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2010

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CONVERGING FEMINIST AND QUEER LEGAL THEORIES: FAMILY FEUDS AND FAMILY TIES

Elaine Craig*

The notion that queer theory and feminism are inevitably in tension with one another has been well developed both by queer and feminist theorists. Queer theorists have critiqued feminist theories for being anti-sex, overly moralistic, essentialist, and statist. Feminist theorists have rejected queer theory as being uncritically pro-sex and dangerously protective of the private sphere. Unfortunately these reductionist accounts of what constitutes a plethora of diverse, eclectic and overlapping theoretical approaches to issues of sex, gender, and sexuality, often fail to account for the circumstances where these methodological approaches converge on legal projects aimed at advancing the complex justice interests of women and sexual minorities. A recent decision from the Ontario Court of Justice addressing a three-parent family law dispute involving gay and lesbian litigants demonstrates why recognition of the convergences between feminist and queer legal theories can advance both queer and feminist justice projects. The objective of this article is to demonstrate, through different and converging interpretations of this case that draw on some of the theoretical insights offered in a new anthology called Feminist and Queer Legal Theory, one rather straight-forward claim. The claim advanced here is that activists, advocates, litigants and judges are all well served by approaching complex legal problems involving sex, sexuality and gender with as many “methods” for pursuing and achieving justice as possible.

La notion que la théorie homosexuelle et le féminisme sont inévitablement en conflit l'un avec l'autre a été bien développée à la fois par les théoriciens et théoriciennes homosexuels et féministes. Les théoriciens et théoriciennes homosexuels ont critiqué les théories féministes les qualifiant d'être anti-sexe, trop moralistes, essentialistes et étatistes. Les théoriciens et théoriciennes féministes ont rejeté la théorie homosexuelle la qualifiant d'être pro-sexe sans esprit critique et dangereusement protectrice du domaine privé. Malheureusement, ces descriptions réductionnistes de ce qui constitue une pléthore d'approches théoriques aux questions de sexe, de genre et de sexualité qui sont diverses, éclectiques et qui se chevauchent manquent fréquemment de tenir compte de circonstances où ces approches méthodologiques convergent sur des projets légaux visant à faire avancer les intérêts juridiques complexes des femmes et des minorités sexuelles. Une décision

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récente de la Cour de justice de l'Ontario portant sur un litige en droit de la famille entre trois parents et impliquant des parties homosexuelles et lesbiennes démontre pourquoi la reconnaissance des convergences entre les théories juridiques féministes et homosexuelles peut faire avancer à la fois les projets légaux homosexuels et féministes. Le but de cet article n'est pas de suggérer qu'une seule «théorie juridique féministe homosexuelle» convergente soit possible, ou même désirable. Plutôt, le but est de démontrer, par le biais d'interprétations différentes et convergentes de ce cas qui s'inspirent de certaines intuitions théoriques présentées dans une nouvelle anthologie intitulée *Feminist and Queer Legal Theory*, une proposition assez simple. La proposition avancée ici est que les activistes, les avocats, les parties à un litige et les juges sont tous bien servis en abordant des problèmes légaux complexes au sujet de sexe, de sexualité et de genre avec autant de «méthodes» que possible pour considérer la justice dans tous ses détails.

I. INTRODUCTION

Feminism meets queer theory. What is this meant to suggest? Where does feminism meet queer theory? Do they meet in a dark alley? Does it mean “ah finally, feminism has met its match...in queer theory?” Perhaps it suggests feminism meets (and is corrected by) queer theory? Why is it feminism meets queer theory and not queer theory meets feminism? After all, feminism has been around a lot longer than queer theory.

Feminism Meets Queer Theory, released in 1997, was one of the first book length explorations examining how feminism and queer theory contradict and interrogate one another.¹ The purpose of the collection was to examine queer theory's rendering of feminism – to revisit queer theory's representation of feminism as “tied to a concern for gender, bound to a regressive and monotonous binary opposition.”² If there is an overarching theme to be discerned from this collection of works, the allusion to confrontation evident in its title, while certainly not reflective of every paper included in the collection,³ might be said to reflect this theme.

This notion that queer theory and feminism are inevitably in tension with one another has been well developed both by queer and feminist theorists. Queer theorists have critiqued feminist theories for being anti-sex, overly moralistic, essentialist, and statist. Feminist theorists have rejected queer theory as being uncritically pro-sex and dangerously protective of the private sphere. Unfortunately, “these simplistic and sexual centric renderings of feminist and queer

1 E. Weed & N. Schor, eds., *Feminism Meets Queer Theory* (Bloomington and Indianapolis: Indiana University Press, 1997).

2 *Ibid.* at xi.

3 One important example being Judith Butler's essay “Against Proper Objects” *ibid.* 1. Butler argues against the presumptive assignment of sex and sexuality as the “proper objects of study” to gay and lesbian studies/queer theory and the assignment of gender as the “proper object of study” to feminist theory.

theories fail to capture the breadth, depth and contingency of both.”⁴ Most disheartening about these reductionist accounts of what constitutes a plethora of diverse, eclectic and overlapping theoretical approaches to issues of sex, gender, and sexuality, is their frequent failure to account for the circumstances where these methodological approaches converge on legal projects aimed at advancing the complex justice interests of women and sexual minorities.

It is for this reason that Martha Fineman, Jack Jackson and Adam Romero’s recent edited collection, entitled *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations*, which again considers the debates between and among feminist and queer legal theorists, is promising.⁵ Intimate encounters and uncomfortable conversations: nothing in this description suggests strange confrontations in dark alleys. If anything the title summons forth the image of a bedroom scene between nascent and uncertain lovers, or perhaps the gauche morning exchange after a drunken one-night stand.⁶ To be sure, some of the chapters in this book focus on the divergences between feminism and queer theory,⁷ maintain a strong theoretical commitment to anti-identity and anti-foundational claims,⁸ a sex negative characterization of feminism⁹ and an assumption that the political interests of sex affirmative sexual minorities and committed feminist legal theorists will inevitably diverge. However, most of the chapters in this book articulate some recognition of, or hope for, or benefit in, the convergences between feminism and queer legal theories.¹⁰

A recent decision from the Ontario Court of Justice addressing a three-parent family law dispute involving gay and lesbian litigants demonstrates why recognition of the convergences between feminist and queer legal theories can advance both queer and feminist justice projects. The case – *C.(M.A.) v. K.(M.)* – involves an application by a lesbian couple seeking to have their daughter’s non-

4 A. Romero, “Methodological Descriptions: ‘Feminist’ and ‘Queer’ Legal Theories” in M. Fineman, J. Jackson & A. Romero, eds., *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Burlington: Ashgate Publishing Company, 2009) 197.

5 *Ibid.*

6 Lest one think my suggested imagery overreaches what might have been intended to be invoked by this title, consider the collection’s original designate: *Strange Bedfellows?: An Uncomfortable Conversation In Feminist And Queer Legal Theories*. See for example online: Yale <www.law.yale.edu/faculty/schultzpublications.htm> where Professor Schultz cites her contribution to the collection using this title.

7 Most notably, Janet Halley’s essay “Queer Theory By Men” in *Feminist and Queer Legal Theory*, *supra* note 4, 9 at 11 suggests that we take a break from feminism. Halley does not suggest that “the convergence of feminism with queer theory is impossible or undesirable; it is merely that divergence is both possible and highly valuable”. Her argument is that “we don’t always need feminism in order to have meaningful left projects about sexuality.”

