Harmonizing Family Law’s Identities

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This paper examines family law in the context of the federal government’s harmonization of federal law with the civil law of Quebec and the common law of the other provinces. Family law is a rich subject for harmonization because its organizing concepts are simultaneously legal and social constructs. A careful examination of the legal sources creating family law is a necessary step prior to harmonization, and the author takes a more expansive view than usual of the sources defining the family. He suggests clarifying the core of conceptual conflict by identifying the various legislative objectives of family law regimes: protection of vulnerable individuals, organization of relations between individuals, and definition of the state’s relation to individuals. Then he turns to family law’s dynamic impact on personal identity and the ways in which people define themselves using concepts shaped by law. Legislatures sometimes deploy family law to define people’s identities; this practice is now mirrored in claims by individuals that state law should reflect their own values and identities, embracing a model of reflective law.

The author then contrasts internal harmonization (reducing conceptual conflicts within the state legal order) with external harmonization (increasing coherence between state and non-state normativities). Regulation of same-sex couples illustrates the interaction between the state legal order and other normativities and the ways in which the state may acknowledge other systems. Analysis of claims in favour of same-sex marriage reveals that, given substantive reforms already achieved, arguments for marriage now depend on family law’s symbolic elements affecting identity and presuppose a reflective family law. There is as yet no consensus on this role for family law, however, and family law’s complexity and impact on identity militate for reform that is cautious and incremental.

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Introduction

My parents desperately wanted a family, but were unable to have children of their own. The young woman who gave birth to me was unable to care for me, but loved me so much that she wanted me to have a family that could look after me. When I was a week old, my parents brought me home from the hospital and adopted me, and I became their son. There are more details—my parents’ fruitless visits to fertility specialists, their assessment by a pregnant social worker, the excitement when the agency phoned to say a boy was available, that in naming me they replaced a name chosen by my birth mother—but that is the basic story I was told from infancy, and which anchors my identity.

During a family law class, I learned the law necessary to recast my story. Legally characterized, it would go something like this:

Two individuals who were spouses of one another with whom a child had been placed made an application to adopt that child. Prior to that placement an adoption homestudy had been prepared. The written consent of every parent was obtained, not before the child was seven days old. The court made a final and irrevocable order for the adoption of the child, and thereafter the adopted child became the child of the adoptive parent and the adoptive parent became the parent of the adopted child, and the adopted child ceased to be the child of the person who was his or her parent before the adoption order was made.¹

¹. See Child and Family Services Act, R.S.O. 1990, c. F.11, respectively ss. 146(4)(b), 3(1) “child,” 146(1), 142, 137(1)-137(3), 3(1) “court,” 157, 146, 158(2)
Because I was at McGill, I also learned how lawyers would tell my story in Quebec:

Two persons of full age sought jointly to adopt a child. The general consent of the parent(s) was obtained. Until the order of placement, which could not be granted until thirty days after the giving of consent, parental authority was delegated by operation of law to those persons to whom the child had been given. Adoption conferred on the adopted person a filiation that replaced his original filiation; he ceased to belong to his original family. Adoption created the same rights and obligations as filiation by blood, and the effects of the preceding filiation ceased.2

In my studies, I had seen many life dealings recharacterized as transactions between legal subjects, but it was a shock to conceive of my own story so transformed. More than had the law freshman’s realization that thousands of unthinking purchases of sodas or bus tickets were onerous contracts of sale, hearing the narrative I had known my whole life expressed in legal language confronted me with how intimately law permeates and influences the way individuals define themselves in relation to others and their place in the world.

Several observations follow. First, the affective elements of the story—the adoptive parents’ desire for a child and grief over years of childlessness, the birth mother’s love—do not survive the translation into legal language. The law’s orientation toward the best interests of the child, enshrined in common law, civil law, and federal law regimes in Canada, is comparatively chilly, indicating the severe constraints on law’s ability to reflect the full range of human interaction. Second, the same story translates into law differently, in vocabulary and concepts, in one jurisdiction and under one legal system than in another. In common law Ontario, the statute simply declares the adopted child to have

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2. See respectively arts. 153, 546, 551, 555, 566ff., 556, 577, 578, 579, para. 1 C.C.Q. See also Private Law Dictionary of the Family and Bilingual Lexicons (Cowansville, Qc.: Yvon Blais, 1999) s.v. “adoption” [Dictionary of the Family]. Both accounts may be rendered in the other official language.
become the child of the adoptive parent; in contrast, in civilian or mixed-system Quebec, the civilian concept of filiation mediates adoption: adoption confers a filiation equivalent to filiation by blood.\(^3\) These differences raise implications for a federal bijural state such as Canada, where federal law must operate with provincial regimes derived from two distinct legal traditions. Third, some of the words used—parent, child, adoption—are the same in all three tellings, indicating an overlap between everyday or social concepts and legal concepts, suggesting that some terrain is common to both legal systems. Finally, two legal recharacterizations of the same story suggest that still more retellings are possible,\(^4\) and that another (perhaps non-legal or at least non-state) normative and rhetorical framework may mediate these facts.\(^5\) In short, powerful as legal discourse may be, it is never the sole discourse operational; indeed, the very process of detecting law’s influence entails recognition that other normative orders also require notice.

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3. Even the “naturalistic” concept of filiation by blood is a legal construction, as made clear by the rules providing for legal presumptions that in some circumstances pursue finality at the cost of biological accuracy. See Dictionary of the Family, \textit{ibid.}, s.v. “filiation by blood.” For a reminder that these legal conceptualizations of adoption reflect contingent family paradigms that vary over time and between jurisdictions, see D. Marianne Brower Blair, “The Impact of Family Paradigms, Domestic Constitutions, and International Conventions on Disclosure of an Adopted Person’s Identities and Heritage: A Comparative Examination” (2001) 22 Mich. J. Int’l L. 587.


5. \textit{E.g.} it would be possible using biblical terms to describe my parents as “barren” (Genesis 29:31; Luke 1:7) and then “remembered” by God later in their lives with a child (Genesis 30:22; 1 Samuel 1:19). An unexpected son brings laughter (Genesis 21:6) and is a “great mercy” (Luke 1:57). The Old Testament contains no explicit mention of adoption, but the pharaoh’s daughter “takes Moses as her son” (Exodus 2:10), and the New Testament characterizes this event as adoption (Acts 7:21) (all NRSV). These themes also occur in other contexts, such as fairy tales, which focus particularly on foundlings, stepmothers, and mythologies.
This paper builds on these observations and examines family law through the lens of harmonizing federal law with the civil law of Quebec and the common law of the other provinces. For present purposes, harmonization is a general process of mutual engagement between systems aiming at greater conceptual compatibility and coherence.6 Part I submits that a careful understanding of the field of law at issue must precede any harmonization effort, and so examines the diverse sources and discursive processes that create family law. A central theme will be the multiplicity of kinds of objectives at play in all instruments and practices of state law and their role in harmonization. This part then turns from considering how family law is constituted to what family law itself helps constitute, namely the personal identities of the legal subjects it regulates. Part II considers the relationship of the governmental project of harmonization of federal and provincial law with the harmonization of state and non-state normativities. It examines the movement towards a family law that no longer simply preordains a closed set of permissible family relationships subject to state protection and incentives, but also reflects and affirms relationships of different kinds that citizens consider valuable to them personally. This section uses the example of marriage to consider critically the means by which the state legal order may engage with other, non-state normativities.

Family law presents a rich field for this exploration. First, as will become apparent, state family law demonstrates a number of different types of objectives. Second, it reveals multiple sources of

6. This definition makes it clear that this paper is not limiting itself to the sense of harmonization developed by and currently used by the federal government in its harmonization initiative. See Federal Law-Civil Law Harmonization Act, No. 1, S.C. 2001, c. 4. A variety of materials developing the federal government's application of the term is available: see Canada, Department of Justice, The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Biphuralism (Department of Justice Canada, 1997) [Harmonization] and the Department of Justice Canada, online: <http://canada.justice.gc.ca/en/dept/pub/hfl/table.htm> (date accessed: 30 May 2002).
normativity, possibly making its production more complex, or at least complex in different ways, than some other subjects that require harmonization under the division of powers, such as interest.\textsuperscript{7} Third, many family law concepts are simultaneously social concepts, engaged in everyday life and discourse. It has been argued that legal forms, as social forms, abstract social relations into forms of legal relations.\textsuperscript{8} In other words, where a concept is legal and social, the legal aspect tends to dominate. Thus the interaction of federal and provincial family law affects both lawyers as they draft contracts and pleadings and laypeople in how they view their family relationships. What is much less certain is whether legal forms also trump religious forms; religion's sturdy purchase on legal and social concepts, although often unstated, informs much of the debate around marriage that I discuss below. Finally, a study of concepts and objectives in family law is timely because the definition of one of its central institutions, marriage—relied on as a proxy for many characteristics in countless federal and provincial laws—is currently being challenged in the courts.

I. Constituting Law

A. Creation of Family Law

Harmonization risks overemphasizing legislated state law. Such emphasis is understandable, given that a key part of harmonization targets dissonance in the wording of federal statutes. However, federal statutes are just one component of the state normative order, and exclusive attention to enacted rules


overlooks the implicit law lying beneath the surface. To counter this undue influence, harmonization requires a particular sensitivity to diverse sources of law and the processes of their development. This paper will briefly identify the sources of family law at the federal and provincial levels of the Canadian state legal order. The focus here is on what Fuller characterizes as "sources of laws," where a judge obtains the rules by which to assign cases; it is not the source of law’s normative force in human lives. Family law, particularly in Quebec, demonstrates not only the usual sources and expressions of state normativity, but also others less frequently identified.

Nevertheless, the starting point remains the constitutional distribution of legislative competence. Parliament may make laws concerning marriage and divorce, and the provinces have jurisdiction over the solemnization of marriage and property and


10. Family law as a constituted category is relatively new. In the common law world, it has been recognized as such only recently; in civilian France and Italy, it has been seen as an autonomous field for at least a century and a half. See Philip Girard, “Why Canada Has No Family Policy: Lessons from France and Italy” (1994) 32 Osgoode Hall L.J. 579 at 584-88. The recognition appears to have arrived later in Quebec: compare the book on persons in the C.C.L.C. and the book on the family in the C.C.Q. On the slow development of family law in Quebec, see John E.C. Brierley & Roderick A. Macdonald, eds., Quebec Civil Law: An Introduction to Quebec Private Law (Toronto: Emond Montgomery, 1993) at para. 89.


12. See the lists of sources of legal rules and their modes of expression in the Canadian legal order in Roderick A. Macdonald, “Encoding Canadian Civil Law” in Harmonization, supra note 6, 135 at 142-43. For the sources of law on the eve of Confederation, see Roderick A. Macdonald, “Harmonizing the Concepts and Vocabulary of Federal and Provincial Law: The Unique Situation of Quebec Civil Law” in ibid., 29 at 31 ["Harmonizing Federal and Provincial Law"].

