

Testing the Origins of the Family Patrimony in Everyday Law

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Résumé de l'article

Le présent article vise à resituer les origines du patrimoine familial, en remettant en cause l'opinion selon laquelle les dispositions législatives adoptées en 1989 expriment du droit nouveau. Si le patrimoine familial n'est pas simplement la transplantation maladroite d'une fiducie statutaire ontarienne, il n'est pas non plus le reflet d'un postulat moral qui n'aurait eu, avant 1989, aucune consistance juridique. Même en dehors de toute étude sociologique, on peut formuler l'hypothèse que le patrimoine familial consacre des normes coutumières déjà présentes dans l'ordre juridique québécois au moment de son adoption. Pendant la période où le mariage constitue notamment une entreprise économique commune, les règles du droit usuel dicteraient que les époux partagent certaines richesses accumulées par eux sans égard aux droits formels sur les biens en question. Ces normes coutumières, obscurcies par une tendance moderne chez les juristes à s'en tenir au droit étatique pour connaître la teneur du droit matrimonial, forment néanmoins des sources importantes du droit patrimonial de la famille. Une fois établie la manière dont le droit usuel complète le droit formel de la famille, on constate que la base juridique de la réclamation d'une part du patrimoine familial ne marque pas de rupture, dans les faits, avec la tradition du droit civil québécois au regard du droit patrimonial de la famille.

Testing the Origins of the Family Patrimony in Everyday Law*

Nicholas KASIRER**

This essay seeks to reevaluate the origins of the family patrimony by challenging the idea that the provisions introduced into the Civil Code of Québec in 1989 amounted to new law. The family patrimony is not simply a statutory trust borrowed maladroitly from Ontario, nor does it reflect a moral postulate that, prior to 1989, had no legal status. It may be argued, in advance of sociological study, that the family patrimony should be understood as reflecting customary norms that were already present in the Quebec legal order at the time of its enactment. Where wealth is accumulated by the spouses during the period that marriage is lived as a joint economic endeavour, rules of everyday law may require the sharing of certain property without regard to which of them has formal title thereto. These customary norms, obscured doctrinally by a modern disinclination among jurists to look beyond state-made law and its adjuncts in the regulation of married life, are potent sources of family property law. Once the manner in which everyday law complements the formal law of matrimonial property is made plain, it becomes apparent that the claim to a share of the family patrimony is not, in fact, a break with tradition in Quebec's Civil law of family property.

Le présent article vise à resituer les origines du patrimoine familial, en remettant en cause l'opinion selon laquelle les dispositions législatives adoptées en 1989 expriment du droit nouveau. Si le patrimoine familial n'est pas simplement la transplantation maladroite d'une fiducie statutaire ontarienne, il n'est pas non plus le reflet d'un postulat moral qui n'aurait

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An uneasy relationship between love and money befuddles the law of family property, set as it is on the hopeless mission of forcing the patrimonial and the extrapatrimonial onto separate legal paths. Try to explain, for example, — in legal terms — why spouses share property. Love and hate encourage married people to behave with apparent irrationality as private law actors, sharing property when they are not obliged to and refusing to do so even when the state threatens them with its most powerful tools for the imposition of its will¹. At the outset of marriage and at its often difficult end,

1. This is occasionally recognized by the courts, as it was in one case in which spouses fought over the family patrimony at divorce « pour des raisons qui sont plus d'ordre personnel et psychologique que financier »: *Droit de la famille* — 1395, [1993] R.J.Q. 1659, 1662 (Moisan J.) (C.A.).

wives and husbands seem stubbornly disinclined to separate feelings from finances. Modernity has not yet managed to upset stereotype here. The dreamy insouciance of the newlyweds' claim that they can live on love is all too often matched by the angry recklessness with which the same two, if given the chance, grab at family property when things go wrong.

A similar malaise afflicts the *Civil Code of Québec's* «family patrimony», despite an earnest undertaking, from the legislature, as to certainty of purpose². The rules, which are designed to impose the sharing in value of certain of the spouses' essential assets at the end of married life³, seem to add to the confusion as to why property should be divided. On what basis does sharing proceed? Is it as a mere incident of marriage, as its inclusion in the Civil Code's primary regime would suggest? Is one spouse being rewarded for contribution—direct or indirect, real or imagined—to the wealth of the other as a legislative answer to the thorny problem of unjust enrichment in marriage? Could the share in the family patrimony be a bonus for good behaviour, on the slightly crazy theory, suggested by art. 422 C.C., that «bad faith» can disentitle a spouse to his or her equal share? The uncertainty, felt most pointedly by spouses and their legal advisers, is shared by scholars who have tried and failed to reconcile the family patrimony with existing legal institutions and who, understandably, are shy to accept what appears to be the sudden imposition of a Common law statutory remedy into the conceptually distinct civilian realm of matrimonial property law⁴.

What is the source, then, of the idea that spouses must share the value of certain property regardless of which of them has the right of ownership therein? The device does carry with it an air of novelty. It is certainly true,

2. The policy basis of the family patrimony was alluded to in the title of the legislation which brought this new institution to the Civil Code: *An Act to amend the Civil Code of Québec and other legislation in order to favour economic equality between spouses*, S.Q. 1989, c. 55, as amended by S.Q. 1990, c. 18, and later consolidated as arts 414-426 C.C. (S.Q. 1991, c. 64).