8 *Ibid.*

9 Katherine Franke, “Theorizing Yes: An Essay On Feminism, Law and Desire” in *Feminist and Queer Legal Theory*, *supra* note 4, 29.

10 This is not to suggest that this is the first academic work recognizing the convergences between feminist theories and queer theories. For only a few of the many examples see Susan B. Boyd, “Family, Law and Sexuality: Feminist Engagements” (1999) 8(3) Soc.& Leg. Stud, 369; Brenda Cossman, “Sexuality, Queer Theory, and ‘Feminism After’: Reading and Rereading the Sexual Subject” (2004) 49 McGill L. J.847; Diana Fuss, *Essentially Speaking, Feminism, Nature & Difference* (New York: Routledge, 1989).

biological mother legally adopt the child without the consent of the child's father (a known gay male donor and involved parent from birth).¹¹ *C.(M.A.) v. K.(M.)* offers a compelling example of the complex ways in which the political commitments of feminist legal theory, gay and lesbian rights scholarship and queer legal theory, and the tensions within and between these methods of thought and analysis, intersect and converge. It also supports the assertion that, in many instances, approaching complex problems from only a single theoretical approach is unlikely to adequately reveal the complexities of peoples' sexual and gendered social realities. *C. (M.A.) v. K. (M.)* can be read as a case about sex, sexuality, gender, heterosexism, sexism, or gay and lesbian rights. The different interpretations of the case offered below suggest that, perhaps where lived realities present intersecting, overlapping, converging and competing interests, theoretical pursuits will (or should) follow.

There is no singular "feminist queer legal theory" or "queer feminist legal theory" emerging from *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations*. The various convergences suggested by several of the contributors to this anthology do not offer one singular theory that can coherently accommodate, let alone reconcile, all of the competing interests involved when sex, gender, sexuality and law intersect. The convergences between queer and feminist projects discussed by some of the authors, and reflected in *C.(M.A.) v. K.(M.)*, do suggest, however, that not only is there more than one way to theorize the justice interests involved in a case where sex, sexuality and gender intersect but also that any effort to even flesh out what those justice interests might be requires having more than one way to think about such cases.

Part II of this paper will briefly describe the central claims typically identified with each of feminist, queer and gay and lesbian rights theories. Following this will be a discussion of queer, feminist and gay and lesbian rights analyses of the reasoning in *C.(M.A.) v. K.(M.)*. The objective of this article is not to suggest that one converging "feminist queer legal theory" is possible, or even desirable. Instead, its objective is to demonstrate, through different and converging interpretations of this case that draw on some of the theoretical insights offered in *Feminist and Queer Legal Theory*, one rather straight-forward claim. The claim advanced here is that activists, advocates and litigants are all well served by approaching complex legal problems involving sex, sexuality and gender with as many "methods" for pursuing and achieving justice as possible. Queer theorists would be as ill advised to "take a break from feminism" as feminists would be to ignore the potential for women's equality to be derived from some queer projects. Similarly for judges dealing with cases like *C.(M.A.) v. K.(M.)*. Judges in cases that involve wading through the competing and overlapping interests that arise when issues of sex, gender and sexuality intersect, will be more likely to cut a judicious path by considering the conceptual precepts and political commitments of both queer theory and feminism.

This is not to suggest that every intimate encounter, and its ensuing uncomfortable conversation, will be productive, or symbiotic. The benefits of intersectional approaches to issues of sexism, heterosexism, (and racism and classism)

11 (2009) 94 O.R. (3d) 756.

derive from the deployment of mutually reinforcing theoretical approaches in those instances where justice interests converge.

II. FEMINISM, QUEER THEORY AND GAY AND LESBIAN STUDIES

Each of feminism, queer theory and gay and lesbian rights theory can refer to a great variety of different methodological, political and theoretical approaches. While it would be impossible (and inconsistent with the premise of this paper) to comprehensively define “queer theory,” “feminist theory” and “gay and lesbian rights theory,” it is nonetheless necessary to briefly (and generally) describe what is intended for the purposes of this discussion by each of these terms.¹²

Of these three theoretical genres feminism, of course, has the longest (and most diverse) history. However, while there are many types of feminism, “to a great extent, all approaches deemed feminist elaborate in some form upon a central question: how to understand gender from a critical and equality-driven perspective.”¹³ The different methods for this equality project include approaches focused on formal equality or substantive equality, those focused on dominance or power feminism, as well as sex radical feminism and cultural feminism.¹⁴

Gay and lesbian rights theory could also be characterized as an equality project. It is an equality project that, for the most part, ascribes to a binary hetero/homo notion of sexual identity – a conception of sexuality as an innate, essential and immutable aspect of one’s identity. “Building upon perceived successes of previous civil rights movements, gay and lesbian political leaders adopted a formal equality model that sought to equate the moral value and political status of homosexuality and heterosexuality.”¹⁵ In other words, it is a theoretical approach dedicated to achieving anti-discrimination protections and equality guarantees for those individuals that identify as gay and lesbian.

Queer theory, on the other hand, is not concerned explicitly and directly with equality.

[It] focuses “on the manner in which heterosexuality has, silently but saliently, maintained itself as a hidden yet powerfully privileged norm,” and an implicit if not explicit questioning of the goals of formal equality that, on their face simply reify the very categories that have generated heterosexual privilege and Queer oppression.¹⁶

Queer theory generally refers to intellectual projects, informed by postmodern

12 It is impossible to comprehensively define any one of these approaches (particularly feminist and queer theoretical approaches) because each term encompasses a rich variety of different approaches. That this is the case strengthens rather than weakens the thesis of this paper.

13 M. Fineman, “Introduction: Feminist and Queer Legal Theory” in *Feminist and Queer Legal Theory*, *supra* note 4 at 2.

14 *Ibid.* at 3.

15 *Ibid.* at 4.

16 *Ibid.* at 5 quoting from L. Kepros, “Queer theory: Weed or seed in the garden of legal theory?” (1999/2000) 9 *Law and Sexuality* 279.

thought, that challenge hegemonic sex and gender norms. It is an intellectual effort that “celebrates the lack of regular boundaries in life.”¹⁷ Arguably there is a political commitment to equality interests underpinning the work of most queer theorists. However, unlike feminist and gay and lesbian rights theories, the language of queer critiques, and the analytical tools drawn upon to develop queer arguments, do not focus on equality *per se*.

As is evident even from these very general descriptions, there are numerous tensions between queer theories and feminist theories and gay and lesbian rights theory. Many queer theorists contest both the existence of, as well as the political worth of, attempting to maintain a rigid distinction between heterosexuality and homosexuality, putting queer theory in tension with gay and lesbian rights approaches.¹⁸ Gay and lesbian rights scholars respond by arguing that without some notion of a fixed subject possessed with an essential sexual identity, the advancement of equality for sexual minorities is not possible.¹⁹ The distribution of equality guarantees and anti-discrimination protections is premised on a categorical approach to rights that requires reification of the category “homosexual.” Indeed, in Canada formal legal equality for gays and lesbians has been achieved through a categorical approach to equality that emphasizes sexual identity as an innate and essential aspect of one’s self.²⁰ This is an approach that requires reification of the very identity categories that queer theory challenges.²¹

Some queer theorists challenge feminism’s singular focus on one particular social hierarchy. Gay and lesbian studies scholars have, at times, accused feminism of making heterosexist assumptions. Queer theorists have also suggested that feminism has failed to adequately theorize women’s sexual pleasure. Feminists have suggested that queer theory’s celebration of lack of sexual boundaries fails to adequately account for the sexual harms women so frequently endure.²²

17 *Ibid.* at 396.

