THE MODERN LAW REVI

Cohabitation and Comparative Method

Robert Leckey* to views within a legal tradition's past.

INTRODUCTION

Legislatures and policy makers in many places are sensibly turning their attention to the question of unmarried couples. Sometimes they do so simply in response to the prevalence and openness of this form of family life. Other times they do so because a court has put them on notice that the di¡erential treatment of married and unmarried couples runs afoul of an entrenched human right such as equality. Whatever the impetus, the search for appropriate regulation of unmarried couples often turns to comparative law. Comparatists typically contrast regulation of these relationships by the common law and civil law: at least limited recognition of unmarried couples appears in some common law jurisdictions, while the civil law of the family typically remains ¢xed ¢rmly on marriage. Such comparison may inform policy makers and enlarge the menu of doctrinal options. It also raises substantial methodological questions, among them the choice of jurisdictions to study and the appropriate form of comparison.n

Functionalism is a prominent method of comparison, focusing on legal rules in di¡erent places as various solutions to a common problem.[1] The functionalist approach on this family law ques

bitation refers to two adults, of the same sex or of opposite sexes, who live together in a conjugal relationship. A former cohabitant, Susan Walsh, challenged Nova Scotia's restrictive presumption that equal division of property applied only to married couples.[7] She contended that this rule discriminated against her on the basis of marital status, contrary to the equality guarantee in the Canadian Charter of Rights and Freedoms.[8] Eight judges rejected her claim that denying unmarried cohabiting couples the presumption of property division violated their essential human dignity. Where legislation drastically alters the legal obligations of partners towards one another, wrote the majority, 'choice must be paramount'.[9] On that view, many persons in circumstances similar to those of the parties have chosen to avoid marriage and its legal consequences. Furthermore, despite functional similarities between married and unmarried couples, signi¢cant heterogeneity characterises the class of unmarried couples. Gonthier J agreed with the majority on the permissibility of excluding unmarried couples from a matrimonial property regime. He took pains to distinguish the respective legal bases for spousal support and matrimonial property. Spousal support, legislatively imposed, is needs-based, ful¢lling a social objective; the division of matrimonial property is contractual, a core incident of the consensual decision to marry. In dissent, L'Heureux-Dube, J emphasised the historical disadvantage of unmarried couples, their functional similarity to married couples, and individual cohabitants' lack of choice over their marital status.

The judgment is instructive for other jurisdictions with a bill of rights regarding the interaction of family law with equality guarantees. o19(th)02072(e-9(7669)3-499(mi2120

variously from the common law or the civil law, the same constitutional guarantees apply across the federation. As when British scholars and their counterparts elsewhere in Europe discuss decisions of the European Court of Human Rights, scholarly reaction to *Walsh* reveals common law and civilian sensibilities. A sketch of the backdrop of private law, against which the constitutional claim unfolded, will offer a comparison of the treatment of unmarried couples by legislatures in neighbouring common law and civil law jurisdictions.

Within the Canadian federation, the provinces enjoy general legislative jurisdiction over the family as a matter of 'property and civil rights', though the Parliament of Canada has power over 'marriage and divorce'.[12] In every common law province and in civilian Quebec, marriage entails, among other obligations, a reciprocal duty of support. On separation, provincial laws presume a division of the increase in value of certain assets, irrespective of which spouse holds title. In the common law provinces, spouses may contractually displace the presumptions about sharing property. Under the Civil Code of Quebec, while it is possible to select a matrimonial regime other than the default partnership of acquests, the regimes of the so-called family patrimony and the compensatory allowance are obligatory as matters of public order.[13] Turning to unmarried couples, legislation enacting public or social schemes such as workers' compensation or income assistance in every jurisdiction, and legislation ordering income taxation and government pensions at the federal level, treats them identically to married spouses in most respects.[14] I-276.-14.9041ng

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into their matrimonial property regimes.[19] It is thus unsurprising that some comparatists, adopting a functionalist approach, conclude that the common law provinces have partially or fully assimilated cohabitants to married couples while Quebec has largely ignored them.[20]