3. Arts 414-426 C.C. provide for the establishment, as a mandatory incident of marriage, of a «family patrimony» composed of the spouses' homes, furniture, cars and pension plans. While this mass is notionally created as of the date of marriage, «regardless of which one of [the spouses] holds a right of ownership in that property» (art. 414), its net value is divisible only at the dissolution or annulment of marriage or upon legal separation (see esp. arts 416-418 C.C.).

4. For a colourful expression of the view that the Common law connections of the family patrimony render it a legislative «intruder» into the Civilian tradition, see E. CAPARROS, «Le patrimoine familial: une qualification difficile», (1994) 25 *R.G.D.* 251, 266.

if one puts store in the debates of the legislature⁵, that Equity's constructive idea that marriage is a joint economic endeavour which mandates sharing is relevant to the presence of the rules on the family patrimony in Quebec's Civil Code. The apparent newness is compounded by its mandatory character as the centrepiece of a new matrimonial public order in modern family law. Newness turns to affront for traditionalists irked by the legislature's apparently carefree manipulation of the time-honoured conceptual vocabulary of the Civil law of property : a « patrimony » that is nothing of the sort, a « partition » in the absence of true indivision — even the usual basis for titularity between persons and property seems bent out of shape by the text of the Code⁶. The family patrimony has generally been seen as a new, atraditional and, in many circles, bad idea.

This essay seeks to reevaluate the origins of the family patrimony by challenging the idea that what was introduced in 1989 was new law. There is certainly a closeness between the Common law statutory regimes for the division of family assets and the family patrimony⁷, but the connections should not be overstated : Equity and its statutory cousins are not the source of the family patrimony, they merely provided the means for expressing, in the prose of positive law, a legal idea already present in Quebec's own *droit commun*. The family patrimony is not simply a statutory trust borrowed maladroitly from Ontario, nor does it reflect a moral postulate that, prior to 1989, had no legal status. Scholars are right in suggesting that the new institution has no obvious link to existing structures in the positive law of Quebec matrimonial property. But in dismissing the family patrimony as a foreign legal idea, some have overestimated its status as a legal transplant and underestimated its local character.

It is possible, in advance of sociological study, to suggest that the roots of the family patrimony can be traced to customary norms already present in the Quebec legal order at the time of its enactment. Notwithstanding the

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5. ASSEMBLÉE NATIONALE, *Journal des débats* (8 June 1989) p. 6490 (per Hon. M. GAGNON-TREMBLAY). By connecting the family patrimony to legislative schemes such as the Ontario *Family Law Reform Act*, the Minister for the Status of Women allied the new rules with what is often described as a « statutory constructive trust » for marriage in Common law Canada.
 6. This latter point is exemplified by the difficulty in characterizing the interest of the non-owner spouse in the mass of the family patrimony prior to the end of marriage, especially given the terms of art. 421 C.C., as discussed *infra*.
 7. For an argument that the Common law legislative experience may serve as a useful guide for understanding the family patrimony see N. KASIRER, « *Couvrez cette communauté que je ne saurais voir* : Equity and Fault in the Division of Quebec's Family Patrimony », (1994) 25 *R.G.D.* 569, 575-583, 586-589.

terms of a marriage contract or the rules of a chosen matrimonial regime, married life may have brought with it, prior to 1989, the establishment of a family fund of property—a «communauté taisible⁸», to borrow a term from the *très ancien droit*—according to which each spouse had a legal entitlement to a share of notionally family property. Where riches are accumulated during the period of *vie commune* that marriage is said to embody, rules of everyday law may require the spouses to share that property without regard as to which of them has formal title thereto. Instead of looking to the textual exposition of matrimonial law in the civil codes as a point of reference for the family patrimony, one might better understand the new institution against the backdrop of a long-standing informal tradition among Quebec spouses for sharing the financial ups and downs of marriage. This communitarian sense—sometimes described as an *esprit communautaire*—may itself reflect a customary norm, obscured doctrinally by a modern disinclination among jurists to look beyond state-made law and its adjuncts as sources of the law of matrimonial property.

From this perspective, the apparent revolution in the law of marriage of 1989 takes on a more benign aspect. The idea that spouses must share essential family property may not have been an impulsive legislative «diktat⁹», but rather the consecration of an existing practice so well-entrenched that it constituted a custom having legal status. Much of the law of family property can be traced to patterns of spousal behaviour which are themselves potent sources of private law and this may well be true for the family patrimony. Once the manner in which customary law complements the positive law of matrimonial regimes is sketched (1.), it becomes apparent that the claim to a share of the family patrimony is not, in the end, a break with tradition in Quebec's Civil law of family property (2.).

8. F. OLIVIER-MARTIN, *Histoire de la Coutume de la Prévôté et Vicomté de Paris*, t. II, fasc. I, Paris, Éd. Ernest Leroux, 1926, p. 149, noted the existence of a «communauté taisible [qui] ne porte que sur les meubles et les acquêts, c'est-à-dire les acquisitions faites pendant que dure la vie commune» arising spontaneously in the 13th century law of marriage.

9. The family patrimony was so described by J. PINEAU, «La protection des conjoints: conventions matrimoniales ou société à parts égales?», in *Conférences sur le nouveau Code civil du Québec: Actes des Journées louisianaises 1991*, Cowansville, Éditions Yvon Blais, 1992, 109, p. 122. Professor Pineau's compelling indictment of the family patrimony rested primarily on his objections to the imperative character of the reform.