18 See for example Eve Kosofsky Sedgwick, *The Epistemology of the Closet* (Los Angeles: University of California Press, 1990).

19 Recognizing both the need for and the potential pitfalls of this categorical approach to equality and the ways in which it excludes those sexual minorities whose sexual identities are more fluid, some gay and lesbian rights scholars argue for a strategic deployment of arguments about fixed and immutable sexual identities. Carl Stychin describes this as “strategic essentialism.” See for example Carl Stychin, *A Nation by Rights: National Cultures, Sexual Identity Politics, and the Discourse of Rights* (Philadelphia: Temple University Press, 1998).

20 See for example *Egan v. Canada* [1995] 2 S.C.R. 513 in which the Supreme Court of Canada first recognized sexual orientation as an analogous ground under section 15 of the *Charter*. In *Egan*, at para. 5, Justice LaForest, writing for the majority, characterized sexual orientation as “a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs”.

21 For a critique of the categorical approach to rights see for example Brenda Cossman, “Lesbians, Gay Men, and the *Canadian Charter of Rights and Freedoms*” (2003) 40 *Osgoode Hall L.J.* 223; Didi Herman, *Rights of Passage: Struggles for Lesbian & Gay Legal Equality*, (Toronto: University of Toronto Press, 1994); Jody Freeman, “Defining Family in *Mossop v D.S.S.*: The Challenge of Anti-Essentialism and Interactive Discrimination For Human Rights Litigation” (1994) 44 *U.T.L.J.* 41; Douglas Kropp, “Categorical Failure: Canada’s Equality Jurisprudence – Changing Notions of Identity and The Legal Subject” (1997) 23 *Queen’s L.J.* 201.

22 See “Introduction: Feminist and Queer Legal Theory” in *Feminist and Queer Legal Theory*, *supra* note 4.

All of these are important critiques because they illuminate the weaknesses with each of these theoretical approaches to issues of sex, sexual or gender injustices. Moreover, the tensions between queer theories, feminist theories and gay and lesbian rights theory are not manifested only in their theoretical precepts. At times their political commitments are also directly in tension. For example, dominance feminism's approach to the criminal regulation of pornography is directly in tension with some gay and lesbian rights scholars more libertarian position with respect to pornography. In the Canadian context, both feminist and gay and lesbian rights activists have adopted essentialist approaches to gay and lesbian pornography that would be in tension with queer theory.²³ Consider also the feminist movement's success in turning the law's scrutiny to the sexual violation of children; this same scrutiny has frequently manifested as a vilification and deep-seated fear of the gay male as prototypical child molester.

But it is equally important to identify the ways in which feminist, queer and gay and lesbian projects (and progressive critical scholarship more broadly) converge.

It is increasingly plain that all forms of identity and identification are multiplicitous and multidimensional...The myriad intersectionalities created by the multiplicity of all human identities thus challenge critical legal analysts of all stripes to produce increasingly nuanced works that unpack the consequences of diversity and difference within and across social or legal hierarchies.²⁴

In his contribution to *Feminist and Queer Legal Theory*, Francisco Valdes suggests that what he describes as second stage sexual orientation scholarship or queer theory should adopt Professor Mari Matsuda's jurisprudential method. Queer theorists should, in an intentional and consistent way, "ask the other question."²⁵ Borrowing from Matsuda (and it should be noted, the work of a substantial number of other feminist theorists who have taken seriously the need for feminism to critique its own hetero, racial and class essentialisms) Valdes argues:

regardless of the subject position taken in any project, we must learn to step back from that position and query ourselves how the analysis might be broadened or deepened if the topic or issue were to be approached from another subject position.²⁶

23 See L. Karaian, "The Troubled Relationship of Feminist and Queer Legal Theory to Strategic Essentialism: Theory/Praxis, Queer Porn, and Canadian Anti-Discrimination Law" in *Feminist and Queer Legal Theory*, *supra* note 4 at 375.

24 F. Valdes, "Queering Sexual Orientation: A Call for Theory as Praxis" in *Feminist and Queer Legal Theory*, *supra* note 4 at 94.

25 *Ibid.* at 108.

26 *Ibid.*

The competing interpretations of *C.(M.A.) v. K.(M.)*²⁷ offered below are an attempt to oblige Valdes' prescription. Asking the other question/s of this case reveals a circumstance in which the objectives of those interested in queering hegemonic family norms that serve to exclude those that don't /won't conform to them converge with the objectives of those interested in reforming the social institutions that have perpetuated a gendered division of labour and eradicating a public/private sphere distinction that has subjugated and oppressed women. It also reveals a case that, while to some extent consistent with both queer and feminist objectives, is not necessarily consistent with gay and lesbian rights objectives.

III. THREE APPROACHES TO THREE PARENT FAMILIES: THE CASE OF *C.(M.A.) V. K.(M.)*

The factual circumstances at issue, the arguments advanced by the litigants, and the reasoning adopted by Justice Cohen of the Ontario Court of Justice in *C.(M.A.) v. K.(M.)* combine to make this case a fascinating and illuminating example of the manner in which feminist legal theory, gay and lesbian rights scholarship and queer legal theory, and the tensions within and between these methods of thought and analysis, converge.

C.(M.A.) v. K.(M.) involved a motion by a lesbian couple in Toronto asking the Ontario Court of Justice to dispense with the consent of their daughter's biological father to an adoption of their daughter by the non-biological mother. M.A.C and C.A.D. were the child's custodial parents and primary care givers. M.A.C was the child's biological mother and C.A.D. the child's non-biological mother. M.K., the child's biological father, was also an involved parent in the child's life. When considering the possibilities for conceiving a child, M.A.C. and C.A.D. had rejected the option of using an anonymous semen donor in favour of finding a known donor – preferably a gay male. They felt that it would be preferable for their child to know his or her father. M.K. agreed to be that person. The three established a parenting agreement under which M.K. was to be named on the certificate of live birth and to receive reasonable access but the applicants would be the child's custodial parents and primary caregivers.

For the first few years of their daughter's life things went smoothly. M.K. had access visits one evening every week and one weekend per month. The three parents and their extended families had dinners, took vacations and celebrated holidays together. However, at some point their parenting triangle became less amicable. M.K. persistently asked to spend more time with his daughter and the applicants persistently refused. Acrimony ensued.

There is nothing particularly significant about these facts alone. It is not unusual for there to be struggles between a non-custodial parent and the child's custodial parents over access time with a child. However, unlike most legal disputes involving custodial parents and the non-custodial access parent, in this case the family did not shift from one two parent family to a new, differently constituted two parent family with one of the original parents becoming a third access par-

27 *Supra* note 11.

ent. Here, as the court found, the family started as a three-parent family with mutual support for many aspects of each others lives and shared holidays, baby showers, “Christmases, birthdays, pride weeks and school social events.”²⁸ The parenting agreement each signed before the birth of their daughter stipulated that they would “spend time together as a family.” Prior to the breakdown of this non-traditional family the three parents had discussed launching a *Charter* challenge in an effort to obtain a three-way adoption; they had also drafted pleadings to make an application for a declaration of three-way parentage (similar to that granted in *A.(A.) v. B.(B.)*).²⁹ There is an important distinction between what the applicants sought in this case and those circumstances where parties turn to the court to resolve the dissolution of their nuclear family. In this case the applicants turned to the law both to negate (rather than dissolve) the reality of their original three-parent family and to seek legal reification of their newly constituted two parent nuclear family.³⁰ This, they argued, was in the best interests of their child.

