be determined by reference to factors such as time, intention and continuity: \textit{Re Rai}, (1980) 27 OR (2d) 425 at 429. In Saskatchewan, the court may waive the residency requirement if it is the best interests of the child to do so: \textit{Adoption Act} (SK), \textit{supra} note 18, ss 16(3) and (5).
\textsuperscript{52} \textit{Re Rai}, \textit{supra} note 51; \textit{JB v CWS}, [1996] OJ No 186.
\textsuperscript{53} \textit{Adoption Act} (BC), \textit{supra} note 11, ss 5(2), 29(3).
\textsuperscript{54} \textit{CYFE Act}, \textit{supra} note 46, s 61(1),(3). Adoption of a non-resident is only possible if approval from a director of a licensed agency is obtained: s 72.1.
\textsuperscript{55} \textit{Civil Code of Quebec}, art 3147.2.
\textsuperscript{56} \textit{Adoption Act}, CCSM, c A2, s 11.
question of which law it should apply. In Quebec, this question is resolved by art. 3092.1 of the Civil Code, which provides that “the rules that govern consent to adoption and the eligibility of a child for adoption are those provided by the law of the child's domicile”. In general, courts apply the law of the forum to determine whether to grant an adoption order.\(^5^7\)

 Appropriately, an adoption finalized in one Province or Territory will be recognized in other Provinces and Territories. The general rule in the various statutes is that an adoption must have been completed pursuant to laws substantially similar to those of the place in which recognition is sought.\(^5^8\) Alberta takes a slightly different approach, requiring only that an adoption order made outside of Alberta “create[d] a permanent parent-child relationship.”\(^5^9\) While the general requirement of substantial similarity may have an effect on the validity of an overseas adoption order, it is unlikely to lead to non-recognition of inter-provincial adoption orders. Nevertheless, if such a situation arose, common law principles are not precluded simply because an order does not fit within the statutory framework.\(^6^0\) The reasons for recognizing inter-jurisdictional adoption orders are obvious: non-recognition carried the extraordinary potential consequence of rendering a child orphaned in one Province while parented in another. Such an outcome is antithetical to the child’s best interests and the development of his or her capabilities: at minimum, it could engender a sense of insecurity about the strength of the parent-child relationship; at worst, it could lead to non-recognition of parental authority in medical emergencies or

\(^{57}\) Stephen GA Pitel & Nicholas Rafferty, Conflict of Laws (Irwin, 2010) at 456; Walker & Castel, supra note 50 at §20.5.

\(^{58}\) Walker & Castel, supra note 50 at §20.6.

\(^{59}\) CYFE Act, supra note 46, s 73.

\(^{60}\) Walker & Castel, supra note 50 at §20.6. For example, in Canada Trust Co v Bowie, [1992] OJ No 877, the respondent, who was the natural child of an Ontario resident and entitled to inherit under the terms of that parent's will, was held to be ineligible to share in the proceeds of the estate because he was adopted in British Columbia, where adoption laws sever the connection between natural parents and children for all purposes.
placement of children into the public care system. The idea that such outcomes may be preferable to adoption and parenting by lesbian and gay people has justifiably been eliminated from Canadian law.  

B. Regulation of International Adoption

Intercountry adoption by Canadian residents implicates provincial and federal law (as well as the law of a sending state). The formal requirements for international adoption are a matter of provincial law, while immigration issues are subject to federal regulation. The most recent statistics indicate that in 2010, Canadian residents adopted 1,968 children from foreign jurisdictions, slightly down from the 2,130 children adopted in 2009.

In Ontario, there is a measure of uncertainty about the applicable legislation for intercountry adoptions that are finalized in the sending state. The *Intercountry Adoption Act*, which implements the *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, appears to apply to the adoption of all children from foreign states, whether or not those states are Convention signatories, and whether or not the adoption is finalized in Ontario or the child’s country of origin. However, in *Re G*, Wolder J of the Ontario Superior Court opined that the *IA Act* “does not apply to children whose

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61 Nevertheless, certain jurisdictions in the United States cling to a distinction between recognition of an adoption and its incidents in order to deny recognition of an adoption based on public policy: see *Adar v Smith*, 639 F 3d 146 (5th Cir 2011).


63 *Intercountry Adoption Act*, SO 1998, c 29 [*IA Act*].

64 *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, Hague Conference on Private on International Law, 29 May 1993 (entered into force 1 May 1995) [*Adoption Convention*]. Enacted into Ontario law by ss 2(1) and 3(1) of *IA Act*, supra note 63.

65 See definition of “intercountry adoption” in s 1.1 of the *IA Act*, supra note 63.
adoptions are not finalized in the child’s country of origin" and applied the provisions of the CFSA. As Pitel has noted, “[t]his misinterprets Ontario’s legislation, under which an intercountry adoption includes one meeting the definition in article 2 … which is significantly broader.” The Explanatory Statement issued by the Hague Conference in respect of the Adoption Convention makes this abundantly clear:

[T]he Convention applies no matter where the adoption takes place, either in the State of origin or in the receiving State. Consequently, Article 2 covers the following cases: (a) where the adoption is granted either in the State of origin or in the receiving State before the child is moved to the receiving State; (b) where the child is moved to the receiving State and the adoption takes place after his or her arrival there, either in the State of origin or in the receiving State; and (c) where the child is moved to the receiving State for the purposes of adoption, although no adoption takes place either in the State of origin or in the receiving State.

Furthermore, the IA Act provides that in the event of “a conflict between the law of Ontario and the Convention, the Convention prevails.” Accordingly, the better view is that the IA Act applies to all intercountry adoptions by residents of Ontario, whether the orders are finalized in the sending state or in Ontario. It is desirable that the legislature confirms this position to ameliorate future uncertainty.

The IA Act provides that applicants must apply to a person or entity licensed to conduct intercountry adoptions, obtain an adoption home study, and obtain the Director’s approval, before the applicant may leave Ontario for the purpose of an intercountry adoption or finalize an intercountry adoption. Payment of any kind

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67 Pitel & Rafferty, supra note 57 at 458.
69 IA Act, supra note 63, s 3(2).
70 Ibid, s 5(1).
in connection with an intercountry adoption is expressly forbidden except in respect of the expenses of prescribed persons and legal fees.\textsuperscript{71} An intercountry adoption finalized in or by residents of Ontario will be recognized in all states party to the \textit{Adoption Convention}.\textsuperscript{72}

In contrast to Ontario, Alberta has not passed enabling legislation in respect of the \textit{Adoption Convention}, despite being party to it.\textsuperscript{73} Section 72.1 of the \textit{CYFE Act} simply provides that “[a] resident of Alberta who wishes to adopt a child who is not lawfully admitted to reside in Canada must apply to a director, in accordance with the regulations, for approval to proceed with the placement of the child”. Overseas born children who are resident in Canada are subject to the same requirements as children born in Canada.\textsuperscript{74} Adoption of children from \textit{Adoption Convention} signatories requires approval from Alberta's Central Authority; the process must also comply with the requirements of the \textit{Adoption Convention}.\textsuperscript{75} Foreign adoption orders are recognized in Alberta if the order creates a permanent parent-child relationship.\textsuperscript{76}

The cleanest approach is that taken by British Columbia, which has simply incorporated the \textit{Adoption Convention} into provincial law.\textsuperscript{77} Non-Convention adoptions involving children from outside of British Columbia require the approval of a director or an adoption agency, which \textit{must} be granted if all parties have

\begin{itemize}
\item \textsuperscript{71} \textit{Ibid}, s 19.
\item \textsuperscript{72} \textit{Adoption Convention}, \textit{supra} note 64, art 23(1).
\item \textsuperscript{73} The \textit{Adoption Convention} entered into force in Alberta on 1 November 1997: Hague Conference on Private International Law, \textit{Status Table}, online <http://www.hcch.net/index_en.php?act=conventions.childstatus&cid=69&mid=719>.
\item \textsuperscript{74} The immigration and citizenship procedures canvassed above in respect of Ontario apply equally in Alberta.
\item \textsuperscript{75} See Alberta Human Services, \textit{International Adoption}, online: <http://humanservices.alberta.ca/adoptions/15548.html>.
\item \textsuperscript{76} \textit{CYFE Act}, \textit{supra} note 46, s 73.
\item \textsuperscript{77} \textit{Adoption Act} (BC), \textit{supra} note 11, s 51.
\end{itemize}
been given the required information, the prospective parents have been approved on the basis of a home study, and consent have been obtained in accordance with the law of the jurisdiction on which the child is resident.\textsuperscript{78} The confusion in Ontario suggests that British Columbia’s approach is preferable, given that the purpose of the provincial legislation is to enact the Adoption Convention into Canadian law.

The immigration and citizenship process for overseas adoptions depends on whether the adoption is completed overseas or in Canada and may also depend on the citizenship status of the adoptive parents. In the case of adoptions that are to be finalized in Canada, citizens and permanent residents must sponsor the child to enter Canada as a permanent resident under the family class in accordance with regulations 117(1)(g)\textsuperscript{79} and 118\textsuperscript{80} of the Immigration and

\textsuperscript{78} Ibid, s 48.

\textsuperscript{79} Immigration and Refugee Protection Regulations, SOR/2002-227 [Immigration Regulations], r 117(1)(g) provides that a member of the family class includes:

[A] person under 18 years of age whom the sponsor intends to adopt in Canada if

(i) the adoption is not being entered into primarily for the purpose of acquiring any status or privilege under the Act,

(ii) where the adoption is an international adoption and the country in which the person resides and their province of intended destination are parties to the Hague Convention on Adoption, the competent authority of the country and of the province have approved the adoption in writing as conforming to that Convention, and

(iii) where the adoption is an international adoption and either the country in which the person resides or the person's province of intended destination is not a party to the Hague Convention on Adoption

(A) the person has been placed for adoption in the country in which they reside or is otherwise legally available in that country for adoption and there is no evidence that the intended adoption is for the purpose of child trafficking or undue gain within the meaning of the Hague Convention on Adoption, and

(B) the competent authority of the person's province of intended destination has stated in writing that it does not object to the adoption.

\textsuperscript{80} Ibid, r 118 requires that the sponsor provide “a statement in writing confirming that they have obtained information about the medical condition of the child or of the foreign national”.

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Refugee Protection Regulations. In the case of adoptions that are finalized in the child’s country of origin, if at least one parent is a Canadian citizen by birth or naturalization, he or she is able (though not required) to apply directly for citizenship on behalf of the child as a result of changes introduced in 2007. Alternatively, if the prospective adoptive parents are not citizens of Canada by birth or naturalization, they will need to sponsor the adopted child as a member of the family class under r 117(1)(b) (dependent child of the sponsor), in accordance with regulations 117(2), 117(3) and 118. In either case,

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81 Ibid.
82 The immigration process remains an option for citizen parents if it is deemed preferable: see Citizenship and Immigration Canada, CP 14: Adoption, Grant of Canadian Citizenship for Persons Adopted by Canadian Citizens on or after January 1, 1947 (2012) [CP 14: Adoption] at 6. However, parents should be aware that the adopted child will only be able to pass on Canadian citizenship to their own children if those children are born in Canada; this is not the case for persons who are naturalized: see Citizenship and Immigration Canada, Citizenship law and adoption, online: <http://www.cic.gc.ca/english/citizenship/rules_2009/adoption.asp>.
83 An Act to Amend the Citizenship Act, SC 2007, c 24 introduced s 5.1 into the Citizenship Act, RSC 1985, c C-29, which provides for direct citizenship for adopted children of Canadian citizens if prescribed conditions are met. Regulation 5.1 of the Citizenship Regulations, SOR/93-246 imposes extensive formal requirements that differ according to whether or not the adoption took place in a Convention country. In certain instances, for example, where a child is adopted in China, it is not possible for the adopted child to travel on a Canadian passport. In those circumstances, a facilitation visa will be granted to enable initial travel to Canada: CP 14: Adoption, supra note 86 at 48-9.
85 A permanent resident is permitted to sponsor a person for entry to Canada: Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA], s 13(1).
86 Immigration Regulations, supra note 79, r 117(2): A foreign national who is the adopted child of a sponsor and whose adoption took place when the child was under the age of 18 shall not be considered a member of the family class by virtue of the adoption unless (a) the adoption was in the best interests of the child within the meaning of the Hague Convention on Adoption; and (b) the adoption was not entered into primarily for the purpose of acquiring any status or privilege under the Act.
87 Ibid, r 117(3) establishes when the adoption is considered to have been in the best interests of the child.
citizenship may subsequently be sought on behalf of the adopted child pursuant to s 5(2) of the *Citizenship Act*.\textsuperscript{88}

All this being said, and despite the formal availability of intercountry adoption for same-sex couples \textit{within} Canada, in practice it is not generally a viable option because of discriminatory policies against same-sex adoption in many foreign nations. For example, the most recent figures indicate that 22\% of international adoptions were from China,\textsuperscript{89} which does not permit same-sex couples to adopt.\textsuperscript{90} Adoption of American children is potentially an option for same-sex couples resident in Canada,\textsuperscript{91} though of course laws vary between states concerning adoption by same-sex couples. Canada (at the provincial level) and the United States (at the federal level) are signatories to the \textit{Adoption Convention}, meaning that 42 USC §14932 and sections 96.53, 96.54 and 96.55 of Title 22 of the \textit{Code of Federal Regulations} apply. None of those provisions prohibits adoption by same-sex couples. In reality, though, figures from the US Department of State show that in the 2011 financial year,\textsuperscript{92} the only States that sent children to Canada were Florida (18), Nevada (1) and South Carolina (12). While Florida’s ban on adoption by homosexuals was found to be unconstitutional in 2010,\textsuperscript{93} the State has maintained its requirement that only

\begin{itemize}
\item \textsuperscript{88} *Citizenship Act*, supra note 83. The requirements of r 4(1) of the *Citizenship Regulations*, \textit{supra} note 83 must be met.
\item \textsuperscript{89} According to Statistics Canada: “About 8,000 of these international adoptions were from China. After peaking at 53\% of Canadians’ international adoptions in 2005, China remains the primary source country. It accounted for close to 22\% of Canadians’ international adoptions in 2009. Other source countries that year included the United States (12\%), Ethiopia (8\%), Vietnam (8\%) and Haiti (7\%): Statistics Canada, \textit{International Adoptions}, \textit{supra} note 66.
\item \textsuperscript{90} United States Department of State, \textit{Intercountry Adoption - China}, online: <http://adoption.state.gov/country_information/country_specific_info.php?country-select=china>; Statistics Canada, \textit{International Adoptions}, \textit{supra} note 75.
\item \textsuperscript{91} In 2009, 12\% of adopted children from overseas came from the United States: \textit{ibid}.
\item \textsuperscript{92} United States Department of State, \textit{FY 2011 Annual Report on Intercountry Adoption} (2011).
\item \textsuperscript{93} \textit{Florida Department of Children and Families v Adoption of XXG}, 45 So 3d 79 (Fla Dist Ct App 3d Dist 2010).\end{itemize}
unmarried individuals or opposite-sex married couples may adopt children.\textsuperscript{94} South Carolina permits gay and lesbian individuals to adopt children; there is no explicit prohibition on joint adoption by same-sex couples.\textsuperscript{95} Nevada allows any adult person to adopt individually; couples may only adopt if they are married.\textsuperscript{96} It seems likely that Nevada’s ban on same-sex marriage will be struck down in the near future.\textsuperscript{97} Factoring in the likelihood that a proportion of those adoptions involved relatives, it is clear that adoption from the United States is a slim possibility for same-sex couples in Canada.