1. Custom Obscured in the *patrimoine familial*

Do all spouses have a legal entitlement to one-half of the property accumulated by their partners during the time they both were contributing to the marriage as a common affective enterprise? Of course not, says the student of the civil codes, mindful that freedom of contract in marriage and freedom of willing are the traditional twin pillars of the law of family property in Quebec¹⁰, and have remained so even since the advent of the primary regime to promote economic equality in 1980¹¹. Positive law shied away from imposing an ethic of sharing property rights in marriage prior to 1989, preferring a contractual model for matrimonial regimes founded on choice, or presumed choice, as a basis for the pooling of the spouses' financial interests. Whether through « organized indivision » or a « deferred community », sharing has been a feature of marriage for those who « chose » to allow community of moveables and acquests or the partnership of acquests, as the case may be, to regulate their financial lives. But in the mainstream theory of matrimonial law such a pooling of assets and liabilities is optional¹². While the shared-property regimes have always enjoyed status of legislative model, they have never been more than gentle suggestions by the codes. Indeed prior to the enactment of the family patrimony, the idea that spouses were forced to share certain property appears, from the perspective of positive law, to stand *contra legem*. Historically, the law has always left spouses free to avoid sharing beyond the indivision that arose by accident or their own design by opting for separate property regimes¹³.

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10. Prior to modern reforms of family law, these pillars rested on former arts 1257-1259 and art. 831 *Civil Code of Lower Canada* (C.C.L.C.). The public order rules in the C.C.L.C. affecting property rights of the spouses concerned marital authority (see art. 1259 C.C.L.C., repealed by S.Q. 1964, c. 66) and thus, in principle, the *administration* of property rather than *title* thereto, which is our concern here.
 11. See art. 463 C.C.Q., enacted by S.Q. 1980, c. 39, and carried forward as art. 431 C.C. While the primary regime initially gave spouses powers over family property, notably the family residence and its contents, it shied away from establishing a veritable indivision or even a deferred common mass as between them. But see former arts 458 to 462 C.C.Q. (modified by S.Q. 1989, c. 55, at art. 429 C.C.), which allowed attribution of ownership in the residence and the furniture as a compensatory allowance.
 12. An exception to this was the effect of the rule of the immutability of the matrimonial regime: once spouses had adopted, for example, the « organized indivision » of community of property at the outset of marriage, that choice could not be changed thereafter by virtue of art. 1265 C.C.L.C., repealed by S.Q. 1969, c. 77.
 13. Typically favoured has been separation as to property (see today arts 485-487 C.C.). As in the past, where simple indivision arises in respect of private property of spouses separate as to property, they remain theoretically free to force partition at any time, subject to the general rules on partition and, as we will posit *infra*, the informal law imposing sharing during marital life.

But another, more measured view is possible. It may be that, prior to the legislative initiative of 1989, spouses considered certain property as forming a fund of family assets and liabilities — a *patrimoine familial* in a traditional sense of that expression¹⁴ — held by them together as a necessary consequence of their affective alliance. Preoccupied with a description of the complex body of rules that make up the enacted law of matrimonial property, scholars have not inquired as to whether such sharing, if it existed, was undertaken as a matter of law as much as simple love and affection. Yet fired as it may be by love and affection, where the instinct to share is both well-established and compelling, popular custom consecrates it as law, thereby transforming marriage into a juridical vehicle for the pooling of rights and obligations, notwithstanding the texts of the law of matrimonial property. Taking the measure of custom is not, of course, merely a matter of appearances: the classical theory of informal sources of law, even in its most optimistic expression¹⁵, typically requires that habit and force of habit be joined before popular custom is consecrated as law¹⁶. This said, if such patterns of behaviour between spouses did exist (1.1), and if spouses felt bound to adhere to them (1.2), there is reason to believe that mandatory sharing of property was a feature of matrimonial law prior to 1989.

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14. The turn of phrase *patrimoine familial* has a long-standing currency in the French legal tradition, and is occasionally encountered in Quebec literature: see, e.g., É. COLAS, « Vers une meilleure protection du patrimoine familial », (1968) 3 *R.J.T.* 87, *passim*. Note however that the expression has had, along with its rough English-language equivalent « family property », a shifting meaning, referring variously to common property in marriage, the legitim and its cousins, rules on intestate succession giving blood relatives a better claim than relatives by alliance, patterns of will-making promoting primogeniture or the family blood-line over the surviving spouse, anomalous successions and more. What I call « family property » in this essay is thus a subset of a broader category which one might also style as « marital property ».
 15. For two prominent and enthusiastic accounts of the role of custom as a source of law by Quebecers, see R.A. MACDONALD, « Pour la reconnaissance d'une normativité implicite et inférentielle », *Sociologie et sociétés*, vol. 18, 1986, p. 47, building on ideas of Lon Fuller, and J.-G. BELLEY, « Conflit social et pluralisme juridique en sociologie du droit », unpubl. doctoral thesis, Paris, Université de Paris II, 1977, pp. 461 s., who developed the thinking of Jean Carbonnier. Both make compelling cases for the relevance of *lex non scripta* in the Quebec legal order.
 16. For a classical definition, see K.N. LLEWELLYN and E.A. HOEBEL, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence*, Norman, University of Oklahoma Press, 1941, p. 22: « « custom » [...] is a fused, confused word suggesting at once a very general practice and a felt sense of rightness ». For a parallel definition by a French civilian, cast imaginatively in terms of the « conscience juridique spontanée », see J.-L. SOURIOUX, *Introduction au droit*, 2nd ed., Paris, PUF, 1990, para. 32.