Noteworthy about this case is both the discourse and arguments invoked on behalf of the applicant lesbian couple and the court’s response to their arguments and the remedy that they sought. M.A.C. and C.A.D. based their argument on a distinction between their family structure and what the claimants referred to as the ‘heterosexual norm’. They argued that their “social position as lesbian parents renders their need to have Ms. C.A.D. pronounced a legal parent more urgent than it would be for a heterosexual couple;” their suggestion was that because they are lesbians, Ms. C.A.D.’s status as the non-biological parent is “invisible;” as such, “Mr. M.K.’s consent to the adoption should be dispensed with to solidify Ms. C.A.D.’s position as an equal legal parent.”³¹ This was necessary, they contended, because of their vulnerability stemming from their family’s non-conformance with the heterosexual norm. In other words, the applicants’ advanced queer theory’s critique of the primacy of biology and heterosexual reproduction, as well as its critique of the routine social expectations rendering C.A.D. invisible as a mother, that arise from this society’s hegemonic hetero-

28 *Supra* note 11 at para. 15.

29 (2007), 83 O.R. (3d) 561.

30 Under current adoption law in Ontario, for C.A.D.(the non-biological mother) to legally adopt her daughter, M.K. must cease to be the child’s second legal parent. Justice Cohen found that “the applicants seek an adoption order not only because they wish to change Ms. C.A.D.’s legal status, but also because they wish to change Mr. M.K.’s” (at para. 5). Several factors in this case support the conclusion that the applicants wanted more than just legal security for the child’s non-biological mother: i) prior to the de-compensation of their familial ties the parties had discussed launching a *Charter* challenge in order to pursue a three parent adoption; ii) when their relationship was still amicable the parties had actually drafted pleadings to seek a legal declaration that their daughter had three legal parents; iii) under the original three party parenting agreement C.A.D. is a custodial parent. This agreement could have easily and relatively inexpensively been incorporated into a Superior Court custody order had the applicants chosen. M.K. testified that he fully supported either a three-way adoption or a three way declaration of parentage. The applicants testified that they no longer had any interest in obtaining a three-way adoption or declaration of parentage and argued that M.K. had thwarted earlier attempts to proceed with either of these applications by demanding increased access. Justice Cohen was not persuaded that the applicants had exhausted the possibilities of reasonable compromise.

31 *Supra* note 11 at para. 3.

normative social order. What is interesting is that they advanced this queer argument as justification for seeking the law's protection for their nuclear, two-parent family (from their self-created former three-parent family). They argued that this adoption was needed in order to produce "security, structure, boundaries and clarity for their family."³²

The applicants' examples of M.K.'s lack of boundaries and lack of structure included exercising access with his new partner before the applicants had met him and concern over the number of sexual partners he had had. Structure, boundaries, permanency and clarity and the exclusionary social model that privileging them produces are precisely what the postmodern infused queer theoretical approach challenges. These applicants, who intentionally established a non-traditional three-parent (perhaps queer) family, and in response to its breakdown invoked a queer argument about hetero-normativity, came to the court seeking structure, boundaries, permanency and clarity. In particular, they sought the structure, boundaries and clarity of the two-parent, nuclear family; that is to say, they asked the court to legally privilege the norm. Ironically, by their suggestion of the social and legal vulnerability of their family produced by the hegemony of hetero-normativity, these applicants invoked the discourse of queer theory in order to pursue legal recognition of, and protection for, the preeminent hetero-normative social institution: the nuclear family.

Justice Cohen denied the applicants' motion to dispense with M.K.'s consent for the adoption. She rejected the applicants' argument that it was in the child's best interests to have "one stable and secure" two-parent family.³³ Justice Cohen stated that the best interests of the child do not turn on "the protection of a specific family structure" nor does the "nuclear family of two parents and a child enjoy...special preference." She also noted that "adoption is inescapably about biology, because adoption severs a child's biological link to a parent" and that "even in a society that has placed affectional ties at the centre of a child's best interests, the child's biological connections remain a fundamental value;" Justice Cohen determined that it would undermine the child's sense of her place in the world to legally sever her biological relationship with her father.³⁴ Justice Cohen went on to state that

This case is 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. In this case I am considering the legal situation of a self-constructed, non-traditional family – the three-parent family created by these parties.³⁵

Justice Cohen's reasoning in this case provides examples of the ways in which

³² *Ibid.* at para. 5.

³³ *Ibid.* at para. 26.

³⁴ *Ibid.* at paras. 64 – 66.

³⁵ *Ibid.* at para. 75.

feminist and queer projects can converge. Whether from a feminist perspective or a queer perspective, aspects of Justice Cohen's reasoning are as much in tension with each other as is the applicants' reliance on a queer critique of heteronormativity in order to pursue the legal reification of the normative family structure. Significantly, from either methodological approach the elements of her reasoning that are in tension are the same. More significantly, those aspects of her judgment that seem most queer also seem most feminist and those that seem least queer would also likely be perceived as least feminist.

There are both queer and feminist analysis that would strongly endorse Justice Cohen's ready recognition of three-parent families and their equal standing in family law and her refusal to privilege the two-parent nuclear family - indeed her insistence on interrogating the definition of parent and the notion of nuclear family.³⁶ Her recognition of M.K. as not merely a sperm donor, her refusal to adopt the applicants' arguments about their child's needs for the supposed structure, boundaries and stability of one two-parent family and her recognition of the social vulnerability of gay fathers can all be supported by both queer and feminist theories. In tension with each of these aspects of her decision is the significance she places on M.K.'s biological contribution to the family and her endorsement of marriage as a social institution that reflects and creates stability and security. Both queer theoretical analysis and feminist analysis offer strong critiques of these elements of her decision. A further layer to the reasoning in *C.(M.) v. K.(M.)* is suggested by the tensions it presents for gay and lesbian rights theory. The decision in *C.(M.) v. K.(M.)* simultaneously recognizes and fails to recognize sexual minority rights claims.

The paragraphs to follow will first discuss the ways in which both feminist and queer theories support Justice Cohen's reasoning. Following this will be a discussion of how feminist and queer theories converge to critique one of the central tensions evident in Justice Cohen's decision - the primacy it grants to (male) biology. The last part in this section will discuss the tensions this case reveals within gay and lesbian scholarship and between it and queer and feminist theories.

A. Queer and Feminist Convergences

A feminist analysis in support of Justice Cohen's ready recognition of this three-parent family³⁷ and her refusal to privilege the nuclear family model might begin with Martha Fineman's critique of the nuclear (or what she calls the sexual) family.³⁸ Fineman argues that our "societal and legal images and expectations of family are tenaciously organized around a sexual affiliation between a man and

36 *Ibid.* at para. 75.

37 She begins her judgment by giving full legitimacy and equal recognition to the reality of this three-parent family. *Supra* note 11 at para. 1.