C. The (Substantive) Reality of (Formal) Equality

While lesbians and gay men in Canada enjoy formal legal equality with respect to adoption, overt and covert forms of discrimination remain apparent. Research into the adoption experiences of lesbian, gay, bisexual, transgender and queer (LGBTQ) people in Ontario found that “homophobic or heterosexist attitudes” were occasionally voiced by adoption workers, while warnings about such attitudes amongst others in the adoption system, particularly in private agencies, were prevalent.\textsuperscript{98} In addition:\textsuperscript{99}

\textsuperscript{94} \textit{Fla Stat Ann} §63.042(2). Despite the decision in \textit{XXG}, subsection (3) (“No person eligible to adopt under this statute may adopt if that person is a homosexual”) remains on Florida’s statute book.

\textsuperscript{95} \textit{South Carolina Children’s Code} §63-9-60.

\textsuperscript{96} \textit{Nev Rev Stat} §127.030.

\textsuperscript{97} \textit{Sevcik v Sandoval}, No 2:12-CV-00578-RCJ-PAL (D Nev 10 September 2012), appealed to Ninth Circuit, Case No 12-16995; \textit{SmithKline Beecham Corp v Abbott Labs}, 740 F 3d 471 (9th Circ, 2014).

\textsuperscript{98} Lori E Ross et al, “Policy, Practice, and Personal Narratives: Experiences of LGBTQ People with Adoption in Ontario, Canada” (2009) 12 Adoption Quarterly 277 at 282-83. See also Philip Burge & Margaret Jamieson, “Gaining Balance: Toward a Grounded Theory of the Decision-Making Processes of Applicants for Adoption of Children with and without Disabilities” (2009) 14:4 Qualitative Report 566 at 583 (recounting the story of one gay male adoptive parent: “And then she [the social worker] said, ’I’d like to be honest with you; it goes heterosexual, gay couples, single”).

\textsuperscript{99} Ross et al, \textit{supra} note 98 at 284-85.
Nearly all ... single and same-sex partnered participants were asked by their workers whether they would be able to provide their adopted child with appropriate gender role models. This question seemed to be grounded in the presumption that children need male and female role models to develop normally and, by extension, that families without both a make and female role model were deficient, relative to a heterosexual nuclear family.

Troublingly, a significant majority of the study’s participants had been involved with the public adoption system. The study’s authors concluded that “the potential strengths of LGBTQ people are not universally recognized or acknowledged in the adoption process” and “many adoption workers still envision families through an essentialist lens that prioritizes the heterosexual nuclear family model”.

A study of adoption workers employed by the British Columbia Ministry of Children and Family Development disclosed a belief on the part of participants that amongst adoption workers there is “widespread systemic discrimination against them [gay and lesbians applicants] as a group” and “nontraditional families ... had less chance of being selected for a placement than did heterosexual couples”. Research in Quebec into the experiences of gay men identified a similar “disjuncture between the pro-gay changes in the legal framework and the persistent, if variable, resistance to families headed by same-sex couples that still permeates aspects of the administrative system”.

The Canadian experience suggests that even when “family diversity” is embraced, a tension remains between normalization and alterity – queer parents

\(^100\) Ibid at 277 (reporting that 38 of 43 participants had been involved with public adoption, while only 3 participants had been involved with private adoption; two participants had undertaken international adoption).

\(^101\) Ibid at 288-89.


are put forth as exemplars of a state’s progressive modernity and tolerance, but this also casts such persons as requiring tolerance from the benevolent state and its “ordinary citizens”. Furthermore, it is clear that only particular lesbians and gay men – the “good homosexuals” who marry or couple monogamously, who form part of the middle class, and who do not challenge gender norms – are generally considered desirable candidates for adoption, even if they fall below heterosexual couples in the adoption hierarchy.\textsuperscript{104} The embrace of diversity within adoption is thus invested with its own hierarchical imperative, a sort of epistemological limit that warns against too much of a good thing. A cogent example is Ontario’s “Raising Expectations” report on infertility and adoption, which, as Margaret Gibson observes, “exclusively represents gay/queer men in ‘same-sex couples’ as indicators of ‘family diversity’ rather than as key players or key concerns in policy development”\textsuperscript{105}. Gibson argues that the language of diversity employed in the report “works to reassure any readers or members of the government who are worried about encouraging, rather than tolerating, queerness that the proposed policy merely reflects dominant beliefs (tolerating existing queerness) rather than advocating change (endorsing the creation of queerness)”.\textsuperscript{106} Gibson’s claim would appear to be borne out by the aforementioned study of queer prospective parents in Ontario, which highlighted the emphasis placed by adoption workers on ensuring an “appropriate” mix of gender roles in a child’s life,\textsuperscript{107} and in turn speaks to a vision of child development that reifies the opposite-sex norm as ideal. The distinction between the public embrace of diversity and the reality of mere tolerance is also clear in the message given to gay prospective parents not to be too “picky” about their

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\footnotetext[105]{Gibson, \textit{supra} note 104 at 411.}

\footnotetext[106]{\textit{Ibid} at 414.}

\footnotetext[107]{Ross et al, \textit{supra} note 98 at 284-85.}
\end{footnotes}
potential future child: “‘Special needs’ children are made more available to queer applicants, who are told, in effect, that they are in no position to be choosy.”¹⁰⁸ This of course devalues not only the prospective parents but also the children, suggesting that they are only worthy of second-tier applicants.

II. Assisted Reproduction Including Surrogacy

The first part of this section considers federal regulation of assisted reproduction in the form of the Assisted Human Reproduction Act.¹⁰⁹ Next, it considers pertinent provincial laws, focusing in particular on the regimes in Alberta, Ontario and British Columbia. Lastly, consideration is given to issues in international assisted reproduction arrangements involving Canada or Canadian citizens and residents. The regulatory and judicial treatment of assisted reproduction in Canada has tended to imbricate its various forms; accordingly, unlike the discussion of assisted reproduction in the United States, this part considers surrogacy, artificial insemination and in vitro fertilization (IVF) collectively.¹¹⁰

A. The Assisted Human Reproduction Act

The jurisdiction to enact laws with respect to assisted reproduction is itself a vexed question in Canada. The federal government attempted to regulate aspects of assisted reproduction through the ill-conceived AHRA. However, in Reference re Assisted Human Reproduction Act,¹¹¹ the Supreme Court was sharply divided as to whether regulation of assisted reproduction (at least in the

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¹⁰⁸ Gibson, supra note 104 at 419.
¹¹⁰ This paper does not consider the right of children to know their genetic origins and attendant issues of privacy, not because such issues are unimportant, but rather because they raise a suite of issues that travel far beyond the scope of the present discussion. The most recent judicial consideration of this issue is the British Columbia Court of Appeal’s decision in Pratten, supra note 1.
form seen in the AHRA) falls within the federal government’s power with respect to criminal law under s 91(27) of the Constitution Act, 1867 or whether it is a matter within the jurisdiction of the provinces over hospitals, property and civil rights, and matters of a merely local nature. Four judges would have upheld the AHRA in its entirety as an exercise of the criminal law power, while four judges would have struck the AHRA down as exceeding the power conferred by s 91(27). Justice Cromwell’s judgment reflected this division: he found that certain provisions were valid while others trenched on provincial competence. Accordingly, the AHRA now bears the scars of its judicial beating and operates in a piecemeal manner; the statutory body created to administer the AHRA was disbanded in 2012. Certain provinces such as Alberta and British Columbia have enacted legislation to deal with the complicated question of parenthood and its attribution; other provinces, most noticeably Ontario, have taken a remarkably informal approach, which in turn has generated limited, though tremendously important, recognition of the parentage of lesbians and gay men who have accessed assisted reproductive technology (ART), as well as the possibility of multi-parent families.

Given the constitutional difficulties associated with federal regulation of ART, it is perhaps unsurprising that what remains of the AHRA would not be out of place as a chapter within the Criminal Code; this is to say that it operates proscriptively and demonstrates little understanding of the motivations

112 Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 [Constitution Act, 1867], s 92(7), (13) and (16), respectively.


115 Criminal Code, RSC 1985, c C-46.
undergirding, and complexity attending, most assisted reproduction. Section 6 imposes a blanket ban on commercial surrogacy, though it does not affect the validity of altruistic surrogacy agreements under provincial law. Section 7(1) provides that “[n]o person shall purchase, offer to purchase or advertise for the purchase of sperm or ova from a donor or a person acting on behalf of a donor”. Subsections (2) and (3) prohibit the purchase or sale of in vitro embryos and other reproductive material. Section 9 provides that “[n]o person shall obtain any sperm or ovum from a donor under 18 years of age, or use any sperm or ovum so obtained, except for the purpose of preserving the sperm or ovum for the purpose of creating a human being that the person reasonably believes will be raised by the donor”. The sanction for contravening any of these sections is extraordinary: a person who is convicted on indictment is liable “to a fine not exceeding $500,000 or to imprisonment for a term not exceeding ten years, or to both”; on summary conviction, a person is liable to “a fine not exceeding $250,000 or to imprisonment for a term not exceeding four years, or to both”.

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116 As Lebel and Deschamps JJ (Abella and Rothstein JJ concurring) stated in Re AHRA, supra note 119 at 499: “Assisted human reproduction was not then, nor is it now, an evil needing to be suppressed. In fact, it is a burgeoning field of medical practice and research that, as Parliament mentions in s 2 of the AHR Act, brings benefits to many Canadians.”

117 The AHRA was even more restrictive prior to 2012, when s 10, which had prohibited insemination outside of a fertility clinic, was repealed: Jobs, Growth and Long-term Prosperity Act, SC 2012, c 19, s 717. As Angela Cameron pointed out in 2008, even if self-insemination was allowed under this regime, the effect of this was to seriously impede the ability of gay men to donate sperm to known recipients, because federal regulations (Processing and Distribution of Semen for Assisted Conception Regulations, SOR 96-254 [Semen Regulations]) prohibit sperm donation by gay men unless a specific exemption is obtained from the government. Thus, if a female same-sex couple wished to use donated sperm from a gay male friend, they would not have been able to do so without taking the risk of fluid-borne pathogens being present: Angela Cameron, “Regulating the Queer Family: The Assisted Human Reproduction Act” (2008) 24 Can J Fam L 101 at 110-15. The regulations concerning sperm donation remain in force after being upheld in Doe v Canada, [2007] OJ No 70, meaning that screening issues remain, though self-insemination is no longer subject to the AHRA.

118 AHRA, supra note 109, s 6(5).
Section 12 of the *AHRA* purports to permit reimbursement of expenses incurred by donors, however, the absence of correlative regulations means that the section is not yet in force, rendering uncertain the legality of any reimbursement even in altruistic circumstances. There is clear evidence that this lacuna has been used as a basis for surrogacy within Canada, in ways that probably do, and certainly do not, comport with a reasonable interpretation of “reimbursement”.

In February 2013, the first ever charges under the *AHRA* were laid against the Ontario-based surrogacy agency Canadian Fertility Services and its director, Leia Picard. The company and Picard were charged with purchasing eggs and paying a surrogate, while Picard was also charged with accepting money to arrange the services of a surrogate.

In December 2013, Picard pleaded guilty to the charges under the *AHRA*. It was agreed that she and her company would share in a $60,000 fine. Alison Motluk’s summation of the case is apposite:

In the end, the case clarified little. It is still unclear where the line should be drawn between acceptable and unacceptable expenses. It is unclear why the government chose to act now, after years of violations – not only by Picard, but by parents and doctors as well. It is unclear whether this is a one-off conviction, intended to send a message, or if it heralds a new era of enforcement. The one thing that is clear is that there is an overwhelming demand for the work Picard does.

By criminalizing only the commercial aspects of assisted reproduction, Parliament has implicitly accepted the potential good (or at least the lesser evil)

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119 For example, in the first case brought under the *AHRA*, Leia Picard admitted that she had provided lump sum payments to surrogates that were not referable to particular expenses: see Alison Motluk, "The Baby-Making Business: on the front lines of Toronto’s booming, semi-legal surrogacy market", *Toronto Life* (3 February 2014). It would seem that not only residents are availing themselves of the patchy Canadian laws, with anecdotal evidence of non-residents engaging surrogates in Canada to take advantage of Canada’s generous health care system for residents: see Kendyl Sebesta, “Loopholes in law spark rise in illegal surrogacy deals”, *Law Times* (2 January 2010).

