

# FAMILY LAW AS FUNDAMENTAL PRIVATE LAW

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*The paper takes issue with a recent emphasis on the role of litigation under the Canadian Charter of Rights and Freedoms as an instrument of family law reform and a sense that family law, constitutionalized, is no longer private law. Such emphasis suggests that reform is better done by courts than by legislatures. The paper aims to rehabilitate an understanding of family law as a core component of a jurisdiction's fundamental private law. This understanding is, descriptively, more faithful to the Canadian experience of family law as an enterprise of governance shared by different branches of government. It is also, normatively, preferable for tackling the thorny distributive issues on the family law agenda.*

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*Cet article remet en question l'importance accordée récemment au rôle du litige constitutionnel comme instrument de réforme du droit de la famille et l'idée selon laquelle ce droit, une fois constitutionnalisé, ne ferait plus partie du droit privé. Ces deux phénomènes supposent que les tribunaux sont mieux à même que les législatures de réformer le droit de la famille. Cet article vise à réhabiliter l'idée selon laquelle le droit de la famille constitue un élément central du droit privé fondamental d'une juridiction. D'un point de vue descriptif, cette idée est plus fidèle à l'expérience canadienne, au sein de laquelle le droit de la famille constitue une entreprise normative partagée par différents niveaux de gouvernement. D'un point de vue normatif, elle est mieux à même d'éclairer les difficiles enjeux distributifs inhérents au droit de la famille.*

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## I. Introduction

An influential essay published in this journal argued that the *Canadian Charter of Rights and Freedoms*<sup>1</sup> had influenced the development of family law in fundamental ways.<sup>2</sup> One consequence, it contended, is that family law is no longer adequately characterized as a field of purely private law. It saw the *Charter* as having articulated values, such as equality, that form a backdrop of principle for family law, and as having legitimated a judicial methodology that permits open articulation of policy considerations. That rich and densely argued essay by a respected legal scholar is remarkable on several levels. One that has gone largely unnoticed is the disjuncture between its argument for the influence of the *Charter* and its judicious acknowledgement of areas of family law where the *Charter* has not penetrated or where fundamental reforms predated it. The essay's dissonance between the influence accorded to the *Charter* and the genesis of developments in family law must be set in context. The emphasis on the *Charter* exemplifies a larger pattern. A number of family law scholars have noted the extent to which constitutional equality litigation has influenced, indeed constitutionalized, their field. Call this constellation of ideas the *public law thesis*.

This paper submits that the public law thesis overstates its point, and worryingly so. Admittedly, denying that the *Charter* and litigation conducted under it have influenced family law would be rash. A debate about “influence” versus “no influence” would be sterile. The point in issue is a matter of degree, of scope, of site, and of mode. Discussions of the constitutionalization of family law in the *Charter* era ascribe an excessive influence to the entrenched bill of rights. They are, correspondingly, unduly dismissive of private law.<sup>3</sup> Even if it is presented chiefly as a description of developments in the 1990s, the account of constitutionalization by proponents of the public law thesis has important future implications. Institutionally, it suggests a larger role for courts and lesser ones for elected decision makers and for private ordering by parties. Substantively, despite the ostensible richness of so-called *Charter* values, the public law thesis may narrow the understanding of family law's possibilities. The public law thesis encourages people to conceive of family law using the lexicon of the

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<sup>1</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

<sup>2</sup> Alison Harvison Young, “The Changing Family, Rights Discourse and the Supreme Court of Canada” (2001) 80 Can. Bar Rev. 749 [“The Changing Family”].

<sup>3</sup> Private law in this paper means rules and principles regulating relations between private persons. Substantively, it is not limited to property, contract, and tort, but also includes family law, successions, and corporate law. Formally, it may be enacted or unenacted. By this definition, a family property statute forms part of private law.

*Charter* and to imagine reforms analogous to constitutional remedies. It implies, problematically, that if a family law rule survives a *Charter* challenge, it is unnecessary to scrutinize that rule in light of other considerations. Conversely, it implies that where a rule fails a *Charter* challenge, it was necessarily bad.

Yet this paper's thrust is not chiefly negative. It endeavours, constructively, to rehabilitate an alternative understanding of family law. It argues for a vision of family law as a core component of a jurisdiction's fundamental private law, its *ius commune*.<sup>4</sup> Understanding family law as *ius commune* is descriptively more faithful to the Canadian experience of family law as an enterprise of governance shared by different branches of government. It is also, normatively, preferable for tackling the thorny issues occupying the family law agenda.

## 2. From Private to Public?

Constitutionally, general legislative jurisdiction over the family devolves to the provinces as a matter of property and civil rights. The federal Parliament's power over marriage and divorce derogates from that general disposition.<sup>5</sup> Scholars have traditionally located family law within private law. For civil law scholars, it is axiomatic that legal regulation of the family forms part of the private law.<sup>6</sup> Within Quebec, that understanding is so evident as to pass virtually without comment. Traditional common law authors are similarly taciturn on the point, but they too classify family regulation as a matter of private law.<sup>7</sup> In the *Charter*'s earlier days, it was thought that its impact on family law would

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<sup>4</sup> Family law as fundamental private law is not the sole dimension obscured by the public law thesis. The claim that the *Charter* has been central in transforming family law from private law to public law overlooks other *non-constitutional* regimes of public law that have repeatedly revised notions of what constitutes family. For example, legislation challenged by same-sex cohabitants already placed opposite-sex cohabitants on a footing equal to married spouses for certain purposes. The changing legal recognition of different family configurations by non-constitutional elements of public law merits its own paper.

<sup>5</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, ss. 91(26), 92(13), reprinted in R.S.C. 1985, App. II, No. 5. On the historical reasons for removing marriage and divorce from property and civil rights and assigning power over them to Parliament, see F.J.E. Jordan, "The Federal Divorce Act (1968) and the Constitution" (1968) 14 McGill L.J. 209 at 211-16.

<sup>6</sup> See e.g. Jacques Ghestin and Gilles Goubeaux, with Muriel Fabre-Magnan, *Traité de droit civil : Introduction générale*, 4th ed. (Paris: L.G.D.J., 1994) at no. 101. The exception proving the rule is Éric Millard, *Famille et droit public : Recherches sur la construction d'un objet juridique* (Paris: L.G.D.J., 1995).

<sup>7</sup> Peter Mann Bromley, *Family Law* (London: Butterworths, 1957).

be narrow. The Supreme Court of Canada declared that the *Charter* does not apply directly to disputes between private parties, although suggesting enigmatically that judges should nonetheless develop the principles of the common law consistently with fundamental constitutional values.<sup>8</sup> Scholars sensibly took this holding to narrow the scope for *Charter* innovation in their field of disputes between family members.<sup>9</sup> Moreover, a general sense prevailed that the liberal rights paradigm applied clumsily to family members “encumbered with complex interdependencies, needs, and relations of care.”<sup>10</sup> By the beginning of the 21st century, however, scholars spoke of the *Charter*’s influence on family law as having been substantial. One might suppose this to reflect the general enthusiasm for the *Charter* characteristic of at least English-Canadian legal scholarship.

It is possible to identify a public law thesis comporting two branches. One claim is that the *Charter*, and especially its equality guarantee in section 15, has influenced family law in fundamental ways. Expansive claims for the *Charter*’s influence cite as examples the direct effects of its rights in defining family. For example, courts have held that unmarried cohabitants must for certain purposes be treated equivalently to married spouses,<sup>11</sup> and that a spousal support regime applicable to opposite-sex cohabitants must apply to same-sex cohabitants.<sup>12</sup> The public law thesis characterizes these *Charter* cases as “revolutionary [for having] legally redrawn and expanded the legal vision of family itself.”<sup>13</sup> Furthermore, its claims also extend beyond direct constitutional challenges to the indirect effects of the *Charter*’s values. These values are thought to have exerted a benevolent influence on the determination

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<sup>8</sup> *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174 [*Dolphin Delivery*]. In a triumph of form over substance, the judgment implied that while the unenacted private law of common law jurisdictions escapes *Charter* scrutiny, the codified private law of Quebec does not.

<sup>9</sup> Stephen J. Toope, “Riding the Fences: Courts, Charter Rights and Family Law” (1991) 9:2 Can. J. Fam. L. 55. For an application of *Dolphin Delivery* leading to the conclusion that individual determinations of a child’s best interests are essentially private and shielded from the *Charter*, see the comments of L’Heureux-Dubé J. (dissenting in part but writing for a majority on the constitutional issue) in *Young v. Young*, [1993] 4 S.C.R. 3, 108 D.L.R. (4th) 193 at 91-92 of [1993] 4 S.C.R.

<sup>10</sup> Susan B. Boyd, “The Impact of the Charter of Rights and Freedoms on Canadian Family Law” (2000) 17 Can. J. Fam. L. 293 at 297.

<sup>11</sup> *Miron v. Trudel*, [1995] 2 S.C.R. 418, 124 D.L.R. (4th) 693 [*Miron*].

<sup>12</sup> *M. v. H.*, [1999] 2 S.C.R. 3, 171 D.L.R. (4th) 577.