38 M. Fineman, "The Sexual Family" in *Feminist and Queer Legal Theory*, *supra* note 4 at 45. There is, of course, a wealth of diverse feminist scholarship spanning many decades, which challenges the traditional, heterosexual, hierarchical family model. Martha Fineman's work relies upon much of this critique. Her work is particularly apt for this discussion because Fineman makes the point that the problems for women perpetuated by the nuclear family model will not be resolved by the inclusion of same sex nuclear families in that model.

woman.”³⁹ She contends that legal reforms that expand the traditional nuclear family model to include same-sex couples “merely reinforce the idea of the sexual family. By duplicating the privileged form, alternative relationships merely affirm the centrality of sexuality to the fundamental ordering of society and the nature of intimacy.”⁴⁰ In this way these non-traditional unions are “equated with the paradigmatic relationship of heterosexual marriage.”⁴¹ As such, they do nothing to disturb the dominant social paradigm that privileges the couple as the “foundational and fundamental” basis of the family.⁴² The predominance of this meta-narrative – the sexual family as natural – means that the family is experienced as an institution of primarily “horizontal” intimacy founded on the romantic connection between the couple. There are a number of reasons why the conception of the sexual family as the foundation for the social and legal ordering of society is problematic from a feminist perspective.

Fineman notes that if the nuclear family is natural, “single motherhood can comfortably continue to be considered deviant. It is deviant simply because it represents the rejection of the primacy of the sexual connection as the core organizing familial concept.”⁴³ Single mothers are vilified because they deviate from the natural order. Fineman also demonstrates how maintaining the sexual (couple centred) family model perpetuates systemic gendered inequities in the division of labour. She argues that the focus on the “reorganization of existing gendered roles within the confines of the traditionally populated family unit” has had little success in truly re-distributing and re-valuing care giving work.⁴⁴ “Fathers would be expected to share more in the domestic tasks as modern mothers spend more time and energy in market endeavors. The marital partners simply would rework the parameters of their relationship that, nonetheless, would continue to serve as the anchor defining and giving content to other family associations.”⁴⁵ The difficulty with such limited reformative re-structuring is that it continues to place the (hetero)sexual union as the basic family core. It does not challenge the structure of the family itself. “In its idealized form, the family [remains] a self-contained and self-sufficient unit.”⁴⁶ She argues that the idea of the natural sexually affiliated family “coincides with the idea that it is the repository for the inevitable dependencies” that arise in a social system – that is the care of children, the elderly, the ill and the needy.⁴⁷ This creates a relationship between the “public” state and the “private” family in which “dependency is allocated away from the state.” Privatizing dependency, she explains, means that to be a successful family requires taking on the burdens of caring for a society’s dependencies. These burdens must be allocated within the family and as has al-

39 *Ibid.* at 45.

40 *Ibid.*

41 *Ibid.*

42 *Ibid.* at 47.

43 *Supra* note 38 at 48.

44 *Ibid.* at 57.

45 *Ibid.*

46 *Ibid.* at 59.

47 *Ibid.*

ways been the case, this allocation tends to be gendered.⁴⁸ “The structure of the nuclear family with its interdependent, well defined roles – with women’s roles typically subservient to the greater whole – is one of its harmful legacies.”⁴⁹ In this way, and for this reason, “the way we perceive the family as a social institution facilitates the continuation of gendered role divisions and frustrates the egalitarian ideal.”⁵⁰ Justice Cohen’s refusal to legally privilege the nuclear family or use the law to provide the particular structure and boundaries sought by the applicants in this case can be read as consistent with feminism’s equality project.

The legal recognition of a family that was from its inception a three-parent family (as opposed to the addition of a third or fourth parent after the breakdown and replacement of one horizontal intimacy with another horizontal intimacy) is significant under Fineman’s approach.⁵¹ The three-parent family in *C.(M.A.) v. K.(M.)* was not, prior to its dissolution, a sexual family. At its inception, it was not wholly based on sexual intimacy and the primacy of the couple. If Fineman is correct that giving primacy to “the couple” as the foundational and fundamental element of the family perpetuates patriarchy,⁵² then the legal recognition of the fact of this three-parent family in *C.(M.A.) v. K.(M.)*, and the court’s refusal to erase its prior existence through a nonconsensual adoption, is consistent with feminist equality projects. Any legal reasoning that would have privileged the relationship of intimacy between the child’s mothers (prior to the family breakdown) over the relationship between these three parents prior to its dissolution, would have reinforced the “centrality of sexuality to the fundamental ordering of society.”⁵³ Justice Cohen, commented that, “[t]hey anticipated that a third parent would be involved with their family and had to have anticipated that this parent might disagree with, or challenge, their parenting choices, just as they must do with one another.”⁵⁴ Clearly placing the three parents on equal footing, Justice Cohen’s reasoning can be viewed as quite feminist. If nothing else, the legal recognition of a family that was not, even at its inception, constituted on the basis of horizontal intimacy does not perpetuate the meta-narrative about the sexual family – a meta-narrative that, as Fineman argues, frustrates the egalitarian goals of feminism.

48 *Ibid.*

49 *Ibid.* at 60.

50 *Ibid.* at 59.

51 It should be noted that the thrust of Fineman’s argument is that society is dependent upon the unpaid work of caregivers in the private family and that as such society should provide these caregivers with significant material compensation in the form of a strong social welfare state. The legal recognition of a non-nuclear family is strongly supported by Fineman’s theory but in terms of the economic restructuring she suggests is needed it does not go far enough. For Fineman disruption of the nuclear family is (only) a good first step necessary for the economic restructuring through the “de-privatization” of care giving work she suggests might follow. See for example Martha Fineman, “Contact and Care” (2001) 76 Chicago-Kent L.Rev.1403; Martha Fineman, “The Inevitability of Dependency and the Politics of Subsidy” (1998) 9 Stan. L. & Pol’y Rev. 89.

52 *Supra* note 38 at 47 “The image of horizontally organized intimacy is a crucial component of contemporary patriarchal ideology in that it ensures that men are perceived as central to the family.”

53 *Ibid.*

54 *Supra* note 11 at 74.

In addition, as feminist legal critics have ably demonstrated, the shroud of secrecy and veil of privacy that have historically shielded the nuclear family from public surveillance have rendered invisible a great deal of physical and sexual violence within the “privacy of the home.” Perhaps an inadvertent benefit of divorce and the proliferation of “broken” and re-constituted families is that as they break and re-constitute they have less ability to remain insular and concealed. With divorce comes outsiders. These outsiders come from both some degree of state intervention and surveillance, usually through the courts⁵⁵ and from the reconfiguration of families; when families are re-configured they incorporate new members who might have the ability to highlight abusive dynamics and gendered hierarchies (whether between parents or children or both). These so called outsiders can be good for disrupting the public sphere /private family divide – lifting the veil so to speak. Similarly, families that from the outset include members and intimacies other than just those based on the two-parent horizontal model disrupt the insular and concealed nature of the nuclear family and might help to challenge the public/private distinction. This too is consistent with feminist projects.