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civil rights within the province. Within the federal legal order, sources of family law include statutes, regulations, unenacted common law, including equity, provisions in pre-Confederation colonial laws concerning marriage that a provincial legislature is constitutionally incapable of abrogating, custom, jurisprudence applying federal law, doctrine, and private contract. In the common law provinces such as Ontario, sources of family law similarly include statutes, regulations, custom, unenacted common law, jurisprudence applying provincial law, academic writing (or doctrine), and contract. In Quebec, sources of family law include the Civil Code of Québec, the Code of Civil

13. Constitution Act, 1867, supra note 7, ss. 91(26), 92(12), 92(13). For a brief account of the history of this distribution, see Constance Backhouse, ""Pure Patriarchy": Nineteenth-Century Canadian Marriage" (1986) 31 McGill L.J. 264 at 271-72. Backhouse also provides at 266-71 a history of colonial regimes of divorce.

14. See e.g. Divorce Act, R.S.C. 1985 (2d Supp.), c. 3.


16. See the discussion of unlegislated prohibitions against marriage in Louise Bélanger-Hardy & Aline Grenon, Éléments de common law et aperçu comparatif du droit civil québécois (Scarborough, Ont.: Carswell, 1997) at 580.

17. For the Quebec example of the C.C.L.C., see André Morel, "Le droit civil préconfédéral et le rôle du Parlement après le nouveau Code civil" in Harmonization, supra note 6 at 71.

18. See the recognition of private ordering by spouses in the Divorce Act, supra note 14, s. 15(2).

19. See e.g. Family Law Act, R.S.O. 1990, c. F-3 (FLA).


21. See FLA, supra note 19, s. 51.

22. It is the nature of a civil code that family law, like any subject, is developed not only in its eponymous book, but also throughout. See e.g. provisions relating to successions (Book Three, C.C.Q.) and even insurance (arts. 2419, 2449 C.C.Q.).
Procedure,\textsuperscript{23} statutes,\textsuperscript{24} regulations,\textsuperscript{25} custom, unenacted principles of the \textit{ius commune},\textsuperscript{26} jurisprudence, doctrine, and contract.\textsuperscript{27} Amongst statutes constituting family law should be named those such as the \textit{Income Tax Act},\textsuperscript{28} that by their provisions indicate and enforce (or at least provide incentives towards the continuation and reproduction of) a legislator’s conception of families and their boundaries, though they are neither traditionally nor primarily “family law” statutes. The set of sources varies according to whether the question is “Which are the family law statutes?” or “Which statutes constitute the family in law?” The relationship between the legal and social aspects of family concepts indicates that the second question is the more subtle of the two. Indeed, so framing the inquiry expands it to other categories beyond statutes. It includes international treaties addressing human rights and more specifically children,\textsuperscript{29} and municipal zoning bylaws that, without even using the words “family” or “spouses,” indicate notions of family by specifying how many persons are expected to share a dwelling, as well as legislation constituting a family for purposes of protecting a family farm.\textsuperscript{30} It also expands the list of regulations and corpus of jurisprudence relating to “family.” Terminating a woman’s welfare eligibility because a man lives under her roof expresses state conceptions of family,\textsuperscript{31} as does the refusal of bereavement leave for the death of the father of a same-sex partner.\textsuperscript{32}

\textsuperscript{23} See e.g. Title Four of Book Five.
\textsuperscript{24} See e.g. \textit{An Act to facilitate the payment of support}, R.S.Q. c. P-2.2.
\textsuperscript{26} See preliminary provision, C.C.Q.
\textsuperscript{27} See e.g. art. 431 C.C.Q.
\textsuperscript{28} R.S.C. 1985 (5th Supp.), c. 1.
\textsuperscript{29} See \textit{Dictionary of the Family}, supra note 2, s.v. “family law.”
\textsuperscript{30} See e.g. \textit{Family Farm Protection Act}, C.C.S.M., c. F15.
\textsuperscript{31} See e.g. \textit{General Welfare Assistance Regulations}, R.R.O. 1990, Reg. 537, as am. by O. Reg. 310/95.
Other sources or expressions of family law should be added to this enumeration. First, even a compulsory information session on mediation is a source of state normativity exercised over the family. Mediation generates and implements state ideals and practices. Second, there is the influence on the development of provincial law of jurisprudence applying federal law and, as a corollary, the influence of doctrine discussing that jurisprudence. The converse is also possible, but empirically is much less frequent.

Many courts applying provincial law refer to jurisprudence interpreting federal law. In common law provinces, this process may be unremarkable because both federal and provincial legislation may employ the same common law concepts. In other words, much federal legislation is drawn from the same foundational general law, a common law *ius commune*, as provincial statutes. Thus courts rely on *Chartier v. Chartier*, the leading Supreme Court of Canada decision on the notion of “child of the marriage” in the *Divorce Act*, when interpreting provincial support legislation that uses a similar functional definition of the stepparent-child relationship. They also rely on

33. See arts. 814.3ff. C.C.P. Compare the possibility of court-ordered mediation under the *FLA*, *supra* note 19, s. 3.

34. On the interrelated meanings of *ius commune* as both a basic body of substantive rules of private law and a legislative dictionary used to complement statutes, which are almost inevitably incomplete, see “Harmonizing Federal and Provincial Law,” *supra* note 12 at 44. The notions are developed richly, in the Quebec context, in John E.C. Brierley, “Quebec’s ‘Common Laws’: How Many Are ‘There?’” in Ernest Caparros, ed., *Mélanges Louis-Philippe Pigeon* (Montreal: Wilson & Lafleur, 1989) 111.

the same judgment when interpreting *in loco parentis* in contexts other than child support, such as custody or guardianship. 36 Deployment of Divorce Act judgments in provincial law cases should raise more concerns in Quebec, where support under the *ius commune* has a different conceptual foundation. 37 It is thus peculiar of a Quebec Superior Court judge to invoke Divorce Act jurisprudence in determining support under the civil code. 38 On the one hand, judges of the Quebec Court of Appeal have distilled Divorce Act judgments into general principles that readily apply to provincial family law. 39 On the other hand, Quebec judges are sometimes explicit in finding that a common law concept incorporated into federal family legislation does not otherwise penetrate within Quebec private law. 40 While it is too simple to

37. Compare arts. 392, 511, 585 C.C.Q. with the three theoretical foundations articulated in Bracklow. Compare too the different criteria for fixing an award: arts. 512, 587 C.C.Q.; Divorce Act, supra note 14, s. 15.2.
38. See N.A. v. J.L., [2001] J.Q. No. 2743 at para. 73, n. 5 (Sup. Ct.), online: QL (QJ), aff'd (13 March 2002) Montreal 500-09-011123-015 (C.A.). Sévigny J. cites Bracklow at para. 78 for the proposition that the obligation to contribute to the other spouse's needs may be indefinite. Yet Bracklow expounds only Divorce Act support, and there is authority that, in contrast, art. 587 C.C.Q. "consecrates" the temporary nature of support under the provincial civilian regime. See Michel Tétrault, *Droit de la famille: aspects juridiques et déontologiques* (Cowansville, Qc.: Yvon Blais, 2001) at 249.
40. See e.g. *Droit de la famille—3444*, [2000] R.J.Q. 2533 (C.A.), where the court refused to delegate parental authority to the lesbian partner of a child's mother because the civil law was said to know no concept of psychological parenthood.
assert that the federal divorce power, the Supreme Court of Canada, and the Canadian Charter of Rights and Freedoms are homogenizing Canadian family law, the influence of federal law jurisprudence on provincial law does require attention. Its influence is perhaps best characterized by assimilating federal law jurisprudence with the substantive provisions of federal legislation on matters normally within the abstract notion of a ius commune, such as the Divorce Act, which are already seen as contributing to the corpus of implicit, general, residual, provincial suppletive law. In other words, provincial suppletive law also absorbs elements of federal law, such as jurisprudence, beyond explicit legal rules.

Moreover, even doctrine or scholarly writing assessing Supreme Court of Canada judgments may influence judges as they apply provincial law. It is unlikely that judges applying provincial statutes or the civil code are not affected to some degree by academic statements that, for example, the Court now reflects the popular sentiment that families and not the state should care for their own. Such pronouncements and the adjudicative principles contributing to provincial suppletive law are not of course binding, but even if they are merely “persuasive,” they deserve

42. See “Encoding Canadian Civil Law,” supra note 12 at 209. Such statutes do not become part of the provincial ius commune because they are not provincially enacted.
43. The judicial ambivalence towards this absorption emerges from the three sets of reasons by Brossard, Fish, and Rousseau-Houle JJ.A. in V.A. v. S.F., supra note 39.
attention in harmonization efforts. Harmonization requires an awareness of the porous, dialogic character of adjudication within either legal tradition and awareness that concepts and policies may pervade far more subtly than legal vocabulary—often the initial target of harmonization—and be more difficult to trace.

The final relevant source of family law is non-legal concepts. A myopic focus on the common law/civil law binary may obscure the fact that a central concept in contemporary family law, “best interests of the child,” derives from neither legal system but rather from psychology and psychiatry. The concept’s integration into jurisprudence and legislation has made it a legal concept. Historically, this concept represents a derogation from the common law rule of paternal custody, subject to the tender years doctrine, and the civilian regime of paternal authority. Not long ago, the concept was new to law, and jurists doubted the legal system’s capacity to absorb psychological and psychiatric theories. The concept’s pedigree both simplifies and complicates harmonization of family law, since it withdraws a large portion of the law respecting children from the common law/civil law dyad while posing the difficulty of harmonizing legal concepts from either tradition with psychological insights. This excavation of sources of state law makes it possible to consider how to harmonize the objectives pursued through legal rules and principles.

46. See e.g. the discussion of Taschereau J.’s judging in David Howes, “From Polyjurality to Monojurality: The Transformation of Quebec Law, 1875-1929” (1987) 32 McGill L.J. 523 at 543.

47. See e.g. Racine v. Woods, [1983] 2 S.C.R. 173 at 188; Divorce Act, supra note 14, ss. 16(9), 17(5); art. 33 C.C.Q.


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B. Objectives Pursued

The federal government’s harmonization initiative focuses primarily on technical differences in vocabulary between the civil law and the common law.\textsuperscript{49} My project, however, is to sketch a methodology for a deeper harmonization, one taking greater account of the legal traditions’ organizing concepts. Such harmonization requires sensitivity to different and possibly competing policy objectives, and indeed to potentially incommensurable types of objectives. Categorizing objectives assists in assessing the principal objectives in play. I suggest that there are three types of policy objectives in state family law:

1. the state seeks to protect vulnerable individuals;

2. the state seeks to establish the compulsory and suppletive, default ways of relating between individuals and other individuals, as well as between individuals and property; and

3. the state seeks to establish the relationship between it and individuals.

These types of objectives are primarily instrumental; they seek to achieve particular results. They are not mutually exclusive; measures requiring one person to provide for another may be explicitly or implicitly linked with the state’s role towards its citizens, with the potential burden on the public purse, should state support become necessary, always in the background. The second type resonates closely with the functions of a \textit{ius commune} as foundational private law and of a civil code.\textsuperscript{50} It may typically

\textsuperscript{49} See \textit{e.g.} \textit{Federal Law-Civil Law Harmonization Act, No. 1, supra} note 6, Preamble, which focuses on the “language version” of statutes.