<sup>13</sup> Harvison Young, “The Changing Family,” *supra* note 2 at 788; also Hon. Claire L’Heureux-Dubé, “What a Difference a Decade Makes: The Canadian Constitution and the Family Since 1991” (2001) 27 Queen’s L.J. 361 [“The Canadian Constitution and the Family”].

of family disputes. The *Charter* and its jurisprudence have, it is argued, supplied a “principled framework of values [influential upon] the interpretation or extension of the common law, the interpretation of statutes, and the exercise of judicial discretion.”<sup>14</sup>

A spousal support case, *Moge v. Moge*,<sup>15</sup> emerges as the exemplar *par excellence* of these indirect effects. It reconfigured the understanding of the objectives of spousal support under the *Divorce Act*.<sup>16</sup> The judgment weakens what had previously been understood as an obligation on the part of wives to achieve self-sufficiency, emphasizing instead equitable sharing of the consequences of marriage. This new principle unfurls against a social science depiction of the financial disadvantage that divorce occasions for many women. Equality principles are thought to have “shaped” the Court’s statutory interpretation.<sup>17</sup> Parallels arise with research delineating the laudable influence of the *Charter* on other areas of private law, where judges are spotted from time to time developing the common law consistently with the *Charter*.<sup>18</sup> Promulgators of the public law thesis view the extension of the *Charter*’s values beyond its direct application as a force for good.

The second claim is that family law has been not only influenced, but indeed transformed. Canada is seen to have undergone a “process of constitutionalizing family law.”<sup>19</sup> This constitutionalization of family law has occurred in a “broad, principled sense which has affected the substance and principles of family law.”<sup>20</sup> Consequently, “family law can no longer be characterized simply as an area of law falling within the

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<sup>14</sup> Harvison Young, “The Changing Family,” *ibid.* at 787.

<sup>15</sup> [1992] 3 S.C.R. 813, 99 D.L.R. (4th) 456 [*Moge*].

<sup>16</sup> R.S.C. 1985 (2nd Supp.), c. 3.

<sup>17</sup> Helena Orton, “Using Constitutional Equality Principles to Shape Jurisprudence: *Moge v. Moge*, Spousal Support under the *Divorce Act* and Women’s Equality” [1993] Spec. Lect. L.S.U.C. 61 at 63. For Harvison Young, “the principle of equality drives the decision;” see “The Changing Family,” *supra* note 2 at 780. L’Heureux-Dubé J. herself asserts that the *Charter*’s equality values stood “at the forefront” of her reasons, though doctrines of legal interpretation do not generally view authors as best placed to interpret their own texts; see “The Canadian Constitution and the Family,” *supra* note 13 at 268.

<sup>18</sup> See e.g. Lorraine E. Weinrib and Ernest J. Weinrib, “Constitutional Values and Private Law in Canada” in Daniel Friedmann and Daphne Barak-Erez, eds., *Human Rights in Private Law* (Oxford: Hart, 2001) 43. European jurists speak of the phenomenon of fundamental rights’ horizontal effect.

<sup>19</sup> Nicholas Bala, “The *Charter of Rights & Family Law* in Canada: A New Era” (2001) 18 Can. Fam. L.Q. 373 at 427.

<sup>20</sup> Harvison Young, “The Changing Family,” *supra* note 2 at 788.

domain of private law.”<sup>21</sup> This claim appears to depend upon the sense of a state interest in the family; the increasing role of legislation; the reliance upon values such as equality; and judicial articulation of policy considerations. In these narratives, equality is prominent as both the leading right applied directly and the leading value influential indirectly.<sup>22</sup> The notion that family law should be regarded as constitutionalized and now public is distinct from the important point that distributive regimes of public law — notably taxation and social assistance — affect families. Like the idea of the *Charter*’s indirect effects, this idea evokes scholarship emanating from other jurisdictions with entrenched bills of rights, some supportive,<sup>23</sup> some more cautious.<sup>24</sup>

In fairness, the second claim should not be understood literally. The contention that the purely private law characterization of family law is outdated need not imply that family law no longer falls within the jurisdiction of the provinces over “property and civil rights.”<sup>25</sup> It is better understood as underscoring family law’s important public dimension, attesting that family law’s animating values are public law values, of which substantive equality under the *Charter* is an example. It implies further that the traditional resources of private law are inadequate for addressing the field’s challenges. The claim is a call to think of family law differently, to subject its regimes to the values of the *Charter* and of public law and to seek further reform along the lines of the *Charter* cases.

A careful reader soon notices that the “constitutionalization of family law” jostles uneasily with substantive developments recounted by Dean Harvison Young’s essay. Her essay acknowledges the influence of legislative amendment on the judicial approach to family law, and indeed that “significant changes were underway before the *Charter*.”<sup>26</sup> It records

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<sup>21</sup> *Ibid.* at 792; see also Susan B. Boyd and Claire F.L. Young, “Feminism, Law, and Public Policy: Family Feuds and Taxing Times” (2004) 42 Osgoode Hall L.J. 545 at 554.

<sup>22</sup> But see analysis of the deployment of s. 7 to protect families in Gerald Chipeur, “Family Ties: Individual and Family Rights under Canada’s *Charter of Rights and Freedoms*” (2003) 52 U.N.B.L.J. 215.

<sup>23</sup> See e.g. Julia Sloth-Nielsen and Belinda Van Heerden, “The Constitutional Family: Developments in South African Family Law Jurisprudence under the 1996 Constitution” (2003) 17 Int’l J. L. Pol’y & Fam. 121.

<sup>24</sup> See e.g. Katharine B. Silbaugh, “*Miller v. Albright*: Problems of Constitutionalization in Family Law” (1999) 79 B.U.L. Rev. 1139. It is likely too soon to assess the general relationship between family law and the United Kingdom’s *Human Rights Act 1998* (U.K.), 1998, c. 42.

<sup>25</sup> *Constitution Act, 1867*, *supra* note 5, s. 92(13).

<sup>26</sup> Harvison Young, “The Changing Family,” *supra* note 2 at 769, 752.

too that the Supreme Court of Canada established early on that arguments of “parental ‘rights’” framed under the *Charter* would not “change the basic structure and approach to custody and access,”<sup>27</sup> a bread-and-butter issue in family litigation. Already, then, one suspects that the constitutionalization claim may be overstated. Yet, exaggeration is not the sole problem marking the understanding of family law as *Charter*-influenced public law.

### 3. *The Limits of the Charter*

The public law thesis is problematic as a description of Canadian family law. The idea that family law has been “constitutionalized” overstates the uniformity obtaining across the federation. At the provincial level, significant differences penetrate to family law’s core. Family maintenance acts in most common law provinces recognize a support obligation on the part of step-parents towards their stepchildren.<sup>28</sup> But this is not true in all provinces.<sup>29</sup> Differences in the treatment of unmarried cohabitants are more striking. Two common law provinces include unmarried cohabitants in their matrimonial property regimes.<sup>30</sup> Those provinces and seven others recognize support obligations as between unmarried cohabitants identical to those applicable to married spouses.<sup>31</sup> The civil law of Quebec, for the most part, views what it calls *de facto* spouses as linked in no way, whatever the duration of their shared life.<sup>32</sup> Given the prevalence of cohabitation, successive long

<sup>27</sup> *Ibid.* at 774.

<sup>28</sup> *Family Law Act*, S.A. 2003, c. F-4.5, ss. 47, 48; *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 1 “parent” (b); *The Family Maintenance Act*, C.C.S.M. c. F20, s. 1 “child”; *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 1 “child” (d); *Family Law Act*, R.S.N.L. 1990, c. F-2, s. 2(1)(a)(ii); *Family Law Act*, R.S.O. 1990, c. F.3, s. 1(1) “child”; *Family Law Act*, R.S.P.E.I. 1988, c. F-2.1, s. 1(1)(a); *The Family Maintenance Act*, 1997, S.S. 1997, c. F-6.2, s. 2 “parent”.

<sup>29</sup> Nova Scotia’s legislation contemplates support only for the children of void and voidable marriages, a class of support creditors with a distinctly anachronistic flavour, unrelated to the contemporary prominence of so-called blended families (*Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, ss. 47-48). In Quebec, reciprocal support obligations arise only between spouses and parents and children (Art. 585 C.C.Q.).

<sup>30</sup> *The Family Property Act*, C.C.S.M. c. F25, ss. 13, 14; *Family Property Act*, S.S. 1997, c. F-6.3, ss. 4, 21(1), 22(1).

<sup>31</sup> *Adult Interdependent Relationships Act*, S.A. 2002, c. A-4.5, ss. 31(5), 31(6); *Family Relations Act*, *supra* note 28, s. 89; *The Family Maintenance Act*, *supra* note 28, s. 4; *Family Services Act*, *supra* note 28, s. 112; *Family Law Act* (N.L.), *supra* note 28, s. 36; *Maintenance and Custody Act*, *supra* note 29, ss. 3-5; *Family Law Act* (Ont.), *supra* note 28, s. 30; *Family Law Act* (P.E.I.), *supra* note 28, s. 30; *The Family Maintenance Act*, 1997, *supra* note 28, s. 5.