Converging with this feminist argument in support of Justice Cohen’s refusal to privilege the nuclear family, any legal reckoning which disrupts the assumption that what is common (or assumed to be common) is therefore natural and correspondingly good (or better), will also find support from queer methodologies. Queer theory’s most basic critique is its challenge to, and disruption of, the concept of sex as a natural or pre-social phenomenon that ought to dictate the ways in which social institutions, privileges and responsibilities are distributed. When sex and gender norms are conceptualized as natural those individuals and social groupings that do not conform to them are correspondingly conceptualized as unnatural. So for example, as Jeffrey Weeks argues, “because we learn very early on from many sources that ‘natural’ sex is what takes place with members of the ‘opposite sex,’ ‘sex’ between people of the ‘same sex’ is therefore, by definition, ‘unnatural.’”⁵⁶ In other words, every sexual act, desire or identity is understood through and measured against a heterosexual paradigm. When social

55 One might suggest a divergence here between this statist assertion and queer theory’s supposed aversion towards state regulation. This is commonly identified as one of the tensions between feminist and queer theories. The claim is that as feminism turned toward the state for assistance to reduce violence against women and promote public sector equality between the sexes, sexual minorities fought to reduce or remove state interference in their (sexual) lives. However, I don’t think the divergence identified here is between feminism and queer theory. Given its precepts, queer theory is neither inherently statist nor non-statist. It is, as Adam Romero suggests, a positionality in reference to a norm (see A. Romero, “Methodological Descriptions: ‘Feminist’ and ‘Queer’ Legal Theories” *supra* note 4 at 179). It is irrelevant to the concept of queer whether said norm is hegemonic as a result of state reification, social policing or (more likely) a combination of the two. A law reform initiative or judicial rendering that disrupts the normative order is as queer (and not queer, given queer theory’s paradoxical nature – see Elaine Craig, *Sex and The Supremes: Towards A Legal Theory of Sexuality*, forthcoming) as is a subversive social practice or moment of cultural dissent. If there is a tension here, it may actually be between feminism and the gay and lesbian rights movement’s fight for sexual liberty.

56 Elaine Craig, *ibid.*, citing Jeffrey Weeks, *Against Nature*, (London: Rivers Oram Press, 1991) at 4.

structures, such as family, are founded upon these supposedly pre-social norms and consequently “naturalized” along with them (giving rise to meta-narratives such as Fineman’s “sexual family”) those individuals and social groupings constructed as unnatural are socially and legally disadvantaged. Fineman’s critique of the sexual family is so well suited for this discussion of the convergences between feminist and queer approaches demonstrated by Justice Cohen’s reasoning because it is a critique that lends itself as easily to queer projects as to feminist ones. Similarly, (and converging with both feminist thought and perhaps gay and lesbian rights agendas) Justice Cohen’s refusal to equate the structure and boundaries of the nuclear family with the best interests of the child would also find support from queer legal thought.

The paragraph introducing this section asserted that queer theory and feminist theory would also converge on Justice Cohen’s affirmation of the fertility obstacles faced by gay men. One of the aims of many queer theorists is to reveal the “paradoxical, fractured and/or flipped capacities” of male, female, sexuality, desire and power and the impact that emerges through the psychic reversal of these social forms.⁵⁷ Justice Cohen ended her reasons by acknowledging that lesbians “might fear the loss of control over their own reproduction occasioned by the necessary involvement of a sperm donor in the creation of their family” but went on to remind the applicants, using their own words, that “the options for gay men are in some ways much bleaker than even...[theirs].”⁵⁸ A queer reading of this aspect of her judgment might identify the power that could arise when the typical discourse regarding the subjugation of women through the social, legal and violent regulation of the female body and its reproductive capacities is paradoxically reversed. The couple with no semen might be bleak, but the one with no uterus is bleaker. In this case, the decision to become pregnant, the choice of father and the process of insemination were exclusively within the control of the applicants. As between the applicants and the respondent in this case, bio-power over reproduction flowed from female to male.

But what is the convergence with feminism regarding this element of Justice Cohen’s decision? How is the legal recognition of the reproductive rights of men feminist? It is feminist because it is not a recognition of the fertility interests of all men – here Justice Cohen’s comments are necessarily limited to the fertility obstacles of gay male partnerships. A legal nod to the reproductive interests of gay male families – to their opportunities to become parents - is an implicit acknowledgement that there is nothing necessarily female about raising children. One of feminism’s earliest aims was to disrupt the gendered division of labour by disaggregating the essentialist assumption that childrearing, and the domestic work that inevitably comes with it, are inherently women’s work. Recognition of gay male fertility interests is recognition of the possibility of some social arrangements in which men (albeit a very small gay minority of them) take sole responsibility for the work (and social contribution) of caring for some of society’s children.⁵⁹

57 Halley, *supra* note 7 at 25.

58 *Supra* note 11 at para 75.

59 The Alberta Court of Appeal, in *H. (D.W.) v. R. (D.J.)* (2009), CarswellAlta 1104 also

Laura Kessler develops the argument that “[a]lthough family care giving may simply seem to support patriarchy, closer examination reveals that it can also be a “deeply and complexly subversive practice.”⁶⁰ Her claim demonstrates another conception of the way in which feminist and queer theorists might converge on this aspect of Justice Cohen’s reasoning. Kessler argues that both queer and feminist legal theorists have frequently overlooked the ways in which the care work of ethnic and racial minorities, gays and lesbians and heterosexual men can be a form of political resistance. She provides several examples of this “transgressive caregiving.” Her first example discusses black women’s practices of resistance to the systemic control of African American women’s reproduction (both historically and currently). One such practice centres on the family and community relations that they have developed, such as the practice of “othermothering” – women who assist blood mothers by sharing mothering responsibilities. “Historically, othermothering has operated not only informally but also through well developed institutions and movements such as black churches, black women’s clubs ...and the black civil rights movement.”⁶¹ Kessler argues that “othermothering” is as significant to women’s liberation as it is to black survival. “[O]thermothering undermines the patriarchal family, the male bread-winner ideal, and the notion of biological motherhood.”⁶² While not directly analogous to “othermothering” and its practices of resistance on a broader community scale, “doublefathering” may nonetheless have at least some similar impact. Moreover, as Kessler herself argues, “when men engage in care work – even men in traditional marriages with relatively traditional gender patterns – they resist ...the continued construction of men as inauthentic caregivers within family and social welfare law.”⁶³

B. Converging Critiques of *C.(M.) v. K.(M.)’s* Emphasis on Biology

Convergences between feminist and queer analytical approaches are revealed not only by arguments that support the reasoning in this case. As suggested above, both queer and feminist legal theories also offer strong critiques of Justice Cohen’s privileging of biology in this case. Both explicit in her reasons for judgment and implicit in the ultimate outcome of this case is the “fundamental value” Justice Cohen places on biology.⁶⁴ There are both queer and feminist critiques of privileging biology over social contexts or relationships.

A queer reading of this aspect of the case might argue that one of its internal tensions is between the Court’s refusal to privilege the “natural” nuclear family and the Court’s emphasis on the primacy of biology. Queer theorists have frequently critiqued the inevitable essentialism and heterosexism that flows from

recognized this particular type of familial arrangement in a case involving an access dispute between the separated fathers of a daughter conceived with a surrogate. In that case, by granting a post separation access order to the non-biological father the court refused to erase the prior existence of a “two father no mother from inception” family.

60 L. Kessler, “Transgressive Caregiving” in *Feminist and Queer Legal Theory* *supra* note 4 at 349.

61 *Ibid.* at 353.

62 *Ibid.* at 353.

63 *Ibid.* at 361.

64 *Ibid.* at para. 64.

founding the organization of social institutions and legal privileges on biology and heterosexual intercourse.⁶⁵ From a queer perspective, given its critique not only of the assumption that there is a “natural” family structure but also its critique of biology itself *and* the role it is given in the legal and social regulation of people,⁶⁶ Justice Cohen’s emphasis on the biological connection between M.K. and the child is problematic. To be sure, she does recognize that M.K. and the child share more than mere biology. She notes that M.K. has been a committed and loving father involved in the child’s life from the beginning. However, unquestionably she places heavy emphasis on the importance, the “fundamental value,”⁶⁷ of their biological connection. Was this necessary given such strong evidence regarding M.K.’s parenting role and relationship with his daughter?