This paper's first section takes as its point of departure the functionalists' observation of a sharp contrast in regulatory tack between the common law provinces and Quebec. Accepting the scholarly reactions to Walsh on their own terms, it presents the view of them as representing distinct conversations in the common law provinces and in Quebec. Criticisms in the common law provinces present themselves as bearers of a functionalist approach to family law. By contrast, those in civilian Quebec cast themselves as committed to formal ordering in the service of autonomy. Despite these differences, a similarity is implicit: scholars of both legal traditions are reluctant to acknowledge the disapproval that until recently conditioned the regulatory posture towards cohabitation. This section's critical engagement with two prominent discourses of family regulation connects with lively debates in other jurisdictions as to family law's appropriate course.[21] This unstudied similarity, combined with warnings that cultural comparative law can overlook internal diversity, calls for another reading of Walsh. The second section contests the stark contrast between common law and civil law approaches. It rereads Walsh as an address to Quebec, disputing the assumption that the judgment speaks only to the common law provinces. This section challenges the orthodox account of de facto spouses as invisible to the civil law, in part by expanding the set of sources relevant to comparative law. More than is generally acknowledged, they are visible to the civil law, in both the present and the recent past. That comparative accounts have failed to see this presence testifies to the blind spots of discursive comparison.

SELF AND OTHER: CIVIL LAW AND COMMON LAW

Distinct discourses on unmarried couples

On the obvious reading, Walsh speaks to the provincial legislatures that have ascribed reciprocal support obligations to unmarried cohabitants. They are the self, the subject, and Quebec is the invisible other. In Nova Scotia and the other

common law provinces, unmarried partners are indisputably characters in the family law drama. While differences remain in the law of intestate successions, treating cohabitation as triggering matrimonial property obligations would promote the matrimonial regime still further as the single model of intimate relationship.

Facing this consequence, the majority judges seem to have embraced a weak or relative concern for the autonomy of unmarried partners. They peppered their reasons with references to autonomy and choice. Their concern fastens on the interest in preserving cohabitation as an option distinct from marriage. In the majority's view, recognition of marital status as potentially founding a discrimination claim does not require the total assimilation of unmarried cohabitants to married spouses. For the purpose of affirming autonomy by distinguishing marriage from cohabitation, inscribing the line between spousal support and division of property is less important than drawing a line somewhere. Given how few rights and obligations remained the preserve of married couples, marital property assumed salience as the line of last defence.[22]

By contrast, a vigorous strand of Quebec literature exemplifies a strong or absolute autonomy argument. The primary justification for prevailing legislative policy in that province is the legislature's desire to respect the choice of unmarried adults who, it is presumed, prefer to avoid the effects of marriage.[23] For many commentators, the concern is not that autonomy requires a consequential choice between options of marriage and cohabitation. It is that, absent the formal consent of de facto spouses, ascribing a single obligation to them is illegitimate. De facto spouses are thought to have affirmed a wish for their love to subsist in a realm of liberty, outside the law.[24] No enforceable obligations are seen as arising, 'inherent, and not externally imposed,' from the life of the relationship.[25]

Admittedly, the legislature's deference to the autonomy interest is not fully consistent. The disjuncture between autonomy as lodestar in matters of concubinary policy and the imposition of a weighty obligatory regime to protect married spouses from unfair marriage contracts suggests different conceptions of autonomy for concubines and married couples.[26] Quebec's public order rules on marriage make the 'choice' to marry, at least as concerns specified classes of assets, black or white. Talk of the choice to marry or not may be lesser in the common law

22 An alternative reading of the judgment fastens on the distinction between automatic imposition of property division, sought in Walsh, and what was obtained in previous Charter challenges: the right to access a benefit (as in Miron, n 8 above, involving an insurance indemnity: the Court held it to be unjustifiably discriminatory for the standard insurance contract provided by legislation to differentiate between married and unmarried insured persons respecting indemnification for a partner affected by an accident) or access to a support mechanism operative only where the claimant shows economic dependence on the respondent partner (as in M v H [1999] 2 SCR 3 at [301] (Bastarache J concurring); the Court held it to be unjustifiably discriminatory for provincial family legislation to recognise a support obligation on the part of unmarried opposite-sex cohabitants but not same-sex cohabitants).

