

Cohabitation and Comparative Method

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The paper intervenes in current policy debates on unmarried cohabitation and comparative law debates on methodology. It adopts a culturally alert, discursive methodology of comparison to study regulation of unmarried cohabitation under the common law and civil law as well as the effect of an entrenched right to equality protecting against marital status discrimination. It identifies not different legislative solutions to a common problem, but distinct discourses of family law regulation. Yet the approaches are less radically opposed than is often thought. Discursive comparison tends to highlight dominant voices at the expense of minority ones, wrongly characterising minority views as foreign to a tradition. Discursive comparison should not confine itself to a synchronic view of present legal debates; a richer diachronic approach will also attend 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 differential 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 fixed firmly 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.

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Functionalism is a prominent method of comparison, focusing on legal rules in different places as various solutions to a common problem.¹ The functionalist approach on this family law question would seek out the ‘best’ solution to the problem of unmarried couples and the vulnerability experienced by women and children. Important as functionalist comparisons of cohabitation regimes undoubtedly are, this paper treads a different course. It draws inspiration from *cultural* critiques of functionalism.² Such critiques underscore the difficulty of fully understanding rules in isolation from their context.³ They emphasise that legal rules are understandable only in light of the discourse in which they are embedded.⁴ This paper adopts the methodological assumption that legal discourse, not rules, stands at the core of comparison. Consequently, when it compares the regulation of unmarried couples under the common law and the civil law, it will seek to elucidate the distinct legal discourses on this matter of family law. The differentiation of these discourses of cohabitation can help clarify debates in places, such as the United Kingdom, where a major policy review is under way.⁵

Methodologically, the paper also contributes to comparatist explorations. Cultural comparison is rightly viewed as richer and less reductive than functionalism. The paper argues, though, that it may inadvertently reify an author’s original legal tradition (self) and a different tradition (other) as more distinct than they really are. It may emphasise only the dominant voices of a tradition’s discourse. Simultaneously, it may cast minority voices as external to the tradition. Such comparison, illuminating the discourses framing a problem in the present, can obscure even the recent past. In order to appreciate legal traditions’ internal complexity, comparatists would do well to attend to a wide range of legal sources and to ideas expressed across time.

The paper explores these important methodological questions in comparative family law, and comparative law more generally, via a benchmark judgment from the Supreme Court of Canada and the ensuing scholarship. *Nova Scotia (Attorney General) v Walsh*⁶ (*Walsh*) assessed the constitutionality of the property consequences of unmarried cohabitation. In the Canadian common law context, coha-

1 R. Michaels, ‘The Functional Method of Comparative Law’ in M. Reimann and R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006); K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (New York: Oxford University Press, 3rd ed, tr T. Weir, 1998).

2 M. Graziadei, ‘The Functionalist Heritage’ in P. Legrand and R. Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge: Cambridge University Press, 2003) 114–116; P. Legrand, ‘Comparative Legal Studies and the Matter of Authenticity’ (2006) 1 *Journal of Comparative Law* 365, 394–401.

3 M. van Hoecke, ‘Deep Level Comparative Law’ in M. van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Oxford: Hart Publishing, 2004) 167.

4 M. van Hoecke and M. Warrington, ‘Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law’ (1998) 47 *ICLQ* 495, 495, 521–522; G. Samuel, ‘Comparative Law and Jurisprudence’ (1998) 47 *ICLQ* 817, 835. See also the advocacy for a ‘literary analysis’ methodology of comparative law in M. de S.-O.-L’E. Lasser, ‘The Question of Understanding’ in Legrand and Munday, n 2 above, 203–207.

5 See Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* (Law Com No 307, July 2007).

6 2002 SCC 83; [2002] 4 SCR 325.

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, significant 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, fulfilling a social objective; the division of matrimonial property is contractual, a core incident of the consensual decision to marry. In dissent, L'Heureux-Dubé 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. *Walsh* indicates that an equality right, even one understood as alert to disadvantage flowing from marital status, need not require identical treatment of married couples and unmarried cohabitants.¹⁰ The Court's analysis rested entirely on constraints internal to the equality right, the Canadian Charter providing no textual basis for privileging marriage.¹¹ It is critical, however, to draw out the key dimension that makes this domestic constitutional judgment a superb case study for an intervention in debates on comparative law methodology. The claim arose in a common law province. The principle instantiated in a Canadian constitutional decision also applies, however, in Quebec, where the private law derives from the civil law tradition. That is, while the private law of the various Canadian jurisdictions derives

7 Walsh had cohabited with Wayne Bona for ten years and they had two children during the relationship. Walsh and Bona owned a home as joint tenants. At the time of separation Bona had assets with a net value of \$66,000. Walsh claimed support for herself and the two children, and in addition to those claims under the legislation in force she sought an equal division of 'matrimonial' property.

8 Part I of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11. Section 15 guarantees equal treatment and equal benefit under the law without discrimination. It specifies a number of unacceptable bases for discrimination, but judges regard the list as open to analogous others, among them marital status (*Miron v Trudel* [1995] 2 SCR 418).

9 *Walsh* n 6 above at [43].

10 S. Wong, 'The Human Rights Act 1998 and the Shared Home: Issues for Cohabitants' (2005) 27 *Journal of Social Welfare and Family Law* 265, 277.

11 Compare D. Ehlers (ed), *European Fundamental Rights and Freedoms* (Berlin: De Gruyter Recht, 2007) 71 (connecting the permissibility of differential status for married and unmarried couples to the right to marriage in Article 12 of the European Convention on Human Rights).

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 Québec, 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 It is at the level of the private law of general application, embodying the fundamental rules of property and civil rights – what, if anything, unmarried cohabitants owe one another – that larger differences between provinces emerge.