<sup>32</sup> *De facto* spouses are absent from the regimes delineating mutual support obligations, entitlement to the family residence, and establishment and partition of the so-

relationships, and inter-provincial movement, this variety in the regimes regarding stepchildren and unmarried couples is important. If a constitutionalization has occurred, it has not erased substantial differences in the state law of the family from one jurisdiction within Canada to the next. Diversity also persists, of course, in the legal pluralism of family practices.

Formally, the view of family law as dominated by the *Charter* leads to an emphasis upon *Charter* judgments as key legal sources. Scholarly accounts of the development of same-sex marriage in Canada provide a striking example.<sup>33</sup> Yet the prominence ascribed to a particular form of lawmaking betrays the historical development of family law. Family law in Canada has been neither a sequence of *Charter* judgments, nor merely “an aggregation of instrumental legislation” (as is arguably the case in some jurisdictions).<sup>34</sup> It is, rather, the product of a fruitful interaction of different institutional actors and legal forms. The argument that family law is now constitutionalized public law is more, however, than a description of the past.

The public law thesis might be expected to exert a prospective, normative influence. Institutionally, it drives towards perceiving a pre-eminent role for the courts in the field of family law. It privileges the Supreme Court of Canada as the *Charter*'s anointed interpreter. On this understanding, the legislature's task is to follow what the Court identifies as the constitutional fiat, implementing the necessary remedies.<sup>35</sup> Parliament plainly found this role convenient following the same-sex marriage cases. Admittedly, one can conceive an order of things in which legislatures see themselves as robustly interpreting and concretizing *Charter* rights and values. Sections 1 and 33 of the *Charter* perhaps

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called family patrimony. Some social legislation setting out entitlements under government programmes and other collective schemes treats *de jure* (married and civil union) and *de facto* spouses together; see Michel Tétrault, *Droit de la famille*, 3d ed. (Cowansville, Qc.: Yvon Blais, 2005) at 549-51.

<sup>33</sup> Robert Leckey, “Private Law as Constitutional Context for Same-Sex Marriage” (2007) 2 J.C.L. 172.

<sup>34</sup> John Dewar, “Families” in Peter Cane and Mark Tushnet, eds., *The Oxford Handbook of Legal Studies* (New York: Oxford University Press, 2003) 413 at 414.

<sup>35</sup> Mary Jane Mossman, “Conversations about Families in Canadian Courts and Legislatures: Are There ‘Lessons’ for the United States?” (2003) 32 Hofstra L. Rev. 171 at 181. Might not endorsing *Charter* litigation as a “terrain of progressive struggle ... [transfer] power away from institutions which are in principle democratic to institutions which are by definition authoritarian”? See Judy Fudge, “The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles” (1987) 25 Osgoode Hall L.J. 485 at 551.



evoke such democratic aspirations.<sup>36</sup> Within such an understanding, a legislature might take a judicial determination that a rule violated the *Charter* as the penultimate, rather than the ultimate, step. Today, however, *Charter* chatter appears to translate into judicial action and legislative inaction.

Beyond the identity of the government institution that should act, the public law thesis affects the range of available options. Some argue that the philosophy of human rights produces an individualism that impedes a capacity to think about collective interests.<sup>37</sup> Other critiques bear more specifically upon family law and particular agendas, such as the gay and lesbian social movement.<sup>38</sup> An additional point concerns the clumsiness of public law resources for addressing family matters. The public law thesis suggests the appropriateness of public law remedies, notably *Charter* litigation, for reforming family law. Yet the remedial arrows available in a court's quiver when determining a *Charter* challenge appear quite crude.<sup>39</sup> Crucially, this point is not only procedural. The *Charter's* values, particularly equality, are inextricably bound up with how courts have resolved claims. *Charter* litigation in family matters typically adopts a binary logic in which exclusion of the claimant group from a statutory scheme is permissible or impermissible. Where the court pronounces the exclusion permissible, the claimant loses and the status quo subsists. Recall the constitutionally permissible exclusions: same-sex couples from a public pension regime; couples who have cohabited less than the statutory period from the benefits enjoyed by unmarried cohabitants of longer duration; unmarried cohabitants from matrimonial property regimes; and former unmarried cohabitants from a benefit available to separated married spouses.<sup>40</sup> By contrast, where the

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<sup>36</sup> Jeffrey Goldsworthy, "Judicial Review, Legislative Override, and Democracy" in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone, eds., *Protecting Human Rights: Instruments and Institutions* (New York: Oxford University Press, 2003) 263.

<sup>37</sup> Jean-Louis Renchon, "Indisponibilité, ordre public et autonomie de la volonté dans le droit des personnes et de la famille" in Alain Wijffels, ed., *Le Code civil entre ius commune et droit privé européen* (Brussels: Bruylant, 2005) 269 at no. 29.

<sup>38</sup> On the exclusion of queer perspectives by the successful discourse of gay rights, see Miriam Smith, "Framing Same-Sex Marriage in Canada and the United States: *Goodridge*, *Halpern* and the National Boundaries of Political Discourse" (2007) 16 *Soc. & Leg. Stud.* 5.

<sup>39</sup> The Supreme Court of Canada's insistence upon the flexibility of *Charter* remedies, as in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, 232 D.L.R. (4th) 577, has not made itself concrete in family litigation.

<sup>40</sup> Respectively, *Egan v. Canada*, [1995] 2 S.C.R. 513, 124 D.L.R. (4th) 609; *Brebric v. Niksic* (2002), 60 O.R. (3d) 630, 215 D.L.R. (4th) 643 (C.A.), leave to appeal to S.C.C. refused, [2003] 1 S.C.R. vi; *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, [2002] 4 S.C.R. 325, 221 D.L.R. (4th) 1 [Walsh]; *Hodge v. Canada (Minister of*

exclusion is deemed impermissible, the court mandates assimilation into the existing regime. For spousal support purposes, same-sex unmarried couples have been folded into the class of opposite-sex unmarried couples. Same-sex couples have also been assimilated into the class of marriageable couples.<sup>41</sup>

This binary logic likely discourages outcomes subtler than total exclusion or assimilation. However effective *Charter* remedies have proven at changing family regimes for some groups, they are unlikely to stimulate reflection on treatment that is equal in the respect it accords individuals but respectful of difference. The Supreme Court's disability jurisprudence may provide the richest sense that substantive equality does not mandate identical treatment.<sup>42</sup> Family law scholars lauding *Charter* values have not, however, plumbed that cluster of cases for lessons about respectful differential treatment. In fairness, doing so would likely prove politically unattractive. Yet within a governing logic of inclusion and exclusion, marriage remains the privileged inside. Other forms of relationship are either assimilated to marriage or left alone.

For example, it is difficult under the *Charter* to reflect on appropriate regulation for nonconjugal long-term cohabitants, such as siblings. Such persons are unlikely to prove historical disadvantage suffered as members of a marginalized group, but they may well generate interdependence and reliance interests calling for legal recognition.<sup>43</sup> Furthermore, the *Charter's* binary logic renders unlikely regulation by a sliding scale, with mutual obligations intensifying as the relationship lengthens. Neither should one hope for more distinctions between couples raising children and those who do not, although arguably the joint raising of children signals commitment and economic

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*Human Resources Development*), 2004 SCC 65, [2004] 3 S.C.R. 357, 244 D.L.R. (4th) 257 [*Hodge*].

<sup>41</sup> Respectively, *M. v. H.*, *supra* note 12; *Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3d) 161, 225 D.L.R. (4th) 529 (C.A.). What may be viewed as a "logic of semblance" presumes that extension of family regimes to include other groups must be based on patterns of similarity to marriage: see Anne Bottomley and Simone Wong, "Shared Households: A New Paradigm for Thinking about the Reform of Domestic Property Relations" in Alison Diduck and Katherine O'Donovan, eds., *Feminist Perspectives on Family Law* (New York: Routledge, 2006) 39 at 42.

<sup>42</sup> *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241, 142 D.L.R. (4th) 385.