120 Motluk, *supra* note 119. As Picard pleaded guilty to the charges, there is no reported case clarifying the particular provisions that she and her company were alleged to have contravened. However, it would seem likely that the charges referred (at least) to ss 6(1), 6(2) and 7(1) of the *AHRA*.

of assisted reproduction; yet it has removed the practical ability of many parties
to obtain the necessary genetic material or, bluntly, the female body, required to
create a child through these processes. While empirical data demonstrating a
shift towards altruistic donation and surrogacy by reason of the AHRA is not
available, it is reasonable to surmise that the prohibitions have led to one or a
combination of the following situations: intending parents taking advantage of
more permissive regimes internationally; intending parents engaging in covert,
potentially illegal, activity; and/or intending parents seeking the aid of persons
known to them, which in turn has the potential to complicate the question of
parentage. Of course, some people will also abandon this route to parenthood
altogether.

The prohibition on payment for genetic material is particularly problematic for gay
and lesbian intending parents, who at present require at least one form of
donated genetic material, quite possibly in conjunction with the services of a
surrogate. The prohibition on payment for genetic material means that stores of
sperm are exceedingly low, which ironically has led intending parents to
(legally) import sperm from the United States, or attempt to obtain sperm via
unregulated donation. The AHRA’s prohibition is compounded by the ban on

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122 According to Erin Nelson, surrogacy is “presently largely unmonitored by any authority”. This is unlikely to change in the foreseeable future given that provisions in the AHRA that would have enabled data collection concerning ART were struck down in Re AHRA. Erin Nelson, “Global Trade and Assisted Reproductive Technologies: Regulatory Challenges in International Surrogacy” (2013) JLME 240 at 241 note 9.

123 See Sebesta, supra note 119.


125 In 2011, Toronto-based fertility clinic ReproMed reported that there were only 35 sperm donors in Canada: see Danielle Groen, “Down for the count”, TheGridTo.com (19 May 2011) 34. A review of the company’s website in 2014 shows that sperm from around 50 men is presently available: ReproMed, Semen Donor Catalogues, online: <http://www.repromed.ca/sperm_donor_catalogue>.

126 Angela Mulholland, “Women increasingly going online to seek ‘free’ sperm donors”, CTV News (12 December 2013); Picard, supra note 114; Sebesta, supra note 119.
sperm donation by any man who has had sex with another man since 1977,\textsuperscript{127} though the Processing and Distribution of Semen for Assisted Conception Regulations provide an exemption procedure that enables a doctor to request permission to use particular sperm when a patient’s needs cannot be met “using semen that has been processed in accordance with those requirements”.\textsuperscript{128} While the exemption provisions partially alleviate the onerous nature of the ban on gay men donating sperm, the restriction remains particularly burdensome in view of queer kinship structures involving, for instance, shared parentage and the use of known donors.\textsuperscript{129} In contrast to the position taken by the Ontario Court of Appeal on this question in Doe v Canada (Attorney General),\textsuperscript{130} I would argue that the existing prohibition not only infringes the personal autonomy of gay men who wish to donate sperm (at least to known recipients), but also the autonomy of women seeking to use the sperm of their gay male friends by adding another layer of complexity to an already fraught process. Thus, in yet another instance of the state regulating queer bodies,\textsuperscript{131} the parties in this type of situation are

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\item Health Canada Directive, Technical Requirements for Therapeutic Donor Insemination (2000), cl 2.1(c)(i); Semen Regulations, supra note 117.. The exclusion was upheld by the Ontario Court of Appeal in Doe v Canada, supra note 125 on the basis, \textit{inter alia}, that it relates to valid health concerns and did not promote the view that gay men are less worthy of being parents.

\item Semen Regulations, supra note 125, s 19(1). See generally Part 2 of the Semen Regulations. Section 1 defines “assisted conception” in such a way that spouses or partners of women seeking artificial insemination are not caught by the exclusion, though this is, for obvious reasons, not especially helpful to lesbians and gay men.


\item Doe v Canada, supra note 117.
\end{itemize}
required to seek the state’s blessing in order to donate, and use specific donated, genetic material in a medically safe environment.

Egg donation rates are also extremely low as a result of the AHRA’s prohibition on sale of genetic material. For gay men who wish to engage in surrogacy, egg donation is critical. The ban on compensation is therefore particularly onerous, given that egg harvesting is an invasive procedure that few women will undergo altruistically, especially for persons unknown to them. This situation is likely to push people into covert contraventions of the AHRA.\textsuperscript{132} The same can be said of the prohibition on commercial surrogacy. While the regulatory lacuna that is created by the absence of regulations on legitimate expenses means that intending parents and their representatives have been able to proceed in cases where women are willing to provide their services for limited recompense, it is unclear whether those agreements are in fact lawful. This situation affects all of those persons who wish to engage in surrogacy, but the impact is disproportionate for (affluent) gay men, who are affected as an entire class.

If one accepts that parenting is for many people a fundamental element of affective and affiliative life, the justification for these prohibitions can only lie in the harm to those persons who would donate their genetic material or bodies to assist others to become parents. Concerns over exploitation and the devaluing of human life are valid. However, as outlined in Part 1, such concerns do not outweigh the infringement of human capacity and autonomy involved in Canada’s present paternalistic, prohibitory approach to assisted reproduction. The AHRA (and the Semen Regulations) enacts a vision of assisted reproduction that still

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\begin{flushleft}\textsuperscript{132} See “Canadians pay egg donors on the grey market”, \textit{CBC News} (26 March 2014).
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reflects the sort of distrust evident in the earliest cases concerning the technology.\textsuperscript{133} Certainly, it is now acceptable for a woman to be artificially inseminated with semen from a man other than her husband; indeed, a woman can be impregnated with an embryo created using her same-sex partner’s egg and donated sperm.\textsuperscript{134} Nevertheless, single men and women of any sexual orientation, same-sex couples, and infertile opposite-sex couples, are subject to a regime that sharply limits the availability of genetic material, that makes it difficult for gay men to donate sperm, and shifts the burden of assisted conception onto those persons selfless enough to donate their bodies to assist the parenting desires of others. Not only is this system contrary to relational autonomy and respect for queer kinship/family structures – it simply does not work well. The evidence shows that the AHRA has had the effect pushing compensated assisted reproduction underground and across borders, which in turn is likely to create future legal complexities that will have to be responded to in a reactive manner rather than with the sensitivity and realism required by regulation of assisted reproduction.

B. Provincial Regulation

Provincial law is relevant to assisted reproduction primarily at the level of ascribing parentage. This section focuses on parentage in situations involving ART, including questions around multi-parentage. In view of the specificity of the regimes in each Province concerning parentage, the following analysis considers the laws in Alberta, Ontario and British Columbia separately.

\textsuperscript{133} See, e.g., Orford v Orford, [1921] OJ 103.

1. Alberta

Alberta’s *Family Law Act*\(^\text{135}\) was substantially amended in 2010 in response to significant issues with the original Act’s parentage presumptions,\(^\text{136}\) as well as the Uniform Law Conference of Canada’s promulgation of the *Uniform Child Status Act*.\(^\text{137}\) Section 7 of the *FL Act* (Alberta) establishes the basic rules of parentage. In the context of ART, subsection (4) clarifies that a person who donates human reproductive material (HRM) without the intention of using that material “for his or her own reproductive use” is not a parent of a child born as a result of the donation. This intention-based approach should present little problem in the context of anonymous donation. The provision also applies in circumstances where the intending parents know the donor.\(^\text{138}\) While it is appropriate to have regard to the intention of the donor in circumstances of donation to known parties, the provision as drafted potentially enables a donor to assert a retrospective intention to parent, contrary to the intentions of the HRM recipients. Accordingly, donation of HRM in circumstances where the donor is known ought to be accompanied by clear explication of each party’s intentions. Even with a pre-birth agreement, though, cases decided prior to the revised version of the *FL Act* (Alberta)\(^\text{139}\) suggest that involvement by a donor in a child’s life may be risky for women who want to be a child’s sole legal parent because

\(^{135}\) *Family Law Act*, SA 2003, c F-45 [FL Act (Alberta)].

\(^{136}\) See *Fraess v Alberta (Minister of Justice and Attorney General)*, [2005] AJ No 1665 (in which the Court upheld the claimant’s *Charter* arguments) and *Doe v Alberta*, [2007] AL No 138 (in which the *Charter* claim was unsuccessful).

\(^{137}\) In significant respects, though, Alberta has departed from the proposed uniform legislation. See *infra* text accompanying notes 194-95.

\(^{138}\) Of course, there may only be one intending parent and genetic material may be required from more than one donor. However, noting the possible variations at each step is lexically cumbersome. Accordingly, references to “intended parents” ought to be read as including one “intended parent” where appropriate; so too, “anonymous donor” is intended to encompass “donors” unless the context indicates otherwise.

“when the courts are able to identify a biological father they are most likely to do so”.

Section 8.1 of the *FL Act (Alberta)* establishes rules of parentage in the case of assisted reproduction involving the provision of HRM by a person “for his or her own reproductive purposes”. Attribution of parentage is schematically dealt with by reference to the person who provided the relevant HRM. The prima facie assumption when either a man or a woman (only) provides HRM is that the birth mother is a parent: when the HRM provider is a male, he is also assumed to be a parent; when the HRM provider is a female, the birth mother’s spouse or partner is presumed to be a parent. In each case, this is subject to an exception if the birth mother is a surrogate, wherein the male or female HRM provider and his or her spouse or conjugal partner will be considered parents, assuming that the surrogate consents to a declaration that she is not a parent. If a surrogate does not consent to an application for a declaration of parentage, she is the sole parent of the child.

There is no prohibition on vesting parentage in only one person, meaning that a single HRM provider (or a single surrogate) can be declared a parent (subject to potential claims by known donors). The gender-neutral definitions of “marriage”

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140 Roxanne Mykitiuk, “Beyond Conception: Legal Determinations of Filiation in the Context of Assisted Reproductive Technologies” (2001) 39 Osgoode Hall LJ 771 at 798. See also at 799: “In cases of known donors, law operates to thwart attempts by women to create non-traditional families in circumstances even where the parties have agreed that the man will not play a role in the child’s life.”

141 *FL Act (Alberta), supra* note 135, s 7(2)(b) provides that a person identified under s 8.1 is a parent of the child.

142 *Ibid*, s 8.1(1). Thus, anonymous donors and donors who do not intend to parent the resulting child are not considered to have donated HRM for the purposes of section 8.1.

143 *Ibid*, ss 8.1(2)(a) and 8(3)(a).

144 *Ibid*, ss 8.1(2)(b) and 8(3)(b). Subsection (6) provides that the court shall make the declaration if the child was born as a result of assisted reproduction using material from a donor within the meaning of subsection (1)(b) and the surrogate consents.

145 *Ibid*, ss 8.1(2)(c) and 8(3)(c).
and “conjugal” also mean that two men or two women can be declared the parents of a child born via ART (though for men this is likely to be contingent on a surrogate’s consent). When a male and a female both provide HRM, the parents of the child are the birth mother and the male, unless the birth mother is a surrogate, in which case the male and female HRM providers are parents if a declaration under s 8.2(6) is made.146 As with donation by a single HRM provider (within the meaning of the FL Act (Alberta)), non-consent on the part of a surrogate in cases of dual HRM donation will also result in parentage vesting in the surrogate.147 In circumstances where an embryo is created using donated male and female HRM from persons with no intention to parent, the birth mother and her spouse or partner are the parents of the child.148

The parentage presumptions that arise when a person (singly or as part of a same-sex couple) donates (either male or female) HRM should not create problems for queer families so long as any additional HRM is not provided by a person who (contrary to the intentions of the primary donor and his or her partner) intends to be a parent to a resulting child. Thus, a gay male couple that uses anonymously donated eggs, or eggs from a known donor who has no intention to parent a resulting child, will fall within the presumptions under s 8.1(2) (male donor and birth mother are presumed parents subject to surrogate’s consent to a declaration of non-parentage, thereby vesting parentage in the male donor’s spouse or partner) if one of the men provides sperm. However, if neither of the men provides sperm, the birth mother and her partner (if he or she has previously consented) are presumed to be the child’s parents and no provision is made for a transfer of parentage; indeed, s 8.2(2) does not permit an application for a declaration of parentage except by “a person whose human reproductive material or embryo was provided for use in the assisted

146 Ibid, s 8.1(4)(a), (b).
147 Ibid, s 8.1(4)(c).
148 Ibid, s 8.1(5).
reproduction”\textsuperscript{149} or that person’s spouse or partner. Accordingly, for couples or individuals who are unable to provide HRM but who nevertheless engage a surrogate, it will be necessary, subject to the surrogate’s consent, to adopt the child under s 64(3) of the \textit{CYFE Act}.\textsuperscript{150} Conversely, if a woman engages in IVF using gametes donated by persons with no intention to parent a resulting child, she will still be the mother of the child and her partner will be a presumed parent.\textsuperscript{151}

Section 8.2 of the \textit{FL Act} (Alberta) enables surrogates and HRM providers and their spouses or partners\textsuperscript{152} to apply to the courts for a declaration that (a) the surrogate is not a parent of the child, \textit{and}\textsuperscript{153} (b) the HRM provider is a parent of the child.\textsuperscript{154} An application must be made within 30 days of the child’s birth, subject to leave.\textsuperscript{155} The surrogate must consent to the application.\textsuperscript{156} Critically, surrogacy agreements are \textit{not} enforceable and may not be used as evidence of the surrogate’s intention.\textsuperscript{157} An application may not be made if “the declaration

\textsuperscript{149} Ibid, s 8.2(1)(b), as referred to in sub-paragraphs (b) and (c) of subsection 8.2(2).

\textsuperscript{150} Ibid, s 64(3) sets out the requirements for an “application for an adoption order in respect of a child whose step-parent is the applicant or \textit{a child who is placed by a parent directly in the custody of an applicant}” [emphasis added].

\textsuperscript{151} Ibid, s 8.1(5).

\textsuperscript{152} Ibid, s 8.2(2). Note that a spouse or conjugal partner may not apply if both a male and female provided HRM; in that case, only those parties and the surrogate can seek orders under s 8.2: s 8.2(3).

\textsuperscript{153} The use of the conjunction appears to preclude an order that a child has no parents.