In Quebec, *de facto* union is the state of two unmarried persons 'living together as a married couple'.¹⁵ The qualifiers 'in a conjugal relationship' and 'as a married couple' convey the crucial sense of more than the mere sharing of a physical place.¹⁶ Quebec law, until recently, referred to *de facto* spouses as concubines or *concubins*. While the general law of property and obligations may, indirectly, found claims between partners, concubinage or *de facto* union for the most part produces no legal effect under Quebec's civil code. Rare provisions – such as measures regarding consent to care and residential leases – grant *de facto* spouses rights *vis-à-vis* third parties, but no rights enforceable against the other partner.¹⁷ That province's approach to regulation of *de facto* unions may be characterised as one of *laissez-faire*. In contrast, all common law provinces ascribe support obligations to unmarried cohabitants identical to those applicable to married spouses.¹⁸ Two of those provinces have also assimilated unmarried cohabitants

12 Constitution Act 1867 (UK), 30 & 31 Vict, c 3, ss 92(13), 91(26), reprinted in RSC 1985, App II, No 5.

13 Arts 391, 414–430 CCQ.

14 M. Tétrault, *Droit de la famille* (Cowansville: Yvon Blais, 3rd ed, 2005) 549–551.

15 Quebec Research Centre of Private and Comparative Law, *Private Law Dictionary of the Family and Bilingual Lexicons* (Cowansville: Yvon Blais, 1999) '*de facto* union'.

16 N. Kasirer, 'What Is *Vie commune*? Qu'est-ce que *living together*?' in J. E. C. Brierley et al (eds), *Mélanges offerts par ses collègues de McGill à Paul-André Crépeau* (Cowansville: Yvon Blais, 1997).

17 Respectively, arts 15, 1938 CCQ.

18 The constitutional value of sex equality is thought to inflect application of these spousal support provisions: A. Diduck and H. Orton, 'Equality and Support for Spouses' (1994) 57 MLR 681.

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

¹⁹ Citations appear in R. Leckey, 'Family Law as Fundamental Private Law' (2007) 86 Can Bar Rev 69, 75 n 28–29.

²⁰ eg E. Deleury and M. Cano, 'Le concubinage au Québec et dans l'ensemble du Canada: Deux systèmes juridiques, deux approches' in J. Rubellin-Devichi (ed), *Des concubinages dans le monde* (Paris: Éditions du Centre national de la recherche scientifique, 1990) 105; N. Bala and M. Cano, 'Unmarried Cohabitation in Canada: Common Law and Civilian Approaches to Living Together' (1989) 4 *Canadian Family Law Quarterly* 147, 205. For comparison connecting cohabitation to reflections on the legal traditions more generally, see P. Girard, 'Concubines and Cohabitees: A Comparative Look at "Living Together"' (1983) 28 McGill LJ 977.

²¹ From the United Kingdom, L. Glennon, 'Obligations between Adult Partners: Moving from Form to Function?' (2008) 22 Int'l J L Pol'y & Fam 22; A. Barlow and G. James, 'Regulating Marriage and Cohabitation in 21st Century Britain' (2004) 67 MLR 143; from Australia, R. Graycar and J. Millbank, 'From Functional Family to Spinster Sisters: Australia's Distinctive Path to Relationship Recognition' (2007) 24 Wash U J L & Pol'y 121.

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 Québec et les concubins: un mariage discret' (1995) 74 Can Bar Rev 474, 476; J. Pineau and M. Pratte, *La famille* (Montreal: Thémis, 2006) para 375.

24 M. D.-Castelli and D. Goubau, *Le droit de la famille au Québec* (Saint-Nicolas: Presses de l'Université Laval, 5th ed, 2005) 1.

25 J. Eekelaar, *Family Law and Personal Life* (Oxford: Oxford University Press, 2006) 39.

26 Goubau, n 23 above, 476 n 6.

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 justification rarely suppose that the general law of property and obligations optimally regulates the patrimonial consequences of long-term nonmarital intimacy. Instead, the strong autonomy justification 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 affairs contractually often proceed unaffected 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: Thémis, 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.

29 F. Dubé, ‘La démystification du concubinage’ (1987) 9 *Revue de planification fiscale et successorale* 709, 717.

30 A. Roy, ‘La liberté contractuelle des conjoints de fait réaffirmée par la Cour d’appel . . . un avant-goût des jugements à venir?’ (2001) 103 *La Revue du Notariat* 447, 448.

31 *Couture v Gagnon* [2001] R.J.Q. 2047 (Qc CA) (public order not impeding the contractual invocation of matrimonial regime by *de facto* spouses). Compare worries in France that cohabitation agreements attempt, illicitly, to regulate personal status, appropriately determined exclusively by law. P. Malaurie and H. Fulchiron, *La famille* (Paris: Defrénois, 2nd ed, 2006) para 322.

32 J. Millbank, ‘The Role of “Functional Family” in Same-Sex Family Recognition Trends’ (2008) 20:2 *Child and Family Law Quarterly* 1, 1. See also J. Dewar, ‘Families’ in P. Cane and M. Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford: Oxford University Press, 2003) 414–416;

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.

Québec's book on the family recognises some informal ordering: 'an adequate combination of facts' may, for example, establish filiation 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, Gérard 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 classifications, 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 different 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 firm grasp on the juridical and practical specificity 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 reflect on the debates emanating from the other private law tradition, usually conducted in the other official language, they would likely suppose there to be robustly distinct conversations in Canada's civil and common law provinces. Instead of the flat 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 judicial interpretations of the Charter, it is worried, may threaten this

38 Arts 523, 524 CCQ (but possession of status is a second-order proof of filiation, operative only absent an act of birth: art 523, para 2 CCQ).

39 G. Cornu, *L'art du droit en quête de sagesse* (Paris: Presses Universitaires de France, 1998) 152–154.

40 eg discussion of the juridicity of de facto unions in N. Kasirer, 'Introductory Note' in *Private Law Dictionary of the Family and Bilingual Lexicons*, n 15 above, xviii.