<sup>43</sup> Equitable doctrines such as unjust enrichment may rectify injustice as between private parties, but are unlikely to attenuate the effects of statutory exclusions. See e.g. *Burden and Burden v. United Kingdom*, no. 13378/05, [2006] E.C.H.R. (Sec.4) (challenge under European human rights law to inheritance tax exempting spouses and civil partners, but no other couples).

interdependence more precisely than a relationship's legal form.<sup>44</sup> Unlike marital status, sex, and sexual orientation, parental undertakings do not sound under section 15. Family lawyers faithful to the public law thesis are therefore unlikely to dwell on them. Admittedly, some provincial legislation adopts the presence of children as a proxy for increased commitment; but the public law thesis is unlikely to encourage further such sensible innovations. A sense of these limits may have underlain the concurring comments of Bastarache J. in *M. v. H.* about the role of the legislature in undertaking consultation on the possibilities for future legislation. He did not assume that the legislature, seized with the question of same-sex couples, would simply assimilate them into the regime applicable to opposite-sex couples.<sup>45</sup>

Of course, legislatures too sometimes succumb to the seductions of binary categories. The concept of civil union inserted into the Quebec civil code in 2002 incorporates virtually the whole legal regime for marriage.<sup>46</sup> Two major categories of relations thus organize that province's family law: married and civil union spouses are subject to a stringent mandatory regime; those in other formally unrecognized relationships enjoy the autonomy promoted by the general rules of property and civil obligations. In the example of the civil union, the value of equality as modelled by courts in *Charter* litigation — or, more probably, of equality as incarnated in the Quebec *Charter of Human Rights and Freedoms* — likely constrained the legislative understanding of the scope for suitable regulatory action.<sup>47</sup> The *Charter* seems to lead to relatively inflexible remedies, and this logic is tied closely enough with its values that the idea of family law as public law favours *Charter*-type remedies. While the changes effected through *Charter* litigation are doubtless significant, the public law thesis is unlikely to stimulate any rethinking of the field's basic organizing categories. The political commitments of some commentators espousing the public law thesis make this outcome ironic.<sup>48</sup>

A related drawback to viewing family law through the *Charter* lens concerns the constitutive effects of equality analysis. Litigation under

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<sup>44</sup> Heather Conway and Philip 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 L.J.* 715 at 729-31.

<sup>45</sup> *Supra* note 12 at paras. 306, 308. Gay and queer communities are themselves divided over whether their objective is assimilation or difference.

<sup>46</sup> Art. 521.6 C.c.Q.

<sup>47</sup> R.S.Q. c. C-12, s. 10 (right to equal recognition without distinction based, *inter alia*, on sexual orientation) [Quebec *Charter*].

<sup>48</sup> See e.g. Alison Harvison Young, "Reconceiving the Family: Challenging the Paradigm of the Exclusive Family" (1998) 6 *Am. U.J. Gender Soc. Pol'y & L.* 505.

section 15 may reify markers and groups. The announcement that inclusion amongst the analogous grounds is permanent has intensified the effect.<sup>49</sup> The benign judicial intention in so declaring was presumably to spare vulnerable equality claimants the burden of proving each time that a basis for exclusion is justifiably thought an analogous ground. The result, for family law, is presumably that sexual orientation and marital status are suspect grounds forever. The idea that substantive distinctions between married and unmarried couples may well be discriminatory and offensive to the human dignity of unmarried couples complicates the rehabilitation of unmarried cohabitation as an alternative family form valuable for its distinctness from marriage. Ossifying unmarried cohabitants as an identity group is unlikely to prove constructive when attempting to navigate the competing normative orders and changing currents of the economic and social life of contemporary families.<sup>50</sup>

The public law thesis approvingly locates the values detectable in the *Charter* litigation of the 1990s in the *Charter*. The point is less tautological than it appears. One might expect that *Charter* judgments, from time to time, concretize values not internal to the *Charter*. Some may understand the Supreme Court's somewhat libertarian decisions vindicating freedom of commercial expression as instantiating considerations of economic efficiency more than true *Charter* values. It is thus a specification of the public law thesis to note that it assesses some major family cases of the 1990s as engaging a *Charter* right directly (*Miron*<sup>51</sup> and *M. v. H.*<sup>52</sup>) or indirectly manifesting the benevolent influence of *Charter* values (*Moge*<sup>53</sup>). An important consequence follows. If the finest values operative in family law adjudication are *Charter* values — if the impetus for rethinking justice within families derives from the *Charter* — a conclusion that the status quo satisfies *Charter* values is likely to indicate the optimal character of the rules in force. Taking the public law thesis seriously implies that, where a rule of family law survives a *Charter* challenge, scrutinizing it in light of other values or considerations is unnecessary. The reluctance to consider deploying section 33 to preserve a law ruled unconstitutional by the Supreme Court reflects the converse tendency, a refusal to examine whether non-*Charter* considerations might justify a law held to infringe

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<sup>49</sup> *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, 173 D.L.R. (4th) 1.

<sup>50</sup> On the potential for “acts of recognition” and their “civil apparatus” to “ossify the identities that are their object,” see Kwame Anthony Appiah, *The Ethics of Identity* (Princeton: Princeton University Press, 2005) at 110.

<sup>51</sup> *Supra* note 11.

<sup>52</sup> *Supra* note 12.

<sup>53</sup> *Supra* note 15.

the *Charter*.<sup>54</sup> A case decided after publication of the major expositions of the public law thesis raises this problem squarely.

In *Walsh*, the Supreme Court of Canada assessed the constitutionality of the legal consequences of unmarried cohabitation.<sup>55</sup> The complaint targeted the restriction of the presumption of equal division of property to married couples. Susan Walsh contended that this restriction discriminated against her, as someone who had cohabited but not married, on the basis of marital status. The high card in her hand was the Court's decision in *Miron*,<sup>56</sup> which had found distinctions between married and unmarried couples in insurance legislation to be discriminatory. Eight judges of the Court reversed Ms. Walsh's victory in the courts below. The reasons of Bastarache J. for the majority reveal choice as trumps. Where legislation drastically alters the legal obligations of partners *inter se*, "choice must be paramount."<sup>57</sup> In his 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 characterizes the class of unmarried couples.<sup>58</sup> As *Walsh* was a direct *Charter* challenge to matrimonial property legislation, the Supreme Court's judgment is not a pronouncement concerning the potential indirect effect of *Charter* values. It is a judicial assessment that restricting a matrimonial property regime to married spouses complies fully with the applicable *Charter* right. Indeed, following the dignity-based approach to section 15, the majority concluded that, whatever Ms. Walsh's subjective assessment, the exclusion enhanced the essential human dignity of unmarried cohabitants.

Common law scholars greeted *Walsh* with shock and bitter disappointment. *Walsh* has been characterized as a "stunning reversal,"<sup>59</sup>

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<sup>54</sup> The thin view of the non-*Charter* law of the family here parallels the "impoverished conception of administrative law" shown by courts privileging s. 1 of the *Charter* over the resources of administrative law; see Geneviève Cartier, "The Baker Effect: A New Interface between the *Canadian Charter of Rights and Freedoms* and Administrative Law — The Case of Discretion" in David Dyzenhaus, ed., *The Unity of Public Law* (Oxford: Hart, 2004) 61 at 67.

<sup>55</sup> *Supra* note 40.

<sup>56</sup> *Supra* note 11.

<sup>57</sup> *Walsh*, *supra* note 40 at para. 43.

<sup>58</sup> *Ibid.* at para. 39. In dissent, L'Heureux-Dubé J. emphasized the historical disadvantage of unmarried couples, their functional similarity to married couples, and the absence of effective choice on the part of cohabitants.

<sup>59</sup> Graeme G. Mitchell, "Developments in Constitutional Law: The 2002-2003 Term — A Tale of Two Courts" (2003) 22 *Sup. Ct. L. Rev.* (2d) 83 at 123.

a development “starkly at odds with decades of legislative initiatives and Supreme Court of Canada rulings anchored in a functional approach to family relationships.”<sup>60</sup> These scholarly reactions exemplify the assumption that the dominant values and style of family law — substantive equality, fairness, functionalism — derive from the *Charter*. The expectation had been that the Court would resolve the section 15 claim in accordance with those values and that style. It follows from these premises that *Walsh* was wrongly decided. Yet an alternative reading of *Walsh* is perhaps preferable. The judgment may be understood as simultaneously revealing more fully the *Charter* value of equality and undermining the assumption that the values and functionalism of contemporary Canadian family law have their provenance in the *Charter*. *Walsh* would be understood as occasioning reflection on the disjuncture between family law values and *Charter* values, revealing the limits for family law of direct recourse to *Charter* rights and indirect recourse to its values.

Call the difficulty in *Walsh* the embarrassment of choice. The *Charter* and its values apply awkwardly when a claimant protests the consequences of what the law analyzes as chosen. Ensuring, as a matter of vertical relations between state and individuals, that society’s fundamental institutions do not exclude a class of citizens is one matter. Determining, horizontally, a fair allocation of benefits and burdens between individuals who have not adhered to a consensual regime that one of them judges, *ex post*, to have been personally preferable is another. In such instances the *Charter*’s resources prove rather thin. The thrust is not an empirical claim that all cohabitants fully “chose” their marital status, although this somewhat unsubtle, wholly voluntarist view retains a foothold in Quebec.<sup>61</sup> Rather, it is that, in such cases, traditional doctrinal resources have difficulty characterizing the consequences of abstaining from a consensual regime as state coercion or obstruction sufficient to engage the *Charter*’s finest potential. Comparison with the same-sex marriage litigation illustrates the point. Those cases were decided in favour of the gay claimants fairly easily on the basis that they were shut out, against their will, from the consensual regime of marriage. That some read the majority’s affirmation of choice in *Walsh* as increasing the chances for claims for same-sex marriage serves as a sober

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<sup>60</sup> Carol J. Rogerson, “Developments in Family Law: The 2002-2003 Term” (2003) 22 Sup. Ct. L. Rev. (2d) 273 at 274; also Conway and Girard, *supra* note 44.