23 D. Goubau, 'Le Code civil du Quebec et les concubins: un mariage discret' (1995) 74 Can Bar Rev

provinces in part because the possibility of altering their matrimonial property regimes by contract preserves more space for choice in marriage.

Rejection of a legislative framework and praise for freedom of contract might strike common law observers, especially those informed by feminist critiques of contract and family law, as a veiled defence of patriarchal exploitation. Contextualising the strong autonomy claims is therefore important. They unfurl within a civilian tradition including a venerable notarial profession and developed sense of private law justice.[27] The civil law of the family boasts a rich understanding of marriage contracts as protecting vulnerable wives and as the 'patrimonial constitution' of a new family.[28] Presumably some of this benign, forward-looking contractual facilitation transfers from marriage to cohabitation agreements. Proponents of the strong autonomy justi¢cation rarely suppose that the general law of property and obligations optimally regulates the patrimonial consequences of long-term nonmarital intimacy. Instead, the strong autonomy justi¢cation for Quebec's status quo prompts exhortations that de facto spouses should conclude a cohabitation contract, ideally counselled by a notary.[29] De facto spouses are not condemned to a 'vide juridique', insists a law professor (and notary);[30] within the bounds of obligatory rules of public order, the partners are free to create civilly enforceable rights and obligations.[31] Indeed, the notarial profession stands ready to help them do so. Enjoinments that de facto spouses order their a¡airs contractually often proceed una¡ected by the empirically negligible uptake of this option.

A central critique of Walsh articulated by scholars in the common law provinces derives from a commitment to functionalism as family law's dominant regulatory mode. Family law functionalism is like the comparative law method that this paper has bracketed. It focuses on the functions of problem-solving rules. It includes, however, an additional level of functionalism: it focuses on the functions that family units perform. The family law functionalist sees family units as providing emotional and material support to their members. This approach contrasts with formalism, which assigns rights and duties on the sole basis of formal family status, such as marriage or legal parentage. Claims for the functional family 'hold that those who function as a committed interdependent relationship require ^ and implicitly deserve ^ legal protections, regardless of their sex, or restrictive formal indicia of status such as marriage, or ability to marry.'[32] Law's consideration and

27 N. Kasirer and P. Noreau (eds), *Sources et instruments de justice en droit privé* (Montreal: Themis, 2002).
28 J. E. C. Brierley and R. A. Macdonald (eds), *Quebec Civil Law: An Introduction to Quebec Private Law* (Toronto: Emond Montgomery, 1993) para 313.

recognition should attach to 'the realities of familial relationships, rather than to some idealised moral vision of "the family."'[33] (The possibility that other judgments influence functionalist prescriptions will be addressed presently.) Some versions of family law functionalism preserve distinctions between family forms. For example, family law functionalism may take less formal relationships as evidence that the members have different expectations and commitments than do members who have formalised their connection.

The literature also shows, however, another version of functionalism. Once it has identified a function common to two groups, this bolder brand of family law functionalism sweeps aside legal distinctions in treatment of different family units. From this perspective, L'Heureux-Dubé J was right, in her dissent in *Walsh*, to reject any distinction in the kind of obligation or entitlement at issue. If unmarried cohabitants are functionally equivalent to married couples ^ both, that is function indistinguishably as interdependent households ^ differences in treatment between the two classes become suspect. From this point of view, it is inconsistent to recognise a right to spousal support in *M v H*, the case involving same-sex cohabitants, but not to extend the presumption of halving matrimonial property in *Walsh*.