\textsuperscript{154} Necessarily, if such an order is made, the spouse or conjugal partner of the HRM provider will also be declared a parent, subject to any of consent on their part. Attendant amendments to birth registration documents may also be made if a declaration under s 8.2 is received by the Registrar or the court makes an order pursuant to a declaration of parentage under s 9(8): \textit{Vital Statistics Act}, SA 2007, c V-41, ss 11(2) and 14.

\textsuperscript{155} \textit{FL Act} (Alberta), supra note 135, s 8.2(4). Subsection (5) imposes notice requirements.

\textsuperscript{156} Ibid, s 8.2(6)(b).

\textsuperscript{157} Ibid, s 8.2(8)(a) and (b). This is similar to the approach in Quebec, where “[a]ny agreement whereby a woman undertakes to procreate or carry a child for another person is absolutely null”: \textit{Civil Code of Quebec}, art 541. It differs, however, from British
sought would result in the child having more than 2 parents”.

An application under s 8.2 is possible if the child was born in Alberta (i.e., the residence of the surrogate and intending parents is irrelevant).

In the event of a dispute over parentage, s 9 of the FL Act (Alberta) stipulates who may apply to the court for a declaration that a person is or is not a parent. Crucially, s 9(1)(a) enables an intending parent of a child born via surrogacy to apply for a declaration of parentage in the event that the surrogate does not consent to an application under s 8.2. However, the FL Act (Alberta) does not specify the circumstances in which such a declaration is to be made, aside from providing that the presumptions in s 8.1 apply. Potentially, the reference to s 8.1 could be construed as denying the ability of a biological or intended parent to apply if a surrogate has refused consent. However, such an approach would undercut the utility of s 9, meaning that such applications ought to be determined by reference to the presumptions in s 8.1 and the best interests of the child. Even if this approach prevails, though, it would seem likely that in the context of a same-sex commissioning couple, only the HRM providing partner

Columbia, where a surrogacy agreement “may be used as evidence of the parties’ intentions with respect to the child’s parentage if a dispute arises after the child’s birth”:


FL Act (Alberta), supra note 135, s 8.2(12).

Ibid, s 8.2(11).

Such a person is “a person claiming to be a parent of the child” within the meaning of s 9(1)(a) and s 7(2)(b).

FL Act (Alberta), supra note 135, s 9(5).

By reason of ss 8.1(2)(c), 3(c) and 4(c).

See, e.g., *DWH v DJR*, [2011] AJ No 1082 [DWH (Sup Ct)] at [125] per Bensler J: “Given the overarching legislative goal of ensuring the best interests of the child, I do not think that removing parental status from either a genetic or intended parent (as provided for under the FLA) would further this legislative aim”. See also at [139]: “It is contrary to the best interests of the child S to be limited to the legal recognition of a sole parent”.

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would be granted a declaration of parentage because the presumptions in s 8.1 suggest that the parentage of a surrogate may only be voided with her consent, and s 8.2(12) prohibits applications that would result in a child having more than two parents. Section 9 also enables HRM donors in the context of artificial insemination and IVF to seek a declaration of parentage. As with surrogacy declarations, though, an application or declaration is not permitted if the declaration would result in a child having more than two parents. Applications may be made under s 9 if the child was born in Alberta or an alleged parent resides in Alberta.

The convoluted factual matrix in the queer family saga of *DWH v DJR* is instructive in working through the efficacy of the *FL Act (Alberta)*’s parentage provisions. While the legal issues in the litigation primarily concerned the former *Family Law Act* and *Domestic Relations Act*, the Court of Appeal did specifically consider s 9(7) of the current *FL Act (Alberta)*, and how the facts more generally might have been treated under the present regime.

The case arose out of an agreement between a lesbian couple (Ms D and her partner) and a gay male couple (DWH and DJR), to pool genetic resources for the purpose of producing two children: one for each couple. This came to fruition, and baby S was raised for the first three years of her life by the two men. Problems arose when the men separated; the two women and the biological father of S, DJR, decided that DWH should not have access to S and drew up a parenting agreement between themselves that excluded DWH. DWH applied for and was granted contact with S on the basis that he stood *in loco parentis* to

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164 *FL Act (Alberta)*, *supra* note 135, s 9(7).
165 *Ibid*, s 9(6).
166 *DWH v DJR*, [2013] AJ No 699 [*DWH (CA)*].
168 *DWH (CA)*, *supra* note 166 at [3]-[6].
DJR and Ms D subsequently obtained a parenting assessment from a child psychologist that recommended against further contact between S and DWH; on the basis of that report, they successfully applied for an order denying contact between DWH and S. Another trial ensued, the result of which was a finding that DJR and Ms D’s denial of a relationship between DWH and S was unreasonable and contrary to S’s best interests. Crucially, “[f]ollowing the trial, the parties were informed that under the wording of the Family Law Act, Mr R [DWR] was not the legal father of S, and that by operation of the Family Law Act, the child’s only legal parent was Ms D, who did not have primary custody of the child. Mr R then applied to become, and was appointed, a guardian of S in November, 2010.” Thereafter, DWH sought declarations of joint custody, parentage and guardianship of S, as well as a declaration that sections of the former Family Law Act contravened s 15 of the Charter.

At trial, Bensler J found that s 13 of the former Family Law Act infringed s 15 of the Charter because its effect was that “when gay males in a committed relationship decide to have a family assisted by a female … they should either be satisfied with guardianship status (which they must apply for to receive) or they must undertake the protracted adoption process. Denying a gay father (biological or intended) the status of legal parent has a negative effect on his human dignity”. The trial judge then made a parentage order in favor of DWH because, in the Court of Appeal’s words, she “was troubled by the fact that Ms D

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170 DWH (CA), supra note 166 at [10].
172 DWH (CA), supra note 166 at [12].
173 During the pendency of the proceedings, the Family Law Act was amended to its present form: Family Law Statutes Amendment Act, SA 2010, c 16. However, the trial judge considered the constitutionality of impugned provisions of the former Act because they bore on the question of S’s parentage: DWH (CA), supra note 166 at [16].
174 DWH (Sup Ct), supra note 163 at [90]-[91]; DWH (CA), supra note 166 at [20].
was S’s only parent”. On the authority of *AA v BB*, the trial judge found that there was a legislative gap that could be remedied by declaring DWH’s parentage, which was in S’s best interests because “he acted as one of the primary caregivers to the child S for the first three years of her life”. Subsequently, the Minister of Justice and Attorney General suggested to the trial judge that the governing legislation at the time of S’s birth was in fact the *Domestic Relations Act*, not the *Family Law Act*. Justice Bensler agreed and issued supplementary reasons in which she found that s 78(1) of the *Domestic Relations Act* also infringed s 15 of the *Charter* because it “base[d] male parentage on the existence of a spousal or common-law relationship with the birth mother; an occurrence that will never be realized in a same-sex relationship”. Justice Bensler held that s 78(1)(e) of the *Domestic Relations Act* created a presumption of parentage on the part of S’s biological father, DJR. However, in accordance with her original reasons, she also issued a parentage declaration in favour of DWH “because it was not in the best interests of S to be deprived of the legal recognition of both Mr R and Mr H as parents”. Baby S was therefore granted three legal parents.

DJR and Ms D appealed on grounds of procedure and the appropriateness of the trial judge’s exercise of the Court’s *parens patriae* jurisdiction; they also alleged that the parentage order in favor of DWH breached s 9(7) of the current *FL Act* (Alberta). For present purposes, only the third ground is relevant. The Court of Appeal stated, “it seems arguable that Ms D meets the definition of surrogate, as the facts indicate that she ‘gave’ S to Mr R and Mr H in exchange for the

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175 DWH (CA), *supra* note 166 at [23]. While this concern was probably appropriate in the circumstances given that S’s primary caregivers were DWH and DJR, it possibly reflects a more general judicial bias against single parenting: see, e.g., *Doe v Alberta*, *supra* note 136.


177 DWH (Sup Ct), *supra* note 163 at [139].

178 DWH (CA), *supra* note 166 at [32].

179 *Ibid* at [34].
opportunity to be impregnated a second time with Mr R’s sperm”. 180 In the language of the FL Act (Alberta), DJR was a male donor who provided HRM with the intention of becoming a parent to the resulting child. However, because no application to dispense with Ms D’s parentage was ever made, Ms D was S’s only parent within the terms of the present FL Act (Alberta). Therefore, the declaration of parentage in favour of DWH did not offend s 9(7) because it gave S two, not three, legal parents. 181

The Court of Appeal’s view raises a question about the meaning of “relinquish” in the definition of “surrogate” in s 5.1(1)(d) of the FL Act (Alberta). If relinquishment refers to the physical act of transferring the obligation of care to other persons, then Ms D could be construed as a surrogate, despite the fact that her own egg was used, because the definition of “surrogate” does not preclude traditional surrogacy. 182 However, if relinquishment refers to legal parentage, it is arguable that Ms D was not a surrogate because it is unclear that her intention was ever to relinquish her parental status. This distinction is important because if Ms D were not a surrogate, then the presumption in s 8.1(2)(a) would apply, meaning that both Ms D and DJR would be S’s parents (as the parties appear to have assumed from the outset). If that were the case, Justice Bensler’s order in favor of DWH would have contravened s 9(7) of the FL Act (Alberta).

This convoluted situation elucidates the profound and particular harm of laws that do not admit the possibility of more than two legal parents since, as the judgments presently stand, DJR is not a legal parent of S, despite the fact that he is the biological father of the girl and has raised her from birth. 183 The case also

180 Ibid at [68].
181 Ibid at [69].
182 FL Act (Alberta), supra note 135, s 5.1(1)(d).
183 I would argue that in fact DWH ought to have been held ineligible for a declaration of parentage by reason of s 9(7), though the harm occasioned by a finding to this effect would have been only marginally less perverse.
points to the potential harm of automatically vesting parentage in a surrogate who does not consent (whether by act or omission) to a declaration relieving her of parental status. While the parties in *DWH v DJR* appear to have accepted that Ms D was a legal parent of S from the time of her birth, the fact that Ms D and S had developed a relationship was fortuitous; in different circumstances, declaring that Ms D was, until the declaration of parentage in favour of DWH, S’s only legal parent, could have had exceedingly harmful effects on S and her intended parents.

From the perspective of same-sex families, the most significant benefit of Alberta’s parentage rules is the express possibility of declarations of parentage in favour of both partners in a same-sex couple.184 This implements the finding of the Alberta Court of Queen’s Bench in *Fraess v Alberta (Minister of Justice and Attorney General)*185 that the former s 13(2) of the *Family Law Act*, which enabled a declaration of presumed parentage in respect of only the male partner of a woman who was inseminated, infringed s 15 of the *Charter*. Correlatively, intending parents have the benefit of a reasonably detailed procedural regime governing applications for parentage, thereby providing a measure of certainty for all parties. In the case of artificial insemination and IVF, lesbian couples can be certain that anonymous donors have no claim to parentage,186 and both the birth mother and her partner will be declared parents (assuming that the partner consented prior to conception).187 This presumption also applies in the case of known donors, though if the intention is that the donor is not to be a parent, this ought to be documented to ensure that a subsequent claim under s 9 cannot be made (though functional parental status may nevertheless give rise to *in loco parentis* status).

184 Adoption of the child by one or both parents is, therefore, not necessary.
185 *Fraess v Alberta*, *supra* note 136.
186 By reason of the *FL Act (Alberta)*, *supra* note 135, s 8.1(1).
187 *Ibid*, s 8.1(3) or 8.1(5).
In the case of surrogacy, same-sex couples are able to seek declarations of parentage so long as one of the partners provides HRM; the use of known donors is by no means prohibited but care should be taken in light of the parentage presumption that arises where both male and female HRM is provided by persons who intend to parent a resulting child.\textsuperscript{188} In the event that a surrogate refuses to accede to an application under s 8.2, an intending parent may apply for a declaration of parentage under s 9.\textsuperscript{189} If one considers how \textit{DWH v DJR} might have played out under the \textit{FL Act} (Alberta), it is clear that if Ms D had agreed to “relinquish” S and an application was made for a declaration that she was not a parent, both DJR and DWH would be considered S’s legal parents under the \textit{FL Act} (Alberta), and the dispute between the men would have rested solely on S’s best interests.

From a less positive perspective, the \textit{FL Act} (Alberta) in some ways perpetuates the legal circumstances that gave rise to the complexity of \textit{DWH v DJR}. By precluding the possibility of more than two legal parents, the presumption in s 8.1(2)(a) would seem to apply even in artificial insemination scenarios involving more than two adults; thus, if Ms D was not content to relinquish parentage, she would not be considered a surrogate and both she and DJR would be considered parents. The presumption of parentage in respect of spouses and partners in cases of surrogacy would not apply because, as biological parents, Ms D and DJR each “trump” the other’s respective partner. To the extent that this scenario reflects the parties’ intentions, it may not be adverse to a child’s interests. However, as \textit{DWH v DJR} clearly shows, splitting parentage between custodial

\textsuperscript{188} \textit{Ibid}, ss 8.1(4) and 8.2(3).

\textsuperscript{189} The statutory presumptions in s 8.1, even if interpreted in accordance with the best interests of the child, appear not to admit the possibility of voiding parentage in the surrogate if she has refused consent. Thus, a declaration of parentage under s 9 in favour of more than one intending parent would seem to be precluded.
and non-custodial parents can lead to protracted disputes and significant confusion.\textsuperscript{190}

The regime as it stands is also problematic in cases where parties have clearly entered into a surrogacy arrangement. The most immediate issues are interconnected: the non-enforceability of surrogacy agreements and the ability of surrogates to renge on agreements with intending parents and refuse consent to declarations of parentage. Such agreements are, by reason of s 8.2(8), unenforceable,\textsuperscript{191} and may not be used as evidence of consent.\textsuperscript{192} Extraordinarily, such refusal voids the parental status of the HRM donor\textsuperscript{193} unless that person successfully applies for a declaration of parentage under s 9.

Meanwhile, the partner of an intending parent is removed from the equation altogether, even if he or she was intimately involved in the planning of the child’s existence. This position is antithetical to the FL Act (Alberta)’s general emphasis on intention. It allows a surrogate to renge on her intention prior to conception and frustrate not only the intention of intending parents but also the very fact of another person’s parentage. While it is right that a surrogate is not denied a role in the life of a child to which she gave birth, the provisions in the FL Act (Alberta) tilt too far in this direction. A better solution would be to honour the parties’ intentions vis-à-vis parentage, but provide the surrogate with the opportunity of establishing rights to visitation and the development of a relationship with the child.