<sup>61</sup> “Si certaines formes familiales, telle l’union de fait dans notre société, existent en dehors du droit, c’est que parce que les partenaires en ont décidé ainsi;” see Mireille D.-Castelli and Dominique Goubau, *Le droit de la famille au Québec*, 5th ed. (Saint-Nicolas, Qc.: Presses de l’Université Laval, 2005) at 1.

reminder that equality seekers on *Charter* terrain need not form a constituency with fully consistent interests.

Here the emphasis of the public law thesis on *Charter* judgments as the instruments of family law reform proves obstructive. Its idea that the *Charter* has been the driving force for reform elides critical distinctions in the institutional origin of family law developments. The Supreme Court of Canada has never assimilated unmarried cohabitants to married spouses for the purposes of their *inter se* rights and obligations.<sup>62</sup> Ascription of a reciprocal support obligation to unmarried, opposite-sex cohabitants is a legislative phenomenon predating the *Charter*. *M. v. H.* struck down a distinction between two classes of cohabitants on the basis of sexual orientation. The Court views that characteristic as constructively immutable, that is, *unchosen*. Once family law recognizes more than one possible form of adult relationship — now that marriage has been dethroned as the sole model, and the law has ceased positively penalizing unmarried cohabitants — complex regulatory dilemmas arise around choice. Is it really appropriate to regard any distinction between married and unmarried couples as merely “symbolic”?<sup>63</sup> If not, how can partnership alternatives assume “a socially constructive and legally defined relationship to marriage”?<sup>64</sup> Yet even when marriage constituted the sole respectable form of conjugal alliance, matrimonial property regimes showed legislatures striking different, contingent balances between corrective and distributive justice and between obligatory and consensual measures. Within Quebec, for example, the justifications marshalled for the legal regime instated in the 1866 civil code and the amendments made periodically since attested to rich resources within private law for acting on considerations of power and fairness. Like those earlier issues, the newer dilemmas of choice evidenced in *Walsh* are better explored, not under the *Charter*, but on the terrain of fundamental private law.

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<sup>62</sup> For a provincial appellate court’s holding, see *Taylor v. Rossu* (1998), 161 D.L.R. (4th) 266, [1999] 1 W.W.R. 85 (Alta. C.A.).

<sup>63</sup> For a discussion of the “overriding symbolic importance of choice in forming intimate relations” in a critical reading of *Walsh* and *Hodge* which risks underestimating the conceptual difficulties posed for s. 15 claims by failure to opt into a legally available consensual regime, see Hester Lessard, “Charter Gridlock: Equality Formalism and Marriage Fundamentalism” (2006) 33 Sup. Ct. L. Rev. (2d) 291 at 306. Compare Denise Réaume, “The Relevance of Relevance to Equality Rights” (2006) 31 Queen’s L.J. 696 at 716-17.

<sup>64</sup> Harry D. Krause, “Comparative Family Law: Past Traditions Battle Future Trends — and Vice Versa” in Mathias Reimann and Reinhard Zimmermann, eds., *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) 1099 at 1115.

#### 4. Family Law as *Ius commune*

##### A. The Idea of *Ius commune*

Operative in both legal traditions, the concept of *ius commune* has been most fully theorized within the civil law. The Latin term *ius commune* and its translations as “common law,” “general law,” or *droit commun* have multiple usages.<sup>65</sup> The *ius commune*, *droit commun*, or common law of interest to this paper is a jurisdiction’s foundational general law. *Ius commune* refers to the root concepts of private law and the private law rules of general application. The term’s core meaning relates to those general jural concepts and rules governing private law relationships in a given legal order. The *ius commune* consists of the legal rules applicable in all cases where no particular law intervenes.<sup>66</sup> It is the normative fabric against which the legislature legislates in specific cases, the “general juristic foundation and conceptual reference point” for subsequent substantive legal development.<sup>67</sup> The *ius commune* supplies “le lexique de mots souches et le stock de principes qui sont les sédiments de la mémoire juridique.”<sup>68</sup> It functions as a sort of dictionary of private law terms to which legislatures are presumed to refer when they use its terms without stipulating an alternative definition. The *ius commune* “will implicitly be used to complete the regulatory scheme of any statute.”<sup>69</sup> Crucial to the idea is thus the sense in which the *ius commune* operates always in relation to particular laws.<sup>70</sup> *Ius commune* not only expresses the substance of private law relationships, but also grounds public and administrative law.<sup>71</sup>

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<sup>65</sup> *Ius commune* variously refers to a general law based upon Roman law and expressed in Latin; to an amalgam of Roman and canon law; and to the aspiration of a unified private law for Europe. Common law can refer to the legal tradition originating in England; within that tradition, to the rules and principles of the Courts of Queen’s (or King’s) Bench, as opposed to Courts of Chancery and others; and further to rules judicially announced rather than legislatively enacted.

<sup>66</sup> Jean-Louis Thireau, “Droit commun” in Denis Alland & Stéphane Rials, eds., *Dictionnaire de la culture juridique* (Paris: Presses Universitaires de France, 2003) 445 at 445.

<sup>67</sup> Roderick A. Macdonald, “Encoding *Canadian Civil Law*” in *Mélanges Paul-André Crépeau* (Cowansville, Qc.: Yvon Blais, 1997) 579 at no. 16 [“Encoding *Canadian Civil Law*”].

<sup>68</sup> Jean Carbonnier, “Le Code civil” in Pierre Nora, ed., *Les lieux de mémoire*, vol. 2, pt. 2 (Gallimard, 1986) 293 at 306.

<sup>69</sup> Macdonald, “Encoding *Canadian Civil Law*,” *supra* note 67 at no. 16.

<sup>70</sup> H. Patrick Glenn, *On Common Laws* (Oxford: Oxford University Press, 2005) at 20.

<sup>71</sup> John E.C. Brierley, “La notion de droit commun dans un système de droit mixte: le cas de la province de Québec” in *La formation du droit national dans les pays*



The law falling under the rubric “property and civil rights” in the assignment of provincial legislative jurisdiction hints at the scope of the *ius commune*. But the Canadian constitution does not confide the *ius commune* to a single level of government. Some matters given to the federal government — bills of exchange and promissory notes, interest, bankruptcy and insolvency, and marriage and divorce — constitute part of the *ius commune*. As this paper uses the term, the *ius commune* naturally includes family law.

Contrary to positivist and occasionally nationalist suppositions, the *ius commune* is diverse in form and substance. Formally, it is not merely an agglomeration of legislatively-positing rules. A rule falling within the general regime governing the unmediated relations between persons or between persons and property is part of the *ius commune*, irrespective of its enacted or unenacted form and of its institutional origin.<sup>72</sup> Parliament, provincial legislatures, all levels of courts, and daily practice share the generation and sustenance of the *ius commune*. But beyond this diversity of institutional origin, the *ius commune* does not consist only of propositional rules. The law reports of common law jurisdictions, where the *ius commune* is unenacted, reveal the imbrication of foundational rules of private law with values such as common sense or fairness.<sup>73</sup> This point also applies where a legislature has systematically redacted the general private law.<sup>74</sup> The *ius commune* necessarily includes implicit principles and values that do not permit of exhaustive and canonical articulation.

Substantively, the *ius commune* is variable in its origin and content. Resulting as it does from human rather than divine intention, the *ius commune* “est susceptible de changer avec les pays, les temps et les

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*de droit mixte: Les systèmes juridiques de Common Law et de Droit Civil* (Presses Universitaires d’Aix-Marseille, 1989) 103 at no. 18.

<sup>72</sup> A. Rivard, “La notion du ‘droit commun’” (1925) 3 R. de D. 257 at 260.

<sup>73</sup> A.W.B. Simpson, *Legal Theory and Legal History: Essays on the Common Law* (London: Hambledon Press, 1987) at 361.

<sup>74</sup> Legislative acknowledgement of the ineluctability of recourse to unwritten principles appears in mention of “general principles of law” in the preliminary provision of Quebec’s civil code. Lower Canada’s nineteenth-century codifiers conceded that a written *ius commune* “necessarily presupposes the obligation of certain primary and fundamental principles which must underlie and sustain all positive legislation;” see Commission for the Laws of Lower Canada Relating to Civil Matters, *Codifiers’ Report* (Quebec: Desbarats, 1865) vol. 1 at 32. The French codifiers indicated awareness that positive laws can never entirely replace “l’usage de la raison naturelle;” see Portalis *et al.*, “Discours préliminaire,” Conseil d’État, in François Ewald, ed., *Naissance du Code civil: Travaux préparatoires du Code civil* (Flammarion, 2004) 35 at 41.

mœurs.”<sup>75</sup> It is not limited to rules embodying the philosophical ideal of private right, derivable from core principles of liberalism. Expressions of nationalist sentiment to the contrary, Quebec’s *ius commune* is unmistakably plural, “draw[ing] on a variety of norms from different quarters.”<sup>76</sup> In the common law provinces, too, the general private law is not unitary in origin.<sup>77</sup> These observations of form and substance make it possible to consider the promising implications of characterizing contemporary family law as part of the fundamental general law.