Feminist thought would also take issue with the fundamental value and significance attributed to M.K.’s biological contribution to the constitution of this family. A feminist legal scholar might argue that the primacy given to biology in this case fails to account for the distinctions between how, in a society based on gender hierarchy, the power of male biology and female biology are not equal. From this perspective one might argue that Justice Cohen failed to adequately recognize the vulnerable position that the applicants find themselves in as a result of the power of biology – male biology – to render the child’s non-biological mother socially, if not legally, invisible.⁶⁸ Moreover, in a society where women provide the bulk of (what is under paid, and under valued) care giving work for children, a feminist legal analysis regarding the parental entitlements of the biological father might ask shouldn’t the focus be, almost exclusively, on the emotional and care giving relationship between the father and the child and not their biological relationship?⁶⁹

65 See for example, J. Weeks, *Sexuality*, 2nd ed., (Routledge: New York, 2003).

66 See for example, J. Butler, *Bodies That Matter: On The Discursive Limits of Sex* (Routledge: New York, 1993); J. Butler, *Gender Trouble: Feminism and The Subversion of Identity*, 2nd ed. (Routledge: New York, 1999); J. Halley, “Sexual Orientation and The Politics of Biology: A Critique of the Argument From Immutability” (1994) 46 Stan. L. Rev. 503

67 *Supra* note 11 at para. 64.

68 It is important to note that the power of male biology in cases involving lesbian parents have in some instances had not just important social implications but also adverse legal implications for the women parents. See Susan B. Boyd, “What Is A ‘Normal’ Family? C v. C. (A Minor): (Custody: Appeal)” (1992) 55 Mod. L. Rev. 269 writing on both the English and Canadian context. In 1998 Susan B. Boyd published an article suggesting that despite the facial neutrality of family law regimes in Canada, lesbian and gay parents are still subject to the heterosexist if not homophobic reasoning of judges in the application of these supposedly neutral principles. *Lesbian (And Gay) Custody Claims: What Difference Does Difference Make?* (1998) 15 Can. J. Fam. L. 131.

69 A counterargument to this assertion would be that legal entitlements regarding a child are to be assessed based solely on the best interests of the child and not arguments about justice, fairness or equality. A response to this counterargument is that it somewhat begs the question. Biological connection is only presumptively in the best interests of the child in a social and legal system that privileges biology. Moreover, one might compellingly argue that being raised in a familial and social context that values equality over biology will be in the best interests of the child. In the case of *C.(M.) v. K.(M.)* the outcome would have been the same; the point is really only that, given the strong parental relationship between this father and his daughter there was no need to resort to the problematic reliance on the primacy of (male) biology to establish the need to, in the best interests of the child, protect this father’s parental rights and responsibilities.

Historically, family law and the law of paternity defined fatherhood “by the status it can confer upon children rather than in terms of responsibilities, obligations, relationship or nurturing.”⁷⁰ This is a problematic approach from both queer and feminist perspectives. A feminist critique of legal reasoning that emphasizes this aspect of paternity would suggest that it is an approach that conceives of fathers as the owners of children or as breadwinners but offers very little basis for conceptualizing them as caregivers. A queer analysis of such legal reasoning might examine the historical roots of the law of paternity. Queer theorists might argue that the law of paternity and its focus on biology and the act of conception was really about the social regulation of sexuality and the drawing of distinctions between good sex and bad sex by defining which sexual interactions resulting in conception would be legally sanctioned and which would not (i.e. bastards were out and children born of wedlock were in).

There is a second critique of the decision in this case upon which queer and feminist analysis would likely converge. Like so much of the reasoning in this multi-faceted case, the theoretical implications of Justice Cohen’s recognition of this three-parent family and her refusal to equate nuclear family norms (and their structure, stability and boundaries) with the best interests of the child are in tension with her references to marriage and monogamy. She emphasizes M.K.’s current state of monogamy as evidence of his stability (although conversely, she also rejected the applicants’ assertion that his dating history indicated lack of stability and structure). She also suggests the applicants’ consider getting married if they want C.A.D. to feel more secure about her status as the non-biological mother.⁷¹ Many queer theorists have devoted significant effort towards challenging the promotion of same sex marriage in an effort to discourage courts (and other legal and social institutions) from making the very intellectual move that Justice Cohen made in this aspect of her decision.⁷² From a feminist perspective reification of the institution of marriage is problematic for the same reasons that the nuclear family is problematic. Privileging marital relationships over other types of relationships can only serve to perpetuate the ways in which social ordering is centred upon horizontal intimacies and Fineman’s sexual family.

C. An Argument About (Between) Gay and Lesbian Rights

The reasoning in this case also reveals significant tensions from a gay and lesbian rights perspective. The most significant tension with respect to gay and lesbian rights projects in this case might be characterized as a tension between gay *and* lesbian rights projects. On the one hand, the reasoning in this case affirms the legal recognition of gay and lesbian families. In her first paragraph she describes the family in such a matter of fact manner it seems evident she has no

70 Kessler, *supra* note 60 at 360.

71 With this statement Justice Cohen must have been affirming the social benefits and legitimacy that come from marriage because given the legal implications of the decision in *A.A. v. B.B.* (and its affirmation that a court can grant a declaration of three parent parentage), upon which she relies, marriage would certainly not be required in order to obtain greater legal security for C.A.D.

72 See Ruthann Robson, “Compulsory Matrimony” in *Feminist and Queer Legal Theory*, *supra* note 4; see also M. Warner, *The Trouble With Normal*, (Boston: Harvard University Press, 1999).

difficulty giving this family the same recognition that she would give a family of heterosexual parents.

Justice Cohen's decision could also be said to be pro-gay and lesbian rights because it gives legal recognition to the original intention of these gay and lesbian parties to form a family. While acknowledging that their original parenting agreement is not, under Ontario law, legally enforceable, she also placed real significance throughout her decision on the original intention of these parties to create a three-parent family.

More directly, Justice Cohen's reasoning vindicates the rights of gay fathers. She admonishes the applicants for discounting "the fact that Mr. M.K., who also belongs to a historically oppressed group, might likewise feel some fragility in his position."⁷³ As discussed in the previous section, she concludes her judgment by recognizing the minimal reproductive options available for gay men. The recognition of the vulnerability of the gay male parent and perhaps more importantly the affirmation of the legitimacy of the gay male parent is significant for gay rights. "The protection of children from allegedly oversexed, predatory gay men has been a recurring theme in the history of state regulation of same-sex intimacy and family life."⁷⁴ Indeed, historically the construction of the gay male pedophile was used as a "pretext for the widespread criminalization of adult, consensual, same-sex intimacy and the civil regulation of gay reproduction, adoption and parenting."⁷⁵

A judicial recognition not only of gay fathers' rights but also of their social vulnerability as a class of parents is significant. This vulnerability is evidenced by some provincial governments' legislative efforts to address the legal vulnerabilities faced by parents who conceive using a sperm donor. So for example in Alberta, section 13(3) of the *Family Law Act* provides that

...a male person whose sperm is used in an assisted conception involving an egg of a female person who is neither his spouse nor a person with whom he is in a relationship of interdependence of some permanence is not the father of the resulting child and acquires no parental or guardianship rights or responsibilities of any kind as a result of the use of his sperm.⁷⁶

Unfortunately such efforts can subject gay male parents to social and legal vulnerabilities. Consider the case of *H.(D.W.) v. R.(D.J.)*.⁷⁷ *H.(D.W.)* involved an access dispute between a non-biological father and his ex-partner – the child's biological father. The child's biological mother was a gay woman who agreed to be surrogate for the men on the understanding that the biological father would then donate his semen again so that she could have a second child who would

73 *Supra* note 11 at para. 26

74 Kessler, *supra* note 60 at 355.

75 *Ibid.*

76 *Family Law Act*, S.A. 2003, c. F-4.5

77 *Supra* note 59.

be parented by her and her partner. For the first three years of the child's life she lived with, and was cared for by, her two fathers. The litigation arose in this case when the fathers' relationship broke down and the biological father attempted to deny access to the non-biological father.