41 J. Dewar, 'The Normal Chaos of Family Law' (1998) 61 MLR 467.

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

There is more. Political liberalism often understands autonomy as an end, rather than a means towards another good. Yet scholars occasionally posit, if not wholly convincingly, that the substance of Quebec's approach to de facto unions expresses specifically Québécois social values.⁴⁴ For such writers, the ultimate value may be not autonomy, but the distinctness of Quebec society. Functionalist comparisons focusing on unmarried couples as a problem to be solved probably overlook the risk of Quebec's dissolving into common law Canada and North America, a risk without analogue for the civilian member states of the European Union. Moreover, some Quebec family law scholars are hostile towards the Charter. Scholarly criticism of the judgments preceding *Walsh* may thus reflect the perceived illegitimacy of the rights instrument invoked.

These distinctive significations of regulation of de facto unions in Quebec warn against the potentially reductive suppositions of functionalist comparison. That methodology may assume that a legal rule's chief meaning is its instrumental value in solving a problem. A rule may, however, have additional, non-instrumental or symbolic significance. Family law may itself be harnessed in the service of other ends. Yet, beyond recognition of the symbolism ascribed to family law, a caution may be in order, one that complicates the view of the common law and civilian discourses as fully distinct.

The common absence of morality

If the streams of scholarly debate in civilian Quebec and in the other, common law provinces appear distinct, they share an absence: acknowledgement of the regulation of unmarried couples as a moral issue. Until recently, the perceived immorality of unmarried cohabitation underlay the state's regulatory stance. Given that the possibility of a civil marriage arrived in Quebec less than forty years ago,⁴⁵ extended analysis of the border between marriage and de facto union with such scant reference to religion is odd. The silence is queer in light of the desired outcomes of the different discourses. Functionalist analysis calls for treating unmarried couples as if they had married, despite independent justifications, such as feminist or libertarian considerations, for rejecting the involuntary ascrip-

42 eg C. P. Prémont and M. Bernier, 'Un engagement distinct qui engendre des conséquences distinctes' in Barreau du Québec, Service de la formation permanente (ed), *Développements récents sur l'union de fait* (Cowansville: Yvon Blais, 2000) 22–29. Compare French unease about the European Convention on Human Rights: G. Cornu, *Droit civil: La famille* (Paris: Montchrestien, 9th ed, 2006) para 7bis. See also R. Leckey, 'Private Law as Constitutional Context for Same-sex Marriage' (2007) 2 *Journal of Comparative Law* 172, 186–187.

43 For awareness of the risk of overstating the case, see S. Normand, 'Le Code civil et l'identité' in J.-G. Belley et al (eds), *Du Code civil du Québec: contribution à l'histoire immédiate d'une recodification réussie* (Montreal: Thémis, 2005) 654.

44 Prémont and Bernier, n 42 above, 30.

45 SQ 1969, c 74.

tion of a spousal relationship.⁴⁶ The strong autonomy argument aligns with prescriptions for non-recognition rooted in a condemnation of living-in-sin irreconcilable with liberal neutrality. How successfully does the scholarship skirt normative controversies?

The family law functionalist critiques of *Walsh* take refuge from morality in sociological empiricism. Beyond unfavourable assessments of *Walsh* against a measuring stick of reality, aspirations for a family law analysis remote from moral considerations emerge more explicitly. Criticising the vision of family in *Walsh* as 'abstract and idealized', Professor Rogerson dismisses the majority judges' argument based on choice as 'ideological rather than sociological'.⁴⁷ This claim to criticise the judgment from a position of political and moral neutrality is problematic. While it might seem that functionalism as a regulatory approach to the family precludes the need for or suitability of a moral account, it does not. For one thing, sociology is not, of course, neutral. For another, as feminist critiques of polygamy underscore,⁴⁸ the practice of a form of family life does not secure it approval or mere indifference. Functionalism participates in the advancement of moral positions. For example, it has been argued that, in practice, a focus on the functional family can serve as a vehicle for reinforcing a traditional commitment to the biological family.⁴⁹ Functionalism seems ultimately ensnared in morality: although Canadian common law debates articulate less anxiety about the individualism associated with cohabitation than discussions elsewhere,⁵⁰ moral judgments appear unavoidable.

As some scholars have noted, family law functionalism has no intrinsic requirement for a sexual relation. Once one takes the household as the unit of functional comparison, the basis for insisting on a sexual relationship can appear frail.⁵¹ The view of unmarried conjugal couples as marriage-like in a way distinguishable from siblings sharing a home, or ad hoc flat mates, relies on a normative demarcation (possibly one worth questioning). Indeed, even an exclusive focus on cohabiting couples may be unduly narrow.⁵² In a way recognisable from other family law areas, such as identification of a child's parents, prescriptions rooted in ostensibly factual reality occlude the extent to which the live issues are debatable matters of judgment.⁵³ Family law functionalism cannot operate without valuation of different kinds of relationship.

If the discourse of family law functionalism shrinks from explicating its moral tolerance for cohabitation, it is franker in assessing different regulatory modes. Its

46 M. Baker, *Choices and Constraints in Family Life* (Toronto: Oxford University Press, 2007) 50.

47 Rogerson, n 34 above, 275, 300.

48 R. J. Cook and L. M. Kelly, *Polygyny and Canada's Obligations under International Human Rights Law* (Ottawa: Department of Justice, 2006).

49 J. Millbank, 'The Limits of Functional Family: Lesbian Mother Litigation in the Era of the Eternal Biological Family' (2008) 22 Int'l J L Pol'y & Fam 149.

50 J. Lewis, 'Debates and Issues Regarding Marriage and Cohabitation in the British and American Literature' (2001) 15 Int'l J L Pol'y & Fam 159.