### B. Re-viewing Family Law

*Ius commune* has descriptive and normative advantages over the public law thesis for thinking about family law. Understanding family law as part of the *ius commune*, with its multiplicity of legal sources, avoids the risk inherent in the public law thesis of overemphasizing the role of courts and *Charter* judgments at the expense of the diversity of locations from which rules of family law emerge. Just as other fundamental rules of private law, such as the law of property or of contract, result collectively from judgments, legislation, and customary practice, so do the constitutive rules of family law.<sup>78</sup> Fundamental private law better accommodates the changes to family law during the twentieth century. Change has been whole scale, as with the enactment of Quebec’s new civil code in 1980. It has also been incremental, as when courts announce

<sup>75</sup> Rivard, *supra* note 72 at 261.

<sup>76</sup> John E.C. Brierley, “Quebec’s ‘Common Laws’ (*Droits communs*): How Many Are There?” in Ernest Caparros *et al.*, eds., *Mélanges Louis-Philippe Pigeon* (Montreal: Wilson & Lafleur, 1989) 109 at 128. Sources of the *ius commune* within Quebec include the Custom of Paris, Napoleonic codified civil law, enacted and unenacted colonial and imperial English law, enacted and unenacted provincial law, enacted federal law, and customary law.

<sup>77</sup> On some occasions, judges developing the common law have referred explicitly or implicitly to civilian doctrine, such as Robert Joseph Pothier, *A Treatise on the Law of Obligations, or, Contracts*, trans. William David Evans, 2 vols. (Philadelphia: R.H.Small, 1826); see Simpson, *supra* note 73 at 163-69, 179-202. Consider also federal statutes, such as the *Divorce Act*, which constitute part of the *ius commune* of a common law province and reflect both common law and civil law concepts of family law. On the influence generally of civil law on Canadian common law, see H. Patrick Glenn, “The Common Law in Canada” (1995) 74 *Can. Bar Rev.* 261 at 278; see also Jean-François Gaudreault-DesBiens, *Les solitudes du bijuridisme au Canada: Essai sur les rapports de pouvoir entre les traditions juridiques et la résilience des atavismes identitaires* (Montréal: Thémis, 2007) at 145-46.

<sup>78</sup> With its twin ideas of heterogeneity and interaction with particular laws, *ius commune* provides space for pluralist perspectives that understand legal subjects as “actively constituting different, unofficial legal regimes;” see Roderick A. Macdonald, “European Private Law and the Challenge of Plural Legal Subjectivities” (2004) 9 *European Legacy* 55 at 64.

modest changes to common law rules. Changes to the patrimonial treatment of spouses and cohabitants in the 1970s and 1980s resulted from an interaction between courts and legislatures: at times the legislature innovated, at other times, it was the courts.<sup>79</sup> A conception of *ius commune* indifferent to a rule's formal and institutional origins best explains a technical feature of the same-sex marriage litigation: in most provinces, the impugned definition was a nineteenth-century rule announced by judges; but in Quebec, it was a twenty-first-century rule enacted federally.<sup>80</sup>

Yet however important this institutional interaction, it is unquestionably legislatures that have most changed family law in the last fifty years. The list of fundamental reforms initiated by Parliament and provincial legislatures is long: the instatement of no-fault divorce; the abolition of illegitimacy; the civil emancipation of the married woman in Quebec; the abolition of spousal unity of personality; reform to the law of successions; children's law reform; reform of family property regimes. These momentous structural changes make puzzling the emphasis placed by the public law thesis on the *Charter* and its values. Indeed, this emphasis may reveal more about the contemporary legal culture of family law scholars than about family law. The point can be drawn out by returning briefly to *Moge*,<sup>81</sup> the flagship example for the public law thesis of the indirect effect of the *Charter* value of equality.

Recall that subscribers to the public law thesis read the statutory interpretation in *Moge* as animated by substantive equality flowing from the *Charter*. An alternative reading is perhaps preferable. In *Moge*, an equality or equity principle of the provincial *ius commune* supplemented or completed the federal enactment. Precisely such an interaction is to be expected under the Canadian constitution.<sup>82</sup> Two tendencies on the part of family law scholars help explain why the public law thesis made it unlikely for legal scholars to formulate this alternative, each revealing of the influence of the *Charter*. One concerns an assessment of the relative robustness of different equality norms; the other, drawn from legal philosophy and judicial methodology, turns on beliefs about the existence of private law values.

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<sup>79</sup> Harvison Young acknowledges this important legislative role, which stands oddly beside her conclusion on constitutionalization; see "The Changing Family," *supra* note 2 at 754-57, 760.

<sup>80</sup> Respectively, *Hyde v. Hyde* (1866), L.R. 1 P. & D. 130; *Federal Law-Civil Law Harmonization Act, No. 1*, S.C. 2001, c. 4, s. 5.

<sup>81</sup> *Supra* note 15.

<sup>82</sup> Jean-Maurice Brisson and André Morel, "Droit fédéral et droit civil: complémentarité, dissociation" (1996) 75 Can. Bar Rev. 297 at 309.

As for the first, those who understood *Moge* as embodying *Charter* equality may have assessed the reasoning and outcome as so novel that they were necessarily inspired by a value more potent than anything within the resources of private law. Dean Harvison Young distinguishes the *Charter's* substantive equality from the thinner formal equality that she associates with provincial matrimonial property reforms.<sup>83</sup> This distinction arguably understates the significance of the new provincial regimes. The *Married Women's Property Acts* of the 1880s (and the civil emancipation of married women in Quebec in the 1960s) had produced formal equality, letting women equal their husbands in abstract legal capacity. In contrast, legislated presumptions of equal division of property reflect rather thicker concerns. A formal presumption likely responds to awareness that traditional specialization of tasks and market valuations of household labour denied women proof of their contributions to the marriage as a joint economic enterprise. A distinction is worth drawing explicitly: a legal rule's *formal* character (as with the enacted presumptions of equal sharing) should not be taken as indicating that it subscribes to a vision of *formal* equality. The equitable rules regulating unjust enrichment are less formal, but do not necessarily secure substantive equality as a consequence.<sup>84</sup> The sense of equity that enabled women's victories in unjust enrichment cases after the breakdown of lengthy conjugal relationships might provide another private law value operative in *Moge*. Given these plausible alternative inspirations for the judgment, a pre-commitment to the *Charter's* importance in legal order may be thought to have influenced the assessment of its values relative to those of private law. The iconic status of the *Charter* may incline scholars to exaggerate its values and to diminish those of ordinary law.

The second tendency one might suspect on the part of those linking *Moge* and the *Charter* is to doubt the existence of private law values. The public law thesis directs energy to the search for the indirect influence of *Charter* values where judges apply and modify the common law, interpret statutes, and exercise discretion. It may unintentionally divert attention from the notion that the implicit principles and values of the *ius commune* routinely supplement enacted laws.<sup>85</sup> The readings of *Moge* connected to the public law thesis may indicate an inclination to

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<sup>83</sup> Harvison Young, "The Changing Family," *supra* note 2 at 760, 779.

<sup>84</sup> On the enmeshment of formal and substantive equality in the private law regulation of marriage, see Nicholas Kasirer, "The Dance Is One" in Sylvio Normand, ed., *Mélanges offerts au professeur François Frenette: Études portant sur le droit patrimonial* (Ste. Foy, Qc.: Presses de l'Université Laval, 2006) 13 at 21-22, 27.

<sup>85</sup> One self-consciously critical assessment of the outcomes of the *Charter* for women's equality recognizes that the *Charter* and the explicit language of equality do not fully contain the analysis of substantive equality, but does not consider whether such

understand the *Charter* as the sole source of dynamic values. Jurisprudential jargon associates with inclusive or soft legal positivists the idea that moral principles, such as *Charter* values, require express inclusion or incorporation through appropriate law-making procedures.<sup>86</sup> Private law, into which no values have been explicitly incorporated, then stands in contrast as a mere body of rules.<sup>87</sup>

These tendencies reveal much more about the contemporary legal scholarly culture than they do about spousal support or the *Charter*. Consistent with them, family law scholars have spent substantially greater efforts in recent years explicating the *Charter* values relevant to family law than drawing out the values implicit in comparatively recent legislative amendments, associated with notions of public order and good morals (*bonnes moeurs*), or discernible in social practice. For example, prior to the gay rights *Charter* cases of the late 1990s, the Ontario Law Reform Commission had contemplated including same-sex couples in provincial family legislation on the basis “that the social practice of family life has substantially expanded beyond the confines of traditional marriage.”<sup>88</sup> This contrast of the idea that the *Charter* is the single source of values with a reminder of the vitality of principles and values of the fundamental private law makes it appropriate to take up *Walsh* once more.<sup>89</sup>

Under the public law thesis, *Walsh* suggests it is unnecessary to examine further policy options. Once the Supreme Court holds that excluding unmarried couples from the division of property promotes their human dignity, the scope for future action is narrow.<sup>90</sup> If family law’s highest values are *Charter* values, and those values are satisfied, why would a legislature bother studying and debating the patrimonial

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analysis may be generated within private law; see Diana Majury, “The *Charter*, Equality Rights, and Women: Equivocation and Celebration” (2002) 40 Osgoode Hall L.J. 297 at 316.