In resolving the dispute, the court in *H.(D.W.)* concluded that pursuant to section 13(3) of Alberta's *Family Law Act*, neither R., the child's biological father, custodial parent since birth and named second parent on the birth certificate (which creates only a presumption of legal parentage and which was in this case rebutted by section 13(3) of the *Act*)⁷⁸ nor H., the child's non-biological father and former custodial parent since birth, were a legal parent of the child. Under Alberta's *Family Law Act* the child's only legal parent was the biological mother. "So we have this odd situation where Ms. D. is not a custodial parent – or primary residential parent – (as were Messrs. H. and R. before the separation) ... but she is the only legal guardian under the Act."⁷⁹

Given these types of considerations, the decision in *C.(M.A.) v. K.(M.)* might be characterized as quite pro-gay rights. However, gay and lesbian rights scholars might also point to the Court's refusal to offer the law's protection for this lesbian nuclear family as a denial of gay and lesbian rights. *C.(M.A.) v. K.(M.)* is one of the first cases in Canada in which a court has been asked to resolve a legal dispute arising between a lesbian couple and their child's known sperm donor.

In Ontario, gender neutral birth certificates – that is the option to place the names of both mothers on the certificate of live birth – is only available for lesbian couples who use anonymous semen donors. For those couples (straight or lesbian) that use a known donor the option to name the non-biological parent is not available. This adversely impacts lesbian couples as compared to heterosexual couples in two ways. First, lesbian couples are more likely than straight couples to use a known donor. Second, heterosexual couples who have used a known donor have at least the possibility of "flying under the radar" – that is refusing to disclose their method of conception and registering the non-biological father regardless.⁸⁰

Certainly the parenting agreement in this case suggests a choice on the part of these women to make M.K. a known and involved parent. They did not however, have any choice as to whether M.K rather than C.A.D. should be the (second) legal parent from birth.⁸¹

Gay and lesbian rights advocates might also interrogate the concept of "choice" in this context. As Fiona Kelly argues, "the meaning to be attributed to

78 R.'s name was on the birth certificate creating a presumption of parentage. However, the court found that this presumption was clearly rebutted by section 13(3) of the *Act* and that as a result, because R. had not adopted his daughter nor sought a declaration of parentage, he was not the child's legal guardian – despite his biological, and custodial relationship and despite being named on the birth certificate.

79 *Ibid.* at para. 84.

80 Fiona Kelly, "(Re)forming Parenthood: The Assignment of Legal Parentage Within Planned Lesbian Families" (2008-2009) 40 *Ottawa L. Rev.* 185.

81 Lesbian couples could of course also refuse to reveal that the donor is known to them rather than anonymous. However, as Kelly, *ibid.* has argued, the higher level of scrutiny to which lesbian parents are subjected in this context suggests this is less likely.

the donor relationship in the context of the lesbian family is perhaps the most difficult issue lesbian mothers face, both because of the absence of any legal or social guidance on the issue, as well as the strong societal pressure to provide one's child with a "father."⁸² Certainly the evidence in *C.(M.A.) v. K.(M.)* indicates that the applicants experienced this societal pressure in choosing to use a known donor. In discussing their choice to use a known donor Ms. C.A.D. testified: "...we felt that it would be hard enough for a child of two lesbian parents to have a mystery biological link, or possible parent of unknown quantity..."⁸³ Other factors for consideration when interrogating the concept of choice in this context are the disadvantages of using anonymous donor semen in Canada. For many people the use of an anonymous semen donor is financially and/or geographically unobtainable.⁸⁴

While lesbian rights arguments critiquing problematic social assumptions and panics about "father-less" families would converge in this case with queer and feminist critiques regarding the primacy of biology, and the privileging of the patriarch, they would also be somewhat in tension with the queer and feminist readings of this case that affirm Justice Cohen's refusal to reify the applicants' nuclear family. Gay and lesbian rights advocates might reasonably note that the applicants in this case face legal and social vulnerabilities that heterosexual parents would not face.

On the problematic privileging of biology (and its corresponding privileging of heterosexual intercourse) gay and lesbian rights scholars, feminists and queer theorists likely converge. A legal definition of family that emphasizes biology was the main weapon in the arsenal against providing legal benefits to same sex couples.⁸⁵

IV. CONCLUSION

C.(M.A.) v. K.(M.) is a hard case involving the messiness of competing interests that so frequently arises from the complexities of peoples' lives. The facts underpinning *C.M.*, and the court's reasoning in the case, reveal the illogic of drawing a bright line distinction between gender and sexuality and then allocating the former as the proper object of feminist focus and critique and the latter

82 *Ibid.* at 201

83 *Supra* note 11 at para. 9.

84 Subsequent to the adoption of legislation in Canada that prohibited semen banks from paying for donations, the anonymous sperm supply in Canada dried up, so to speak (see for example *Human Tissue Gift Act*, R.S.A. 2000, c. H-15). As a result, it must now be purchased and shipped internationally – typically from the United States. It must be shipped to a fertility clinic where it is stored until insemination. The cost of purchasing, shipping, storing and inseminating usually amounts to more than \$1,000.00 per insemination.

85 In the early *Charter* cases on sexual orientation biological difference was the basis for upholding exclusions from health benefits (see *Andrews v. Ontario (Minister of Health)* (1988), 49 D.L.R. (4th) 584) and same sex marriage (see *Layland v. Ontario (Minister of Consumer and Commercial Relations)* (1993), 104 D.L.R. (4th) 214 at 222. See also Justice LaForest's dissent in *Egan v. Canada*, [1995] 2 S.C.R. 513. For a helpful discussion on the manner in which Canadian courts relied on biological difference to deny the equality claims of gay and lesbian litigants see Cossman, *supra* note 21.

as the object of either queer theory or gay and lesbian studies. Justice Cohen's reasoning did not succumb to this illogic and the result is a nuanced decision; while it has not achieved the impossible (reconciling the irreconcilable tensions that arise when newly emerging queer family ties become family feuds) it is a decision that appears to have recognized alternative or queer family structures without problematically reifying them.

In support of her suggestion that leftist legal projects "take a break from feminism," Halley asserts that her aim is "a posture, an attitude, a practice, of being in the problem, not being in the theory."⁸⁶ The multiple readings of *C.(M.A.) v. K.(M.)* offered above attempt not only to "be in the problem, not the theory" but also to reveal how in order to do that – at least in this case - it might be useful, if not necessary, to deploy and contest as many theoretical approaches as possible. As it happens, in this case feminist and queer projects converged while gay and lesbian rights objectives were more troubled. In another circumstance the convergences and divergences would be different. Far from suspending feminist or queer or any other theoretical inquiry, the inestimable value for critique "issued by the simultaneous incommensurate presence of many theories"⁸⁷ will only arise from a refusal to take a break.

86 J. Halley, *Split Decisions: Taking a Break from Feminism*, (Princeton: Princeton University Press, 2006) at 7.

87 Halley, *supra* note 7 at 9.