

COMMENTARY

MOVING BEYOND THE BEDROOMS OF OUR NATION: REDEFINING CANADIAN FAMILIES FROM THE PERSPECTIVE OF NON-CONJUGAL CAREGIVING

By **Jamie R. Wood***

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Good evening, Canada. Tonight's guest is Jamie Wood, author of Moving Beyond the Bedrooms of Our Nation.¹ Her book is hailed by some as a model for a more inclusive, care-centred Canada and criticized by others as a recipe for family destruction and social chaos.

Welcome, Ms. Wood. Why did you make this call for the "desexualization" of family?

It has been forty years since Pierre Trudeau told Canadians on the CBC evening news that "There is no place for the state in the bedrooms of the nation."² Trudeau made this statement in response to press questions about a controversial bill he introduced in Parliament to decriminalize private homosexual acts. Since then, his purpose in coining this phrase has been met and surpassed.³ Yet, the state has not vacated Canada's bedrooms; it has merely become a little more tolerant of the types of partners it sees as legitimate in the boudoir.

One peek between our sheets reveals bedbug laws that, among other things, define family and family breakdown from the perspective of the marital or "marital-like" dyad,⁴ give special recognition and privilege to conjugal dyads, require consummation to form a valid marriage, afford special consideration to adultery in divorce, and assign unmarried conjugal cohabitants roles, rights and responsibilities associated with marriage.⁵

At a fundamental level, I believe that family's value as an institution primarily resides in its caregiving functions. I am joined in this belief by other scholars, including American Martha Fineman.⁶ It is in the state's interest to recognize and reward relationships of care, regardless of

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1 This article assumes the format of an imaginary interview about a fictional book.

2 "There's no place for the state in the bedrooms of the nation" *CBC Television* (21 December 1967), online: CBC Archive <<http://archives.cbc.ca/400d.asp?id=1-73-538-2671>>.

3 See e.g. *EGALE Canada Inc. v. Canada (Attorney General)*, 2003 BCCA 251.

4 Note: A dyad is an ongoing relationship between two people.

5 See e.g. *Criminal Code*, R.S.C. 1985, c.C-46, ss. 290, 291 & 293; *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3; *Family Relations Act*, R.S.B.C. 1996, c. 128; *Income Tax Act*, R.S.C. 1985, c.1; *Marriage (Prohibited Degrees) Act*, R.S.C., 1990 c.46.

6 Martha Albertson Fineman, *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* (New York: Routledge, 1995).

conjugality, because they help individual members of society and lessen our collective burden.

Focusing benefits and obligations on sexual dyads is counterproductive. Historically, Euro-Canadian socio-religious, moral and legal traditions have framed matrimony as the natural adult state.⁷ Today, fewer Canadians are legally marrying⁸ and divorce rates remain high. Yet, the government ignores the care commitments of non-conjugal adults and continues to ramrod conjugal cohabitants who want to exercise autonomy. In 2001, the Law Reform Commission of Canada called for a more principled approach, guided by equality and autonomy, in its report *Beyond Conjugality*.⁹ Nicholas Bala argues that conjugality should co-exist with adult care as a legal construct.¹⁰ I disagree. I want to see the state eliminate the special legal status of marriage because of its powerful history as a “natural” category that eclipses all other ties.

Like Fineman, I am particularly concerned with the plight of the most vulnerable in our society – children, elders, the ill and the challenged. Benefits targeted at sexual dyads aren’t trickling down to these vulnerable people. Child poverty is rampant, especially among children from single-parent families.¹¹ This fact illustrates the distracting impact of focusing subsidies on conjugality. The elderly are in a similarly desperate state, particularly elderly women. Given Canada’s aging population, this problem will only swell if it is left unaddressed.

Why does sexuality garner so much government attention in defining and shaping family?