Viewed functionally, *Walsh* backslides to bad old formalism. The charge is that *Walsh* stands 'starkly at odds with decades of legislative initiatives and Supreme Court of Canada rulings anchored in a functional approach to family relationships.'[34] The implication is that the legal form of the partners' relationship fails to justify distinctions in the treatment of property held by married spouses as opposed to unmarried cohabitants. Recognising cohabitants as family units with reciprocal rights and duties is appropriate because of the normative 'reality' of their 'real contributions and sacrifices' and 'real interdependencies.'[35] By contrast, *Walsh* is said to be 'unrealistic' in its assessment of unmarried couples' expectations.[36]

The strong autonomy stream from Quebec, defending non-regulation of de facto unions, and the family law functionalist criticisms of *Walsh* from the common law provinces reflect different preoccupations. Yet the sharp contrast is perhaps misleading, as legal regulation usually combines formalism and functionalism. The better question for private law governance is the relative weight of the two modes and the level of abstraction at which they operate.[37] The strong autonomy stream's insistence that only explicit, formalised expressions ^ solemnisation of marriage or of a civil union, conclusion of a cohabitation contract ^ demonstrate intention to submit to family responsibilities likely undervalues tacit commitments and implied undertakings. Indeed, the Civil Code of

N. D. Polikoff, *Beyond (Straight and Gay) Marriage: Valuing All Families under the Law* (Boston: Beacon Press, 2008).

33 N. Bala, 'The Evolving Canadian Definition of the Family: Towards a Pluralistic and Functional Approach' (1994) 8 Int'l J L Pol'y & Fam 293, 312.

34 C. J. Rogerson, 'Developments in Family Law: The 2002^2003 Term' (2003) 22 Supreme Court LR (2d) 273, 274.

35 Bala and Cano, n 20 above, 151.

36 N. Bala, 'Controversy over Couples in Canada: The Evolution of Marriage and Other Adult Interdependent Relationships' (2003) 29 Queen's LJ 41, 55.

37 R. A. Macdonald, 'Article 9 Norm Entrepreneurship' (2006) 43 Can Bus LJ 240, 272^288.

Quebec's book on the family recognises some informal ordering: 'an adequate combination of facts' may, for example, establish ¢liation by showing uninterrupted possession of status.[38]

As for family law functionalism, it probably discounts too heavily the way in which explicit intentions may, in a legally noticeable way, alter the appropriate consequences of conduct. Family life, Gerard Cornu observes sensitively, is rife with the ambivalence and antinomies of ordering, formal and informal, explicit and tacit, conscious and unconscious.[39] These pairs do not, it bears emphasis, map onto a further pair of classi¢cations, legal and non-legal.[40] The family law functionalist and strong autonomy arguments are each insensitive to the other mode of ordering, although in fact they depend on each other. Put otherwise, with regard to cohabitation, functionalism and formalism are both reductive, albeit in di¡erent ways. The functionalists see only the function, not the form. And the formalists see only the form (or lack of one), not the function. Neither vision alone provides a ¢rm grasp on the juridical and practical speci¢city of cohabitation.

The impression is unmistakable that, by and large, the common law family scholars writing mostly in English, and the civil law family scholars writing mostly in French, have little scholarly interaction. The doctrinal literatures seem to coexist in splendid isolation. This situation mirrors that in the European Union, where the sense of family law as a private law matter subject primarily to national regulation has sustained a parochialism in family law scholarship that is unmatched in matters, such as the law of obligations, which squarely occupy an agenda for harmonisation. If the common law and civilian scholars cited here were, however, to re£ect on the debates emanating from the other private law tradition, usually conducted in the other o/cial language, they would likely suppose there to be robustly distinct conversations in Canada's civil and common law provinces. Instead of the £at functionalist picture of rules in several jurisdictions and none in Quebec, what emerges from this reading of the scholarship on its own terms is a textured sense of distinct legal discourses and ambitions for family law: respect for autonomy in the civil law, recognition of the 'reality' of family functioning in the common law. The exercise might be thought, provisionally, to have yielded not only a better understanding of family law, but also, perhaps, a better understanding of the legal traditions. While the second section of the paper will trouble this assessment, the debates around cohabitation in Quebec call for a further observation here.