\textsuperscript{50} On these two functions, see respectively “Encoding Canadian Civil Law,” \textit{supra} note 12 at 151; Brierley \& Macdonald, \textit{supra} note 10 at para. 32.
include attempts to ensure a measure of mutuality in legal relations. The first and second types may overlap, but are qualitatively distinguishable. The general regime of person-to-person relations and of persons and property will, of course, demonstrate protective or at least conservatory elements, as when it protects the right of ownership or the right to force performance of an obligation. Protection in such cases is linked with the titulary of a right, irrespective of the titulary’s personal characteristics. In the sense here, though, protection is based on a state of factual or presumed general vulnerability, not a particular juridical act or interest. Moreover, there may be close connections between the second and third types of objectives. Although even relatively unrestricted private ordering relies on the state’s enforcement mechanisms, such connections are particularly evident where a public order core constrains private bargaining or prohibits it within particular spaces. Such limits are both protective and constitutive of the relationship between the state and its citizens. Finally, there is no link necessary between the objective pursued and the legislative technique deployed; legislation targeted at protecting vulnerable individuals may command, articulate aspirations, seek to teach, or do any combination of these actions. Indeed, the legislative voice employed may not be obvious: the same verb may express the unenforceable aspirations of spousal fidelity and filial respect for parents and the enforceable obligation of alimentary support.

These classifications of objectives assist in harmonization by clarifying the points of substantive conflict between legal regimes. For example, identifying the principle objectives makes it easier to begin the process of harmonizing the conflict between alimentary

51. For instantiations of such protective objectives based on status-based presumptions of vulnerability, see e.g. rules permitting minors to escape contractual liability (art. 160 C.C.Q.) and on lesion (Consumer Protection Act, R.S.Q. c. P-40.1, s. 8).


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support under the Civil Code of Québec and the Divorce Act regime of support for all children of the marriage, not just children of both spouses.\textsuperscript{53} In defining the children of the marriage functionally in relation to persons who stood in the place of parents toward them, the Divorce Act speaks protectively.\textsuperscript{54} Protecting the vulnerable children is the main goal of those provisions, although there may be secondary objectives that fit within the other two categories such as deterring exit from a marriage and reducing the public charge, respectively. In contrast, the civilian support regime, while also engaging secondary objectives in the first and third categories, aims primarily at regulating interpersonal relations.\textsuperscript{55} Unlike Divorce Act child support, the civilian obligation of support is reciprocal and thus less self-evidently distributive.\textsuperscript{56} Its exhaustive enumeration of the set of creditors and debtors based on civil

\textsuperscript{53} Many other federal statutory provisions could serve as the object of harmonization. See e.g. Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 178(1)(b), which refers to alimony, a term foreign to the civil law. For specific harmonization case studies following the Department of Justice Canada's focus on statutory vocabulary, see e.g. John E.C. Brierley \& Nicholas Kasirer, “Document 1 - Review of the Federal Real Property Act – Loi sur les immeubles commerciaux – in Light of the Coming into Force of the Civil Code of Québec” in Harmonization, supra note 6, 793; Jacques Auger, Albert Bohémier \& Roderick A. Macdonald, “Le traitement des créanciers dans la Loi sur la faillite et l'insolvabilité et les mécanismes de garantie dans le droit civil du Québec” in ibid., 911. As will be seen, my harmonization engagement with “children of the marriage” concerns competing policy objectives and organizing concepts more than mere vocabulary.

\textsuperscript{54} On the inevitable wealth transfer element of child support under the Divorce Act, see Francis \textit{v.} Baker, supra note 39 at para. 41.

\textsuperscript{55} An indication that at least the public charge objective is secondary is that the civilian regime, dating from the Custom of Paris, long predates the modern welfare state. It is perhaps partly in acknowledgement of Quebec’s different objectives that the federal divorce regime permits that province to apply its own child support guidelines even to cases of divorce, if the parties reside in Quebec. See Mireille D.-Castelli \& Dominique Goubau, \textit{Précis de droit de la famille} (Saint-Nicolas, Qc.: Presses de l’Université Laval, 2000) at 273ff., 384.

\textsuperscript{56} Art. 585 C.C.Q.
status—those joined by marriage or filiation—integrates it into the fundamental regulatory institutions of the family within the civil law.

This classically civilian integration produces a couple of conflicts when the federal regime of child support is engaged. Viewed rigidly, the conceptual link between support and filiation means that the latter, which results only from blood or adoption, is perturbed when a third person is recognized in relationship with the child, since normally anyone unrelated by filiation or marriage is a juridical stranger.\(^{57}\) Moreover, since child support is also derived from the regime of parental authority, which is undisturbed by a rupture in the relationship between the two parents,\(^{58}\) the classical formulation would find it conceptually incoherent that someone other than the child’s one father and mother could exercise an attribute of parental authority, the duty of maintenance.\(^{59}\)

These conceptual conflicts have practical consequences. A jurist’s knowledge of the division of powers aside, it would be difficult for a Quebec judge to convince a person paying Divorce Act support to the child of his ex-wife that he cannot seek a delegation of an attribute of parental authority—say, a power to visit—because he is a stranger to that child under provincial law. Moreover, Quebec courts have sometimes applied the ius commune flexibly to parties who factually are not strangers, such

\(^{57}\) See Title Two of Book Two, C.C.Q. This conclusion follows from the principle that a civil code exhausts prima facie the universe of possible legal concepts and relationships. See Brierley & Macdonald, supra note 10 at para. 87.

\(^{58}\) Art. 605 C.C.Q.

as unmarried couples. Admittedly, Quebec courts have so far refused to order child support by a former de facto spouse in cases governed under the Civil Code of Québec rather than the Divorce Act. Yet several factors together suggest that permanent maintenance of the gap between the federal and provincial regimes is untenable: the sensitivity to states of fact demonstrated in the cohabitation context, the general recognition that federal law principles are absorbed into provincial supplicative law, and the pragmatic pressure for judges to decide similar cases similarly no matter which level of government enacted the applicable statute.

Classifying the underlying objectives in this example provides at least two options for harmonizing the conflict. First, harmonizers at the federal and provincial levels may prepare arguments as to why in this particular circumstance one type of objective—protection or person-to-person relations—should prevail over another. It would be possible, though unlikely, for Parliament to amend the Divorce Act so that “parent” would automatically assume the meaning developed in the ius commune of each province. In Ontario, for example, where provincial family legislation already defines “parent” functionally, the change would have no practical effect; in Quebec it would eliminate existing stepparent support under the Divorce Act. To earn legitimacy, Quebec’s argument against support by a stepparent would have to be something other than that the historical coherence of the civil law requires it, since the province already privileges protective concerns by recognizing stepparent-child relationships in provincial social legislation.

62. See FLA, supra note 19, s. 1(1) “child,” “parent.”
63. Among many statutes, see e.g. An act respecting income support, employment assistance and social solidarity, R.S.Q. c. S-32.001, s. 19.
Second, identifying the overriding objective in the provincial regime permits federal harmonizers to craft an argument for their policy outcome within the domain of that objective. There is no need for a further protective argument in favour of recognizing a stepparent-child relationship; more pressing is a recasting of the substantive federal regime in terms more coherent with civilian person-to-person relations. It is possible now to descend to a practical level. Perhaps the argument that will finally harmonize in this instance—that is, realize a constitutionally valid federal policy objective using civil law concepts—is that a stepparent should be viewed as an implied parent, relying on the civilian technique for reconciling states of law and fact in respect of third parties that led to the recognition of implied partnerships and apparent mandate. Orders concerning implied parents might be characterized as partial delegations of parental authority. Such a characterization would not touch the residual parental authority of the parents, and would achieve Parliament’s protective objective without invoking filiation and opening the possibility of more than two full parents. This example demonstrates the potential benefit from classifying the objectives of legal rules that conflict directly or conceptually. Such classification does not per se yield harmonization, but it renders visible the relevant objectives and indicates possible avenues for further reforms.

The presence of several types of objectives in family legislation is less obvious than it perhaps should be. On the one hand, parliamentarians are sometimes explicit as to different types of objectives. Similarly, scholars observing family law may

65. See Brierley & Macdonald, supra note 10 at paras. 143, 144, 634, 642, 801, 804.
66. Fuller conveys this insight in Anatomy of Law, supra note 11 at 36-39, though family law literature indicates how rarely it is remembered.
67. See e.g. Ontario, Legislative Assembly, Debates (18 November 1976) at 4793 (R. McMurtry). In discussing the government’s objectives in introducing the
demonstrate awareness of polyintentionality. One may observe that in resolving custody disputes courts perform the two starkly different functions of private dispute settlement and child protection, or that appropriately protecting concubines while respecting individual liberty requires legislative agility. On the other hand, commentary may blandly accept legislative choices at face value as pursuing a single type of objective. One may thus concur with the speeches in the National Assembly that during the reform of family law leading to the first Civil Code of Québec and the recodification yielding the current, second, Civil Code of Québec, the decision to withhold a civil status from de facto spouses was based on the legislator's desire to respect the choices of consenting adults. Such may have been the explicit, official narrative, but surely it conceals other concerns and dimensions. Similarly, to criticize the legislature as author of the family patrimony for substituting its conception of marriage for those of the parties involved and for presuming their inability to regulate their own economic relations overlooks the appropriateness of a legislative attempt to protect vulnerable spouses, overwhelmingly wives.

I have not yet examined whether this analysis applies only to explicit, or at least conscious, legislative and adjudicative objectives. In many instances, policy objectives of the three types

Family Law Reform Act, S.O. 1978, c. 2, the Attorney General mentioned the concern of women becoming financially dependent on men and the increasing demands on the welfare system, explicitly indicating concerns falling within my first and third categories.

68. See Mookin, supra note 48 at 229.
72. See Alain Roy, "L'encadrement législatif des rapports pécuniaires entre époux: un grand ménage s'impose pour les nouveaux ménages" (2000) 41 C. de D. 657 at 683.
so far indicated are visible. Nevertheless, this typology need not confine itself to an excavation of legislative intent. The argument is that these three types of objectives represent not only specific legislative policy objectives, but also, and more fundamentally and generally, dimensions of instruments of state law. That is, even where no legislative history is available and a statute is silent as to its intention, it is probably possible to conceive of the active concerns of each type. Protection is virtually omnipresent in family law, but the other types of concerns are likely present too. A reading of a family law instrument lacks imagination if it identifies no concerns relating to protection of vulnerable persons, to the unmediated relationships between persons and between persons and property, or to the rapport between the state and its citizens. Furthermore, I suggest that the three types are present as both explicit objectives and as normative dimensions in all sociological legal orders. Yet there is a fourth aspect of law that is less frequently explicit, though always present: the effect of family law on personal identity.

C. Creations of Family Law

The substantial overlap of social and legal concepts in family law observed above leads to the participation by the apparatus of state family law in the development of personal identity. This participation implicates harmonization because changes to family law necessarily alter, to varying degrees, how people think about themselves in relation to others and how they conceptualize relationships more generally. Both are basic foundational processes in constructing identities. They are deeply personal and sensitive processes, and they heighten emotions and intensify conflicts.