One answer to this question can be found in antiquated undercurrents of patrilineal kinship that continue to infuse our legal and social norms. Today, most Canadians practice bilateral kinship – where inheritance, status and kin ties flow through both the father’s and mother’s lines. However, Canadian law is rooted in patriarchal, patrilineal kinship traditions. In these systems, children are traditionally seen as their fathers’ possessions rather than as persons in their own right. Kin ties, and intergenerational transfers of property and status pass via the male line from father to son. British customs favoured eldest sons; habitant French Canadian customs allowed fathers to select which son to benefit.¹²

The Achilles’ heel of all patrilineal descent systems is paternal uncertainty. Women always had absolute knowledge of their biological offspring until recent “advancements” in reproductive technology made it possible for egg donation and gestation to be divided.¹³ Men have never had this luxury, so women’s sexuality is monitored and restricted in patrilineal systems to reduce the risk of propertied men being cuckolded into benefiting non-biological children.

Historically, Canada’s mainstream patrilineal orientation has, at times, demeaned and coerced non-conforming communities. Rose Johnny of the Lake Babine First Nation in British Columbia tells of how her community was thrown into turmoil in the 1920s when British Columbia required trap lines to be registered and transferred from father to son, rather than from maternal uncle to nephew, thus eroding the authority and dignity of that nation’s matrilineal

7 Mark D. Walters, “Incorporating Common Law Into the Constitution of Canada: *EGALE v. Canada and the Status of Marriage*” (2003) 41 *Osgoode Hall Law Journal*, 75, at para. 26.

8 Statistics Canada, “2006 Census: Families: Families, marital status, households and dwelling characteristics” *The Daily* (12 September 2007), online: Statistics Canada <<http://www.statcan.ca/Daily/English/070912/d070912a.htm>>.

9 Law Commission of Canada, *Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships* (2001) in Gillian Calder, *Law 322: Family Law*, vol. 1 (Victoria: University of Victoria, 2007) at 13-19.

10 See Nicholas Bala “Controversy over Couples in Canada: The Evolution of Marriage and Other Adult Interdependent Relationships” (2003) 29 *Queens Law Journal* 41 at paras. 122 & 131.

11 Statistics Canada, “Family Income” *The Daily* (30 November 2002), online: <<http://www.statcan.ca/Daily/English/021030/d021030a.htm>>.

12 See James M. White et al., *Families in Canada: Social Contexts, Continuities and Changes* 3rd ed. (Toronto: Pearson, 2005) at 77-84.

13 See e.g. Note on *Rypkema* and Surrogate Mothers in Gillian Calder, *Law 322: Family Law*, vol. 1 (Victoria: University of Victoria, 2007) at 128.

Houses.¹⁴ Aboriginal women have especially suffered from the intersection between paternalism, sexuality and the law. They had to fight government and men in their own communities to gain recognition of their Indian status under the *Indian Act*¹⁵ that is independent of their mate selection choices.¹⁶

Today, Canadian law has shifted to a more functional understanding of parenthood based on care and support rather than biology, though there have been judicial blips such as *Trociuk*.¹⁷ Distinctions between children born inside and outside of wedlock, and between adoptive and biological ties have been abolished by statutes.¹⁸ However, the priorities of our propertied male ancestors still infuse certain aspects of our law. For example, “child” is narrowly defined in estate law. In BC, only spouses, and biological and adopted children can make claims under the *Wills Variation Act*¹⁹ (*WVA*). In *McCrea v. Bain Estate*,²⁰ Crawford J. of the BCSC concluded that a minor stepchild who had been financially supported by his mother’s deceased cohabiting partner could not make a *WVA* claim on his stepfather’s estate, though he would have otherwise been entitled to child support under the *Family Relations Act*²¹ (*FRA*) if his mother’s cohabitation with his stepfather had ended by consent rather than death.²² The court said that the boy’s equality rights under s. 15(1) of the *Charter* were not offended because he could still make claims on his biological or adoptive parents’ estates. This support-inheritance distinction likely finds its roots in 19th Century values. Due to high mortality and remarriage rates, the percentage of stepfamilies in England then was roughly equivalent to contemporary Canada.²³ Stepparents helped to financially maintain stepchildren during life, but inheritance was a different matter.