51 B. Cossman and B. Ryder, 'What Is Marriage-Like Like? The Irrelevance of Conjuality' (2001) 18 Can J Fam L 269.

52 J. Haskey and J. Lewis, 'Living-apart-together in Britain: Context and Meaning' (2006) 2 Int'l J L Context 37.

53 E. Jackson, 'What Is a Parent?' in A. Diduck and K. O'Donovan (eds), *Feminist Perspectives on Family Law* (New York: Routledge, 2006) 67–68.

standard bearers advance normative judgments about the positive outcomes of family law functionalism. Scholars assume that functionalism lines up with progress, beneficent redistribution, and good family law reform. Functional family law approaches supposedly accord with a core objective of feminist legal scholarship and law reform projects – to centre “lived lives” rather than legal doctrine or formal legal categories.⁵⁴ Formalism, which requires explicit, formally channeled expressions of consent, is thought to line up with conservatism, regressive enrichment of stronger parties at the expense of weaker ones, and preservation of a bad status quo. Only L’Heureux-Dubé J, the functionalist dissenting judge, is viewed as progressive. *Walsh* is regarded as bad for failing to protect vulnerable unmarried women. Ascribing consequences to people’s formally manifested ‘choices’ is said to be bad for women and for feminism.⁵⁵ Functionalism and formalism’s mutual reliance here becomes plain. The stance vis-à-vis formalism and functionalism depends on the state’s default option: if legislation included cohabitants in the matrimonial regime subject to individual opting out, scholars currently allying themselves with functionalism would applaud the deference to such formal ordering.

Moreover, the composition of the camp of family law functionalists is partly contingent on the extent of formal status options available to same-sex couples. When same-sex marriage appears implausible, advocates for recognition of same-sex relationships may advance claims cast in functional terms.⁵⁶ From the perspective of same-sex couples in a place where marriage is withheld from them, distinctions between married and unmarried couples cannot be defended on the basis of the choice to marry. By contrast, once marriage seems attainable or is attained,⁵⁷ a discourse of choice prevails and at least some proponents for rights for same-sex couples retire their commitment to functionalism and speak of the choice to marry. In the United Kingdom, the installment of a formal status option for same-sex couples via the Civil Partnerships Act 2004 diminished the concern of some such couples with the treatment of unmarried cohabitants generally.⁵⁸

The discourse of family law functionalism overstates the connection between formalism and conservatism. Quebec, in typical civilian fashion, has narrowly and exhaustively defined the debtors and creditors of support obligations: only *de jure* spouses and parents and children owe each other support.⁵⁹ But as evidence that such formalism need not operate conservatively, the legislature has, in recent years, added new ways that persons may enter the charmed circle of family members linked by reciprocal support obligations. A new civil union regime, grafted onto the code in 2002, added civil union spouses as a category of legal spouse.⁶⁰ Amendments at the same time provided for two persons of the same

54 Millbank, n 32 above, 2 [footnote omitted].

55 H. Lessard, ‘Charter Gridlock: Equality Formalism and Marriage Fundamentalism’ (2006) 33 Supreme Court LR (2d) 291.

56 Millbank, n 32 above.

57 Same-sex couples have been able to marry in some Canadian provinces since 2003 and throughout the country since 2005. Civil Marriage Act SC 2005, c 33.

58 Glennon, n 21 above, 26–29.

59 Art 585 CCQ.

60 Arts 521.1 et seq, 585 CCQ as am. See P. -C. Lafond and B. Lefebvre (eds), *L’union civile: nouveaux modèles de conjugalité et de parentalité au 21^e siècle* (Cowansville: Yvon Blais, 2003).

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 suffer unduly harsh criticism, formally drawn distinctions need not be unprincipled. Enforceable support obligations between de facto spouses on the basis of a specified period of cohabitation are much likelier to generate evidentiary disputes than do support duties for spouses flowing 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 efforts to distance itself from morality, it has obvious bona fides 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 influence on their family regimes. If it was long thought in Quebec, as elsewhere, that concubinage threatened the flourishing and even existence of families,⁶⁵ a worry reflected 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 figure in these accounts as an entirely value-neutral characteristic: it can serve as a proxy for religiously based views. Turning from the scholarship to the enacted rules, it is hard not to suspect that moral judgments underlie the different treatments of autonomy between de

61 Arts 115 para 1 *in fine*, 538.3 para 1 *in fine* CCQ. R. Leckey, "Where the Parents Are of the Same Sex": Quebec's Reforms to Filiation' 23 Int'l J L Pol'y & Fam [forthcoming in 2009].

62 R. L. Deech, 'The Case against Legal Recognition of Cohabitation' (1980) 29 ICLQ 480.

63 A. Bottomley and S. Wong, 'Shared Households: A New Paradigm for Thinking about the Reform of Domestic Relations' in Diduck and O'Donovan, n 53 above, 52.

64 eg L. Ferretti, *Brève histoire de l'Église catholique au Québec* (Montreal: Boreal, 1999).

65 S. Allard, 'La normalisation incidente des conjugalités hors mariage' in R. D. Bureau and P. MacKay (eds), *Le droit dans tous ses états: La question du droit au Québec 1970–1987* (Montreal: Wilson & Lafleur, 1987) 136.

66 Former art 768 CCLC.

67 J. Pineau, 'L'ordre public dans les relations de famille' (1999) 40 *Les Cahiers de Droit* 323, 330.

facto spouses' presumed ability to contract effectively 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.

Different as they are, the family law functionalism of the common law provinces and the strong autonomy argument prevalent in civilian Quebec gesture towards the difficulties 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 reflects 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 differences 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 'sacrifices all refined distinctions in favour of global, present, differentiation.'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, different inflections 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

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 mœurs*) into 'public order,' cf art 13 CCLC; arts 8, 9 CCQ. See *Code civil du Québec [:] 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 Glenn, n 70 above, 13. Another scholar warns against the 'fossilisation' of legal traditions, underscoring their '*complexité interne*': J.-F. Gaudreault-DesBiens, *Les solitudes du bijuridisme au Canada: Essai sur les rapports de pouvoir entre les traditions juridiques et la résilience des atavismes identitaires* (Montreal: Thémis, 2007) 4.

The failings of the discursively oriented comparison so far suggest the merits of rereading *Walsh*, attuned to the internal diversities of legal cultures. Its eye on the heterogeneity of family law within Quebec, this reading starts not from the standpoint of the common law self to which the judgment is most obviously addressed, but from that of the civilian other, to whom the constitutional equality guarantee also applies. As it proceeds, it will show the care necessary in discursive comparison so as to avoid obscuring a tradition's rich internal debates.