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A preliminary point is defining identity. Frequently it means group identity. In this sense the identities of Canadians are observed as articulated juridically, among other means, from the vantage point of social groups. Identities are thus said to be constructed along lines such as country of origin, culture, language, faith, race, ethnicity, class, abilities, and sexual orientation. For example, legal discourses of regulation and exclusion are said to constitute and reconstitute lesbians and gay men.\(^{74}\) It is probably worth studying further the relationship between conceptions of identity and the reification of the Charter’s enumerated and analogous grounds of prohibited discrimination.\(^ {75}\) It is striking that these sources anchor identity to a personal characteristic, one often though not necessarily legible on the body.\(^ {76}\)

In contrast, the aspect of identity considered here develops from relationship with at least one other person. I argue that for most individuals, their complex construction of personal identity—their sense of who they are and where they come from\(^ {77}\)—depends significantly on where they situate themselves in relation to the roles recognized by different expressions of state family law. In this sense I am prepared to go somewhat further than Taylor, who sees identity in dialogue with or struggle against the things our significant others want to see in us. I suggest that it is not just

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76. Few non-visible characteristics—notably mother tongue, sexual orientation, and religious beliefs—are viewed as constitutive of identity. See Roderick A. Macdonald, “La justice identitaire” (Institut québécois de la déficience intellectuelle, Longueuil, 2 November 2001) [unpublished].
dialogue within a relationship, but the very fact of the relationship, that contributes substantially to identity.78 From that perspective, I will now analyze family law in practice.

First, in determining legal identity for purposes of civil status, law names people directly. It thus immediately situates them in relation to others. The paternity or filiation of most children goes uncontested; they and their parents may be unaware that legal institutions have resolved a number of questions for them in a culturally specific way.79 Law is clearly significant in the most superficial sense of who people are.

Second, law creates legal categories and names social relations as legal objects. By situating people within legal categories through various forms of explicit regulation, law plays a complex role in how people imagine and think about relationships. In other fields the law labels people in many ways that are not obvious in social life, for example, as hypothecary debtors vis-à-vis other legal subjects respecting particular obligations. Nevertheless, the legal subjects probably do not view those legal subjectivities as central to their social roles.80 In contrast, being a parent or a child, terms developed in legal rules, is much likelier to be a defining role in an individual’s life. Here the dual social and legal character of family


79. See arts. 523ff. C.C.Q.; Children’s Law Reform Act, R.S.O. 1990, c. C.12, ss. 3-17 [CLRA]. Some of the questions, such as those relating to medically assisted procreation, are clearly not universal and timeless. See the thorough treatment of this theme in Roxanne Mykutiuk, “Beyond Conception: Legal Determinations of Filiation in the Context of Assisted Reproductive Technologies” (2001) 39 Osgoode Hall L.J. 771.

80. It is often difficult to distinguish between status and non-status identities. While being a hypothecary debtor is not generally a distinct status, being a bankrupt clearly is. Statuses are constructed in part according to society’s values; being a hypothecary debtor only becomes a sort of social status when expressed as being a homeowner. Note that society’s socio-economic values accord greater respect to an indebted homeowner than to a debt-free tenant.
concepts may obscure family law’s influence, but intentionally or not, when legal subjects refer to themselves by dual concepts, they incorporate the corpus of legal rules and concepts constituting and informing those roles.

A personal example reinforces the extent to which social relations draw on legal categories and statuses in forming identity. As an adopted gay man I generally view myself as a functionalist when it comes to family relationships; if unmarried men refer to each other as husbands, *tant mieux*, and amongst my heterosexual friends I distinguish little on the basis of a marriage certificate. I have thought that I apply a similarly functional approach when viewing my adoptive parents as simply my parents: while raising me, they assumed parenthood. If I were to learn, however, of a formal defect in my adoption proceedings, and that I was not legally the child of that couple I call my parents, I would immediately seek to rectify it, even if there were no possible legal repercussions: I am of age, so guardianship is not at issue, and they expressly name me in their wills. I am certain that my parents, neither of them a lawyer, would also hurry to correct the error. This reflection suggests that my identity as their child does rest to some extent on the state’s constitution of the legal concept of adoption, or on its imprimatur on a state of fact.81

Law’s role here requires closer scrutiny. On the one hand, in creating categories law provides resources, symbols, and vocabularies that people may deploy in constructing their social

81. Over the past century or so, many Canadians, by ceasing to maintain non-state records, as in family Bibles or parish registers, have permitted the state’s legal records to assume a greater symbolic importance in situating themselves in relation to the past. Perhaps the state’s affirmation of my relationship to my parents would matter less to my identity if the same state of fact were recorded solemnly elsewhere, but it is not; my baptismal record presumes my prior legal filiation. Some of the complexities of an adopted person’s identity, including the interplay between adoptive and biological families and the impact that disclosure of information concerning the biological family may have on the members of that family, particularly the birth parents, are treated in Brower Blair, supra note 3. On the temporal dimensions of filiation, viewed broadly, see Emmanuel Lévinas, *Éthique et infini* (Paris: Fayard, 1982) c. 5.
lives,\textsuperscript{82} and erects a shared normative framework for moral discourse.\textsuperscript{83} On the other hand, law is not merely facilitative, but also normative. State legal institutions and their explicit artifacts shape debate about life's most important questions, symbolizing how people imagine who they are, and how they conceive of their relationships.\textsuperscript{84} It turns out that it is nearly impossible to describe social relations and practices without reference to the legal relations and categories applicable to the people involved.\textsuperscript{85} In a sense, the legal is always present.

It is not that state family law creates \textit{ex nihilo} the intimate relationships with which it occupies itself. The argument is not that the legal predates the social. As Part II will demonstrate, relationships develop within the shelter of a rich and teeming variety of other normative orders.\textsuperscript{86} To this extent, then, I am uncomfortable describing law as "fundamentally constitutive."\textsuperscript{87} Nevertheless, in regulating pre-existing relationships, law reconstitutes the social object as a legal object, and the social object is thereby altered.\textsuperscript{88} Searle suggests that some rules—such as

\begin{itemize}
\item \textsuperscript{82} See Patricia Ewick & Susan S. Silbey, \textit{The Common Place of Law} (Chicago: University of Chicago Press, 1998) at 132.
\item \textsuperscript{83} See Wilbren van der Burg, "The Morality of Aspiration: A Neglected Dimension of Law and Morality" in Witteveen & van der Burg, \textit{supra} note 9, 169 at 186.
\item \textsuperscript{84} See Roderick A. Macdonald, "Legislation and Governance" in \textit{ibid.}, 279 at 310.
\item \textsuperscript{85} \textit{E.g.} identification of persons in a workplace almost immediately seize on legal concepts and roles. See Robert W. Gordon, "Critical Legal Histories" (1984) 36 Stan. L. Rev. 57 at 103.
\item \textsuperscript{86} Indeed, it is an indication of the wealth of social and economic regulation of conjugal relationships that the state's and even the church's roles respecting marriage developed relatively recently in the Western world. See \textit{e.g.} Marilyn Yalom, \textit{A History of the Wife} (New York: HarperCollins, 2001); Philip L. Reynolds, \textit{Marriage in the Western Church: The Christianization of Marriage during the Patristic and Early Medieval Periods} (Boston: Brill Academic Publishers, 2001).
\item \textsuperscript{87} See Gordon, \textit{supra} note 85 at 104.
\item \textsuperscript{88} For a view positing the primacy of the legal more strongly, see Alan Hunt, \textit{Explorations in Law and Society: Toward a Constitutive Theory of Law} (London: Routledge, 1993) at 315-16.
\end{itemize}
rules of the road—regulate minor social activity, such as driving, while others constitute an activity that did not exist previously, such as the rules of chess. His discussion of regulatory and constitutive rules is potentially misleading in this context, because although he recognizes the possibility that a rule may be both regulatory and constitutive, he understates the extent to which most rules are probably both.\textsuperscript{89} Even rules that appear merely to regulate existing relationships—rules referring, say, to parents and children—alter the way people perceive those relationships and other similar relationships that may not be so regulated. State law demonstrates a resilient ability to impose its categories and ways of viewing the world onto relationships existing in everyday life, controlling the very categories through which knowledge is received and organized. This epistemological power combines simultaneously with written law’s inability fully to mirror everyday life. In the domain of the family, state law’s influence is even more subtle, because legal terms such as father, mother, and child are precisely the social terms, and so the controlling legal categories look like social categories.

The system of state legal categories developed in rules clearly does not prevent people from developing relationships that it does not recognize—what the civil law might call innominate relationships, such as same-sex relationships. To an astonishing degree, however, it shapes the way people think about them; it is difficult for legal subjects to abstract themselves from the set of family law relationships so as to render that set the object of political choice. Accordingly, discussions of the strategic value to gay men and lesbians in appropriating the language of the family\textsuperscript{90} occur too late, because most gay men and lesbians identify themselves by relations constructed in family law. They are already sons, daughters, parents, nieces, nephews, cousins, aunts,

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90. See e.g. Cossman, supra note 74, especially at 5-8.
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and uncles,\textsuperscript{91} and the only role concerning which they may debate their self-definition in or out of the family is that of affective partner. Even the widespread notion of the chosen family demonstrates a deep commitment to concepts drenched in law.

In a third, related way, law not only creates categories and orders the way people conceive of relationships, but also fills those categories. Two dimensions of law's performance provide normative substance to these legal relationships. First, legal instruments such as statutes and judgments articulating the importance of legal institutions and how they are supposed to operate are perhaps obviously constitutive of identity.\textsuperscript{92} Second, an understanding of law's performance in the sense of action by legal subjects—forced or facilitated—renders visible a radically wider conception of law's effect on identity. Walzer's perception that individuals assume "concrete identities" through their relationship to social goods, among them property, assists in this broadening because so much of family law's execution consists of economic transactions: alimentary support, division of matrimonial property.\textsuperscript{93} The notion that identity is not an essence but rather a constant performance of acts, beliefs, and commitments constructing, altering, and reinforcing a role may

\textsuperscript{91} Although these last five roles may not be legal concepts as obviously as the first three (see e.g. the limitation of support in art. 585 C.C.Q. to relatives in the direct line in the first degree (which itself acknowledges other relatives \textit{a contrario}), they are more explicitly constituted as legal categories in provisions such as the \textit{Bankruptcy and Insolvency Act}, supra note 53, s. 138, which postpones the wage claims of certain named classes of relatives. See also \textit{Succession Law Reform Act}, R.S.O. 1990, c. S.26, s. 47; art. 555 C.C.Q.


also be helpful in revealing how performance by legal subjects fleshes out their way of seeing relationships through law.\textsuperscript{94}

It follows that virtually all state legal action, written or unwritten, coercive or facilitative, is constitutive of identity. Fathers are probably not accustomed to reading section 15.1 of the \textit{Divorce Act} as an expression of their deepest identity as parents, but from a legal perspective, it may be. \textit{Chartier} demarcates between those who have achieved the relationship described in Justice Bastarache's test (or slipped into it, depending on one's perspective) and those who have not. Reading the federal child support guidelines as a love song of parental affections may seem counterintuitive, but they are perhaps the closest the law can come. Even laws that are not self-evidently linked to identity-forming family relationships may affect identity. Canadian tax law, for example, continues in certain respects to recognize husbands and wives in relation one to another.\textsuperscript{95} Similarly, the practices of police and administrative officials, such as their discretionary exercise of the state's "compassion" in immigration matters, are constitutive.\textsuperscript{96} Facilitative laws that provide options for juridical action to certain legal subjects in particular ways, such as wills, successions, and trusts, are thus also constitutive. Unwritten facilitative or permissive law within state-directed institutions draws lines between people and constitutes categories, as someone could attest who has not been permitted access to his or her same-sex partner's hospital room.\textsuperscript{97}


\textsuperscript{96} See the importance of the interests of the children in a decision concerning their mother in \textit{Baker v. Canada (Minister of Citizenship and Immigration)}, [1999] 2 S.C.R. 817.