\textsuperscript{190} Admittedly, in any multi-parent situation, relationship breakdown is likely to be complex, but parentage declarations that reflect the parties’ intentions and their understandings of their respective roles in a child’s life are likely to focus attention on the critical issue of the child’s best interests, which will often involve maintaining established relationships with parents, instead of necessitating litigation to establish (and challenge) parentage.

\textsuperscript{191} FL Act (Alberta), supra note 135, s 8.2(8)(a).

\textsuperscript{192} Ibid, s 8.2(8)(b). Though a surrogacy agreement may be used as evidence of the consent of a partner or spouse: s 8.2(8)(c).

In a similar vein, and contrary to the position of the *Uniform Child Status Act*, s 8.2(12) precludes declarations of parentage in respect of more than two persons. This ignores the problematic nature of conception for gay and lesbian persons and the possibility of alternative family forms that go beyond a narrow, dyadic conception of parenthood. Lesbian couples that wish to co-parent with a sperm donor must, under Alberta’s law, choose between a parentage order in favour of the mother’s partner or the donor (let alone the possibility of a sperm donor and his partner also being parents of a child). Similarly, gay male couples that engage a surrogate do not have the option of providing a legal mother for their child, unless the non-donating intended father is, paradoxically, content not to be a legal father (subject, in any event, to the surrogate’s consent).

2. Ontario

Ontario’s *Children’s Law Reform Act* is significantly less prescriptive in respect of parentage than the detailed *FL Act* (Alberta). Section 1(1) of the *CLRA* states the basic presumption that “for all purposes of the law of Ontario a person is the child of his or her natural parents and his or her status as their child is independent of whether the child is born within or outside marriage”. Section 8(1) lists circumstances of presumed paternity that revolve around marriage, cohabitation, certification by a man of paternity, or judicial declarations of parentage. Any person “having an interest” can apply for a declaration of parentage. Insofar as ART is involved in a child’s conception, the *CLRA’s* presumptions operate to vest parentage in a birth mother and her male spouse or

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194 This prohibition was not included in British Columbia’s recent legislation concerning parentage in cases of ART: *FL Act (BC)*, *supra* note 157.

195 In contrast, arrangements of this nature are entirely possible, and enforceable, in British Columbia under the *FL Act (BC)*: *infra* Section II(B)(3).


197 *Ibid*, s 4(1). Section 5(1) provides that when no person is recognized as the father of a child under s 8, “any person may apply to the court for a declaration that a male person is his or her father, or any male person may apply to the court for a declaration that a person is his child”.
partner. In this respect, the CLRA reflects an outdated, hetero-centric vision of paternity and parentage. The status of lesbian and gay parents who use ART (and heterosexual couples in surrogacy situations) has been left to the courts.

Section 4 of the CLRA is relevant to judicial determinations of parentage. It provides:

1. Any person having an interest may apply to a court for a declaration that a male person is recognized in law to be the father of a child or that a female person is the mother of a child.

2. Where the court finds that a presumption of paternity exists under section 8 and unless it is established, on the balance of probabilities, that the presumed father is not the father of the child, the court shall make a declaratory order confirming that the paternity is recognized in law.

3. Where the court finds on the balance of probabilities that the relationship of mother and child has been established, the court may make a declaratory order to that effect.

In JR v LH, Kiteley J of the Ontario Superior Court made orders vesting parentage in the (opposite-sex) biological parents of a child born via surrogacy. While the case demonstrates that the presumed parentage of a surrogate birth mother is subject to alteration, the case concerned the most vanilla of fact scenarios: a heterosexual couple, each of whom provided genetic material, and a surrogate who consented to the transfer of parentage. A similar situation came before the courts in MD v LL, in which Nelson J considered whether the Vital Statistics Act, which arguably defines “mother” by reference to “birth”,

\[\text{JR v LH, [2002] OJ No 3998.}\]

\[\text{MD v LL, [2008] OJ No 907.}\]

\[\text{Vital Statistics Act, RSO 1990, c V4 [VS Act (On)].}\]
permits a court to declare that a surrogate is not a child’s mother. Justice Nelson was of the opinion that a declaration of non-parentage is “simply a clarification of status for the genetic parents, the surrogate mother and her spouse, vis a vis their respective relationships towards the child”; accordingly, it was appropriate to exercise the Court’s *parens patriae* jurisdiction to remedy the legislative gap under the *VS Act*(On).

In *D(KG) v P(CA)*, the Superior Court issued a parentage order in a surrogacy case concerning a single gay biological father. With the consent of the surrogate and her husband, O’Neill J, apparently under the Court’s *parens patriae* jurisdiction, issued a parentage order in favour of the biological father and ordered that the child’s birth registration be amended so as to refer to him as her only parent. Referring to both *Gill v Murray* and *Trociuk v British Columbia*

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202 The *VS Act*(On) defines birth as “the complete expulsion or extraction from its mother of a fetus”, which had the effect of deeming the surrogate to be the child’s mother.

203 *MD v LL*, supra note 200 at [55]. Justice Nelson also observed, in reliance on *AA v BB*, supra note 31, that “a declaration that one them [the surrogate and the genetic mother] is the child’s mother might not preclude the other from also being that child’s mother”: *MD v LL*, supra note 200 at [55]. In the earlier case of *Buist v Greaves*, [1997] OJ No 2646, the Ontario Court of Justice held that s 4(1) of the *CLRA*, supra note 196, does not permit a declaration of parentage in respect of more than one parent of the same sex.

204 *MD v LL*, supra note 200 at [61]-[68].

205 *D(KG) v P(CA)*, [2004] OJ No 3508.

206 Unfortunately the reasoning concerning the registration aspect of the case is somewhat unclear as the only reported decision deals with a subsequent costs application. The terms of the *VS Act*(On) do not permit registration of a single male parent. Registration by a birth mother alone is, however, possible pursuant to the exception in *Regulation 1094*, RRO 1990, r (3)(b).

207 The costs application (see above) sets out much of the relevant detail and notes that the applicant and the Deputy Registrar agreed that there was a legislative gap in the *VS Act*(On), supra note 201, which the Court had jurisdiction to fill under its *parens patriae* jurisdiction. The judgment does not, however, expressly state that the Court made its parentage and registration orders in the exercise of that jurisdiction. In respect of the costs application, O’Neill J awarded the applicant 50% of his costs in recognition of the fact that litigation had been required to remedy a legislative gap.

208 *Gill v Murray*, [2001] BCHRTD No 34.
(Attorney General), O’Neill J noted “the importance of birth registrations in general and the problems that might be encountered by persons who attempt to register a birth registration under a regime that has not kept up with reproductive technologies”.

Two years later, in *MDR v Ontario*, Rivard J found that provisions of the *VS Act* (On) that did not permit the inclusion of two parents of the same sex on a child’s birth registration (which provides presumptive, though rebuttable, evidence of parentage) infringed s 15 of the *Charter* and accordingly declared those provisions invalid. Strictly, the Court’s order in *MDR* is confined to situations of anonymous sperm donation. However, Rivard J did not state that inclusion of two women is not possible in cases of known donation; rather, in his view, such cases must be considered on their own facts. Relevantly, in the minimal impairment limb of his s 1 analysis, Rivard J opined:

> [O]nce one gets past the idea that an individual can only have two parents, then it is possible to reach the position of the Applicants, that the government does have alternatives that would be less impairing of the rights of lesbian co-parents but that would be consistent with maintaining a

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210 *MDR v Ontario*, [2006] OJ No 2268. See also *Gill v Murray*, *supra* note 208.

211 *VS Act* (On), *supra* note 201, s 46. See also *MDR*, *supra* note 210 at [38].

212 *MDR*, *supra* note 210 at [233]. In accordance with the (then) prevailing approach to s 15 analysis, the appropriate comparator group was held to be non-biological fathers whose spouses conceived via artificial insemination. Such men were able, under the Regulations, to be registered as a child’s parent on the Statement of Live Birth, whereas a lesbian partner of a biological mother was not able to take the same action, despite neither intending parent being biologically related to the child borne by their partner: at [113]-[114]. At the s 1 stage of the analysis, Rivard J found that the exclusion of lesbian co-parents from the *VS Act* (On) was not rationally connected to the aims of the legislation (in part, “to recognize social parentage when it furthers important social values”): at [251].

213 *Ibid* at [273]. The order was suspended for 12 months to allow the legislature to amend *Regulation 1094*, *supra* note 206.

214 *MDR*, *supra* note 210 at [110], [261].

215 *Ibid* at [255].
record of the biological particulars of parentage. There is no reason not to capture both sets of information.

Nevertheless, the legislative response to *MDR* was to grant the right to include a lesbian co-mother on a child’s birth registration only when “the father is unknown”.

In addition to excluding registration of lesbian partners in situations of known sperm donation, the regulations do not allow certification by one father alone, two fathers or more than two parents. This being said, *D(KG) v P(CA)* indicates that at least in cases where all parties consent, amendment of birth registration documents is possible in cases where a child’s sole parent is male (though such registration is not immediately possible upon birth) pursuant to an exercise of *parens patriae* jurisdiction. By parity of reasoning and in accordance with the *Charter* infringement found in *MDR*, two parents of the same sex ought to be able to apply to the courts for amendment of the register pursuant to *parens patriae* jurisdiction, where existing legal parents consent to the making of such orders. Similarly, *AA v BB*, discussed below, suggests that amendment may also be possible to reflect judicial findings of multi-parentage.

In *AA v BB*, the Court of Appeal dealt with the questions raised by multi-parentage in the context of same-sex relationships. The parties sought a declaration of parentage in favour of the female partner (AA) of a child’s biological birth mother (CC), without any extinguishment of CC’s parentage or that of his biological father (BB), who had been involved in raising the child since his birth. This situation arose because at the time of the child’s birth, Ontario did not permit two women to appear on a child’s birth certificate – the case

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216 *Regulation 1094, supra* note 206, rr 2.1 (definition of “other parent”) and 2.2.

217 Certification by the birth mother alone is possible if the father “is incapable or is unacknowledged by or unknown to the mother”: *ibid*, r 2(3)(b).

218 *AA v BB*, *supra* note 31.

219 *Ibid* at [13].

that established this right, *MDR*, was decided some three years after the child was born and, in any event, limited the right to situations of anonymous sperm donation. Furthermore, the parties wanted BB to be a legal and functional parent of the child. Adoption by AA was therefore not an option because it would have required the termination of BB’s parentage.221

At first instance, Aston J felt constrained by the wording of s 4(1) of the *CLRA* and refused to make the order sought by the applicants.222 Momentously, though, the Court of Appeal overruled the trial judge and held “[f]ive year old DD has three parents: his biological father and mother (BB and CC, respectively) and CC’s partner, the appellant AA.”223 The Court of Appeal agreed with the trial judge that s 4(1) of the *CLRA* did not admit the possibility of a child having more than one parent of the same sex.224 However, the Court proceeded to “bridge [this] legislative gap” on the basis that “[p]resent social conditions have changed”, “[a]dvances in reproductive technology require re-examination of the most basic questions of who is a biological mother”, and “[a]dvances in our appreciation of the value of other types of relationships and in the science of reproductive technology have created gaps in the CLRA’s legislative scheme”.225 It was accordingly necessary to “fill this deficiency” through the exercise of *parens patriae* jurisdiction.226 As a result, the law in Ontario now permits declarations of

221 *CLRA*, supra note 196, s 158(2); *AA v BB*, supra note 31 at [13].
222 *AA v BB*, supra note 31 at [18]. By way of brief additional background, BB provided sperm to CC and it was agreed between the parties that while the women would raise the child, BB would have an active role in the child’s upbringing. Consequently, adoption of DD by AA was undesirable because this would have terminated BB’s parental status by reason of s 158(2) of the *CFSA*: at [13].
223 *Ibid* at [1].
224 *Ibid* at [24].
225 *Ibid* at [33]-[35].
226 *Ibid* at [37]. The Court rejected the proposition that the *CLRA* was intended to exclude declarations of the type made on the basis that the legislation was enacted some thirty years prior to the case: at [37]. The absence of any legislative response to the finding within Ontario tends to support this view, as does the government’s position in *MDR*, supra note 210.
parentage in favour of two persons of the same sex and declarations of parentage in favor of more than two persons in respect of one child.\textsuperscript{227}

The importance of the findings in \textit{AA v BB} is made clear by the subsequent case of \textit{MAC v MK},\textsuperscript{228} which revolved around four parties: lesbian couple MAC and CAD, gay sperm donor MK, and the child B, who was born as a result of MAC’s artificial insemination with MK’s sperm. MAC and CAD wanted CAD to adopt B and sought to dispense with the requirement that MK consent to the termination of his parentage. At trial, the parties disputed the nature of their agreement, but it appears that MK agreed to donate sperm on the understanding that he would play an active role in the child’s life, although the women would be primary custodial parents and MK would have no financial obligations towards the child. A post-birth agreement between MAC, CAD and MK provided that “the parties express their intentions to be co-parents of the child, and to jointly apply for adoption to effect their intentions”; another clause, however, stated, “[i]f the court will not grant the adoption order without terminating [Mr MK’s] parental rights, then [Mr MK] will consent to same.”\textsuperscript{229}

Unsurprisingly, Cohen J refused to accede to the terms of the agreement, finding that it was not a domestic contract under the \textit{FL Act (On)} and was, in any event, subject to the child’s best interests.\textsuperscript{230} She also refused to make the order sought by MAC and CAD on the basis that MK was an important part of B’s life, and the acrimony between the parties meant that removing MK’s parentage would likely

\begin{flushleft}
\textsuperscript{227} As a judicial declaration, the Court’s order in \textit{AA v BB} is entitled to inter-provincial recognition in accordance with the unwritten principle of full faith and credit enunciated by the Supreme Court in \textit{De Savoye v Morguard Investments}, [1990] 3 SCR 1077 at [41].