1.1 Practice as Basis of Popular Custom for Treating Marriage as a Joint Economic Endeavour

Informal law is generally said to rest on observable fact. Thus in order to establish the so-called material element of a custom for sharing property in marriage, one must unearth supporting evidence of a pattern of behaviour well-anchored in both time and space¹⁷. Few would offer that the « what's-mine-is-yours » ethic as a precise description of how all spouses treat property in marriage, but then again few would argue that established practice does not, to some extent, follow this idea. While no systematic sociological study has yet been undertaken, and since love and trust discourage all but the most cynical spouses from keeping accounts, precise research on practice is difficult. The presentation that follows will be impressionistic, but there are scattered signs that spousal behaviour in respect of their property, at least in some quarters, reflects a legal idea that marriage is a joint economic endeavour rooted in the sharing of essential matrimonial property.

Long before 1989, sharing was, of course, celebrated by the legislature as a central value in marriage on the basis of the content of the applicable legal matrimonial regimes. Yet it is not the existence of the regimes of the community of moveables and acquets and the partnership of acquets that is, for present purposes, of primary consequence, but instead the extent to which spouses adhered to these various legislative models for sharing. Such adherence may be viewed, from the perspective of the search for signs of informal law, as practice that spouses shared wealth in marriage as a matter of observable fact. The conventional view is that by sharing property, these spouses were following the dictates of the legal regime. But this practice may also be viewed as rooted in an independent customary norm. Practice may mimic, follow or buttress rules of formal law that promote the sharing of property in marriage. But it may also lead by example or stand in defiance of the legislated order. Practice thus completes the normative picture given by formal law and, perhaps most importantly, may stand in apparent contradiction with it.

17. « Well-anchored » is meant here to suggest of a *definite character* rather than *timeless*. The latter measure is sometimes required by those who admit the category of custom only to set it up as a straw-man. For a compelling argument which shows openness to instant custom, including examples drawn from the family context, see L. FULLER, « Human Interaction and the Law », in K.I. WINSTON (ed.), *The Principles of Social Order, Selected Essays of Lon Fuller*, Durham, Duke University Press, 1981, 211 esp. pp. 266 s.

The communitarian sense inherent in the rules associated with the legal regimes is, as many have pointed out, one of the defining features of Quebec matrimonial law¹⁸. Both community of property and the partnership of acquests rely heavily on the idea that property garnered by the spouses should be shared at dissolution insofar as this property is allied with what is described, in today's parlance, as married life as an economic partnership. A bias in favour of sharing assets and liabilities, or the value thereof, connected with on-going married life is arguably the fundamental orientation of both of Quebec's legal regimes. Beyond the rules in both regimes that characterize income earned by either spouses during the marriage as susceptible of partition or division, as the case may be¹⁹, telling signs of the shared-property stamp include, for community of property, the characterization of « reserved property » of married women as common²⁰, the similar treatment of « joint acquests²¹ », and, for the partnership of acquests, the legislative decision to characterize income derived from inherited property as acquests²², the presumption of acquests²³ and that of

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18. D. BURMAN and J. PINEAU, *Le « patrimoine familial » (projet de loi 146)*, Montreal, Éditions Thémis, 1991, p. 2, wrote of the « association des personnes et des biens, conception traditionnelle du Code civil » which, they argued, was forgotten in 1989 at the time of the enactment of the family patrimony.
 19. For the partnership of acquests, see, e.g., arts 448, 449 and the exceptions at 450 C.C. which include and exclude property from the mass of acquests based on the ideal of marriage as an economic partnership. Note that art. 466 provides that the court may declare the effects of dissolution retroactive to the date the spouses ceased to live together, thus consecrating a practice-based — as opposed to the technically defined — end to the partnership. For community of property, see, e.g., former arts 1272 and 1280 C.C.L.C.
 20. See former art. 1425a C.C.L.C., enacted by S.Q. 1930-31, c. 101. The original proposal for reserved property, tabled in the Legislative Assembly in 1928, departed from its French model and would have characterized such property as private. The law reform commission studying proposals to amend community of property reversed this on the view that the property was no less acquest property simply because it was earned by the married woman: see COMMISSION DES DROITS CIVILS DE LA FEMME, « Droits civils de la femme, Deuxième rapport » [Hon. Charles-Édouard Dorion, chair], (1930) 32 *R. du N.* 321, 348-352.
 21. Former art. 1273 C.C.L.C. created a presumption that immovables and, after S.Q. 1969, c. 77, all property be deemed common unless proven otherwise.
 22. See art. 450 (2) C.C. The original proposal for the partnership of acquests tabled by the Civil Code Revision Office would have had this property characterized as private but the recommendation was changed in order to reinforce the communitarian aspect of the regime: see CIVIL CODE REVISION OFFICE, *Report on Matrimonial Regimes*, Montreal, Éditeur officiel, 1968, pp. 40-41.
 23. Art. 459 C.C., which establishes a rebuttable presumption that property is presumed to constitute an acquest unless proven otherwise.

indivision²⁴. There is, as one expert has put it, a « sens communautaire²⁵ » inherent in the law of matrimonial regimes, premised upon what another scholar has aptly called « le ménage comme communauté économique²⁶ ». Even the regime of separation as to property chooses to err of the side of sharing²⁷ thereby reflecting, no doubt, the legislature's idea that marriage and sharing are, at some level, unavoidable²⁸.