INTERNAL COMPLEXITY: OTHER AS ALREADY SELF

Looking beyond family law, this section highlights the potential perils of cultural and discursive comparison generally: the comparatist's good-faith effort to reconstruct the juridical discourse of a tradition may present it falsely as unified. A rereading of *Walsh* and of the wider debates on cohabitation within Quebec will reveal that the scholarly tradition in that province is less unified than is often supposed. While the previous section, in its delineation of distinct legal discourses on cohabitation, accepted the common interpretation of *Walsh* as the final act in the drama of legislative and judicial recognition of unmarried cohabitants in the common law provinces, this section rereads the judgment as an intermediate act in a Quebec drama. Recasting the judgment as a text that affects Canada's civil law jurisdiction reconfigures the judges who wrote in the case. Recall that, when viewed through the family law lens of regulatory discourses of functionalism and formalism, the concurring judge, Gonthier J, and the dissenting judge, L'Heureux-Dubé J, appeared diametrically opposed. Both judges are, however, civil lawyers from Quebec. When they are regarded as such, and it is remembered that the principles of *Walsh*, a constitutional law judgment, are applicable across the confederation, it becomes possible to reread their reasons as having been written with that province's abstinence from regulating the relations between de facto spouses in mind. How does the constitutional protection of equality play out in the context of the ostensibly gapless codified civil law of the family, one with little place for unmarried couples? Put otherwise, what is the effect of the equality right where the issue is not uneven legislative attention as between married and unmarried couples, but rather a complete and deliberate abstention from legislation in respect of the latter?

A warning for *laissez-faire*

From the Quebec perspective, the live issue after *Walsh* is not functionalism versus formalism, but the permissibility of sustaining a *laissez-faire* regulatory stance towards de facto unions. Gonthier J, concurring with the majority, distinguished an alimentary obligation as need-based from the division of matrimonial assets as a contractual right. Meanwhile, in dissent, L'Heureux-Dubé J, consistent with functionalist views in the common law provinces, reasoned that any distinction between the support obligation and division of property was groundless for the purpose at hand. (Distinctions for other purposes, such as taxation, might well remain appropriate.)

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 imposition devoid of individual volition, but as an emblem of familial solidarity freely and consensually undertaken.⁷⁹ Moreover, as shown by the contract of partnership, which may be tacit or undeclared, there is nothing uniquely matrimonial about a contractual sharing of property.⁸⁰ Beyond these private law subtleties, *Walsh* raises more pressing constitutional issues for Quebec.

Judges assess equality claims under the Canadian constitution using a multifaceted test focused on the contextual effect of a challenged law on the claimant’s dignity.⁸¹ It was undisputed in *Walsh* that the challenged legislation made a distinction on the basis of marital status. The crux was whether, viewed contextually, that distinction discriminated. The majority judges considered the relationship between marital status and the claimant’s characteristics or circumstances. Crucially for Quebec, the majority assessed the matrimonial property provision in relation to Nova Scotia’s spousal support regime. Approaching the conclusion that excluding unmarried cohabitants from the matrimonial property regime is not

74 H. Conway and P. Girard, ‘“No Place Like Home”: The Search for a Legal Framework for Cohabitants and the Family Home in Canada and Britain’ (2005) 30 *Queen’s LJ* 715, 728.

75 Pineau and Pratte, n 23 above, para 494–498.

76 E. Caparros, ‘Le patrimoine familial: une qualification difficile’ (1994) 25 *Revue générale de Droit* 251; *Droit de la famille* – 67 [1985] CA 135, 145 (Qc CA).

77 *Aubry et Rau, Droit civil français*, t 2, vol 2, *Des biens*, (Paris: Librairies Techniques, 7th ed by P. Esmein, 1961) para 4. Quebec Research Centre of Private and Comparative Law, *Private Law Dictionary and Bilingual Lexicons: Obligations* (Cowansville: Yvon Blais, 2003): ‘extrapatrimonial right’, ‘patrimonial right.’

78 D.-Castelli and Goubau, n 24 above, 177; Pineau and Pratte, n 23 above, para 379.

79 Pineau and Pratte, *ibid*; also *Droit de la famille* – 2626 [1997] RJQ 1117, 1122 (Qc Sup Ct) (aliments ideally a self-executing moral and ethical obligation).

80 Recognition of an undeclared partnership (arts 2186 et seq CCQ) occasionally provides a remedy to an estranged de facto spouse: *Beaudoin-Daigneault v Richard* [1984] 1 SCR 2. Gonthier J did not elaborate the idea, but he seemed to view property division as partly constitutive of the status of marriage: D. Réaume, ‘The Relevance of Relevance to Equality Rights’ (2006) 31 *Queen’s LJ* 696, 715–718.

81 *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497; E. Grabham, ‘*Law v Canada*: New Directions for Equality under the Canadian Charter?’ (2002) 22 *OJLS* 641.

discriminatory, the majority judges observed that Nova Scotia's law protects those persons 'unfairly disadvantaged' by their relationship's end. The first 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 benefits 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 benefits 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 benefit 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 fortified 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 benefit. 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-Dubé 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 spouses, it seems possible that he would have accepted a claim that excluding them from the entitlement to need-based alimentary support violates their constitutional equality right.⁸⁶ Perhaps he

82 Quotations in this and the previous paragraphs are from *Walsh*, n 6 above, at [44, 59–61].

83 *Lau*, n 81 above, at [70].

84 Arts 1493 et seq CCQ.

85 Prémont and Bernier, n 42 above, 28, 22–23.

86 Tétrault, n 14 above, 562.

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 indifferent' 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 effects 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 to support another, Quebec courts understood such persons to be doing precisely that, in a way noticeable to law. Furthermore, though de facto spouses owe each other no civil obligation of support, they may owe each other a natural obligation.⁹¹

Moving from aliments to property, de facto spouses continue to come into law's view. Quebec courts were long sluggish in accepting claims in unjust enrichment by one former de facto spouse against the other. For years, a string of judgments striking readers today as anachronistic dismissed claims of unjust enrichment on the basis that love or hope of a better life within concubinage leg-

87 For his traditional view of marriage, see his dissent in *Miron*, n 8 above.

88 Allard, n 65 above, 137.

89 D. Goubau, 'Incidences du concubinage du créancier alimentaire sur son droit aux aliments' (1989) 49 *La Revue du Barreau* 293.