In 1983, the Law Reform Commission of British Columbia recommended broadening the scope of “child” under the *WVA* to include minor stepchildren.²⁴ The government hasn’t moved to action. It is perhaps telling that property division under the *FRA* is also the only legal distinction between cohabiting and marital relationships in British Columbia.²⁵

Turning to bedbug laws, in *Baxter v. Baxter*,²⁶ the House of Lords stated that the consummation requirement for a valid marriage is about “men’s” comfort, not procreation interests. I am not convinced that this modern “intimacy” lens accurately depicts the original intent of consummation requirements. Judicial willingness to infuse broad, modern meanings is also evident in courts expanding the common law definition of adultery to include same-sex acts and extending the fault-based adultery exception under the *Divorce Act*²⁷ to same-sex infidelity in

14 Jo-Anne Fiske & Rose Johnny, “The Lake Babine First Nation Family: Yesterday and Today” in Marion Lynn, ed., *Voices: Essays on Canadian Families* 2nd ed. (Scarborough: Nelson Thompson Learning, 2003) 181 at 189.

15 *Indian Act*, R.S.C. 1985, c. I-5.

16 See e.g. Janet Silman, *Enough is Enough: Aboriginal Women Speak Out* (Toronto: The Women’s Press, 1987).

17 See discussion of *Trociuk v. British Columbia (Attorney General)*, [2003] 1 S.C.R. 835 in Gillian Calder, *Law 322: Family Law*, vol. 1 (Victoria: University of Victoria, 2007) at 124-127. In *Trociuk*, the Supreme Court of Canada found that absolutely excluding a father from his offsprings’ birth registration and surnaming violated his equality rights under s. 15 of the *Charter*.

18 *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 61 and *Adoption Act*, R.S.B.C. 1996 c.5, s. 37.

19 *Wills Variation Act*, R.S.B.C. 1996, c. 490, s. 2.

20 *McCrea v. Bain Estate* (2004), 27 B.C.L.R. (4th) 103, 2004 BCSC 208.

21 *Family Relations Act*, R.S.B.C. 1996, c. 128.

22 Note: Had the mother been legally married, her son would have qualified for child support under the *Divorce Act*.

23 Elizabeth Church, “Kinship and Stepfamilies” in Marion Lynn, ed., *Voices: Essays on Canadian Families* 2nd ed. (Scarborough: Nelson Thompson Learning, 2003) 55 at 58.

24 Law Reform Commission of British Columbia, *Report on Statutory Succession Rights* (1983), online: <<http://www.bcli.org/pages/publications/lrcreports/frameset.html?http://www.bcli.org/pages/publications/lrcreports/repsum102>>.

25 See note on *Nova Scotia v. Bona*, 2002 SCC 83 in Gillian Calder, *Law 322: Family Law*, vol. 1 (Victoria: University of Victoria, 2007) at 89.

26 See discussion of *Baxter v. Baxter*, [1948] A.C. 274 in Calder, *Law 322: Family Law*, vol. 1 (Victoria: University of Victoria, 2007).

27 *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.).

British Columbia and New Brunswick.²⁸ This formal equality treatment masks the scary fact that adultery has historically been defined in the common law as involving “reproductive powers” not sexual behavior.²⁹

Elizabeth Emens argues that adultery laws could be modified to empower people to make conscious choices about whether they want adultery provisions to apply to their relationships.³⁰ I resist because choice does not address my own concerns about creating legal space for, what I perceive to be, property interests in partners’ sexuality. Canadians are typically hyper-sensitive to any perceived commodification of humans or their parts, as is evidenced by the government’s haste in enacting the *Assisted Human Reproduction Act (2004)*.³¹ Despite harbouring harsh attitudes about adultery, extra-marital sexuality is common among Canadians.³² I don’t promote deception, but I think we should take a sober look at legislating on this ground, particularly because “biology” and “romance” arguments often collude to make sexual jealousy an excuse for violence.³³

If you want to desexualize family, why do you accept polyamory? Isn't it immoral?