Indeed, not participating in a particular legal institution shapes identity. One's identity as a spouse may be informed by the performance of legal obligations, but even unmarried persons probably know their status vis-à-vis the legal rules permitting marriage. Capacity requirements and the stipulation that marriage means one man and woman situate certain persons as outside marriage. Most people likely assume their capacity to marry, and are unconscious of its role in constructing their identity. The effect is more perceptible on those, such as gay men and lesbians, who may feel that the state maintains marriage as a dominant institution but tells them that they are not invited to seek official recognition of their most intimate relationships within that privileged institution. Correspondingly, certain members of the majority perceive their identity as linked to the boundaries of legal permissiveness most sharply when legal subjects excluded from a regime seek inclusion, perhaps to marry the partners of their choosing. Until that happens, those members of the majority see no need to articulate the fact that the value of the institution to them depends significantly upon the exclusion of other, different persons or relationships.

This rich process of creating identity by ordering and situating people within legal relationships is doubly dynamic. First, since identity is performative, its construction is never-ending. In the same way that one's status as standing in the place of a parent is constructed over time, in the details of daily life, so the personal meaning of one's role as a parent paying child support under the Divorce Act develops continuously, and given the connection between goods and identity, perhaps deepens incrementally with each monthly cheque. Even the identity of biological parents whose status is never disputed evolves through time with the performance of their legal and social duties.

Second, the process is dynamic; not only identity, but also the law itself, is never static. When legal rules are legislatively amended or altered by their judicial application, the identity on which they bear changes too, though not necessarily immediately

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or in entirely predictable ways. In 1996 the National Assembly eliminated a grandparent-grandchild support obligation. The change may be subjected to the analysis of policy objectives in the previous section. The dimension raised here is that the amendment altered the identities of grandparents and grandchildren, and of all who conceived of the family and themselves in relation to it in a way privileging that bond. As another example, Chartier's enshrinement of the inability to terminate at will the legally enforceable relationship between stepparents and the children of their spouses towards whom they have acted in certain ways over time transforms or at least reifies that relationship, even if the parties had perceived a functional bond in everyday life. Finally, the reduction of tax credits on the basis of income earned by a taxpayer's same-sex partner, one of the hundreds of effects of the Modernization of Benefits and Obligations Act, invites gay and lesbian couples to take their financial interconnectedness seriously and to view each other less as autonomous economic units than they may have previously. More symbolically, it also indicates the federal legislature declaring that gay men and lesbians may form judicially recognizable couples.

Commentators advocating reforms often overlook these ways in which the law affects and indeed effects identity. This oversight is particularly evident respecting protective reforms to benefit vulnerable persons, such as women after divorce. A fuller

98. An Act to amend the Civil Code as regards the obligation of support, S.Q. 1996, c. 28, s. 1.

99. The first two types of objectives are implicated, as the decision raises issues of the relationship between persons and other persons, and also, more subtly, protection of vulnerable persons: the question is perhaps not whether to protect or not, but who is generally more vulnerable, grandchildren or grandparents.

100. In the view of one commentator, "[u]n lien symbolique a été brisé" (Renée Joyal, "Les obligations alimentaires familiales et les enfants: de l'exclusion horizontale à l'exclusion verticale" (1999) 33 R.J.T. 327 at 342).

101. S.C. 2000, c. 12 [Modernization Act]. See e.g. Sch. 2, s. 1, amending the definition of "cohabiting spouse" in the Income Tax Act, supra note 28, s. 122.6, affecting the GST credit in ibid., s. 122.5.
appreciation of law’s role in constructing identity does not detract from the importance of such reforms, but does complicate the project. As spousal support owed by an ex-husband to an ex-wife, or even the statutory and precedential possibility of such obligations, increases, her identity becomes correspondingly more linked to and dependent upon him. As much for reasons of personal identity and human dignity as for the matter of material benefits, then, it may be worth reassessing a regime that systematically poses women as applicants claiming property from the patrimonies of men. Although such concerns underlie some of the privatization literature, its focus remains on more instrumental financial and social safety net outcomes. 102 Similarly, in a discussion of why common law and same-sex cohabitants should be included under provincial matrimonial property legislation, reference to the impact upon the personal identity of the persons involved is notably absent. 103

For harmonizers, this conception of identity demands integration with the exposition of the multiple objectives and dimensions of legal rules and institutions. Given the profound attachment of legal family concepts to social concepts, harmonizing amendments have an impact not only upon the three types of objectives, but also on identity. There are thus no legal rules that harmonizers can view as purely technical—merely regulatory, in Searle’s sense—and unrelated to symbolic expression.

This discussion of how official law’s performance affects identity raises the extent to which the state legal apparatus intentionally seeks to construct its citizens’ family identities. Examples indicate that the production of identity includes not only its performative component, through effect more than by design, but also a self-conscious social ordering intention by


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legislators and legal subjects. While family legislation is prima facie protective and constitutive of person-to-person relations, and increasingly considers the public charge, the Ontario government’s refusal to include same-sex couples in the definition of spouse in the Family Law Act, which for most provisions already included common law spouses, indicates that statute’s prescriptive and normative elements.\textsuperscript{104} The grudging title of the omnibus bill that effected these and many other amendments attests to the provincial government’s attempt to separate performance from identity, or rather to attribute the modified identity to the Supreme Court. The equivalent federal act’s title, in contrast, is almost breezy, chalkling up the changes to modernization, the way it might tinker with legislation regulating airports or telecommunications. There is clearly an unexamined assumption that “modernization” taps into a wellspring of societal approval, and that such a label can disguise constitutive rules as regulatory ones. This offhandedness contrasts sharply with the shrillness of the last-minute insertion of the interpretive clause stipulating that nothing in the act touches marriage.\textsuperscript{105} These particularities reveal the deep symbolic elements of family law statutes. While lawmakers typically recognize the symbolic function of a civil code as an icon, they are less used to acknowledging that function in remedial common law statutes.

To a large measure the legislature’s self-conscious social organization efforts going to identity serve to ordain \textit{ex ante} ideal institutions through which individuals will mediate their relations.\textsuperscript{106} While the example par excellence remains a civil code, common law judgments, family law statutes, and other juridical

\textsuperscript{104} The Ontario government preferred instead to introduce the term “same-sex partner.” See \textit{An Act to amend certain statutes because of the Supreme Court of Canada Decision in M. v. H.}, S.O. 1999, c. 6, s. 25.

\textsuperscript{105} \textit{Modernization Act}, supra note 101, s. 1.1.

\textsuperscript{106} See e.g. Pierre Noreau, “Notions juridiques et réalité sociale: un éternel divorce ou un divorce nécessaire? Le cas du droit de la famille” (1999) 33 R.J.T. 307 at 325, for whom family law responds to the need “de mise en forme symbolique de la collectivité.”
instruments reveal similar intentions. In some instances, deference to protection of vulnerable persons has induced the legislator to deviate somewhat from articulating an ideal in amending a rule self-evidently bearing upon identity. Thus the changes that have virtually effaced distinctions in the civil status of “legitimate,” “legitimated,” and “illegitimate” children probably do not indicate that the state is neutral as to the advantages of raising children within a marriage or at least a stable household. Instead, these changes are attributable either to the principle that children should not suffer for the choices—the implied, religious rather than secular, term is “sins”—of their parents, or to a realization by governments that, if their primarily economic protective objectives were to be met, the diverse means by which families form required changes in the state’s recognition of family relationships. Similarly, judicial response to social science data in the application of divorce legislation, such as evidence on the poverty of divorced women, is an attempt to ameliorate the operation of an existing regime. Accordingly, such changes do not radically disrupt the social organization orientation of state law. Indeed, although less clearly within the inductive common law, there is a sense within the civil law that the engagement of the major types of objectives through the key institutions of family law could have been deduced a priori, without evidence as to how people relate to each other in everyday life.

Nevertheless, deliberate instrumental efforts by legislators to construct the personal identities of their citizens through state family law raise the possibility that citizens themselves will seek to direct state family law for similar ends. Indeed, legislators have recently been confronted with challenges to regimes that are...
grounded not in the types of objectives identified so far, but on another notion. This idea is that state law should not only constitute objects for regulation and create institutions, but should also respond to citizens, reflecting their values and their own non-state institutions, emphasizing law’s role with respect to identity. Family law scholarship needs to consider the pressures towards a reorientation of family law from constitutive to reflective law.

II. Reflective Law

A. Non-state Normativities

The notion of a droit réfléxif developed in various forms through much of the 20th century. Its roots are perhaps identifiable in the concern of the American legal realists in the 1930s that law be more responsive to social needs. Decades later Nonet and Selznick distinguished responsive law from two other modalities of law: repressive law and autonomous law. Their responsive law shows a capacity for adaptation to the society it serves, viewing social pressures as sources of knowledge and opportunities for self-correction. It may illuminate current conflicts in family law, where a self-confidently constitutive law is patently in decline.

Amongst the claims made for same-sex marriage, one is discernible that departs radically from other claims and the three types of objectives of family law identified above. This claim is that the state should recognize same-sex couples by giving them

111. Ibid. at 77. Amongst a vast literature see e.g. Gunther Teubner, Law as an Autopoietic System, trans. by Anne Bankowska & Ruth Adler (Oxford: Blackwell, 1993) c. 5.
112. This change is visible in the waning of the public order tradition of a single family model imposed on all. See Jean Pineau, “L’ordre public dans les relations de famille” (1999) 40 C. de D. 323.
the option to marry on the basis of an evaluation by gays and lesbians of their own intrinsic worth. The proposition is that their unions should be recognized by the state as marriages because those unions are, to them subjectively, as significant as a married union is to heterosexuals. This characterization is not meant to denigrate the claim; their motivating belief is empirically justifiable, and has much history, social science, and psychology in its favour; a subjective belief is not necessarily arbitrary or whimsical. It is apparent, though, that individuals seeking same-sex marriage, like many activists today, are not asking the courts to assess the normative validity of their objective. They are simply seeking its implementation.¹¹³ This claim presupposes the legitimacy of a legal system that not only responds to social science data about who they are and how they live, in the way of Nonet and Selznick’s responsive law, but also reflects an identity they assert and ascribe to themselves, what I mean by reflective law.

In contrast, other claims that may be advanced for same-sex marriage situate themselves more naturally within a constitutive model of law. First, there may be a claim for access to the protective legal and social benefits historically associated exclusively with marriage, though these are increasingly unbundled from marriage as statutory recognition of unmarried couples grows.¹¹⁴ The incremental legal recognition of unmarried


¹¹⁴. This is not to say that there remain no serious financial consequences from not being married. In Quebec, for example, even opposite-sex de facto spouses have no compensatory allowance, division of family patrimony, and benefit of intestate successions. See Benoît Moore, “L’union homosexuelle et le Code civil du Québec: de l’ignorance à la reconnaissance?” (2002) 81 Can. Bar Rev. 121 at 125ff. It remains to be seen whether the Supreme Court will invalidate as discriminatory the restriction of matrimonial property regimes to married

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opposite-sex couples has occurred chiefly within the types of objectives identified above, primarily protection. Second, there may be a claim, like ones made in reform of divorce legislation or filiation, that the fundamental constitutive institutions created by the state are imperfect in their operation and might be improved. A third, related argument may be that there was an error made historically in the definition of the institution. Fourth, the question may be framed as one of human rights, perhaps the ultimate vocabulary of ex ante constitutive idealism. Of these variations, only the reflective law claim leads by definition to the attainment of marriage. In contrast, acceptance of these other claims does not necessarily lead to gay marriage. For example, marriage is clearly not the sole means of obtaining social benefits. Indeed, given the substantive extension of benefits, the rights argument does not lead inexorably to marriage. This observation demonstrates the potentially sharp edge of the recent triumph of substantive over formal equality and the principle of treating different people differently.