\textsuperscript{228} \textit{MAC v MK}, supra note 33.

\textsuperscript{229} \textit{Ibid} at [50].

\textsuperscript{230} \textit{Ibid} at [45]-[46] referring to s 56(1) of the \textit{Family Law Act}, RSO 1990, c F3 [\textit{FL Act (On)}]. “In the determination of a matter respecting the education, moral training or custody of or access to a child, the court may disregard any provision of a domestic contract pertaining to the matter where, in the opinion of the court, to do so is in the best interests of the child.”
\end{flushleft}
result in substantially reduced contact between MK and B. 231 An interesting aspect of Justice Cohen’s reasoning on this point is her finding that the parties could also “jointly apply to the Superior Court for a declaration that B has two legal mothers and a father, as was done in the case of AA v BB”. 232 The record indicates that the parties initially considered this option but MAC and CAD ultimately refused to pursue it on the basis that such a declaration did not provide “sufficient protection” 233 against MK’s demands for increased access. 234 The women’s refusal to pursue this option led Cohen J to “question whether the situation is as urgent as they claim and whether the applicants’ [sic] [MAC and CAD] are motivated more by animus towards the respondent [MK] than by concern for Ms CAD’s status”. 235

Justice Cohen also adverted to the possibility of a three-party adoption of B by MAC, CAD and MK. 236 However, because there was no such application before the Court, the making of an order to this effect was precluded. Such an order would presumably need to be made pursuant to parens patriae jurisdiction given that s 146(4) of the CFSA stipulates that only an individual or two persons who are spouses may apply for an adoption order; similarly, the language of s 146(2), concerning family adoption, is resolutely singular. A further alternative that was not explored in the judgment and which is also arguably within the terms of the CFSA is an adoption order that does not terminate the rights of either existing parent. By parity of reasoning with the logic that underpins AA v BB, s 158(2)(b) of the CFSA can be read as permitting adoption of a child by the spouse of the

231 MAC v MK, supra note 33 at [63]-[64].
232 Ibid at [30]. The Court was also motivated by concern for the relationship between the father and the child, which would have been jeopardized by adoption.
233 Ibid at [32].
234 Ibid at [33].
235 Ibid.
236 A three-party adoption order was supported by the father but not the two women.
child’s parent without extinguishment not only of the spouse’s parental rights but also the parental rights of another legal parent.

MAC raises important questions about the proper role of known donors who play a role in a child’s life, particularly in the context of lesbian and gay parenting, as well as the extent to which courts should have regard to written statements of intention. In Fiona Kelly’s view:

[Th]e effect of the decision was the relegation of the non-biological mother (who had parented the child from birth) to the status of legal stranger, while the biologically related donor (who played a significantly smaller role in the child’s life) was elevated to the status of parent. Thus, while the intentions of the parties were given weight, the law’s prioritization of biology over social relationships meant that the decision’s effect on the two mothers, particularly the non-biological mother, was devastating.

It is certainly important that the law is not used as a means of inserting third parties into functional family units in an attempt to reify the opposite-sex parenting norm. However, MAC need not be read as effecting a relegation/elevation function vis-à-vis social and biological parents. Justice Cohen’s refusal to exclude MK from B’s life does not prioritize biology so much as it emphasizes the importance of maintaining existing relationships between children and parents, including non-custodial sperm donors, if such persons play a significant role in a child’s life, which MK clearly did. Read in this way, MAC does not denigrate women-led families so much as it affirms non-nuclear parenting arrangements, particularly queer kinship forms.

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237 Pursuant to s 146(2)(c) of the FL Act (On), supra note 230.
238 Where it would be in the best interests of the child to make such an order as provided by CFSA, supra note 5, s 136(2).
239 Kelly, supra note 220 at 261.
240 The reasoning suggests that if MK had not played an active role in B’s life, the result might have been that which the women sought. In this respect, the case can be seen as affirming the importance of social parenting by a biological parent.
241 Admittedly, Justice Cohen’s suggestion in MAC v MK, supra note 33 at [33] that “[m]arriage might also assist” MAC and CAD can be viewed as evincing a traditionalist preference for dyadic coupling, but the statement also needs to be understood as a
Justice Cohen responded to this tension in the case “by observing that, in determining B’s best interests, the issue for the court is not the protection of a specific family structure *ab initio*. This court sees all kinds of family structures and, absent specific statutory provisions otherwise, the nuclear family of two parents and child enjoys no special preference when the court is assessing the best interests of a child.”

Indeed, Cohen J was bolstered in her reasoning by the fact that MAC and CAD could have applied to the Court for a declaration of parentage in CAD’s favor, thereby giving B three legal parents, rather than seeking a second-parent adoption at the expense of MK’s parentage. Thus, while some may decry the result in *MAC* as an anachronistic affirmation of opposite-sex parentage, I would argue that the reverse is actually true: Cohen J affirmed the custodial role of MAC and went so far as to question why the parties had not applied for a parentage order in her favour to formalize the parenting triad. Indeed, Cohen J concluded her judgment by declaring that the case was “not about protecting nuclear families to reduce their anxieties. The same imperative that compels us to reconsider our definition of parent in the modern context has equally compelled us to reconsider the concept of the nuclear family.”

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242 *Ibid* at [36].

243 Arguably, a better solution in this type of situation would be the creation of a quasi-parental category for known donors to facilitate the transfer by consent of legal parentage from a known donor to a non-biological mother, without terminating the legal standing of a donor. See Kelly, *supra* note 216 at 262. To an extent, this type of arrangement is already possible under the *CLRA* because an access order can be made in favour of “any other person” if it is the child’s best interests to do so: s 21(1). A quasi-parental category would, however, enable parties to establish their intentions from the outset rather than applying to courts for responsive orders: see, for example, s 41 of the *Care of Children Act* (NZ) and discussion thereof in *Ibid*.

244 Kelly, *supra* note 220 at 261-62.
MAC is emblematic of the state of the law in Ontario concerning assisted reproduction: in the absence of a comprehensive statutory regime, the courts have been tasked with sorting through the rights and obligations of parties who challenge the law’s outdated assumptions. While it is certainly open to debate, I would argue that in the cases thus far, courts in Ontario have generally demonstrated sensitivity to the vagaries of ART and parenting by lesbians and gay men, often through the exercise of parens patriae jurisdiction to achieve results that the enacted law is too myopic to envisage. The legislature, on the other hand, has demonstrated indifference to these questions, amending the law only when it is required to do so, and even then going no further than the strict requirements imposed by courts.245

It is clear that Ontario permits (at least) the following: two legal parents of the same sex; three legal parents in cases of artificial insemination using the sperm of a known donor who maintains an active role in the child’s life; declarations of parentage in favor of an intended parent or intended parents in surrogacy situations where the surrogate consents to a declaration of her non-parentage; and registration of two women on a child’s Statement of Live Birth in cases of anonymous sperm donation. These are tremendously important developments. However, the situation for parties who do not fall within these categories remains tenuous and unclear. What, for instance, is the situation of parties in a tripartite arrangement involving a male same-sex couple and a single woman who is artificially inseminated with the sperm of one of the men? The cases suggest that parentage on the part of all parties would be granted, but this is subject to judicial interpretation and the potential for distinguishing of earlier authority. The situation of parties in a contested application arising out of a surrogacy arrangement is even less clear. Prima facie, the surrogate is the child’s mother and her (male) spouse or partner is presumed to be the child’s father. Intended parents can seek

245 See Regulation 1094, supra note 213; MDR, supra note 210.
a declaration of parentage in their favor under s 4 of the CLRA, but it is an open question as to whether any such application would be successful.

3. British Columbia

In stark contrast to Ontario’s patchy, under-inclusive legislation, British Columbia’s recently enacted *Family Law Act*\(^\text{246}\) provides detailed guidance concerning the parentage status of parties who engage in assisted reproduction. The *FL Act* (BC) presumes that the birth mother of a child conceived as a result of assisted reproduction is the child’s parent,\(^\text{247}\) “regardless of who provided the human reproductive material”.\(^\text{248}\) Except in cases of death, “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”, subject to proof of non-consent or withdrawal of consent.\(^\text{249}\) A donor “is not, by reason only of the donation, the child’s parent”,\(^\text{250}\) and donation alone is not a basis for a judicial declaration of parentage,\(^\text{251}\) which can only be made in accordance with Part 3 of the *FL Act* (BC)\(^\text{252}\) or the *Adoption Act*.\(^\text{253}\) These provisions clearly establish a legal presumption of parentage in favor of non-biological intended parents who are married to or in a marriage-like relationship with a birth mother. The provisions also clarify that a single woman who engages in assisted reproduction

\(^{246}\) *FL Act* (BC), *supra* note 157.

\(^{247}\) *Ibid*, s 27(2).

\(^{248}\) *Ibid*, s 27(1)(a).

\(^{249}\) *Ibid*, s 27(3).

\(^{250}\) *Ibid*, s 24(1)(a).

\(^{251}\) *Ibid*, s 24(1)(b).

\(^{252}\) *Ibid*, s 24(1)(c).

\(^{253}\) *Adoption Act* (BC), *supra* note 11, in accordance with *FL Act* (BC), *supra* note 157, s 25.
is presumed to be the child’s only parent, unless there is an agreement to the contrary, in which case s 30 of the FL Act (BC) (discussed below) applies.254

Section 29 applies in situations where there is a written agreement between a potential surrogate and an intended parent or intended parents255 and:

the agreement provides that the potential surrogate will be the birth mother of a child conceived through assisted reproduction and that, on the child's birth,
(i) the surrogate will not be a parent of the child,
(ii) the surrogate will surrender the child to the intended parent or intended parents, and
(iii) the intended parent or intended parents will be the child's parent or parents.

An intended parent of a child born pursuant to a valid agreement “is the child’s parent” so long as no party withdrew from the agreement prior to conception, and after the birth, the surrogate gives written consent to surrender the child to the intended parent(s), who take the child into his, her or their custody and care. Crucially, this means that intended parents in BC do not need to obtain a judicial declaration of parentage if the requirements of s 29 are met. Pre-birth parentage orders are no longer possible, as they were under the regime established in

254 These provisions are complemented by s 3(1.1) of the Vital Statistics Act, RSBC 1996, c 479 [VS Act (BC)], which provides that in cases of assisted reproduction, “the parents of the child” or, “if the child has one parent only … the parent of the child” must submit a report of birth.

255 Section 20(1) of the FL Act (BC), supra note 157, provides that “'intended parent or ‘intended parents' means a person who intends, or 2 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 an agreement with another person before the child is conceived that
(a) the other person will be the birth mother of a child conceived through assisted reproduction, and
(b) the person, or the 2 persons, will be the child's parent or parents on the child's birth, regardless of whether that person's or those persons' human reproductive material was used in the child's conception.
Rypkema v British Columbia,\textsuperscript{256} but consent can be given on the day of birth such that the intended parents’ names appear on the birth certificate.\textsuperscript{257}

One area that the \textit{FL Act} (BC) does not entirely resolve is parentage in a situation where a surrogate does not provide post-birth consent to surrender the child. Section 29(6) states that the agreement is not to be construed as providing consent “but may be used as evidence of the parties’ intentions with respect to the child’s parentage if a dispute arises”.\textsuperscript{258} Thus, in a situation where a surrogate changes her mind, the intended parent(s) can apply to the court for parentage orders pursuant to s 31 of the \textit{FL Act} (BC). There is no reported decision in British Columbia that deals with a contested parentage application arising out of surrogacy;\textsuperscript{259} in any event, the application of a decision made prior to the new regime would be debatable. While s 29 does not speak to multi-parentage involving intended parents and a surrogate (indeed, it appears to envisage a maximum of two intended parents\textsuperscript{260}), s 31(3) provides that orders declaring parentage are, to the extent possible, required to give effect to the rules respecting the determination of parentage in Part 3 of the Act. Accordingly, multiparentage orders might be possible in contested surrogacy cases because of the statutory warrant for multi-parentage in s 30 of the Act, although that section requires the making of an agreement that specifically envisages multi-parentage. This being said, for the reasons explored in Part 1, a preferable approach may be to uphold the parties’ pre-conception intentions but grant the surrogate enforceable rights to visitation with the child.\textsuperscript{261}  

\textsuperscript{256} Rypkema v British Columbia, [2003] BCJ No 2721.  
\textsuperscript{258} FL Act (BC), supra note 157, s 29(6).  
\textsuperscript{259} Busby, supra note 257 at 296-97.  
\textsuperscript{260} By reason of the fact that s 29 only contemplates an agreement between “a potential surrogate and an intended parent or the intended parents”, who are in turn defined in s 20(1) by reference to one or two persons.  
\textsuperscript{261} See Part 1, Section III(B)(3).
Section 30 controls situations outside of the surrogacy context in which a written agreement between parties is made prior to conception by assisted reproduction. It clearly enables a child to have more than two legal parents in two situations:\textsuperscript{262}

(i) The first situation, provided for by s 30(1)(b)(i), is where there is an agreement between “an intended parent or the intended parents and a potential birth mother who agrees to be a parent together with the intended parent or intended parents”. The definition of “intended parents” appears to limit the number of parents in this scenario to three,\textsuperscript{263} irrespective of whether the intended parents provide HRM. Where there is only one intended parent, that person and the birth will be the parents. Donors who are not party to an agreement are not parents.\textsuperscript{264}

(ii) The second situation, provided for by s 30(1)(b)(ii), involves “the potential birth mother, a person who is married to or in a marriage-like relationship with the potential birth mother, and a donor who agrees to be a parent together with the potential birth mother and a person married to or in a marriage-like relationship with the potential birth mother”. By reason of the definition of “birth mother” (“the person who gives birth to, or is delivered of, a child, regardless of whether her human reproductive material was used in the child’s conception”), and the principle that unless otherwise stated, a singular term includes the plural,\textsuperscript{265} it would seem that the reference to “donor” includes both egg and sperm donors, meaning that a child born pursuant to an agreement made under s 30(1)(b)(ii) can have up to four legal parents. Of course, an agreement under this provision may

\textsuperscript{262} In each case, the agreement must provide that the potential birth mother will be the birth mother if a child conceived through assisted reproduction, and on the child’s birth, the parties to the agreement will the child’s parents: \textit{FL Act} (BC), \textit{supra} note 157, s 30(1)(c).