<sup>86</sup> Kenneth Einar Himma, “Inclusive Legal Positivism” in Jules Coleman and Scott Shapiro, eds., *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002) 125.

<sup>87</sup> Administrative law scholarship has already underscored the propensity of the *Charter*, or at least of its scholars, to diminish by implication the unenacted resources of law that is not supreme; see caution against the *Charter*’s being “regarded as the only relevant source of non-statutory law” in J.M. Evans, “The Principles of Fundamental Justice: The Constitution and the Common Law” (1991) 29 Osgoode Hall L.J. 51 at 56.

<sup>88</sup> John D. McCamus, “Family Law Reform in Ontario” [1993] Spec. Lect. L.S.U.C. 451 at 466.

<sup>89</sup> *Supra* note 40.

<sup>90</sup> One might object that *Walsh* is wrongly decided and that the public law thesis survives this judicial error. This paper has hinted that, on the merits, the public law thesis

treatment of cohabitants? Why would a judge incrementally alter the private law? Despite its finest intentions, the public law thesis can be expected to shrink the terms for debate and policy analysis.<sup>91</sup> Yet the rejection of the *Charter* challenge should not foreclose analysis as to the aptness of legislatively amending the private law. Endorsing the outcome in *Walsh* as a correct determination under section 15 of the *Charter* says nothing about the appropriateness, as a policy matter, of altering the *ius commune* applicable to unmarried spouses, or creating a particular regime for them. It is precisely this paper's point that the public law thesis renders examination of such amendments less likely. Two further observations are in order.

Despite what the public law thesis, if correct, might have predicted, the Supreme Court's constitutional imprimatur upon the consignment of unmarried couples to the general property regime has not been the final word. Throughout the 1990s, Quebec courts were relatively sluggish in accepting claims in unjust enrichment from estranged *de facto* spouses. But the Quebec Court of Appeal has recently eased the path for cohabitants to make such claims, announcing two helpful presumptions. A *de facto* union's long duration now occasions presumptions of correlation between impoverishment and enrichment and that the enrichment is unjustified.<sup>92</sup> By easing the path for unmarried couples, the court has "harmonized" the regimes for married and unmarried couples.<sup>93</sup> The court did so despite legislative reticence to enact special rules for *de facto* spouses and a pronouncement from the highest court that exclusion from property division fully satisfied the *Charter*'s standards.<sup>94</sup> This incremental development of the civil law indicates a sense of shared competence in the development of family law and an understanding that constitutional values do not exhaust the field. The

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understates the voluntarist fiber woven into the Supreme Court's idea of *Charter* equality. Moreover, the public law thesis holds up Supreme Court judgments as beacons for family law, relieving legislatures of labour beyond following that light. Maintaining the public law thesis after *Walsh* necessitates this difficult nuance: legislatures should accept as the final word only those judgments approved by right-minded scholars.

<sup>91</sup> For analysis of the thin *Charter* equality discourse deployed in Parliament respecting same-sex marriage, see Robert Leckey, "Profane Matrimony" (2006) 21:2 C.J.L.S. 1. Compare concern that constitutional decisions by the Supreme Court of the United States "can shut off debate in family law cases almost unwittingly" in Silbaugh, *supra* note 24 at 1140.

<sup>92</sup> *L.(L.) v. B.(M.)*, [2003] R.D.F. 539, 231 D.L.R. (4th) 665 (Qc. C.A.).

<sup>93</sup> Jean-Louis Baudouin, *Les obligations*, 6th ed. by Pierre-Gabriel Jobin with Nathalie Vézina (Cowansville, Qc.: Yvon Blais, 2005) at no. 585.

<sup>94</sup> Quebec has not, admittedly, proven fertile terrain for the grander claims of the *Charter*'s influence in family law. For a moderate account, see Tétrault, *supra* note 32 at 18-20. The *Charter* figures nowhere in the index to *Le droit de la famille au Québec*, D.-

notion that what occurred is harmonization, as opposed to unification, contrasts constructively with the *Charter's* logic of inclusion and exclusion. Cohabitants are no longer merely legal strangers, but neither are they assimilated into the matrimonial regime. Once the question of unmarried spouses is returned, with family law generally, from public law to the fundamental private law, a continuity comes into sight between Quebec's small moves in *assouplissant* the regime of unjust enrichment and equitable decisions from common law jurisdictions.<sup>95</sup> The development is best understood, not using the idea of *Charter* values, and not focusing on the discriminatory exclusion of an historically marginalized group, but engaging with the unwritten principles and values of the *ius commune*.<sup>96</sup>

The other observation is that despite the explicit *Charter* discourse, the critical reactions to *Walsh* tacitly adopt a private law lexicon. While commentary typically criticizes the Supreme Court's resolution of the *Charter* claim, one is struck by the emphasis upon the injustice as between the partners, rather than a sense of the wrongs inflicted by a privileged (married) majority upon an historically marginalized (unmarried) minority.<sup>97</sup> What resonates in the discussions — about formalism versus functionalism, parties' reasonable expectations, cognitive limits on long-range planning, pressures impeding informed and free choice — are concepts and concerns of private law. Where suspicion arises that consent is insufficiently informed and free, or that other factors are likely to generate contracting failures, it is legitimate and reasonable to attempt a balance between freedom of choice and paternalism. Private law does so routinely.

Finally, some of the most compelling criticisms of the state of the law that *Walsh* left intact underscore the unequal treatment of children on the basis of their parents' marital status. As a rule, children of married parents enjoy the legal protections of the matrimonial home on family

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Castelli and Goubau, *supra* note 61. More striking still is the failure of Quebec family scholars and practitioners to connect family law with the Quebec *Charter*, *supra* note 47, which explicitly applies to private relations.

<sup>95</sup> There are, however, limits to the allowable effects of robust equitable values. See the admonition, post-*Walsh*, that the doctrine of unjust enrichment not be distorted to yield a presumption of equal sharing in *Wylie v. Leclair* (2003), 64 O.R. (3d) 782 at paras. 17-20, 226 D.L.R. (4th) 439 (C.A.).

<sup>96</sup> It is perhaps debatable whether equitable presumptions bearing solely upon *de facto* spouses alter the *ius commune* or amount to a new exceptional regime. The larger point is that determinations that the general rules are unacceptable and that a particular law is needed are made within private law.

<sup>97</sup> Compare the critical literature generated by *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, 221 D.L.R. (4th) 257 [*Gosselin*].

breakdown, while those of unmarried parents do not. If the disruptive effects of such a distinction do not, strictly speaking, violate legislative declarations of children's equality,<sup>98</sup> they rightfully provoke hard questions. Yet as the title of a fine exploration of the issues makes plain, referring to "collateral damage,"<sup>99</sup> concern for the children of unmarried parents is an instance of private law's ordinary worry about externalities and third parties. The *Charter* discourse of substantive equality and essential human dignity offers little help in working through the conundrums.

Other pressing questions on the family agenda are also likely better assessed with a view of family law as fundamental private law. The appropriate scope for contractual derogations from matrimonial property regimes remains controversial; some advocate more, others advocate less.<sup>100</sup> Recognition of more than two parents raises further complicated dilemmas. Already it occurs for child support purposes on family breakdown, where a person having functioned as a parent may join a child's legal parents as a third payor.<sup>101</sup> Its permissibility as a planned matter of legal parentage at the start of a child's life is more controversial.<sup>102</sup> Consensual religious arbitration is, similarly, best viewed as a matter of fundamental private law, rather than tackled using *Charter* rights or values. With respect to this mechanism, choice again incapacitates the *Charter*. It is awkward to assess the alleged inequality of the individual outcomes of a consensual regime. These issues — implicating, as they do, complex questions of choice and horizontal redistribution — are best viewed squarely within private law. Many of them call for broad debate in political forums. By contrast, the tendency of the *Charter* has been to narrow political discourse. Admittedly, these distributive matters within the family are appropriately regarded as connected with public policy issues, such as social assistance.<sup>103</sup> The point is that the complicated public policy relationship between family

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<sup>98</sup> See e.g. *Children's Law Reform Act*, R.S.O. 1990, c. C.12, Part I ("Equal Status of Children"); Art. 522 C.C.Q.: "All children whose filiation is established have the same rights and obligations, regardless of their circumstances of birth."

<sup>99</sup> Dominique Goubau, Ghislain Otis and David Robitaille, "La spécificité patrimoniale de l'union de fait: le libre choix et ses 'dommages collatéraux'" (2003) 44 C. de D. 3.

<sup>100</sup> Robert Leckey, "Contracting Claims and Family Law Feuds" (2007) 57 U.T.L.J. 1 at 34-36.