117. See e.g. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. Some scholars argue that any regulation of same-sex couples parallel to marriage
Finally, the celebration claim requires state marriage only if celebration is defined so narrowly, from a monist, state-centred perspective, as to equal (tautologically) only that.

Distinguishing these constitutive and reflective visions of family law may facilitate dialogue between persons disagreeing on the substantive questions. For example, it allows proponents of recognition of same-sex unions at least to identify and possibly to respect Gonthier J.'s dissent in *M. v. H.*118 It explains, to some extent, the unavoidable comedy of the reasons in *EGAILE Canada v. Canada (A.G.)*119 The incoherence in that judgment attests to the limits of the adjudicative function to deal with weighty questions of social change and the implementation of reflective law; courts are oriented, probably appropriately, toward the constitutive law functions. Absent such institutional strictures, the petitioners would not have asked the British Columbia Supreme Court to unearth the historical common law definition of marriage, but would have articulated openly the substantive claim that the petitioners and other gays and lesbians should have full state recognition of their unions because they believe that they deserve it.

Situating law's reflective role within harmonization requires greater terminological precision. The harmonization discussed so far is internal harmonization—efforts to render federal law more conceptually compatible with the law of each province and vice versa. Given the bias of past legislative drafting, the greatest

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runs afoul of constitutional norms of equality. For the argument in an American context, that separate but equal institutions are inherently unacceptable, see Yuval Merin, *Equality for Same-Sex Couples: The Legal Recognition of Gay Partnerships in Europe and the United States* (Chicago: University of Chicago Press, 2002) c. 10. I suggest that the Canadian experience, less scarred by slavery and official racial segregation, yields a different analysis. It is arguable that a substantively equivalent parallel regime such as Quebec's new civil union would not amount to burdensome treatment sufficient to trigger the first inquiry of the test in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, a preliminary step for demonstrating discrimination.

dissonance clearly sounds between federal and Quebec law. It is necessary to recall that the impurity—polyjural pedigree has a less pejorative ring—of the civil law in Quebec and the common law in the other provinces constrains such internal harmonization to some degree.120 Nevertheless, provincial law maintains a certain “internal integrity,”121 which internal harmonization seeks to reinforce. In contrast, this section introduces external harmonization, the pursuit of greater coherence between state law—federal or provincial, expressed in common law or civil law vocabulary and concepts—and other, non-state normativities. External harmonization does not appear explicitly in the existing literature, but it is implicit in, for example, the suggestion that Parliament should modify the substance of articles in the Civil Code of Lower Canada under federal competence to render them more consistent with contemporary values.122

Such statements provoke an inquiry as to the meaning of “contemporary values” and their juridical significance. Their relevance seems slight according to the positivist view that it is appropriate for state law to establish ideals that will always, perhaps inevitably, be some distance removed from social life.123 Perhaps this gap is merely further evidence of written law’s incapacity to exhaust the normative content of any legal or social regime. Consequently, such a perspective sees little import for state law in observations that the family may be subject to other systems of normativity,124 such as everyday law125 or microlegal

120. For discussion of the diverse sources of law in Quebec, see e.g. Howes, supra note 46 at 529-32. For a focus on Upper Canada, see G. Blaine Baker, “The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire” (1985) 3 L.H.R. 219 at 263-64.

121. The term comes from “Harmonizing Federal and Provincial Law,” supra note 12 at 41.

122. Ibid. at 58.

123. See Noreau, supra note 106 at 315. He notes at 320 that there was a gap between the ideal law of the family as laid out in the C.C.L.C. in 1866 and the contemporary everyday life of the family.

124. Some authors are comfortable using “law” more freely. Fuller talks about the customary law of a campsite (Anatomy of Law, supra note 11 at 48), but others
systems, and if not a non-state legal order, then at least highly developed non-legal regulation. A different approach, however, acknowledges that state law has always recognized other normativities and incorporated elements from them. For example, European civil law of the family has absorbed elements of ecclesiastical law and aristocratic law, while in Canada, aboriginal customary adoption has survived and is constitutionally protected. Even the division of powers respecting marriage, divorce, and the solemnization of marriage is not a product of purely state legal or political considerations, but reflects negotiation around the conservative social and religious forces within Canada East.

External harmonization occurs today more subtly than explicit legislative inclusion of measures with easily identifiable origins. First, it may influence the drafters of written state law more implicitly. A legislative reform process hearing representations

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126. See W. Michael Reisman, Law in Brief Encounters (New Haven, Conn.: Yale University Press, 1999).


128. See Girard, supra note 10.


130. See the fascinating discussion of the politicking behind the federal powers over marriage and divorce in F.J.E. Jordan, “The Federal Divorce Act (1968) and the Constitution” (1968) 14 McGill L.J. 209 at 211-16.
from associations and individuals is perhaps better characterized not as a process of amending state law within a closed system, but as an encounter between state and various non-state normativities. Similarly, the lists of interveners in Supreme Court cases indicate the implication within the discursive adjudicative process of many other normative orders, religious or not. Second, in a way entirely unwritten, a process of external harmonization constantly influences agents of the state in determining which measures of written state law to enforce and how to do so. State law that is not enforced remains law, but its intensity is altered. 131

Returning to the family context, the earlier example of the recent irrelevance to civil status of the circumstances of a child’s birth is less persuasively characterized as a protective effort than as harmonization with everyday normativity. For centuries state law enshrined distinctions on the basis of circumstances of birth, though they disadvantaged so-called illegitimate children. What changed in Canada and other Western societies in the last thirty years was not the focus on protecting children, but the social mores that no longer condemn extramarital procreation to the same degree. Similarly, the admission of social science evidence in Charter cases may demonstrate an encounter with non-legal normativities. The Brandeis briefs in M. v. H. allowed the Supreme Court of Canada to recognize that there were many such couples cohabiting and sharing resources in Canada, and that the combined effect of those many relationships was deeply normative, 132 even if, as is arguable, the norms of same-sex couples are not identical to those of married or unmarried heterosexual couples.

131. See Carbonnier, supra note 124 at 31-33, 140-42. Indeed, it may be helpful to move beyond the dichotomy effective/ineffective or enforced/not enforced, and to think of state laws as always effective, like non-state laws, only subject at various times to different relative priorities vis-à-vis other normative orders. The Supreme Court explores the relationship between written law and its implementation in Little Sisters Book and Art Emporium v. Canada (Minister of Justice), [2000] 2 S.C.R. 1120, 2000 SCC 28.

132. Supra note 118 at paras. 58, 70.
The challenge for state law is to encounter other normativities respectfully and sometimes to harmonize with them. This project leads to a conceptualization of state law not as the sole normative order, but rather as one of many, each of which is in constant interaction with other normativities. It follows that state external harmonization affects not only individual identities, but also those other normativities. Engagement with other normativities requires them to adjust or reinforce themselves in response to changes in the state legal order. In other words, external harmonization is necessarily a multivalent process. For example, in the 1960s Parliament enacted divorce legislation to render state matrimonial law more in harmony with non-state normativities that recognized the breakdown of marriages. In turn, the normativities generated by various religious orders needed to respond to the altered state regime or to changing social conditions. The policy decisions made within different denominations attest that external harmonization does not dictate a particular instrumental outcome, but is a process that requires imagination and openness to alternative means of ordering relationships.

External harmonization poses a particular problem for the federal legislator concerning the civil law. The historically close relationship between federal law and the regimes of the common law provinces has permitted the technically incorrect perception that Parliament and the nine provincial legislatures share management and development of a single legal order. In contrast, the terminological and conceptual discord between much federal legislation and the *ius commune* of Quebec has fostered the perception that, post-Confederation, Quebec has sole custody of the civil law within Canada. Accordingly, federal law initiatives have been characterized as foreign incursions into the corpus of

134. Consider the development within some denominations of divorce ceremonies, though the mainstream adaptations may have been less obvious, and the recasting of marriage vows to eliminate a woman’s duty of obedience.
provincial civil law. Once external harmonization, with its active demands on lawmakers, emerges as a practice of law reform, the question follows as to whether external harmonization of the civil law with non-state normativities is a solely provincial or a joint provincial and federal responsibility. May Parliament leave the responsibility for stating the civil law in modern garb to the provincial legislature, or does it have weightier responsibilities? Even if Parliament can find modernized concepts invoked by the C.C.Q. that fit the conceptual apparatus federally, is it obliged to give these concepts a content that has been predetermined by the province, or is it entitled to seek some better harmonization with the living civil law as reflected in other non-state normativities?

The better view is that the federal government bears a responsibility for the development of the civil law. At the very least, Parliament has a responsibility with respect to those articles in the Civil Code of Lower Canada that the National Assembly is constitutionally incapable of abrogating. Without necessarily agreeing that it is constitutionally permissible for Parliament exhaustively to codify the civilian ius commune in matters of federal legislative competence applicable within Quebec, one may accept that the federal government has an active role, at least in federal matters such as banking, insolvency, interest, negotiable instruments, intellectual property, and marriage and divorce. This position is compatible with a view of the civil law that does not see it as frozen positivistically in the provincially codified law, but rather as a living law not exhaustively expressed in written instruments.

The federal legislator’s assumption of its responsibility in the external harmonization of a Canadian civil law may incidentally affect its internal harmonization. It may lead Parliament to pursue

135. See e.g. V.A. v. S.F., supra note 39 at 38-39, Brossard J.A.
137. See e.g. Brierley, supra note 34 at 116; Alain-François Bisson, “La disposition préliminaire du Code civil du Québec” (1999) 44 McGill L.J. 539 at 555ff.
the latter with greater sensitivity to the notion of an evolving civil law, and at the same time with less timidity toward the civil law as defined by the provincial legislature of Quebec. Parliament is not compelled to choose between civil law concepts as defined by the National Assembly or common law concepts, the content of which it amends without hesitation. External harmonization may thus lead to an internal harmonization that not only seeks to have federal statutes speak in the language of the current Civil Code of Quebec, rather than the Civil Code of Lower Canada, but also to enrich the civil law by the addition of new or amended civilian concepts implementing constitutionally valid federal policy objectives. This might address the disharmony between federal and provincial family law, not by enjoining the provincial legislature to take account of federal law incursions but by inviting Parliament to harmonize by using adapted or even novel civilian concepts. As for external harmonization, Parliament’s role in engaging with other, non-state legal normativities raises the question of how that should be done.