Polyamory finds acceptance in my book precisely because I believe that sexuality should be an irrelevant factor in defining family. Monogamous marriage is one legitimate lifestyle, but some people don’t have sexual partners and others have many. George Murdock’s famous cross-cultural analysis revealed that 195 of 250 societies preferred plural forms of marriage, though monogamy was universally practiced due to sex ratios and economic barriers.³⁴ So, even in a historical sense, we can’t equate morality to our privileging of monogamy and serial monogamy.

Emens describes a diverse spectrum of people who self-identify as polyamorous.³⁵ Many in this community do not consider traditional patriarchal forms of polygamy to be polyamory – preferring to identify as “radically honest” and egalitarian. There is disagreement about whether one needs to have multiple sexual partners to be polyamorous or if it is an attitude. There also isn’t consensus as to whether sex is a necessary component. Regardless, if these relationships involve caregiving, people who want legal recognition should receive it. Depending upon each person’s situation, this could include one, many or no relationships receiving legal recognition. Denying privileges over concerns about bankrupting public and private benefits programs is unprincipled. We don’t restrict nuclear families in the number of recognized dependent children.

Isn't your proposal just an attack on the traditional family?

“Traditional” must be used cautiously when describing family. Before the emergence of other social institutions, family was the sociopolitical, economic and religious unit that met all individual and group needs. Family theorists contend that it was extended and all-powerful.³⁶ In contrast, modern references to “traditional” are synonymous with the nuclear family, a form that some feel is structured to meet the demands of industrialized societies. It has been used

28 See *P.(S.E.) v. P.(D.D.)*, [2005] BCSC 1290; *Thebeau v. Thebeau*, [2006] N.B.J. No. 178.

29 See discussion of *Orford v. Orford* (1921), 49 O.L.R. 15 (S.C.) in Gillian Calder, *Law 322: Family Law*, vol. 2 (Victoria: University of Victoria, 2007) at 21.

30 Elizabeth F. Emens, “Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence” (2004) 29 *New York Review of Law and Social Change* 277 at 364.

31 *Assisted Human Reproduction Act*, R.S.C. 2004, c. 2.

32 White, *supra* note 12, at 211-212.

33 See e.g. David M. Buss, “The Strategies of Human Mating” (1994, May-June) 82 *American Scientist* 238.

34 George Peter Murdock, *Social Structure* (New York: The MacMillan Company, 1949) at 24.

35 Emens, *supra* note 30, at 359.

36 White, *supra* note 12, at 67-69.

to cast other structures, including single-parent, post-divorce, intergenerational, matrifocal, polygamous, blended and non-conjugal families, as deviant, dangerous and unworthy of equal recognition.

Nonetheless, this isn't an attack. To the extent that relationships in nuclear families, or any other type of family of orientation, fulfill caregiving functions, they should be legally recognized and fostered. Adult siblings and adult child-parent relationships are ideally situated to benefit from my proposal. Currently, people who are strangers, friends or distant relatives can form non-conjugal relationships under the guise of marriage. These marriages, however, are voidable so people run the risk of having one partner seek annulment on the grounds of non-consummation.³⁷ Even if voided some legal responsibilities still flow from these relationships.³⁸ In contrast, s. 2(2) of the *Marriage (Prohibited Degrees) Act*³⁹ prohibits people from marrying parents or siblings and s. 3(2) voids such relationships.⁴⁰ So, non-conjugal adult relationships spawned from childhood families of origin are currently least likely to get recognition or benefit.

Don't caregiver models marginalize men from family?