Civilian family law embodies an ideal of coherence, one manifested in the elegantly interconnected and self-referential titles of the civil code's book on the family. It does not embrace the idea of regulatory chaos.[41] Overbroad

coherence.[42] The prospect of a judgment construing a Charter provision as invalidating the civilian matrimonial regime resonates on several levels. The coherence of Quebec's civil law, understood as key to the preservation of cultural distinctness, is on the line.[43]

standard bearers advance normative judgments about the positive outcomes of family law functionalism. Scholars assume that functionalism lines up with pro-

sex to register on a declaration of birth as a child's legal parents, and for the married or civil union spouse ^ male or female ^ of a woman who gives birth after conceiving by assisted procreation to be presumed the child's second parent.[61]

Moreover, lest formalism su¡er unduly harsh criticism, formally drawn distinctions need not be unprincipled. Enforceable support obligations between de facto spouses on the basis of a speci¢ed period of cohabitation are much likelier to generate evidentiary disputes than do support duties for spouses £owing from a formal exchange of consents recorded by the registrar of civil status and a wedding photographer. Applying property division to cohabitants, which requires a start date from which to measure change, is also thorny, as are matters such as characterisation of transactions as at arm's length for taxation purposes. In any event, feminist assumptions that functionalism best protects vulnerable women in the service of a larger feminist project understate tensions with more liberal feminisms focused on formal equality.[62] They are also inconsistent with feminist calls for family law to press beyond 'patterns of dependency' to 'a more interactive pattern of shared commitment.'[63]

As for the strong autonomy argument's e¡orts to distance itself from morality, it has obvious bona ¢des of liberal neutrality. Yet it attends too little to the religiously derived moral objection to concubinage prominent until recently and to the Roman Catholic Church's domination of Quebec's intellectual, legal, and social life over centuries.[64] Likewise, family scholars in civil law countries in Europe, especially France, with its republican commitment to laïcité, may well underreport the persistence of Roman Catholic in£uence on their family regimes. If it was long thought in Quebec, as elsewhere, that concubinage threatened the £ourishing and even existence of families,[65] a worry re£ected in positive law, the concern was inseparable from ecclesiastical teachings. In the early 1980s, however, the Quebec legislature abrogated the rule declaring unenforceable an individual's gift to his concubine that exceeded aliments.[66] This change signalled that the civil law would no longer penalise concubines, even if it resisted advantaging them.

Today explicit prejudice against concubines on moral grounds is rather less frequent in Quebec legal scholarship. More often than their common law counterparts, however, some civilian scholars continue to emphasise the importance of marriage in providing the stability necessary for families.[67] While household stability is empirically measurable, it likely does not ¢gure in these accounts as an enti

facto spouses' presumed ability to contract e¡ectively and married spouses' meriting core protections shielded from contractual derogation. The overlap as to regulatory outcome between a normative preference for marriage and the strong autonomy argument invites more candid acknowledgement.

Di¡erent as they are, the family law functionalism of the common law provinces and the strong autonomy argument prevalent in civilian Quebec gesture towards the di/culties of acknowledging that, in a liberal democracy with entrenched equality rights,[68] legally regulating families remains a moral enterprise. This observation speaks to family lawyers, although embarrassment about the moral dimensions of legal regulation exceeds the family sphere.[69] Indeed, the phenomenon re£ects the law/morality distinction in legal positivism generally. Another observation speaks to cultural comparatists: when endeavouring to practice a deeper comparative law, they should not take scholarly discourse at face value.

Study of the relation between the scholarly treatment of cohabitation and morality has uncovered gaps and contradictions in mainstream scholarly accounts. Well-intentioned culturally focused studies, not of rules but of discourse, may exaggerate di¡erences between self and other while minimising internal tensions within a legal tradition. Comparative law may reinforce the idea of distance and foreignness between the home legal system and that with which one compares. Critiques of 'culture' in comparative law come to mind. Patrick Glenn argues that, to distinguish a particular society from others, culture 'sacri¢ces all re¢ned distinctions in favour of global, present, di¡erentiation.'[70] The diversity to which comparative law 'should be strongly attuned'[71] must include not only diversities from one place to another, but also those internal to the law of a place. The internal tensions ^ assertions of neutrality combined with normative assessments within functionalism, di¡erent in£ections of autonomy for married spouses and cohabitants within Quebec ^ are part of the story. So, too, is the historical moral disapproval of cohabitation that contemporary accounts are reticent to acknowledge. A cultural comparative study that regards rules in force as embedded only in the synchronic context existing today is also incomplete.[72] Caution is required to avoid an organic coherence of culture 'in an expanded present' where societies 'simply, and separately, are.'[73]

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68 In addition to 'marital status' as a prohibited ground of discrimination under s 15 of the Canadian Charter, s 10 of Quebec's Charter of Human Rights and Freedoms RSQ c C-12 forbids civil status discrimination.