90 *G (L) v B (G)* [1995] 3 SCR 370.

91 Pineau and Pratte, n 23 above, 538 n 1734. Though a natural obligation is not enforceable, payments made voluntarily are not recoverable (art 1554 para 2 CCQ). Moreover, a natural obligation may serve as the cause of a civil obligation, making a subsequent promise to perform a natural obligation civilly enforceable. J.-L. Baudouin, *Les obligations* (Cowansville: Yvon Blais, 6th ed by P.-G. Jobin with N. Vézina, 2005) para 26. Payment of a natural obligation may also avoid prohibitions on gifts, as in the case of an administrator of the property of others (art 1315 CCQ), or rules regarding the validity of gifts and their required formalities (eg arts 1818, 1824 CCQ). For recognition of a natural alimentary obligation between two individuals who 'ont été conjoints de fait même s'ils n'ont pas fait vie commune,' see *LL v ÉJ* [2004] RJQ 3062 at [11, 30] (Qc Sup Ct).

ally justified 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 justification 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 life⁹⁴ – reflect an unobvious sense that juridical life is an all-or-nothing matter, rather than one of degrees.⁹⁵ Perhaps de facto spouses occupy, like same-sex marriages in other places, a 'state of liminality, betwixt and between recognition and nonrecognition.'⁹⁶

Turning from the civil code and judgments to scholarly writings, further observations undermine the assertions that concubines are invisible to law. Not long ago, de facto unions or *unions libres* were virtually invisible in books structured around marriage as the sole legitimate conjugal relation. They appeared in an annex,⁹⁷ as a counterpoint underscoring the importance of marriage,⁹⁸ or as a problem raised by their exclusion from the alimentary obligation.⁹⁹ More recent texts, however, relativise marriage as just one exemplar, albeit the privileged one, of a larger category of conjugal unions,¹⁰⁰ or as one instantiation of 'the couple.'¹⁰¹ In the organisation of these books – a significant indicator in careful civilian scholarship¹⁰² – de facto unions appear on a footing equal to marriage. Of course, no needy de facto spouse can sue for support on a textbook. Still, such scholarly discussion (even if consisting largely of negative statements of inapplicable rules) hints that, at a minimum, de facto spouses occupy some place in the legal imaginary. Is not the repeated denial of legal status itself a form of recognition? Even as doctrinal writers insist that the legislature withholds all recognition of their existence, the existence and prevalence of de facto unions becomes increasingly speakable. The case may be analogous to that of same-sex marriage, judicial and legislative denials of which may amount to some recognition.¹⁰³ Relationships entirely between individuals who are truly strangers, as a matter of positive law and legal thought – for example, between an individual and his neighbour's second cousin – appear nowhere in family law books.

Speaking from Quebec, the comparative studies cited above treat legal recognition of de facto spouses as an external, foreign, and distinctively common law

92 D. M. Hendy and C. N. Stonebanks, 'Strangers at Law? The Treatment of conjoints de fait in the Civil Law of Quebec and the Development of Unjust Enrichment' (1995) 55 *La Revue du Barreau* 71, 93–95.

93 *B (M) v L (L)* [2003] R.D.F. 539 (Qc CA).

94 Pineau, n 67 above, 328.

95 N. Kasirer, 'Testing the Origins of the Family Patrimony in Everyday Law' (1995) 36 *Les Cahiers de Droit* 795.

96 B. Cossman, 'Betwixt and Between Recognition: Migrating Same-Sex Marriages and the Turn Toward the Private' (2008) 71 *Law and Contemporary Problems* 151.

97 M. D. Castelli, *Précis du droit de la famille* (Quebec: Presses de l'Université Laval, 1987) 351–363.

98 J. Pineau, *La famille* (Montreal: Presses de l'Université de Montréal, 1972) para 18.

99 M. Ouellette, *Droit de la famille* (Montreal: Thémis, 3rd ed, 1995) 298.

100 D. -Castelli and Goubau, n 24 above, 13–168.

101 Pineau and Pratte, n 23 above, 23–516.

102 P. Jestaz and C. Jamin, *La doctrine* (Paris: Dalloz, 2004) 253.

103 B. Cossman, 'Migrating Marriages and Comparative Constitutionalism' in S. Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006) 223–224.

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 filiation, it represents the abolition of the old status of illegitimacy. But for those who understand certain rules concerning married spouses as indirectly but concretely benefiting children – for example, the custodial spouse’s possible right to use of the family residence¹⁰⁴ – 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 married spouses, but they betray dissatisfaction with *laissez-faire*. Characterisation of *Walsh* as vindicating ‘*le droit à la marginalité*’¹⁰⁷ hints that the strong autonomy justification fails to secure universal assent. Some hope that the legislature will demonstrate imagination and suppleness in appropriately protecting concubines while fully respecting individual liberty.¹⁰⁸ Is there not a middle ground, some wonder, between total assimilation into the matrimonial property regime and utter failure to recalibrate the parties’ economic positions?¹⁰⁹ Moreover, while functionalism does not dominate family regulation within

104 Art 410 para 2 CCQ. The code nowhere explicitly contemplates awarding a former *de facto* spouse a right of use to a dwelling to which she holds no title, but some precedents show willingness to order at least a temporary right of use to a custodial parent to remain in a family dwelling with the children. Tétrault, n 14 above, 595; R. LaSalle, ‘Les conjoints de fait et la résidence familiale’ in Barreau du Québec, Service de la formation permanente, n 42 above, 103–105. Some readers detect authority for awarding a non-proprietor custodial parent a right of use in a home owned by the other partner in stipulations of every child’s right to the protection and security of his parents and requiring every decision concerning a child to be taken in light of his interests (respectively arts 32, 33 CCQ): R. LaSalle, ‘Les conjoints de fait et le droit d’usage de la résidence familiale’ in Barreau du Québec, Service de la formation permanente (ed), *Congrès annuel du Barreau du Québec* (Montreal, 1997) 359–360.