\textsuperscript{263} Cf \textit{barbara findlay} & \textit{Zara Suleman}, \textit{Baby Steps: Assisted Reproductive Technology and the BC Family Law Act}, Paper 6.1 (Continuing Legal Education Society of British Columbia, 2013) (arguing that under s 30(1)(b)(i), “there is no limit to the number of intended parents who may also become parents of the child”: at 6.1.34).

\textsuperscript{264} \textit{FL Act} (BC), \textit{supra} note 157, s 24(1).

\textsuperscript{265} \textit{Interpretation Act}, RSBC 1996, c 238, s 28(3).
only result in two parents if the birth mother is not married or in a marriage-like relationship, and only one donor is a party to the agreement (whether or not there is more than one donor of HRM).

In any of the above situations, parties to a valid agreement “will be the parents of the child” upon his or her birth.\textsuperscript{266} Accordingly, judicial orders are not necessary to establish legal multi-parentage.\textsuperscript{267} However, a judicial order may be desirable in the event that parties intend to establish residence in another Province, since judgments of sister Provinces are entitled to recognition,\textsuperscript{268} whereas the enforceability of parentage by operation of law is less certain in places such as Alberta, with its prohibition on declarations of parentage in respect of more than two adults.\textsuperscript{269}

The new laws in British Columbia are a significant endorsement not only of the principle of intentionality, but also the rich variety of family structures that arise in queer and non-normative communities. The \textit{FL Act} (BC) envisages legal parentage on the part of same-sex couples that engage in ART, including surrogacy; it also provides for multi-parentage on the part of diverse groupings (for example: lesbian birth mother and heterosexual donors; gay fathers and lesbian birth mother; straight birth mother, her male partner, and gay and lesbian HRM donors). Furthermore, while the \textit{FL Act} (BC) is prescriptive in its detail, it is also noticeably non-interventionist in situations where the parties comply with its provisions. While it would be preferable, in my view, for the position of intended parents to be given greater weight in contested surrogacy cases, Part 3 as a

\begin{footnotes}
\footnote{FL Act (BC), \textit{supra} note 157, s 30(2). If a party withdraws or dies prior to conception, the agreement is revoked: s 30(3).}
\footnote{Obtaining a birth certificate that reflects this reality is, so far, proving to be more complicated due to administrative unpreparedness: Catherine Rolfsen, “Della Wolf is BC’s 1st child with 3 parents on birth certificate”, CBC News (6 February 2014).}
\footnote{De Savoye v Morguard Investments, \textit{supra} note 227 at [41].}
\footnote{FL Act (BC), \textit{supra} note 157, s 8(12).}
\end{footnotes}
whole suggests that a flexible approach is to be taken in the event that a dispute of this sort arises.

C. International Assisted Reproduction Involving Canadian Residents

There is no question that Canadian residents engage in international surrogacy, and purchase gametes from outside of Canada, though precise numbers are unavailable. While the AHRA prohibits payment to surrogates and “the purchase of sperm or ova from a donor or a person acting on behalf of a donor”, it does not operate extra-territorially; and Canadian criminal law does not prohibit entry into (commercial or altruistic) surrogacy arrangements, or the purchase of gametes, outside of Canada. Indeed, the Government has recognized the reality of cross-border family formation by issuing guidelines for assessing parentage for citizenship purposes, and making regulations that

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271 Nelson, supra note 122.
deal with importation of sperm and ova.\textsuperscript{275} This section is ostensibly concerned with the intersection between international surrogacy and citizenship; I note in passing, though, that it is difficult to ascertain the logic underpinning a ban on the domestic purchase of gametes while regulations permit their importation.

The relevant premise in matters of citizenship and immigration is this: a child born overseas is a Canadian citizen at birth if, at the time of birth, at least one parent of the child was a Canadian citizen through birth or naturalization.\textsuperscript{276} The government’s stated position is that “parent”, for the purposes of the \textit{Citizenship Act}, refers only to genetic parents.\textsuperscript{277} A recent judgment of the Federal Court of Appeal, \textit{Canada (Minister of Citizenship and Immigration) v Kandola},\textsuperscript{278} affirms the Government’s position.

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\textsuperscript{275} Semen Regulations, \textit{supra} note 117.
\textsuperscript{276} \textit{Citizenship Act}, \textit{supra} note 83, s 3(1)(b). Procedurally, the parents of a child born overseas via ART must apply for citizenship for the child through the consulate in the relevant jurisdiction. In cases of surrogacy, Citizenship and Immigration Canada requires the child’s birth certificate, proof of payment of hospital bills, and the contractual agreements with the laboratory and the surrogate. DNA testing may also be required. If a decision concerning the application has been made, it is possible to obtain a Canadian passport for the child prior to receipt of the certificate of citizenship. See Canada, \textit{Surrogacy}, online at: <http://www.canadainternational.gc.ca/india-inde/consular_services_consulaires/surrogacy_maternite_de_substitution.aspx>. Awareness of the laws of the relevant sister state is also critical. For example, India does not recognize a child born via surrogacy in India as an Indian citizen. Accordingly, in the absence of a genetic link to an intending parent, the child is stateless until such time as citizenship or residence is granted. See \textit{Yamada v Union of India}, (2008) 11 SC 150.

\textsuperscript{277} Prior to the publication of \textit{Operational Bulletin 381, supra} note 274, a Canadian couple reportedly left twins in India after it was discovered that a medical mistake meant they were not genetically related to the children and therefore the children were ineligible for citizenship or residency in Canada. It is not clear why the couple did not pursue international adoption of the children. See Westhead, \textit{supra} note 270. A similar situation arose for another Canadian couple in 2006, when a laboratory mistake meant that only one twin created using donor eggs and the intending father’s sperm was genetically related to the man. The couple spent the next five years negotiating with Canadian and Indian immigration authorities to bring the non-genetically related child back to Canada along with his sister. It is not clear upon what basis the government allowed the child to enter Canada: Raveena Aulakh, “Couple fights federal surrogacy policy to bring their boy back to Canada”, \textit{The Toronto Star} (20 August 2011).

\textsuperscript{278} \textit{Canada (Minister of Citizenship and Immigration) v Kandola}, [2014] FCA 85 [\textit{Kandola (FCA)}].
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At first instance in the *Kandola* litigation,\(^{279}\) the Federal Court rejected the government’s restrictive interpretation of “parent”, finding that for the purposes of s 3(b) of the *Citizenship Act*, “parent” includes “the lawfully recognized parents of a legitimised child in accordance with the laws of the place where the legitimation took place”.\(^ {280}\) Thus, the applicant, who was born in India via IVF using donated sperm and ova, was entitled to derivative Canadian citizenship because her legal guardian was a Canadian citizen and she was his legitimised child under Indian law.\(^ {281}\)

In the Court of Appeal, Noël J (with whom Webb JA agreed) overturned the lower court’s finding that the respondent child was entitled to citizenship as a legitimised child of her legal guardian and gestational mother.\(^ {282}\) This left the question of whether the term “parent” requires a genetic linkage for the purposes of the *Citizenship Act*. By reference to the French version of the Act, the Court held that “the only type of connection which can confer derivative citizenship is a genetic/gestational one”, meaning that the respondent’s legal guardian was not a “parent” for the purposes of s 3(1)(b) and she was therefore not entitled to derivative citizenship.\(^ {283}\) Justice Mainville dissented on the basis that the French text as enacted was no different to the English text; accordingly, based on a textual,\(^ {284}\) contextual,\(^ {285}\) and purposive\(^ {286}\) analysis of s 3(1)(b), he found that

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\(^{279}\) *Kandola v Canada (Citizenship and Immigration)*, [2013] FC 336 [*Kandola (FC)*].

\(^{280}\) *Ibid* at [41].

\(^{281}\) *Ibid* at [35], [41]-[42]. The guardian’s wife, the birth mother of the child, was an Indian citizen: *ibid* at [3]. See also *Kandola (FCA)*, supra note 278 at [6]-[7].

\(^{282}\) *Kandola (FCA)*, supra note 278 at [53]-[55]. The Minister also unsuccessfully appealed the standard of review adopted by the judge at first instance: *ibid* at [20], [29]-[45].

\(^{283}\) *Ibid* at [67]. The Court flagged the possibility of an equality issue if it were found that women can only be considered a “parent” under the Act if she gives birth to a child: *ibid* at [72]-[75].

\(^{284}\) The express exclusion of adoptive parents from the ambit of s 3(1)(b) was said to support an inference that Parliament “intended to refer to a legally recognized parent”: *ibid* at [100].
the term ‘parent’ is used therein in its legal sense rather than in its biological or genetic sense”. Justice Mainville also suggested that denying citizenship to children such as the respondent might infringe s 15(1) of the Charter, in light of the British Columbia Court of Appeal’s finding in Pratten v British Columbia that manner of conception is an analogous ground.

The approach taken by the Court of Appeal in Kandola is unfortunate for a number of reasons. Practically, it means that in cases where legitimation occurs in the state of birth, a child who has no genetic link to his or her Canadian parent(s) is likely to be placed in legal limbo: citizenship in the state of birth may not be available in the absence of a genetic link with a citizen (for example, India); and international adoption may be unavailable in the state of birth because it is not possible to adopt one’s own child. In addition, the definition of “dependant child” in the Immigration Regulations does not extend to situations in which neither parent has a genetic or gestational connection to the child.

In 1977, when the Citizenship Act, supra note 83 was enacted, “the legal notion of parent was well understood as including a man who was legally presumed to be the child’s biological father even though he may not have necessarily had, in fact, a genetic connection to the child”: Kandola (FCA), supra note 278 at [103], [108]-[110].

“One of the purposes for introducing paragraph 3(1)(b) through the 1977 Act was clearly to expand the ambit of derivative citizenship so as to recognize derivative Canadian citizenship for a child born to a Canadian parent outside wedlock.” Ibid at [114]. Further amendments had the purpose of “treat[ing] all children of Canadian citizens substantially equally, irrespective of the circumstances of their birth”: Ibid at [119].

Ibid at [96].

Pratten, supra note 1.

Kandola (FCA), supra note 278 at [120]. Justice Mainville also adverted at [122] to the decision of the Federal Court of Australia in H v Minister for Immigration and Citizenship, [2010] FCA 119, in which the term “parent” was given its legal meaning in a case that concerned a provision similar to s 3(1)(b) of the Citizenship Act, supra note 83.

See Citizenship and Immigration Canada, OP 2: Processing Members of the Family Class at [5.14], 16-17.

“Biological child” in R2(a)(i) also includes a child who:

(a) is not genetically related to the parent making the application;
meaning that family class permanent residence may not be possible.\textsuperscript{291} This being said, if a child is born outside of Canada to intending parents who do not have a genetic or gestational link to the child, and the state of birth does not legitimate the relationship between the child and his or her intending parents, international adoption ought to be possible (though this may in turn be subject to prohibitions on adoption by same-sex parents).

At the level of principle, it is unfortunate that the Court applied an outdated notion of parentage that does not reflect the legal understanding of the term or the emerging reality of international assisted reproduction. Given that the legislature has seen fit to allow foreign adopted children to obtain Canadian citizenship, denying children born via international surrogacy the same privilege is, in the

\begin{itemize}
\item[(b)] was born through the application of assisted human reproductive technologies; and
\item[(c)] was born to the parent making the application or to the person who, at the time of the birth of the child, was that parent’s spouse, common-law partner or conjugal partner.
\end{itemize}

Thus, “the female spouse or partner must have given birth to the child”: ibid. Contra Khosa v Canada (Citizenship v Immigration), [2010] IADD No 2203 (finding that a child who was born to a Canadian citizen in India was a “dependent child” for the purposes of the Citizenship Regulations, supra note 87, despite having no genetic linkage to either parent).

\textsuperscript{291} See, e.g., Tian v Canada (Citizenship and Immigration), [2011] IADD No 1065. That case dealt with an application by the non-genetically related mother of a child born via surrogacy in China. The mother was a permanent resident of Canada. Her application to sponsor the child was rejected on the basis that she was not biologically related to the boy. On appeal to the Immigration Appeal Division, she argued that the definition of dependant child contravened s 15(1) of the Charter because it excluded classes of children born through surrogacy. Member Cochran displayed a stunning lack of insight into the matter before him by rejecting this claim out of hand on the basis that a genetically unrelated parent could adopt a child born via surrogacy. This, of course, is not possible when the parent is already recognized as being a parent in the country of birth. In the Member’s view, the appellant ought to have brought an application for a declaration of parentage in Canada, which would have brought the child within the meaning of “dependant child”. Subsequent litigation has shown the appellant Li Ping Tian in unfavourable light, with indications that she deceived the donor whose sperm was used to create the child: see Tian v Ren, [2013] BCJ No 578. See further Kandola (FC), supra note 279 at [8], observing that the visa officer who rejected the applicant’s application did not even suggest family class permanent residence as an option, suggesting instead humanitarian and compassionate grounds or a discretionary grant of citizenship.
words of Richard Storrow, “a particularly draconian and disproportionate response to the problems that a country fears may arise from the violation of its surrogacy proscriptions abroad”. Even if one accepts the rationale underpinning domestic bans on commercial surrogacy, denying citizenship to the children of Canadian citizens solely because of the choices made by their parents is manifestly contrary to the development of children’s capabilities and autonomy.

Conclusion

Mr White was driven, as a result of his argument, to contend that it would not be adultery for a woman living with her husband to produce by artificial insemination a child of which some man other than her husband was the father! A monstrous conclusion surely. If such a thing has never before been declared to be adultery, then, on grounds of public policy, the Court should now declare it so.

– Orford v Orford (Ontario Supreme Court, 1921)

[H]aving rejected the argument that a child's parents at birth must be her biological parents, it becomes necessary to re-define who can be a parent ... I can think of the following ways of conceptualizing who those parents might be:

1. biological parents
2. individuals who have an intent to parent at the time of birth (and possibly who evidence such an intent)

Storrow, supra note 272 at 543.