69 For the amputation of 'public order and good morals' (ordre public et bonnes m□urs) into 'public order,' cf art 13 CCLC; arts 8, 9 CCQ. See Code civil du Quebec [:] Commentaires du Ministre de la Justice (Montreal: DACFO, 1993) 37^38. On attempts to downplay morality in the criminal law, see B. L. Berger, 'Moral Judgment, Criminal Law and the Constitutional Protection of Religion' (2008) 40 Supreme Court LR (2d) 513.

70 H. P. Glenn, 'Legal Cultures and Legal Traditions' in van Hoecke, n 3 above, 12.

71 Graziadei, n 2 above, 114.

72 For the distinction between synchronic and diachronic approaches, see G. Samuel, 'Taking Methods Seriously (Part One)' (2007) 2 Journal of Comparative Law 94, 115^116.

73 G.6(M88(oaa.3(n)-17.4(n)33.1(,)-296.4(n)-295.7(7)38(0)-297.1(a)32.9(b)20.5(o)45.8(v)39.5(e)39.3(,)-188.9(1)101.3

Though the distinction appears unfounded under a robust family law functionalist analysis, and has been declared 'not convincing in common law Canada,' it resonates with doctrinal distinctions within the civil law and possesses 'considerable power' in a civilian jurisdiction.[74] The alimentary obligation is characterised in the civil law as being of public order; reciprocal; personal and intransmissible; and unseizable.[75] Matrimonial property, in turn, is classically an object of premarital contracting.[76] For the civil lawyer, distinguishing the alimentary obligation from matrimonial property rights is thus not arbitrary. It acquires further weight from its evocation of the fundamental division between extra-patrimonial rights, which their titularies cannot alienate, and patrimonial rights, which they may.[77] Some Quebec commentators, reassured by the bright doctrinal line between alimentary obligations and property division, read Walsh as unequivocal assurance that the civil code's exclusion of de facto spouses from its matrimonial property rules passes constitutional muster.[78] From a perspective of private law and constitutional law, however, a more complicated reading is appropriate.

Even within private law doctrine, Gonthier J's distinction is not entirely unproblematic. An alimentary obligation is classically viewed, not as a legislative impo-

discriminatory, the majority judges observed that Nova Scotia's law protects those persons 'unfairly disadvantaged' by their relationship's end. The ¢rst feature (and thus the weightiest?) is that provincial legislation allows an unmarried cohabitant to apply to a court for a support order. The court hearing such an application considers 'a host of factors' relating to the parties' organisation of their relationship as well as their particular needs and circumstances.

The second feature is the doctrine of unjust enrichment and the remedy of the constructive trust. The majority concluded that unmarried persons' essential human dignity is inviolate 'where the multiplicity of bene¢ts and protections are tailored to the particular needs and circumstances of the individuals.'[82] Here those judges followed the leading judgment on equality claims. That judgment had declared a violation of the equality guarantee to be less probable where legislation considers the claimant's 'actual needs, capacity, or circumstances' and those of similar others in a way respectful of their human worth.[83] What might Walsh signal to Quebec, where the bene¢ts and protections tailored to the needs and circumstances of de facto spouses are substantially thinner? While a de facto spouse may claim unjust enrichment under the book on obligations,[84] Quebec general private law lacks any bene¢t or protection targeting de facto spouses as such.