105 eg D. Goubau, G. Otis and D. Robitaille, ‘La spécificité patrimoniale de l’union de fait: le libre choix et ses “dommages collatéraux”’ (2003) 44 *Les Cahiers de Droit* 3.

106 Compare the judgment that, in the European setting, violations of Article 8 and Article 14 of the European Convention on Human Rights are likelier where differential treatment of unmarried couples adversely affects their children: Wong, n 10 above, 275.

107 Tétrault, n 14 above, 555.

108 C. Dubreuil and B. Lefebvre, ‘L’ordre public et les rapports patrimoniaux dans les relations de couple’ (1999) 40 *Les Cahiers de Droit* 345, 365.

109 G. Lefrançois, ‘Évolution et révolutions: dernières tendances jurisprudentielles en droit de la famille’ [2005] 1 *Cours de Perfectionnement du Notariat* 3, 13; B. Moore, ‘Quelle famille pour le XX^e siècle?: Perspectives québécoises’ (2003) 20 *Can J Fam L* 57, 94. J. Jarry, *Les conjoints de fait au Québec: vers un encadrement légal* (Cowansville: Yvon Blais, 2008) 165 calls for ‘*la reconnaissance d’une obligation alimentaire balisée*’ applicable to unmarried couples with children. In a revealing confirmation of the background discourse in Quebec, she takes care to show that her proposal – carefully supported, in a rare way for Quebec scholarship on the matter, by feminist analysis – is consistent with ‘*le respect du choix des individus libres et autonomes*’ (*ibid.*).

Quebec, interventions occasionally show a functional, as opposed to formal, sensibility. For one author, the fundamental difference between married spouses and *de facto* spouses lies not internally in the couple's intentions, but externally in the applicable law.¹¹⁰ On a similar reading, the jurisprudence teaches that concubines' '*problèmes matrimoniaux*' (how telling the adjective!) are identical to those of married persons.¹¹¹ There is not only a difference fit for comparison between common law and civilian regimes, but also one internal to Quebec.

A diachronic view of Quebec legal sources reveals additional elements. Quebec undertook a decades-long process of revision and recodification of its general private law, culminating in the adoption of the Civil Code of Québec in 1991. The year 1978 saw the publication of the fruit of the labours of the law reform agency called the Civil Code Revision Office (CCRO). In its book on the family, the CCRO's Draft Civil Code provided:

338 *De facto* consorts owe each other support as long as they live together. However, if exceptional circumstances justify it, the court may order a *de facto* consort to pay support to his spouse once they no longer live together.¹¹²

The commentaries proposed that the exceptional circumstances, determinable by a court, might include a *de facto* union's long duration as well as the abandoned consort's age, health, and lack of resources.¹¹³ Had the provision been enacted, this reading of 'exceptional circumstances' would have drawn it close to the Nova Scotian regime approved in *Walsh* as 'tailored.' The legislature ultimately declined to adopt this recommendation, relying largely on strong autonomy and liberal feminist arguments.

Text that an author has drafted and cut during revisions, or that one party has proposed and another, more authoritative party has overridden, lays no claim to canonical literary or juridical status. But a rejected text nonetheless illuminates currents of thought. It indicates a community's boundaries of the thinkable. Nothing drafted or seriously proposed – especially by a prominent law reform agency such as the CCRO – can be regarded as unthinkable. It has already entered the field of legitimacy and illegitimacy.¹¹⁴ As a social phenomenon, *de facto* unions have never been unthinkable. The proposal by the CCRO demonstrates that it is juridically conceivable within the civil law, however inadvisable on views that ultimately prevailed, to extend the support obligation derived from family solidarity to persons not allied by a formal family bond. Marriage and filiation, the two civilian institutions classically establishing a family and permitting its expansion,¹¹⁵ no longer exhaust the possibilities imaginable under Quebec law for recognising reciprocal family rights and obligations.

110 A. Cossette, 'Le concubinage au Québec' (1985) 88 *La Revue du Notariat* 42, 59.

111 Allard, n 65 above, 140.

112 Civil Code Revision Office, *Report on the Québec Civil Code: Volume I: Draft Civil Code* (Quebec: Éditeur officiel, 1978) 119.

113 Civil Code Revision Office, *Report on the Québec Civil Code: Volume II, Tome 1: Commentaries* (Quebec: Éditeur officiel, 1977) 206.

114 J. Butler, *Undoing Gender* (New York: Routledge, 2004) 105–106.

115 Cornu, n 42 above, para 147.

The differences between legislative and adjudicative change become important. It is unsurprising that an area as sensitive as family law provokes differing 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 voices, such as that in the proposed draft Article 338, have less scope for future influence. Unlike dissenting judgments, the CCRO's Draft Civil Code occupies an 'ambiguous status in the catalogue of sources of private law.'¹¹⁸

Perhaps it is natural for a new civil code quickly to achieve canonical status, its enacted text transferred from a realm of contingency in which different possibilities competed, into one of authoritative certainty. This is especially so in Quebec, given the ambitions of the Civil Code of Québec to replace the antiquated Civil Code of Lower Canada. Yet why should conservative doctrinal writers cast the contours of Quebec family law, reformed on several occasions in the past thirty years, as almost immutable when they are not?¹¹⁹ The texts in force do not, after all, represent the sole possible treatment of de facto spouses within the civil law tradition.¹²⁰ Jonathan Hill argues convincingly that comparative law may 'demonstrate the extent to which the form and substance of any legal system are not "natural", but result from the implementation of moral and political values.'¹²¹ Properly understood, the point includes not only the displacement of a technical and value-neutral idea of law by moral and political values, but also the elevation, in instances of law reform, of certain moral and political values over others.¹²² Comparative law can help show how a legal system's status quo represents the implementation of moral and political ideas selected over plausible and competing possibilities. Moreover, the values drawn on in interpreting a text can change without the law's textual

116 *cf* *Murdoch v Murdoch* [1975] 1 SCR 423; *Rathwell v Rathwell* [1978] 2 SCR 436.