In the case of foreign residents who engage in surrogacy within Canada, provincial law applies (assuming that the arrangement also complies with the AHRA, supra note 109) equally to resident and non-resident intending parents. Thus, depending on the province in which a child is born, parents will need to rely on statutory presumptions and declarations of parentage. From a migration perspective, s 3(a) of the Citizenship Act, supra note 83 confers citizenship on any person who is born in Canada, meaning that foreign residents are able to obtain travel documents for their child. (Only one parent (or custodial parent or legal guardian) needs to apply for a child’s passport, subject to requirements in the event of divorce or separation and court orders concerning access by the non-custodial parent: Canadian Passport Order, SI/81-86, cl 7.

Orford, supra note 133 at [29].

Orford, supra note 133 at [29].
3. individuals who have an intent to parent prior to conception - i.e., who use artificial reproduction
4. individuals in a spousal or other relationship of permanence with a biological parent
5. the parent acknowledged by a birth parent
6. some combination of the above

– MDR v Ontario (Ontario Superior Court, 2006)\textsuperscript{295}

Canadian law concerning assisted reproduction has developed considerably since Justice Orde’s expostulation in Orford v Orford. It is now far from “monstrous” for a woman to engage in artificial insemination while living with her husband – or wife, or same-sex partner, or alone. Nevertheless, the law pertaining to relationships between gay parents and children remains imbued with moral judgment. At the federal level, the AHRA severely limits access to assisted reproduction; in so doing, it disproportionately affects the parenting capacities and relational autonomy of gay and lesbian individuals and queer families. To the extent that queer Canadians are able to access ART, provincial laws respond with varying degrees of sensitivity.

Alberta’s provisions significantly clarify the legal position of parties involved in assisted reproduction, and affirm the rights and obligations of same-sex partners, but the provisions as a whole continue to reflect a distinctly nuclear, dyadic conception of parenting and family structuring that fails to accommodate the “promise of alternative family forms”\textsuperscript{296} and the rich diversity of queer relational structures. In Ontario, the protections afforded to gay parents are fragmented and unstable. The relevant statutes reflect a vision of parenting that harks back to the earliest days of assisted reproduction, when artificial insemination itself was not considered “monstrous”,\textsuperscript{297} but the notion of lesbians and gay men

\textsuperscript{295} MDR, supra note 210 at [262].
\textsuperscript{296} Mykitiuk, supra note 140 at 772.
\textsuperscript{297} Orford, supra note 133 at [29].
accessing such technologies of the self and the other was not even on the legislative radar. This situation is disrespectful of the affiliative parenting capacity of lesbians and gay men; it constitutes a significant denial of relational autonomy because parents are forced to seek the imprimatur of the judiciary to establish legal relationships with children; and it subordinates “new relational possibilities” to a model of family life that revolves around nuclear, opposite-sex norms. In contrast, the laws in British Columbia are unquestionably the most progressive in Canada: they evince respect for the affiliative and rational-emotional capabilities of lesbians and gay men, and the reasoned decisions that are involved in assisted reproduction and which instantiate autonomy in a relational sense; they also reject and dismantle hierarchies based on gender preference and traditionalist notions of nuclear parenting and childhood development.

In matters of adoption, Canada’s legal system is formally indifferent to sexual preference. In one sense, this is entirely appropriate because equal access to the adoption system recognizes the parenting capacity of lesbians and gay men (and the evidence attesting to this capacity) and evinces proper respect for affiliative choice and non-traditional family structures. However, research into the actual experiences of lesbians and gay men with the Canadian adoption system indicates that substantive equality has not yet been achieved. It appears that at least some people involved in the adoption system are not yet comfortable with queer parenting, or at least those persons who transgress the acceptable face of diversity, and exercise discretionary powers to stymie the efforts of gay and lesbian prospective parents, all the while remaining within the formal letter of the law. In addition, the hierarchies within the adoption system suggest not only the existence of lingering heteronormativity but also an emerging form of homonormativity based around the construction of good, worthy homosexuals. Furthermore, while the legal system accommodates same-sex couples that wish to adopt, the possibility of a third (or fourth) parent adoption remains little more than a legal possibility. Such narrowness is itself subtly coercive and normalizing, and fails to recognize the variety of relational structures within the queer community. Accordingly, it appears that there is further work to be done in
Canada not only to counter the narrative that children perform “better” in opposite-sex households, but also the terms of gay and lesbian legitimation and the homogenizing of queer existence that is seen in the preference for white, middle-class, married homosexuals as adoptive parents.

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CONCLUSION

Roughly a century after the date said by Foucault to mark the emergence of the “homosexual … [as] a species”,¹ Dennis Altman wrote, “[t]he homosexual represents the most clear-cut rejection of the nuclear family that exists, and hence is persecuted because of the need to maintain the hegemony of that concept.”² Another ten years on, Kath Weston observed how lesbians and gay men were establishing families composed of lovers, partners and friends in opposition to “the prevalent assumption that claiming a lesbian or gay identity must mean leaving blood relatives behind and foregoing any possibility of establishing a family of one’s own”.³ By the 1980s, gay families had consciously emerged, ostensibly defined by their non-procreativity and in opposition to “straight families”.

Fast-forwarding to 2013, the American Sociological Association in its amicus brief to the US Supreme Court in the Perry and Windsor cases was able to say that “[t]he clear and consistent consensus in the social science profession is that across a wide range of indicators, children fare just as well when they are raised by same-sex parents when compared to children raised by opposite-sex parents.”⁴ In 2014, a district court judge in Utah opined:

¹ Michel Foucault, The History of Sexuality, Volume I (New York: Vintage, 1990) at 43. Foucault argued that “the psychological, psychiatric, medical category of homosexuality was constituted from the moment it was characterized – Westphal’s famous article of 1870 on ‘contrary sexual relations’ can stand as its date of birth – less by a type of sexual relations than by a certain quality of sexual sensibility, a certain way of inverting the masculine and the feminine in oneself. Homosexuality appeared as one of the forms of sexuality when it was transposed from the practice of sodomy onto a kind of interior androgyny, a hermaphrodisism of the soul”: ibid (footnote omitted; the reference is to Carl Westphal, Archiv fur Neurologie, 1870).

² Dennis Altman, Coming Out in the Seventies (London: Wild & Woolley, 1979) at 47.

³ Kath Weston, Families We Choose (New York: Columbia University Press, 1991) at 196.

It defies reason to conclude that allowing same-sex couples to marry will diminish the example that married opposite-sex couples set for their unmarried counterparts. Both opposite-sex and same-sex couples model the formation of committed, exclusive relationships, and both establish families based on mutual love and support.\(^5\)

Expanding on Weston’s narrative of queer kinship, we have seen not only a “shift from the identification of gayness with the renunciation of kinship (no family) to a correspondence between gay identity and a particular type of family (families we choose)”,\(^6\) but a shift from families we choose defined in opposition to procreation, parenting and equal forms of relationship recognition, to gay families constituted (in part) by married same-sex partners with biological and/or adopted children.

Unquestionably, the path from Altman’s observation and Weston’s study to the striking down of DOMA and the sight of some 1300 same-sex couples marrying in Utah has been beset by tragedy and venomous homophobia. In the United States, fear over the threat to so-called “traditional” marriage engendered DOMA and its vicious progeny; courts and legislatures throughout the country restricted the ability of lesbians and gay men to become and remain (legal or functional) parents; and sodomy remained a criminal act in parts of the United States until 2003. While Canada, in comparison, has evinced greater tolerance of alternative sexualities and gay families, its path to formal equality encountered significant resistance to same-sex marriage and queer parenting.

Yet change has happened. The past three decades have seen a shift from what Martha Nussbaum has called a politics of disgust, towards a politics of humanity.\(^7\) The closet is not quite the “shaping presence” it was three or even

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\(^6\) Weston, supra note 3 at 212.

two decades ago.\(^8\) Gay and lesbian relationships have, to varying degrees, come to be recognized as being worthy of the same respect and dignity as opposite-sex relationships: same-sex marriage has been possible throughout Canada for nearly ten years, and it appears to be moving inexorably towards recognition throughout the United States. The opposition detected by Weston between “chosen families” and “straight families”, in which the former is defined by its non-procreative nature and the latter is assumed to be procreative, is dissolving.\(^9\) The parenting capacity of lesbians and gay men is increasingly acknowledged, and gay relationships no longer “stand entirely outside a procreative framework”,\(^10\) though pockets of virulent resistance remain. Gay parents are no longer at risk of adverse custody determinations based on their sexuality alone; individual adoption is formally permitted throughout the United States and Canada, and only a few American States expressly prohibit joint adoption by same-sex couples. Assisted reproduction is a legal possibility for prospective queer parents, albeit one with significant constraints not formally related to sexuality (at least domestically).

At the same time, it must be recognized that these developments are an incomplete response to the law’s history of persecuting and occluding alternative modes of sexual and relational being. The analysis in this paper suggests that the field of relations for lesbians and gay men has followed the example of opposite-sex coupling and become, to varying degrees, “circumscribed in such a way that sexuality is already thought in terms of marriage and marriage is already

\(^8\) See Eve Kosofsky Sedgwick, \textit{Epistemology of the Closet} (Berkeley: University of California Press, 1990) at 68. I certainly do not mean to suggest that many lesbians and gay men, particularly young men and women, do not continue to feel the paralyzing fear of homophobia and its cousin, self-loathing. However, public “acceptance” of same-sex attraction and corresponding identity categories has increased dramatically since, for instance, 1991, when \textit{Epistemology of the Closet} was published.

\(^9\) Weston, \textit{supra} note 3 at 35; see also at 108.

thought as the purchase on legitimacy”.\textsuperscript{11} We are increasingly becoming “people for whom domestic, economically interdependent, long-term, coupled and monogamous intimacy is the paradigm of adult intimacy itself”.\textsuperscript{12} This focus is at least partly responsible for the ongoing dearth of alternative forms of legal relationship recognition, and the tendency for those alternatives to mirror or be subsumed by marriage, once that privilege is bestowed. Systems of relationship recognition that orbit the marital form fail to respect the differing capabilities, relational needs and choices of not only lesbians and gay men in intimate relationships but also the families of choice characterized by affective, but not sexual, intimacy. This position does not amount to a denigration of lesbians and gay men who “aspire to occupy the same status and dignity as that of a man and a woman in lawful marriage”;\textsuperscript{13} rather, it stresses that a prioritization of marriage is itself disrespectful of human capacity and relational autonomy because of the coercive nature of the “choice” that is presented.

The politics of humanity and recognition of the capabilities of lesbians, gay men and their children means that queer parenting is generally no longer considered oxymoronic and tantamount to child abuse. But the law has by no means responded in a fulsome manner. Protections for non-biological parents have developed, but too often by reference to the relationship between parents. The situation remains troubling for non-biological mothers in situations involving known sperm donors. There is a trend towards clarifying the parentage of children born via assisted reproduction, but there is also considerable uncertainty about the status of assisted reproduction agreements in large parts of North America: the regulations that do exist diverge sharply regarding enforceability and the rights of surrogates. The recently enacted laws in California and British

\begin{itemize}
  \item \textit{United States v Windsor}, 133 S Ct 2675 at 2689 (2013).
\end{itemize}
Columbia evince the greatest respect for the capabilities, autonomy and diversity of queer families, but they also fall short at the level of enforcement: California tips the scales too far in favor of commissioning parents; while British Columbia does not go quite far enough in this direction.

In the US and to a lesser extent Canada, the path to parenthood is also distinctly stratified: assisted reproduction (particularly surrogacy) and private adoption are increasingly the preserve of the affluent, with queers of lower socioeconomic status forming a new cadre of prospective foster parents who are told to expect little more than the children who have already been rejected by others. International adoption and surrogacy would be subject to the same critique, if the backlash against gay rights in significant parts of the non-Western world had not rendered these modes of family formation virtually impossible for lesbians and gay men. Less overt forms of discrimination are also evident within Canada and the US, even in jurisdictions that mandate formal equality. Prospective adoptive parents remain subject to cultural preferences for opposite-sex parenting, or gay couples that approximate the heterosexual ideal. Bans on surrogacy, both in toto and commercially, indirectly impact gay men (and women of lower economic status) to a disproportionate extent; and bans on payment for gametes affect both lesbians and gay men.

The law in North America also remains generally enamoured with the two-parent model, which has a disproportionate impact on queer family formation for biological and cultural reasons. British Columbia is at the vanguard of deconstructing this dyadic preoccupation, and by extension the link between parentage and biology, by recognizing the possibility of three or more legal parents from the time of a child’s birth. California and Ontario have also taken important steps in this direction, but recognition is still focused on protecting existing relationships, rather than recognizing that a child’s best interests (and those of his or her parents) might best be served by declaring parentage in more than two adults from the time of birth. A small number of other States in the US
permit third parentage in limited circumstances, but the vast majority of American States and Canadian Provinces are resolutely dyadic concerning parentage.

Accordingly, pace Andrew Sullivan, gay and lesbian activism should not simply pack up and revel in “acceptance”.\(^\text{14}\) The law concerning gay families in North America is fragmented and in many places unstable. With the apparent inevitability of same-sex marriage throughout the United States, and its existence in Canada, attention must shift from equal marriage rights to achieving a thicker form of equality that transcends the “false bouquet” of formal, liberal rights.\(^\text{15}\) Awareness of the terms upon which forms of equality have been and will continue to be granted is crucial. At a practical level, de-coupling marriage and socioeconomic benefits is one aspect of a post-marriage equality project. Another is renewing the emphasis on legal recognition and protection for the “families we choose” that do not involve conjugality or blood relations. Protection for non-biological parents has been a critical focus since the 1970s, and advocates such as Nancy Polikoff have made tremendous progress; it must be recognized, though, that the project is not complete. Restrictions on assisted reproduction also require reconsideration, particularly in Canada. Developments in parts of North America suggest that multi-parentage will be an important next-step in the ongoing gay parenting revolution; this process is to be encouraged along the lines of the framework in British Columbia.

The law has taken extraordinary steps since the emergence of the discourse on gay families. There are, however, extraordinary steps still to be taken.


\(^{15}\) Brown & Halley, supra note 12 at 6.
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