But the communitarian orientation inherent in the civil codes does not in itself constitute the basis of practice, even where the legislature and others insist that the very vocation of the suppletive legal regime is to provide a model for spousal behaviour²⁹. It is certainly true that the Quebec legislature, through its official organs, has never been shy to express its hope that the legal regime will find favour with spouses³⁰. Yet practice depends on more than aspiration; instead, practice is evidenced, at least in part, by spousal attitudes to the shared-property models offered up by the general law. Where spouses adhere to the legal regime in great numbers, this decision may reflect a practice consonant with the inclination to share property in marriage, assuming — perhaps wishfully — a measure of informed consent to matrimonial conventions. This behaviour, once isolated, may demonstrate the material basis of an independent customary norm for sharing in marriage.

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24. Art. 460 C.C. provides that property that a spouse cannot prove to be either exclusively private or acquests is presumed to be held jointly, in undivided co-ownership.
 25. E. CAPARROS, *Les lignes de force de l'évolution du droit des régimes matrimoniaux en droit comparé et québécois*, Montreal, PUM, 1975, para. 3.
 26. P. CIOTOLA, « Les conventions matrimoniales au lendemain de la réforme des régimes matrimoniaux », (1976) 1 *C.P. du N.* 157, para. 30, used this image to describe the classification of property under the partnership of acquests.
 27. See the presumption of indivision created by art. 487 C.C. In France, it has recently been argued that courts should fix on property as « value » instead of « title », especially by manipulating this presumption of indivision, in order to recognize the « equities » in separation of property: see M. STORCK, « Le titre ou la finance ? Le droit de propriété dans les régimes de séparation de biens », D.1994.I.Chr.8.61, 61-62.
 28. See, e.g., the « Explanatory Notes » to the legislation enacting the partnership of acquests (reproducing a report of the Civil Code Revision Office): « the union created by marriage necessarily gives rise to a certain mingling of the material interests of husband and wife » QUEBEC, *Bill 10, An Act respecting matrimonial regimes. First Reading*, Quebec City, Éditeur officiel, 1969, p. I.
 29. This is no doubt an aspiration for a regime designed to apply to all spouses who do not expressly choose otherwise: see E. CAPARROS, *Les régimes matrimoniaux au Québec*, 3rd ed., Montreal, Wilson & Lafleur, 1988, para. 137.
 30. See, e.g., QUEBEC, *op. cit.*, note 28, « Explanatory Notes », p. III: « [a]s a matter of sound legislative policy, the legal regime must not only respect a certain ideal, it must also suit the majority ».

Historically, statistics on the choice of matrimonial regimes have been unreliable: the central data bank of such information was only established in 1969³¹. Certainly there is evidence of a long-standing sense, expressed in legal literature, that spouses *should* adopt the applicable legal regime, very often advanced for reasons of conservative political ideology according to which community of property represented the ideal familial division of labour³². Recent data, more reliably gathered, shows a relative increase in marriages subject to the partnership of acquests since its inception in 1970³³. Some have seen this as a sign that Quebeckers have accepted the so-called *esprit communautaire* as appropriately applicable to them³⁴. This said, the number of marriages has decreased in recent years, compensated in part by a higher incidence of cohabitation outside marriage. From the perspective of the law in the books, these unions proceed in a manner analogous to separation of property, thus apparently undercutting the import of the statistics favouring partnership of acquests³⁵.

Assuming practice does confirm a measure of social acceptance of the legal regime as the appropriate device for property relations in marriage, this practice would have to be carefully analyzed. Patterns of behaviour would be immensely sensitive to historical fact and there are good reasons to think that they varied widely according to criteria that, once identified, would give meaningful shape to the normative character of financial decisions in marriage. It has been plausibly suggested that socio-economic influences have been relevant to the decision to adopt separate as to property³⁶, that the rural-urban divide provides a basis for analyzing contractual

31. *An Act respecting the central register of matrimonial regimes*, S.Q. 1969, c. 78. For an early call on the urgency to establish such a data bank in order to facilitate commercial transactions, see [J.-J. LEFEBVRE], «Chez nous et ailleurs: Banque d'états matrimoniaux», (1949) 52 *R. du N.* 165.

32. A strongly-worded presentation of this thesis is found in the report of the Quebec commission reviewing matrimonial law as a prior to the enactment of S.Q. 1930-31, c. 101: see COMMISSION DES DROITS CIVILS DE LA FEMME, *op. cit.*, note 20, pp. 311-314. Law reformers made a rather unscientific but not necessarily implausible claim that community of property was applicable to at least 80 % of Quebec marriages at the time.

33. See A. COSSETTE, «Statistiques en matière du mariage», (1991) 93 *R. du N.* 536, 538.

34. See J.-P. SENÉCAL, «La réforme québécoise instituant le patrimoine familial: la recherche d'un nouvel équilibre», in *Conférences sur le nouveau Code civil du Québec: Actes des Journées louisianaises 1991*, *op. cit.*, note 9, p. 145.

35. It must be noted, however, that there is a widespread insensitivity in legal literature to the informal law which regulates so-called *de facto* marriages: see *infra*.

36. Historians B. BRADBURY *et al.*, «Property and Marriage: The Law and Practice in Early Nineteenth-Century Montreal», *Histoire sociale/Social History*, vol. 26, 1993, pp. 10-14, have suggested that early 19th century marriage contracts reveal that the marriage contract was an instrument of the bourgeois propertied classes.

behaviour³⁷ and, more impressionistically, that cultural attitudes to property can be measured by the choice of regime³⁸.