The majority's reasoning seems to undercut an argument, made prior to Walsh, in defence of the constitutionality of Quebec's laissez-faire approach. The contention was that Ontario's legislative ascription of a spousal support obligation to unmarried cohabitants had forti¢ed the discrimination claim in the earlier dispute in Miron. Since the insurance indemnity sought in the earlier case replaced the insured victim's support obligations, it was logical that an unmarried cohabitant entitled to claim a right to support under family legislation would be equally entitled, under insurance legislation, to receive a substitutive bene¢t. Those Quebec authors saw Ontario's legislation as a contextual factor favoring the claimant in that case.[85] This reading of Miron implies that consistent and total exclusion of de facto spouses from all private law regimes ^ as opposed to an asymmetrical, partial recognition ^ might survive Charter scrutiny. Walsh suggests, however, that it was precisely the partial assimilation of unmarried cohabitants to married cohabitants for support purposes that made permissible their continuing exclusion from the property regime ^ hardly endorsement of Quebec's non-recognition for both alimentary obligations and property division.

In the Quebec context, the respective reasons of L'Heureux-Dube Ł and Gonthier JJ appear more compatible. Opposed as they are when viewed through the grille of formalism versus functionalism, those two judges might concur on the suitability of requiring an alimentary obligation. While Gonthier J would not extend Quebec's family patrimony to de facto s7(p.4(e)101.2(u)1s)0((a)2oalw)53.actex9(ru)13

hoped that extending an alimentary obligation to de facto spouses, thus blunting the sharpness of the distinction between married and unmarried couples, might have made retaining marriage for opposite-sex couples more defensible.[87] In any event, if drawing a line short of total assimilation is the key message for the common law provinces, the judgment's thrust for Quebec may be the constitutional dubiousness of total laissez-faire. Beyond this rereading of Walsh, the orthodox account of de facto spouses as invisible to Quebec law is inaccurate, and the root of this inaccuracy is a matter of interest to comparatists generally.

Comparative method and de facto spouses in the civil law

While the code remains 'superbly indi¡erent' to de facto unions,[88] the frequent doctrinal assertions that the civil law regards de facto spouses as entirely legal strangers one to another are too blunt. The few codal references show that de facto spouses constitute what lay people would call families. Admittedly, the recognition accorded de facto spouses is sporadic. One instance outside the four corners of the code is the idea that, absent any enforceable obligation, de facto spouses nevertheless support each other. This notion may have juridical e¡ects when a divorced spouse, a debtor of spousal support, seeks to reduce or terminate that obligation in virtue of his former spouse's new concubinage. For a time, Quebec courts presumed in such circumstances that concubines supported one another.[89] The Supreme Court has overruled the legal presumption, but for the purposes of varying a support order, a new family situation on the part of the support creditor remains relevant.[90] Here the procedural details matter less than the underlying assumption: absent any legal duty of one de facto spouse

ally justi¢ed a woman's enrichment of her concubine.[92] In 2003, however, the Court of Appeal eased the path for cohabitants to make such claims by announcing two presumptions. A de facto union's long duration now yields presumptions of the correlation between impoverishment and enrichment and of the absence of justi¢cation for the enrichment.[93] Repeated assertions that concubines or de facto spouses are immune to private law regulation, legal strangers one to another ^ that only marriage has a juridical life[94] tical69lifes3(s)15.1(an)-246.1(a)10.1(l)-12l-5(u

phenomenon. (It does not help, of course, that unmarried couples are casually and inaccurately referred to as common law spouses.) In doing so, surveys of the positive law conceal the extent of debate and internal unease. Contemporary Quebec legal resources include challenges to the status quo, framed internally, as a matter of consistency with the civil code, and externally, with reference to policy.

One internal complaint departs from the declaration in Article 522 that children have the same rights and obligations regardless of their circumstances of birth. Foregrounded as the general provision on ¢liation, it represents the abolition of the old status of illegitimacy. But for those who understand certain rules concerning married spouses as indirectly but concretely bene¢ting children ^ for example, the custodial spouse's possible right to use of the family residence[104] ^ those rules' inapplicability to de facto spouses disadvantages their children relative to the children of married parents.[105] Such disadvantage signals a contradiction and a failing for the code's ambition of coherence.[106]

Other arguments address the more delicate question of potential injustice between the adult partners. Arguments within Quebec do not envisage assimilation of de facto spouses with mart1412.6Tc[oeos0.2(o)15l-reos0b0.3(e)yeenlonelu9.74ele fjuon