Caregiving has traditionally been gendered work. Fineman uses the Mother-Child metaphor as a nod to this reality.⁴¹ That doesn't mean that women are positioned, either biologically or socially, to have a monopoly on care. Men can and do fulfill these roles. I reject Fineman's metaphor in my own work, however, because mothers receive social recognition and exaltation that is typically denied to their unmarried, childless sisters. These women, who are socially cast as having no families, have historically carried some of the heaviest elder care burdens – a less socially valued form of caregiving than parenting in our society.⁴² I feel that using the Mother-Child metaphor doubly renders these women's experiences invisible.

But, don't economic realities place women in more caregiving roles?

For decades, feminists and social scientists have been crying for solutions to the wage gap and to women's disproportionate responsibility for family work. No remedy has been found despite much political puffery. It is interesting that we suddenly seem attuned to their exploitation now that we think it could potentially give women an edge in public policy.

I argue that we are still working from a male wage earner model.⁴³ Marrying women off to men is arguably the oldest form of social welfare. I am cautiously optimistic that a new framing of family could prompt the market to pay women more because the state itself would see their caregiving, and hence their time, as valuable. Conversely, if it isn't biology or marital ties that make a father a father, what we are really signaling to men is that we value their ongoing, caring involvement in the lives of their children, partners, parents, siblings and friends.

What do you say to gays and lesbians who have finally gained access to legal marriage?

Queer communities are intimately acquainted with the cruel arbitrariness of how law defines family and the pain of exclusion. Some wanted and rightly received formal equality treat-

37 See Gillian Calder, *Law 322: Family Law*, vol. 1 (Victoria: University of Victoria, 2007) at 84.

38 See *Ibid.*

39 *Marriage (Prohibited Degrees) Act*, R.S.C., 1990, c.46.

40 See H.R. Hahlo, Nullity of Marriage in Canada: With a Sideways Glance at Concubinage And Its Legal Consequences (Toronto: Butterworth, 1979) at 43-44 in Gillian Calder, *Law 322: Family Law*, vol. 1 (Victoria: University of Victoria, 2007) at 90.

41 Fineman, *supra* note 6, at 233-235.

42 Susan A. McDaniel, "Family/Work Challenges among Mid-Life and Older Canadians" in Marion Lynn, ed., *Voices: Essays on Canadian Families 2nd* ed. (Scarborough: Nelson Thompson Learning, 2003) 153 at 157.

43 See e.g. Fineman, *supra* note 6.

ment for their cohabiting and marital relationships after years of arduous legal battles.⁴⁴ Others shun being squeezed into a “but for” box that is defined from a monogamous, heteronormative perspective.⁴⁵ I understand that if marriage is emptied of its civil meaning heterosexuals are left with the option of religious marriage. Depending upon their faith backgrounds, many same-sex couples would be frozen out of these religious rites on the grounds of religious freedom.⁴⁶ However, without the legal aspect, Queer communities would be free to construct and practice ceremonies for conjugal partners, or polyamorous groups, if desired.

I ask that people see the justice in helping to gain equal legal recognition for non-conjugal adult caregiving relationships. The only solace I can provide is that caregiving is a universal concept that cuts across sexual orientation and does not position heterosexuals in a place to claim first right.⁴⁷ I argue that gays and lesbians sought and won equal recognition for their conjugal relationships not because their sexuality is the same as heterosexuals', but because their economic and emotional ties are equally worthy of recognition. I argue abandoning conjugality as a relevant legal factor is the path to substantive equality.

I am reminded of the story of Tina, a transgendered person, who died of AIDS.⁴⁸ During her illness, Tina had a non-conjugal, fictive kin network of ex-lovers and friends who housed her, cared for her and gave her companionship. Currently the state does nothing to recognize or support the powerful work of families like Tina's. Under my model that would change.

Religious leaders have reacted quite negatively to your work. What is your response?