Yet there are further signs, again of imperfect probative weight, that spouses are following something other than the dictates of enacted law in adhering to the legal regime. Some have rooted, in occasionally florid terms, community of property in a « natural law » which has a separate existence from the text of the Code³⁹. At different times in Quebec's legal history, the normative force of the legal regime has been situated on a plane other than that of state-made injunction in other terms⁴⁰, often coloured by personal ideological projects⁴¹. It may be that the communitarian sense that experts so often allude to as the core of the rules of the Code is in fact rooted outside of the official law in a customary norm⁴². French jurist Jean

37. One vivid if anecdotal account of the rural perspective is found in C.-É. GAGNON, *Mémoires d'un notaire de campagne*, Saint-Laurent, Éditions du Septentrion, 1990, pp. 89-91.

38. For a colourful though slightly suspect explanation of how English-speaking and French-speaking couples approach the signing of the marriage contract differently, see H. TURGEON, « Matrimonial Property Law in the Province of Quebec », in W. FRIEDMANN (ed.), *Matrimonial Property Law*, t. 2, Toronto, University of Toronto Press, 1955, pp. 144 s.

39. See, e.g., P. AZARD, « Introduction », in R. COMTOIS, *Traité théorique et pratique de la communauté de biens*, Montreal, Rec. dr. et juris., 1964, p. 9, who wrote: « lorsque l'on examine à fond la question, aussi bien sous l'angle du droit que de la morale, on serait tenté de suggérer que le principe d'une certaine mise en commun des biens des époux fait partie du droit naturel, en ce sens qu'il découle de la nature même et des fins de l'institution du mariage ».

40. See, e.g., P. PAQUETTE, « Notre régime de séparation de biens », (1921) 23 *R. du N.* 121, 124: « C'est pourtant un principe élémentaire de justice que les biens acquis et gagnés par les époux, vivant ensemble, devraient appartenir également à l'un et à l'autre. Bien que travaillant chacun dans une sphère différente, ils sont cependant deux collaborateurs d'une seule et même œuvre : la fondation de la famille. » For a variation, see R. COMTOIS, *op. cit.*, note 39, para. 393-394.

41. For jurist M. GÉRIN-LAJOIE, *Sauvons nos lois françaises. La Communauté légale*, Montreal, Fédération nationale Saint-Jean-Baptiste, 1927, pp. 4-5, community of property was based on an ancestral conception of marriage for French Canada, bound up in Quebec's « pensée française » and constituted part of its « patrimoine national ». Others linked its persuasive force to a brand of Roman Catholic thinking: e.g., C.-É. DORION, « La philosophie du Code civil », (1925-26) 4 *R. du D.* 134, 144-145 and 201.

42. For an arch-conservative presentation of this thesis by a judge and matrimonial law reformer, see C.-É. DORION, « La communauté de biens : Pourquoi faut-il la maintenir dans notre Code? », (1928-29) 7 *R. du D.* 323, who argued that community of property was anchored in custom and had to be maintained because « [n]os gens connaissent les coutumes ; ils ignorent la loi » (p. 327). I am grateful to Sylvio Normand for this reference.

Carbonnier has written of the « persévérance de l'aspiration communautaire⁴³ » which, while consonant with some of the principles of the legal regime in France, seems in many respects stronger and more all-encompassing than the terms of the *Code civil*. In Quebec, leading experts Jean Pineau and Danielle Burman have spoken of the « mœurs québécoises » which embrace a variation of the continental attitude towards sharing of property⁴⁴. It may well be that the « aspiration » alluded to by Carbonnier and the « mœurs » spoken of by Pineau and Burman are not inherent in law's texts but instead in the people that feel them. In other words, the practices sensed may be rooted in a popular custom that, to a greater or lesser extent, is mimicked by the legal regimes.

This custom would be *secundum legem* — in conformity with made law — and may serve to prop up the legislative model where the legislature has accurately defined the parameters of the customary norm. The success of the legal regime at any given point in time, if measured in terms of its public appeal, would depend on how closely it fit with existing custom. Custom becomes, in the words of English jurist C.K. Allen, « the raw material of law⁴⁵ » ; it shapes official law, it leads it and, on occasion, custom is led by it. The text of the Civil Code, where it shadows existing custom, sits on the firm ground of what Lon Fuller described as the « interactional foundations of enacted law⁴⁶ » ; certainly there are many instances of Quebec matrimonial law reform where such an argument could be mounted compellingly⁴⁷. It may be that, wittingly or unwittingly, the makers of the formal law of matrimonial property have sought to reproduce existing attitudes and informal legal practices. To take an early example, this was no doubt the case at codification in respect of permissible changes to the

43. See J. CARBONNIER « Préface », in M.-P. CHAMPENOIS-MARMIER and M. FAUCHEUX, *Le mariage et l'argent*, Paris, PUF, 1981, p. 15, in which Carbonnier noted a survey which showed that many French couples believed that their financial relations were governed by what would amount to a « communauté universelle ».