B. Implementing External Harmonization

Although external harmonization raises a number of issues, this discussion confines itself to the legislative tools of harmonization with non-state normativities.\footnote{E.g. from a judicial perspective, external harmonization asks what procedures are appropriate for gathering information about other normativities and what sort of evidence will be admissible and sufficient to demonstrate the existence of norms. External harmonization for other governmental institutions raises other questions; indeed, administrative agencies already practice external harmonization by appointing non-lawyer experts to tribunals.} First, as it has done before, the legislature may open up space in its legal fabric where other normativities may enter and operate. The civilian natural obligation, respecting which the courts will neither enforce execution nor assist a debtor who regrets past performance, bridges different normativities.\footnote{See Carbonnier, supra note 124 at 21.} Within the family context, more

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specifically, the provision for a delegation of parental authority short of withdrawal of that authority from the titular parents provides space for relationships other than those explicitly recognized by traditional civilian filiation. A hypothetical example would be an amendment to the Code of Civil Procedure recognizing non-state family mediation, perhaps by a clergyperson or family friend. Second, the legislature may explicitly integrate principles and norms from other normativities into state legal instruments and institutions. External harmonization of this or any kind is not systemically the preserve of the federal rather than the provincial or of a common law rather than a civilian legislature. More than twenty-five years ago, Quebec led all other Canadian jurisdictions by legislating a prohibition against discrimination on the basis of sexual orientation. An underlying question is whether external harmonization demands express written inclusion of another normativity or whether it suffices to pursue substantive inclusion by opening up space.

Recognition of same-sex couples within the Canadian state legal orders provides a useful case study on these matters. Recall that, responding to M. v. H., the Ontario legislature created a new designation, that of same-sex partner. Parliament, in contrast, amended the definition of common law spouses to include same-sex couples. The National Assembly of Quebec has amended the civil code to introduce a new institution, the civil union. This was not in direct response to M. v. H. since there is no provincial regime of support for any kind of de facto couples.

141. Charter of Human Rights and Freedoms, R.S.Q. c. C-12, s. 10. If this measure were a matter of internal deduction from first principles of equality, rather than one of external harmonization, there is no reason that sexual orientation would have been recognized at that time of change in social attitudes towards homosexuality rather than decades previously.
142. The Quebec statute introducing a new institution, the civil union, takes the same approach as did Ontario in the sense of creating a new term, though the institution it shadows is marriage, not regulation of cohabiting opposite-sex
approach, petitioned for by EGALE, would open marriage to same-sex couples.

Ontario’s response may initially appear to be a legislative opening of space for another normativity, one already regulating same-sex couples and recognizing them as potentially stable socio-economic units meriting support and engendering potential economic vulnerability on their dissolution. Such a reading of the amending statute is perhaps too kind. External harmonization by opening up space generally involves the state’s ceding regulatory ground to another normativity. Ideally its hallmarks are respect for alternative ways of ordering human activity and flexibility, and it should be primarily facilitative, to encourage the exercise of individual agency. On closer examination, it becomes apparent that Ontario’s response does not display these characteristics. It imposes a compulsory regime identical in all substantive respects to that governing opposite-sex common law couples, and differs only in name. Harmonization focused more on providing space for other normativities that might have looked to the diversity of same-sex relationships and, instead of substantively assimilating all same-sex cohabitations to common law spouses, permitted gay men and lesbians to assert their own interdependent relationships, which for a variety of socio-economic reasons may not perfectly mimic a traditional model of opposite-sex cohabitation.

143. This conception of external harmonization is obviously indebted to Fuller’s work on the facilitative role of legislation. See e.g. Lon L. Fuller, “Law as an Instrument of Social Control and Law as a Facilitator of Human Interaction” (1975) B.Y.U.L. Rev. 89.

144. Bastarache J. raises these questions in his concurring reasons in M. v. H., supra note 118 at paras. 296ff. But for a sociological study indicating that in many respects gay and lesbian households over time develop labour patterns similar to those in heterosexual households, see Christopher Carrington, No Place Like Home: Relationships and Family Life among Lesbians and Gay Men (Chicago: University of Chicago Press, 1999). To some extent the legislator may have been constrained by its understanding of the bluntness of the inclusion required by the Charter, and so tailoring a regime to the particularities of diverse same-sex

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The federal response at least has the virtue of greater directness. It assimilates same-sex couples to opposite-sex cohabiting couples. In doing so it highlights the asymmetry between opposite-sex couples, who can chose between marriage and unmarried cohabitation, and same-sex couples, for whom marriage is not an option. The federal scheme has harmonized the law to the extent of treating same-sex couples as legally cognizable units, but it has applied an existing legal regime to them without modification. Dipping into another normativity for the class of objects to be regulated but not for the means of so doing is not a particularly subtle external harmonization.

Quebec's civil union represents a different approach. The provincial legislation creates a new civil status, unlike the Ontario and federal statutes, which legislatively recognize states of fact. Nevertheless, the Quebec regime also effectively applies an existing legal regime—the provincial civilian regime of marriage—to those same-sex and opposite-sex couples who are civilly united. Indeed, it is questionable whether the mandatory provisions of the family patrimony in Quebec's matrimonial regime relate to the needs and circumstances of many same-sex couples.

In contrast, the EGALE petition sought a redefinition of the existing state legal concept, the historic institution of marriage.

affective arrangements might have required complicating the regime for opposite-sex couples too. Such complication might not be negative: the current regime crudely assimilates couples where one person refuses to marry and where both choose not to marry. This shows that Charter decisions do not necessarily make sophisticated family law.

145. Of course power imbalances may impede one de facto spouse from persuading the other to proceed to marriage. See Miron v. Trudel, [1995] 2 S.C.R. 418 at para. 153.

146. See also the registered domestic partnership created by Law Reform (2000) Act, S.N.S. 2000, c. 29.

147. The petitioners sought a declaration that the marriage of two persons of the same sex was not prohibited at common law or by statute; that the relevant director was entitled to issue marriage licences to same-sex couples; and that the director was required to issue marriage licences to them. Alternatively, they sought a declaration that any prohibiting provision was inconsistent with the
This approach raises a number of difficult questions.\textsuperscript{148} It presupposes considerable elasticity on the part of an ancient legal and social concept. Explicit redefinition of this state legal concept may do at least three things. First, it gives the state legal normative order undue emphasis by suggesting that state recognition matters more than recognition in non-state normativities. This is further indicative of the extent to which the state legal apparatus organizes people's imaginations.\textsuperscript{149} The lack of precision in separating and situating state and non-state normativities is understandable, as frequently the state marriage ceremony is bundled with another ceremony, often a religious one, that roots the couple's relationships in a different normativity. The lesser significance attached to the state legal order is more visible in naming a child, where there is a sharper separation of state and non-state functions. For many people, the celebration by family and friends of a child's birth and naming is

Constitution and thus void. See \textit{EGALE}, \textit{supra} note 119 at para. 2. The Ontario case in which the applicants had been "married" after a reading of the banns is a similar attempt to alter the state's definition of marriage, although the use of the legal loophole respecting the banns is more a challenge to the implicit definition. See \textit{Halpern v. Canada (A.G.)} (2002), 215 D.L.R. (4th) 223 (Ont. S.C.J.) \textit{[Halpern]}. See also \textit{Hendricks v. Quebec (P.G.)}, [2002] J.Q. No. 3816 (Sup. Ct.)

148. The attempt to redefine and expand a state concept sees the response to the current problem of uneven regulation of couples not as an argument for less state regulation of affective relationships, but more. An alternative would clearly have been reducing the link between civil status in an affective relationship and the conferral of benefits. Associating benefits with marriage is particularly problematic in the United States, where, in the absence of a state health service, people rely more on employers' medical insurance.

149. One may even see advocates as being "transfixed" by the symbolism of legal recognition (David L. Chambers, "What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples" (1996) 95 Mich. L. Rev. 447 at 450). See e.g. MacDougall, \textit{supra} note 116 at 260ff., whose discussion of celebratory alternatives remains firmly anchored within the state legal order. Alternatively, it is possible that activists appreciate the relation of the state normativity to other normative orders, but deliberately target the state arena as the most profitable deployment of scarce resources of media and public attention. I am grateful to Eric Ward for raising this point.
likely to focus much more around a religious ceremony, such as a christening, than around the registration of an act of birth. Second, harmonization through the redefinition of marriage might overemphasize words over deeds. As discussed above, identity is created in the daily performance of obligations, in lived relationships, in a way that is at least as meaningful as the making of legal or other verbal declarations. The pursuit of substantive protection and social acceptance is thus probably more urgent than explicit legal textual inclusion. Third, the focus on redefinition of marriage may overemphasize that particular relationship at the expense of other bonds of kinship. A reform focused primarily on marriage overshadows other family relationships—the roles of legal subjects, irrespective of sexual orientation, as siblings, cousins, aunts, uncles, nieces, nephews—and diverse friendships. Harmonization focused on marriage may reproduce a narrow conception of family relations that has not succeeded in practice.

Its unintended consequences aside, the legitimacy of redefining a legal concept as a means of external harmonization is questionable. Not only does it presuppose a certain social consensus around the validity of law’s reflective role, which does not yet obtain, but it is also logically incoherent. It is a structural constraint of external harmonization that while one normativity may express its values and norms to another normativity, it is not entitled to prescribe the precise instrumental means of their incorporation within that other normativity. An amendment of the state definition of marriage is a legal solution that can only occur internally within the state legal order. The

151. The legitimacy of harmonization measures cannot be taken for granted, either respecting external harmonization across normativities or internal harmonization across jurisdictions within the state order of private law. In any case, the maintenance of differences is inherent in the notion of harmonization as opposed to unification. See Martin Boodman, “The Myth of Harmonization of Laws” (1991) 39 Am. J. Comp. L. 699 at 702.
law and custom of everyday life, within any one of thousands of micronormativities, do not speak directly in state legal terms, although they are influenced by them, just as state law plays a significant role in constructing individual identities. Activists who seek state marriage have stopped speaking from within their own non-state normativities, such as the intense non-state regulation of de facto unions, and have begun to speak the language of internal amendment of the state legal order. The latter is obviously not entitled to prescribe the way that other normative orders, such as religions, respond to changes in state laws respecting marriage and filiation, although pragmatically some response will be necessary in ways that the synods or other legislating organs of those religions will determine. Similarly, the argument that the non-legal normativity already regulating same-sex couples leads necessarily to legal characterization as marriage forgets that no legal language can exhaustively express a situation's normative content. Indeed, legal characterizations of everyday life express emotions clumsily at best and are always to some extent hypothetical, approximative, and provisional. There is a risk that the argument for same-sex marriage assumes an absolute faith in the ability of state law to grasp life, overlooking the gap between the state law of marriage and the everyday normativities of each heterosexual marriage.