117 L. L. Fuller, *Anatomy of the Law* (Westport: Greenwood Press, 1976) 93–94. See also K. D. Richman, 'Talking Back: The Discursive Role of the Dissent in LGBT Custody and Adoption Cases' (2007) 16 *Law and Sexuality* 77.

118 N. Kasirer, 'Introductory Essay: "Values", Law Reform and Law's Conscience' in P.-A. Crépeau with É. M. Charpentier, *The UNIDROIT Principles and the Civil Code of Québec: Shared Values?* (Scarborough: Carswell, 1998) xx.

119 eg in 1996, the Quebec legislature eliminated the reciprocal duty of support between grandparents and grandchildren by restricting the alimentary obligation to relatives in the direct line to the first degree (art 585 CCQ as am), though the change triggered a firestorm.

120 French law recognises concubines minimally, though now including two categories, *pacés* and *non pacés*. The Pacs has evolved, as a consequence of the reform of 23 June 2006, from a contract to a partnership. Malaurie and Fulchiron, n 30 above, para 295. While it does so controversially, the French civil code now defines concubinage: art 515–8 CN; Cornu, n 42 above, para 45bis. On recognition of de facto spouses in Portugal, see M. J. R. C. V. Tomé, 'Family Law and Family Values in Portugal' in M. Maclean (ed), *Family Law and Family Values* (Oxford: Hart Publishing, 2005) 329–331.

121 J. Hill, 'Comparative Law, Law Reform and Legal Theory' (1989) 9 OJLS 101, 115.

122 On the private law values informing legislative reform of family law, see Leckey, n 19 above.

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 fixed.¹²⁴ Once it is acknowledged that the range of relevant values is not fixed, 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 reflecting different 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 first 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 differing 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 Won't Work in Theory' (2006) 44 *Osgoode Hall Law Journal* 11, 39–43.

124 D. Jutras, 'Louis and the Mechanical Beast or Josserand's Contribution to Objective Liability in France' in K. Cooper-Stephenson and E. Gibson (eds), *Tort Theory* (North York: Captus University Publications, 1993).

125 Often ignored entirely, it is mentioned by Pineau and Pratte, n 23 above, para 375; D.-Castelli and Goubau, n 24 above, 174 n 396; Jarry, n 109 above, 111.

126 Lasser, n 4 above, 209.

127 H. P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford: Oxford University Press, 3rd ed, 2007) 22–26.

128 V. V. Palmer (ed), *Mixed Jurisdictions Worldwide: The Third Legal Family* (Cambridge: Cambridge University Press, 2001).

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 formalism and functionalism. Not only those adamantly opposed to recognising de facto spouses within Quebec, but also those outside Quebec who were surprised by the strain of autonomy and liberty discerned in the Canadian Charter by the *Walsh* court, may be insensitive to competing ideas within their own traditions. Comparative treatments of cohabitation are incomplete until they attend not only to the presence or absence of particular legal rules and their current justifications, but also to the moral disapproval influential until recently.

Admittedly, taking a Canadian inter-provincial comparison as a comparative foray into the common law and civil law regulation of unmarried couples calls for caution. The partial assimilation of unmarried cohabitants to marriage in the Canadian common law provinces does not typify a distinctively common law approach: these Canadian solutions exceed recognition in other Anglo-American jurisdictions.¹³⁰ The prominence of functionalism by common lawyers thinking about unmarried cohabitation is, nevertheless, a wider phenomenon.¹³¹ Similarly, the debates of the family law scholars in Quebec surveyed here resonate with those in other civilian jurisdictions.¹³² Indeed, the discourses identified in this paper are ones in relation to which cohabitation policy in any tradition needs to situate itself.

The final caution, two-fold, is sociological. First, whatever this paper's success in undermining the view of distinct discourses in the common law provinces and in Quebec, the former approving cohabitation, the latter disapproving, individuals do not order their family practices with primary reference to political boundaries or the state legal tradition.

Second, some differences are probably better chalked up to the sociology of the legal academy than to legal traditions. While this paper cannot explore the point, casual observation suggests that different understandings of the enterprise of family law scholarship are discernible in Quebec and in the common law provinces. Many scholars of family law in the common law provinces seem to have taken up their labour, at least in part, as a feminist political engagement, often emphasising distributive justice. By contrast, in Quebec, what can fairly be characterised as a more conservative orientation is embedded in an understanding of

129 eg G. P. Fletcher, 'Comparative Law as a Subversive Discipline' (1998) 46 *American Journal of Comparative Law* 683; H. M. Watt, 'La fonction subversive du droit comparé' [2000] RIDC 509.

130 G. Douglas, *An Introduction to Family Law* (Oxford: Oxford University Press, 2nd ed, 2004) 46–54; M. C. Regan Jr, 'Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation' (2001) 76 *Notre Dame L Rev* 1435.

131 A. Barlow, S. Duncan, G. James, and A. Park, *Cohabitation: Marriage and the Law: Change and Legal Reform in the 21st Century* (Oxford: Hart Publishing, 2005) 98–106.

132 eg C. Martin and I. Théry, 'The Pacts and Marriage and Cohabitation in France' (2001) 15 *Int'l J L Pol'y & Fam* 135, 142–143.

family law scholarship as advancing the doctrinal development of a conceptually coherent private law, one more reflective 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 conflicting 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 tradition's internal complexity, for forestalling a recognition of difference in the self.¹³⁴

133 Jestaz and Jamin, n 102 above, attend to the institutional reproduction of the community of French university law professors. See also F. Cownie, *Legal Academics: Cultures and Identities* (Oxford: Hart Publishing, 2004).

134 N. Kasirer, 'Legal Education as *Métissage*' (2003) 78 *Tul L Rev* 481, 490.