44. See J. PINEAU and D. BURMAN, *Les effets du mariage*, Montreal, Éditions Thémis, 1984, p. 2.

45. C.K. ALLEN, *Law in the Making*, 6th ed., London, Oxford University Press, 1958, p. 62.

46. See L. FULLER, *loc. cit.*, note 17, 230.

47. Consider an obscure example. The rules relating to the conventional regime of the exclusion of community (former art. 1414 C.C.L.C. *et seq.*) were repealed, according to Hon. Claire Kirkland-Casgrain, Minister responsible for the major reform of 1964 (S.Q. 1964, c. 66), because it was « presque disparu » : QUEBEC, *La capacité juridique de la femme mariée dans le Québec* (Bill 16), by C. Kirkland-Casgrain, Quebec City, Office d'information et de publicité, 1964, p. 14.

marriage contract⁴⁸ and, more importantly, with the adoption of the community of moveables and acquests, if we allow ourselves the inference based on the delightfully ambiguous expression « the general laws and customs of the country » found in former art. 1260, para. 1, C.C.L.C.⁴⁹.

While the popularity of the partnership of acquests may indeed be explained by its overlap with a custom *secundum legem* which consecrates sharing to marriage, it is also possible to argue that the practice of sharing illustrates that formal and informal law have not always coincided completely. One fertile ground for testing this is to study the behaviour of spouses who do not adopt a shared-property regime. Do they share? If so, does the communitarian sense that they thereby express have a normative basis? It may be that sharing undertaken by spouses who are not « bound » to do so reposes on everyday norms that completes the sparse rules in the Code that make up the regime of separation as to property.

The first area for inquiry should be the marriage contract given that spouses who choose to depart from the legal regime have had to appear before a notary to consecrate the choice in authentic form. Again, systematic research on these valuable sociological sources has yet to be undertaken⁵⁰. But there is a long-standing appreciation, in legal literature, of perceived practice: where spouses adopt separation as to property, the husband has generally « compensated » his wife, by way of gifts in the marriage contract, for her decision to forego the sharing that would have been brought about by the legal matrimonial regime⁵¹. The practice has often been criticized. A spouse who works in the home, having no proprietary stake in « family » income by virtue of her matrimonial regime, often received far less by way of gift than she would have as a share of one-half of her husband's salary as

48. See *Fifth Report of the Commissioners Charged with the Codification of the Laws of Lower Canada*, Quebec City, George E. Desbarats, 1865, p. 201, where the abolition of the mutual donation of usufruct after marriage was proposed given that it was so rarely practised.

49. Repealed by S.Q. 1969, c. 77. The full text read as follows: « If no covenants have been made, or if the contrary has not been stipulated, the consorts are presumed to subject themselves to the general laws and customs of the country, and particularly to the legal community of property, and to the customary or legal dower in favor of the wife and of the children to be born of the marriage. » In French, the expression in my italics read « aux lois et coutumes générales du pays ».

50. Again, social historians have begun this work: see, e.g., H. DIONNE, *Les contrats de mariage à Québec (1790-1812)*, Ottawa, National Museum of Canada, 1980.

51. R. COMTOIS, *op. cit.*, note 39, para. 369. This is an inference that one may draw from standard forms for marriage contracts published by and for the notarial profession: see, by way of example, P. CIOTOLA, « Les donations par contrat de mariage », in CHAMBRE DES NOTAIRES, *Répertoire de droit: famille*, Montreal, SOQUJ, 1991, doc. 6.

acquest property⁵². But the sense that the marriage contract completes the matrimonial *statut* of spouses separate as to property by bringing a measure of sharing to the marriage is well-established for the period preceding the enactment of the family patrimony⁵³.

Practice here, if consecrated by customary law, reflects rules which are *praeter legem*, at least from the perspective of the few codal rules of separation of property. Research would have to be undertaken in the factors which bring about the variations in the content of marriage contracts of couples separate as to property in order to isolate practice as the material dimension of custom in a meaningful way. Moreover a parallel study of spouses subject to community of property regimes who nevertheless made marriage contracts would complete the picture, perhaps revealing signs of informal norms that reduce or alter the sharing established by the regime⁵⁴. Again, there are suggestions in the literature that differing patterns of contractual practice reflect the rural-urban divide⁵⁵, the social status of the couple⁵⁶, the alimentary role the gifts may be called on to play given the relative ages and fortunes of the spouses, and more. This is a rich avenue for research but it seems plain that the idea that separation of property carries with it no legal basis for sharing is an oversimplification.

Moreover, the content of the marriage contract is not only the result of spousal preference but also reflects the tenor of notarial practice. Notaries' standard forms, or their standard form advice, have no doubt been very

52. For a criticism of the effect of such practice as a substitute for partnership of acquests in which notarial habit is identified as culprit, see J. PINEAU, *loc. cit.*, note 9, 114 and 118.

53. As P. CIOTOLA, *loc. cit.*, note 26, para. 96, wrote in 1976, «le contrat de mariage doit assurer, par son contenu, un minimum de protection au foyer familial, notamment à l'épouse».

54. This suggestion is made in a remarkable book by a French jurist writing before socio-logical jurisprudence came to matrimonial law: C. SAUJOT, *La pénétration des idées séparatistes dans les régimes communautaires*, Paris, LGDJ, 1956, p. 45 s. («la volonté individuelle et l'augmentation des propres»).

55. Some of the richest historical literature has focussed on gifts made in notarial form generally: see G. BOUCHARD, «Les systèmes de transmission des avoirs familiaux et le cycle de la société rurale au Québec, du XVII^e au XX^e siècles», *Histoire sociale/Social History*, vol. 16, 1983, p. 35; and S. DÉPATIE, «La transmission du patrimoine dans les terroirs en expansion: un exemple canadien au XVIII^e siècle», *Revue d'histoire de l'Amérique française*, vol. 44, 1990, p. 171.