154. Legislators appear to feel sometimes that mere quantity of words draws law closer to everyday reality: consider the laundry lists of factors for fixing spousal support under federal or provincial legislation, or the competing models of marriage and spousal support in Bracklow. For the argument that it is a legal instrument or model's flexibility more than its written exhaustiveness that best accommodates the normative content of relationships, see Leckey, “Relational Contract and Other Models of Marriage”, supra note 115. For a historical study, a key theme of which is the gap between the legal availability of divorce and the

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Careful analysis of what constitutes the state legal concept at issue facilitates a more tentative, open-ended external harmonization. Judgments and legislative amendments have already separated to a significant extent, less so within Quebec, a number of tangible benefits from the ceremony of official recognition. The protective objective is thus already largely achieved, although the regimes may yet be enhanced. To generate policy alternatives in external harmonization, the official marriage ceremony requires further dissection. Two principle elements of the ceremony are the vows by the prospective spouses and the declaration by the state-authorized official. For most couples, the more important of the two may well be their swearing the vow to each other, in front of their assembled family and friends. If so, this public affirmation and expression of commitment, like many other benefits, can also be severed from state marriage.\(^{155}\) The state may choose to facilitate such affirmations by providing a number of different options to assist couples in making them, although couples can probably do so without state support. The state might, for example, provide a register open to recording a variety of public solemn commitments, not limited to those between pairs of sexual partners.\(^{156}\)

A side issue, one more particularly of internal harmonization, is the impact of reforms already made in recognition of same-sex and opposite-sex unmarried couples upon the definition of marriage. It is nonsense to claim that giving unmarried couples


155. *Celebration*, the central concept in MacDougall, *supra* note 116, has the potential to be a richly liberating concept, inviting people to seek multiple ways of celebrating relationships, if defined openly from a legal pluralist perspective.

156. Historically the state has recognized at least one status commitment other than marriage: see the provisions concerning acts of religious profession in arts. 70-74 of the original C.C.L.C., eliminated in subsequent amendments. But multiplying the options may blunt the signalling effect of state recognition of relationships. See Michael J. Trebilcock, "Marriage as a Signal" in F.H. Buckley, *ed.*, *The Fall and Rise of Freedom of Contract* (Durham, N.C.: Duke University Press, 1999) 251.
the benefits and corresponding obligations traditionally associated with marriage has not altered the legal institution of marriage, or rather such a claim can be made coherent only by positing a narrow, hermetically sealed notion of the nature of any legal institution. That is like saying that the law of trusts would be unaffected by the legislative creation of an institution that in many functional respects resembled a trust. Such statements show an insensitivity to the fact that there are four dimensions of law reform, explicit instrumental reform, explicit non-instrumental reform, implicit instrumental reform, and implicit non-instrumental reform.

At the very least, the amendments after M. v. H. constitute implicit non-instrumental reforms to marriage, as does Quebec's civil union. A legal institution's meaning as a legal concept must consider both internal factors (its grounds of formation and obligations) and external factors (its relationship with other like and unlike institutions and its suitability in various scenarios). Marriage's "meaning" is not just the juridical rule of one man, one woman, but also its position at the top of a hierarchy of recognized relationships. Legislative tinkering with marriage-like relationships, such as the development of "limping marriage," where a cohabiting couple is understood as married for some purposes but not others, demonstrates the constructedness and contingency of marriage, or at least of legally recognizable

157. As an example of how similar institutions interact, see the observation that unmarried couples are "téléguidés" by the presence of marriage in Carbonnier, supra note 124 at 262.
160. See Heather Brook, "How to Do Things with Sex" in Stychin & Herman, supra note 115, 132 at 144. For a critical discussion arguing that conjugality not be used as a proxy for reduced need in government support schemes, see Brenda Cossman & Bruce Ryder, "What Is Marriage-like Like? The Irrelevance of Conjugality" (2001) 18 Can. J. Fam. L. 269.
affective relationships, and opens the door to future adjustments. In Quebec, the maintenance of the codified status quo while social legislative reforms have recognized de facto spouses has not left the role of the civil code untouched, but has resulted in a social and juridical paradox.\footnote{161} This is the sort of gap between code and law that recodification sought to reduce.

For external harmonization, the question would ask to what extent amendment of the state definition of marriage would affect the non-state normativities that first developed around enduring same-sex relationships. One view, oblivious to what I have described as the multivalent character of external harmonization, suggests that the option for gay couples to marry would result in no normative pressures on them to do so, or on single gay men and women to contract long-term relationships. This view emphasizes the inherent value in achieving formal equality. By failing, however, to consider the changed expectations of gay persons that would result from an option to marry, it demonstrates the risk that rights discourse, in pursuing architectural symmetry for different groups, may lose touch with non-legal realities. An instrumental variation of this position holds that achievement of formal equality would have a restricted non-legal normative impact: it would make society generally more tolerant, but would not alter society’s expectations of gay men and lesbians or the internal norms of the gay community. More consistent with the insights of the interaction of state and non-state normativities is the contrasting view that an opening of the state institution of marriage to same-sex couples would result in greater social pressures, from society generally and within the gay community, for gay men and lesbians to take advantage of their new right.\footnote{162}


\footnote{162} I suggest that when a right is conferred on a group, there is an implicit agreement that the group will exercise it: e.g. there would have been outrage if
Conclusion

Rather than prescribing specific amendments to state family law further to harmonize federal and provincial regimes, this paper has argued that a necessary prior step is a nuanced and inquisitive reading of the relevant legal sources—an approach which may also assist in endeavours other than harmonization. I proposed, first, a consideration of sources of law, one that looks beyond self-evidently family-oriented instruments of legislative will to include other sources including legal rules that are not expressly part of the corpus of family law, concepts and interpretive approaches developed in judicial application of federal statutes, custom, practice and belief. The cursory examination of some family law cases indicated the porosity of legal systems to outside legal and social influences. This permeability may appear to be a weakness, but it is potentially a strength. I suggested that implied parenthood might be one way to accommodate the stepparent-child relationship under the Divorce Act as applied in Chartier within civil law conceptions. The openness of family law to the absorption of psychological concepts makes possible another means of harmonization, emphasizing the psychological content of such de facto parenthood rather than its roots in the common law doctrine of in loco parentis.

Once the sources of law within a particular field have been gathered, specific conflicts can be identified between the federal law and provincial civil and common law regimes. I have suggested assessing the sources of law to discern the various policy objectives in play. Legal rules constitute legal relations and institutions, so these rules will likely manifest explicit and implicit

women, having won the right to vote, never voted. That the right to state marriage would have a significant normative impact is common ground between commentators who fear such an impact as destructive of gay sexual culture and those who would welcome it as a civilizing force. Compare Michael Warner, The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life (New York: Free Press, 1999) c. 3; William N. Eskridge Jr., The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment (New York: Free Press, 1996).
objectives on several dimensions: protecting vulnerable persons, ordering the modalities of interaction among individuals and between persons and property, and establishing the relationship between the state and individuals. Identifying legislative objectives along these dimensions facilitates respectful listening and may clarify the core of conflict.

Family law also reveals a fourth dimension, its role in constructing individual identities. I framed this point as speaking chiefly to audiences inclined to defend the status quo or historical conceptions. On the one hand, legislators should be aware of the severe negative impact on the identities of persons excluded from particular family law institutions. This observation leads to a plea for tolerance and openness to more inclusive law reform. On the other hand, advocates seeking reforms—often in the interest of protecting vulnerable persons, notably women and children—should recall that, if all four dimensions of law are almost always engaged when the legislature or other institution of state normativity acts, no perceived victory, say in the distribution of goods, will be achieved without an unintended consequence. That consequence will be a corresponding alteration in the relations that construct the identities of the persons involved, and even of those not directly within the amended regime. Similarly, the legislature cannot pursue one type of objective—notably altering the relationship of the state to its citizens in the interest of the public purse—without also affecting identity. When legislatures and judges further recognize unmarried couples in order to reduce the payment of state benefits, they render marriage ever more self-evidently constructed and susceptible of reconstruction and alteration.

A further implication requires mention. If family law’s role in identity formation requires deference and considerable sensitivity from legislators guarding institutions of family law, the corollary is that those seeking change must also respect those who may resist. Advocates of change who seek an audience for their proposals on the basis that the knowledge of lawmakers is always imperfect and that scepticism is warranted as to the existing legal order of the family must accept the corresponding contingency of
their own positions. If not, they risk replacing one tyranny over the legal regulation of relationships informing identity with another. The insight that the most banal workings of family law—regulations stipulating support, compulsory information sessions respecting mediation—participate vitally in constructing personal identities cannot be readily harnessed to a particular political agenda. Those who oppose expanded juridical and symbolic recognition of psychological parents or same-sex relationships partly construct their identities, too, on state instruments of family law, and changes to existing regimes may perturb them.\(^{163}\)

The paper has also observed that one argument raised by gay men and lesbians for access to the institution of marriage is qualitatively different from, or bespeaks a different conception than, the more traditional view of the role of family law. Instead of a constitutive role, such an argument may assume a reflective role. It focuses not on why the existing \textit{ex ante} conceptualization of the universe of family relationships is erroneous or incomplete, but on how important the relationships at issue are to those seeking gay marriage. This orientation toward reflective law raises complex issues for legislators: which other normativities should be accepted as sources for what I have called external harmonization?

In this external harmonization, Parliament has an underrecognized role. In partnership with the National Assembly, it should ensure that the civil law applicable in Quebec engages with other normativities and thus retains legitimacy with citizens. Parliament's role respecting the common law is more widely accepted, and it has a responsibility concerning the common law's external harmonization too.

If anything, this study—its observations of the richness of sources of law, the complexity of multiple kinds of objectives—

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163. For an argument sensitive to the identities of different communities, see William N. Eskridge Jr., \textit{Equality Practice: Civil Unions and the Future of Gay Rights} (New York: Routledge, 2002). See also the remedy and the recognition of the “competing values and interests of all societal participants” in \textit{Halpern, supra} note 147 at para. 6, Smith A.C.J.S.C.
suggests that harmonization and other reform should occur cautiously and incrementally. In family law such discussion of incremental change evokes the notorious swing vote of Sopinka J. in *Egan*.

His comments on the relative newness of society’s acceptance of same-sex relations read poorly from a rights perspective. The pace of a society’s organic change ought not, in principle, to excuse violating the rights of any of its citizens. Such excuses give the impression that a society is not taking rights seriously. It is possible, however, that such examples in a field of law so rich in sources and implicated up to the elbows in the muck of everyday life indicate less the limits of society’s commitment to justice than the limits of rights discourse. Sopinka J.’s incrementalism may indicate that he was conscious of the tension between the traditional, constitutive role of law and its emerging reflective role, and that the struggle between these two conceptions would disrupt and convulse the law for years to come. Alternatively, if he was unconscious of this tension, his comments may still call attention to the need for caution in reform. In the meantime, the dual character of family law concepts as legal and social means that changes of any kind in either legal order and within either legal tradition may cause profound and unpredictable effects.

In the end, while harmonization of the various state legal orders with each other and with other normativities is possible to some extent, the state law reformer’s overwhelming feeling may be one of humility and appreciation of the fragility of the tools of state law that he or she brings to the task. State law’s concepts of the family play a powerful role in shaping identity and organizing the way people think about relationships. For that reason, among others, their harmonization requires care. Yet concepts of state law do not replace other ways for people to tell themselves and others who they are; they do not, for example, replace storytelling. While a statutory or codal stipulation of a support obligation, or of the consent by which my birth mother, aged

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164. *Supra* note 92 at paras. 105, 106, 111.
twenty-one, surrendered me to my future parents, is the closest the state comes to recognizing how one person says to another “I love you,” and while it affects significantly how people define themselves and their roles, it is obviously not the closest that individuals come. This reminder of the affective poverty of state law may be worth bringing to attempts to harmonize not only the questions around marriage, but also regulation of the family and intimate relationships more generally.

R. Leckey

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