Freedom of religion is enshrined in our *Constitution Act, 1982* under s. 2(a) of the *Charter*. Nothing that I propose interferes with any religious group's ability to offer marriage rites. I only argue that no legal status should flow directly from those rites. Despite living in a period of historically low religious service attendance, most Canadian high school students report that they would opt for a religious wedding over a civil ceremony.⁴⁹ This indicates to me that many Canadians view religious recognition as qualitatively distinct from legal status.

Many religious communities have complained for years, though not always convincingly, that state action to liberalize divorce, define cohabitation as marital ascription and accept same-sex dyads has undermined sacred meanings.⁵⁰ Government vacating the field offers a solution.

Potentially, my recommendations could foster freedoms for marginalized religious and cultural minorities who have traditions of plural marriage, but have been denied the opportunity to practice because of *Criminal Code* provisions or, as in the case of the polygynous community of Bountiful, B.C., exercise their faith in the threatening shadow of the law.⁵¹ These groups include, but aren't limited to Muslims, Mormons, some Aboriginals and some Africans.

In terms of placing caregiving, rather than sexuality, at the epicenter of family life, I hope that people of all faiths can identify with this theme as a familiar one. For example, the Jewish faith passes from mother to child, not from spouse to spouse. Similarly, if we think of the most

44 See e.g. *EGALE Canada Inc. v. Canada (Attorney General)*, 2003 BCCA 251.

45 Gillian Calder “Class 5: Same-sex marriage” (Lecture presented to UVic Family Law, 20 September 2007).

46 See Note on *Reference Re: Same Sex Marriage* at para. 58 in Gillian Calder, *Law 322: Family Law*, vol. 1 (Victoria: University of Victoria, 2007) at 108. See also *Civil Marriage Act*, R.S.C. 2005, c. 33, s. 3.1.

47 See generally Rachel Epstein, “Lesbian Families” in Marion Lynn, ed., *Voices: Essays on Canadian Families* 2nd ed. (Scarborough: Nelson Thompson Learning, 2003) at 77.

48 White, *supra* note 12, at 7.

49 Reginald W. Bibby and Donald C. Posterski, *Teen Trends: A Nation in Motion* (Toronto: Stoddart, 1992) at 30.

50 See Walters, *supra* 8, at 9-14 for discussion of the complex history between law and religion in defining marriage.

51 See *Criminal Code*, R.S.C. 1985, c. C-46, ss. 290, 291 & 293. See also Gillian Calder, *Law 322: Family Law*, vol. 1 (Victoria: University of Victoria, 2007) at 87-88.

celebrated “couple” in Western history, famous lovers like “Brangelina” cannot compete with Mary and Jesus – mother and child.

I know that many of my critics identify with Christianity. In *Jesus: A Revolutionary Biography*, John Crossan depicts Jesus as a radical egalitarian who opposed the power structures of patriarchal family and despised the notion of children as property of their parents.⁵² Crossan sites scripture to illustrate his point, including *Mark 10:13-16* where Jesus universally accepts all children into his fold, despite his disciples’ protests. Crossan contrasts this with the 1st Century practice of empowering biological fathers to choose between accepting infants into their houses or exposing them for death or slavery. I am not an expert in theology, but it seems that attempts to tie Jesus to a wife and biological offspring have met resistance partially because they reflect priorities that distract from this social father’s caregiving example.

What is the biggest barrier to moving your plan from paper to policy?

The status quo gives the main body of voters special status and allows the market to exploit non-conjugal care under the guise of simplicity and efficiency. There isn’t political currency in telling the privileged that policy needs to change. Even partnered people who see the justice in extending legal recognition to non-conjugal units will likely not fully embrace moving out of the bedroom and will want to keep monogamous conjugality as a *de facto* trump card.⁵³

Thank you. We are out of time. ... Tune in next week when I am joined by Gillian Calder.

52 John Dominic Crossan, *Jesus: A Revolutionary Biography* (New York: Harper Collins, 1994) at 58-64.

53 Bala, *supra* note 10, at paras. 122 & 131.