<sup>101</sup> *Chartier v. Chartier* (1998), [1999] 1 S.C.R. 242, 168 D.L.R. (4th) 540.

<sup>102</sup> *A.A. v. B.B.*, 2007 ONCA 2, (2007), 83 O.R. (3d) 561, 220 O.A.C. 2.

<sup>103</sup> On links between public assistance and assumptions of private family support in *Gosselin*, see Mary Jane Mossman, "Choices and Commitments for Women: Challenging the Supreme Court of Canada in the Context of Social Assistance" (2004) 42 Osgoode Hall L.J. 615 at 621-22.



law and public distributive schemes such as taxation and social assistance is better negotiated with the starting point that family law is a part of private law.

A final point merits notice. This paper has linked the public law thesis for family law with the general enthusiasm for the *Charter* that has swept the Canadian legal academy. Yet the public law thesis, particularly its claim for the transformation of family law from private law to public law, has a more particular pedigree, one explicitly linked to feminist theoretical commitments. Arguments critical of family law as private law evoke feminist indictments of the historical conception of the private sphere. Feminist theorists have convincingly attacked the notion of the household as a unit shielded from state intervention, one respecting which justice claims could not be framed.<sup>104</sup> Sharp awareness of the private sphere's dark history may incline scholars immersed in the rich resources of feminist theory to approach the idea of private law with suspicion, and of public law with more optimism. Admittedly, feminist acknowledgement of the rather more mixed effects of applying public law norms to families might temper these inclinations. A critical feminist literature reading the enlarged family support obligations in *M. v. H.* — a flagship judgment for the public law thesis — as an instrument of the state's privatization of its collective support burden underscores the point.<sup>105</sup>

Here a worrisome confusion of private law with the classical private sphere calls for scrutiny. It is argued, for example, that increased recognition of family law's public importance demonstrates that it is no longer private law.<sup>106</sup> This claim troublingly implies that private law lacks public importance, disclosing impoverished assumptions about private law. Indeed, counter-productively, the gesture of removing family law from private law on the basis of its public importance implicitly ratifies the idea of a private sphere beyond the state's reach. A clear state interest persists even in matters that, unlike family law, are still regarded as uncontroversially falling within private law, such as property and obligations. (There, as well, private law interacts with public policy and distributive schemes, for example, property law with taxation, and tort with income assistance and employment insurance.) Error arises in supposing that, in the contemporary legal order, the *Charter* provides the

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<sup>104</sup> Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989) at 125-26.

<sup>105</sup> See e.g. Brenda Cossman, "Family Feuds: Neo-Liberal and Neo-Conservative Visions of the Reprivatization Project" in Brenda Cossman and Judy Fudge, eds., *Privatization, Law and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002) 169 at 183-90.

<sup>106</sup> Harvison Young, "The Changing Family," *supra* note 2 at 788.

best emblem of law's social significance. Viewing family law as foundational private law recognizes its importance to society without recourse to religious transcendental ideas or to that contemporary sacred text, the *Charter*. The civilian notion of a civil code as civil constitution aptly conveys private law's social importance.<sup>107</sup> Crucially, the writ of private law is not coterminous with the classical private sphere to which feminists have so persuasively objected. Continued emphasis upon family law as *ius commune* is fully consistent with an appropriately sharpened awareness of the state or social interest in the regulation of families. As Jeremy Webber has argued, classifying something as private action for a charter's application, and presumably for other purposes, need not entail its exemption "from other forms of legal regulation; it may well be appropriate to control it vigorously by means other than a charter of rights."<sup>108</sup> The distinction between public law and private law turns, not on the measure of importance, nor on the suitability of regulation, intervention, or redistribution. Perhaps most critically, neither does it turn on the appropriateness of values and aspirations of equity and equality. It hinges, rather, on the different structural logic and remedial resources made available by each.

### 5. Conclusion

If, on enactment of the *Charter*, it swiftly became apparent that legal scholars would massively invest their research efforts in explicating the new instrument, it has taken somewhat longer to appreciate that it affects not only how they spend their time, but also how they see the world. Although there have been dissenters from the outset, the work of a vast cohort of scholars emphasizes the *Charter* as source of good norms and driver of reform. In family law, the general scholarly embrace of the *Charter* has taken form in the public law thesis. Yet central articulations of that thesis express ambiguities. Dean Harvison Young's own essay furnishes evidence for a counter-argument against her conclusion as to family law's constitutionalization. Another signal of ambivalence appears at the close of an argument that *Moge*, the spousal support judgment, incarnates the *Charter* value of substantive equality. The authors caution that the judicial approach in that judgment need not be exclusive to courts bound by entrenched rights. Its equality principles "reflect ideals of human dignity, justice and equity which can inform

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<sup>107</sup> For rich discussion of the French civil code's "constitutionnalité purement sociologique," see Carbonnier, *supra* note 68 at 309.

<sup>108</sup> Jeremy Webber, "Tales of the Unexpected: Intended and Unintended Consequences of the Canadian Charter of Rights and Freedoms" (1993) 5 *Canterbury L. Rev.* 207 at 219 n.55.

decisions and the decision-making process” elsewhere.<sup>109</sup> The reflection simultaneously extends that paper’s thrust and undercuts its emphasis on the *Charter*. If ideals of dignity, justice, and equity can spring from a non-constitutional source in jurisdictions without a charter, why cannot they also do so in places with one? The basis for assuming that the values in *Moge* were constitutional ones dissolves. The present paper has aimed to unsettle the somewhat exaggerated emphasis upon the role that recent accounts of family law credit to the *Charter*, disputing the idea that contemporary family law’s finest values are *Charter* values. Plainly a rich avenue for future research — perhaps departing from the law and society notion of internal legal culture — lies in exploring why family law scholars have emphasized the *Charter* to such an extent.

It is worth making the stakes explicit. While skeptical modesty justly accompanies speculations on legal scholarship’s influence in the world, the public law thesis could be thought, beyond its descriptive unsatisfactoriness, to produce unattractive effects. It implicitly ordains one branch of government — the judiciary — as most responsible for family law. Simultaneously it provides that branch with only a limited armoury of conceptual resources in the form of *Charter* rights, values, and remedies. The *Charter*’s values may well be rather thinner than proponents of the public law thesis — and the scholars surprised by *Walsh* — have supposed. Its equality might be more classically liberal than has been thought. What if the majority reasons in *Walsh* fully instantiate *Charter* values? Indeed, whether this supposition holds or whether the Supreme Court, measured by some standard other than its place in the legal hierarchy, decided the case wrongly, the effect is the same. The public law thesis provides little basis for turning from a failed *Charter* claim to constructive reflection and debate in other forums. Recognizing the structural limits of constitutional equality mechanisms is a strategic imperative precisely for those most concerned about securing fairness and equality in the real world of family policy. To be clear, the argument is not that the *Charter* has no role to play in family matters. It is that the *Charter*, even pushed to its limits, fails to reach a number of issues and concerns regarding families.

In contrast, the notion that values such as equity and fairness sustain the fundamental private law of the family is much more promising. Its contention, in the aftermath of *Walsh*, would be that the status quo respecting unmarried cohabitants fails to instantiate the values of private family law, or at least that it bears examining whether it does. But *Walsh* is not the only issue. *Charter* values, undoubtedly effective in the gay

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<sup>109</sup> Alison Diduck and Helena Orton, “Equality and Support for Spouses” (1994) 57 Mod. L. Rev. 681 at 702.

rights cases where an accepted absence of choice fused compellingly with a clear identity claim, are unlikely to prove so constructive at working through the distributive items occupying the family law agenda. Nor, as this paper has argued, should one reasonably expect that the set of section 15 grounds and the repertoire of *Charter* remedies would serve family law's needs over the longer term. Yet the public law thesis seeds such expectations.

As celebrations of its twenty-fifth anniversary attest, the coming into force of the *Charter* has been constructed as a foundational moment. Its enactment, or legal scholars' understanding of it, appears to have naturalized the family law then extant. Yet family law in 1982 had recently undergone tumultuous, fundamental change in legislative forums. The first federal divorce statute was a mere fourteen years old. Provincial legislatures had substantially reformed matrimonial property in the interests of equity and equality. They had equalized the status of all children in the interest of not penalizing innocent victims. A collective presentism — if not exclusively attributable to the scholarly focus on the *Charter*, surely not unrelated to it — relegates these innovations to a distant past. Even a rare effort to remember family law before the *Charter*, such as Dean Harvison Young's excellent paper, may inflate the *Charter*'s positive effects. The hope animating this paper is that the concept of *ius commune*, exceeding as it does enacted law, might direct scholarly attention to explicating the implicit principles and values of family law as private law. Those anxious about the legitimacy of judicial interpretations of the *Charter* should notice that the legislative reforms of the 1970s and 1980s, and the values they instantiated, rightfully claim a sounder democratic pedigree. If it is too much to suppose that rethinking family law as private law might nudge legislatures fully to take up their responsibility in keeping family law current, it is fair to confront the public law thesis' tacit endorsement of legislative passivity.