Quebec, interventions occasionally show a functional, as opposed to formal, sen-

The di ¡erences between legislative and adjudicative change become important. It is unsurprising that an area as sensitive as family law provokes di ¡ering views; moreover, communities do not change unanimously and uniformly. In the Canadian common law provinces, reform of spousal property relations proceeded gradually. A dissenting voice raised against the tide eventually persuaded the majority of judges and became orthodoxy.[116] Dissents in common law cases may thus serve as signposts according freedom to later courts.[117] In Quebec, where the orthodox theory of sources of law ^ however contested ^ accords the legislature a monopoly on family law reform, dissenting or counter-majoritarian voicaw an amrrioy0.3(i)22

alteration.[123] For example, judicial and scholarly interpretations of the French Civil Code's provisions on delictual liability have altered while the Napoleonic text remained ¢xed.[124] Once it is acknowledged that the range of relevant values is not ¢xed, jurists should be open to a wider range of sources. Within current debates on de facto unions, for example, the ghost of the rejected proposal arguably merits larger recognition.[125] The comparatist should 'refuse to deploy a positivist conception of legal materials.'[126]

With this stillborn proposal in mind, the re-reading of Walsh becomes richer yet. Gonthier and L'Heureux-Dubé JJ can be read as speaking not only to a future civil law of Quebec, but also to the past that might have been. It is understandable that sensitivity to the fragile position of the civil law in North America leads to a hardening of what are regarded as its key elements. On the question of unmarried couples, however, Quebec's family scholars are best viewed as debating the merits of their approach to family regulation relative not to a common law approach storming the gates, but to an imagined future in their own past.

CONCLUSION

This paper has adopted a cultural and discursive comparative method to show that regulation of unmarried couples in Canada's civilian and common law jurisdictions can be seen as re£ecting di¡erent aspirations for family law. It challenges scholars and policy makers in other jurisdictions to be more self-conscious of the aspirations and discourses they adopt when addressing this pressing problem for contemporary family regulation.

Nevertheless, the more cultural comparison in the ¢rst section invited caution. Shifting attention from posited rules to less authoritative texts, such as scholarly narratives, risks overemphasising dominant voices, obscuring internal disagreements, and essentialising legal cultures. As argued by the second section, there is also a risk of occluding the past. Quebec civil law must not be taken as incorporating only the di¡ering opinions expressed today, or those expressed in the most authoritative legal sources. Its past and its legal writings not currently boasting the force of law are also part of its tradition.[127]

The lesson is not only for Quebec scholars. The imperative of appreciating the internal debates and complexity of the civil law of Quebec is not a consequence of Quebec's characterisation by some scholars as a mixed jurisdiction.[128] The peril

123 R. A. Macdonald and H. Kong, 'Patchwork Law Reform: Your Idea Is Good in Practice, But It

of ignoring diversity within a tradition is one to which comparatists anywhere may be susceptible. Indeed, it is perhaps a hazard that is greatest for scholars regarding a jurisdiction the law of which is thought to be not mixed, but somehow, problematically, 'purely' civil or common law. Looking abroad comparatively may be subversive,[129] but so too may be studying more closely tensions internal to the legal discourse at home. Contrary to some comparative reports, common law treatments of cohabitation reveal a mixture of approval for formal-

family law scholarship as advancing the doctrinal development of a conceptually coherent private law, one more re£ective of corrective justice. The caution for comparatists is that their work should, optimally, include not only the study of the juridical texts of a place, but also, more sociologically, the composition of its community of jurists.[133]

Family law scholars understand the life under one roof of a man and a woman, two men, or two women as the de facto union warranting their primary attention. The self and other constituting every couple are the focus for doctrinal family law. Theirs is not, however, the sole cohabitation of interest. Comparison reveals cohabitations of other stripes: common and civil law within the same federation, formal and functional impulses in the law of a single place. It is this paper's ambition to have underscored another cohabitation, that of con£icting ideas and concerns within a single legal tradition's regulation of families. Comparing self and other ^ solutions implemented by positive law and layers of argument and scholarly preoccupation ^ is valuable. Yet it is no warrant for overlooking a tradi-