56. See A.M. STEWART and B. BRADBURY, «Marriage Contracts as a Source for Historians», in D. FYSON *et al.* (eds.), *Class, Gender and the Law in Eighteenth and Nineteenth Century Quebec: Sources and Perspectives*, Montreal, Montreal Business History Group mimeo., 1993, p. 33.

influential in the choice of matrimonial regime and particularly on the content of the *pacte de famille*. When patterns of advice take shape and are followed, it is appropriate to think of the notary as having a hand in law-making⁵⁷. Where notaries consistently advise clients to make gifts in the marriage contract, to take one example, or where the *parfait notaire*⁵⁸ suggests that contracts establishing separation as to property be accompanied by a conventional appointment of the spouse as heir, the sharing that results is as much a result of systematized practice as it is of freedom of contract or of willing⁵⁹. In his brilliant study entitled *Recherches sur le rôle de la formule notariale dans le droit positif*, French jurist Jean-Louis Souriou signalled the richness of matrimonial law as a means of understanding the relationship between notarial practice and emergent customary norms⁶⁰. While notaries typically describe their own work in family law as facilitative rather than normative, the manner in which they speak of their sense of responsibility extending beyond the interests of the couple before them often betrays their own understanding of what a Belgian notary has described as « l'adaptation du droit patrimonial de la famille par la pratique notariale⁶¹ ». Quebec notaries have advised innovative and even aggressive use of the marriage contract to achieve not just desired effects for individual clients, but with a sense that they play a role in directing social ordering in respect of matrimonial

57. See R.A. MACDONALD, « Images du notariat, imagination du notaire », (1994) 1 C. P. du N. 1, para. 113-119 and 123-131, for a brilliant consideration of the « normative » role of these practitioners. For a rare self-conscious expression of this phenomenon by a notary working in matrimonial law, see M. LÉGARÉ, « Réflexions sur les régimes matrimoniaux », (1975) 77 R. du N. 575, 583.

58. This term is used to designate books of standard forms for notaries. For an example of gift giving as standard-form advice, see S. BINETTE, « Le contrat de mariage depuis le nouveau Code civil du Québec », (1981) 1 C.P. du N. 107, para. 25, 31 and 37.

59. See, e.g., notary F. COULOMBE's defence of separation as to property, « De nos régimes matrimoniaux », (1921) 23 R. du N. 161, 165, on the basis that « [l]es notaires de la campagne savent que sur cent testaments [...] qu'ils reçoivent, quatre-vingt-dix-neuf, quelquefois cent, sont en « faveur du conjoint survivant ». More recently, see R. COMTOIS, « Le rôle du praticien dans l'élaboration des règles de droit », (1974) 77 R. du N. 151, 160, and, for a theoretical overview, see M. OUELLETTE, « Rapport canadien : le rôle de la pratique dans la formation du droit », in *Travaux de l'Association Henri-Capitant*, t. XXXIV, Paris, Economica, 1985, 63, pp. 64-65, 72-73.

60. See J.-L. SOURIOUX, *Recherches sur le rôle de la formule notariale dans le droit positif*, Paris, Lib. du journal des notaires et des avocats, 1967, para. 125, in which the author noted that the « droit des gens mariés de l'ancienne France [...] illustre particulièrement les relations entre la formule notariale et la règle coutumière ».

61. M. GRÉGOIRE, « L'adaptation du droit patrimonial de la famille par la pratique notariale », in *Famille, Droit et changement social dans les sociétés contemporaines: Travaux des VIII^e Journées Jean Dabin*, Brussels, Bruylant, 1978, p. 296. A similar point is made for Quebec by J. AUGER, « Une formule pas comme les autres », (1974) 76 R. du N. 407, 413.

property⁶², most recently from the perspective of « preventive law⁶³ ». Research should fix on notarial forms and notarial records as a means of teasing out evidence of the material basis of a custom for sharing in marriage⁶⁴.

But it may be that the practice of sharing is invisible not only to the Civil Code, but also to the formal institutions associated most readily with the matrimonial *statut*, including the marriage contract. Do spouses share when the terms of both their matrimonial regime and their marriage contract do not require it? Once more, the situation of spouses separate as to property provides a most useful testing ground: do they share and, if so, is this sharing a legal phenomenon? Here again, the difficulties associated with documenting the practice become even more daunting. Yet even in the absence of sociological data, there is a nagging certainty among the closest observers of matrimonial law that the strictures of formal law cannot account for all of the spouses' behaviour in respect of their finances. French jurists have observed what has been called — positivistically — a *de facto* community of property practised during marriage by spouses who are separate as to property. « Une communauté de fait s'introduit presque toujours, entre eux », wrote René Savatier in respect of spouses separate as to property, « sous le couvert de leur régime⁶⁵ ». Quebec experts have remarked upon the same phenomenon, and did so especially vigourously through the late 1960s as separation as to property was adopted as an alternative to the increasingly dysfunctional legal regime of community of property⁶⁶. John Brierley described the « paradox » of separation in that « spouses will, as a matter of fact, inevitably, to some degree tend to practise

62. See, e.g., the proposals of notary A. ROY, « Les contrats de mariage innovateurs », unpubl. manuscript presented at the « Law and You Seminar », Montreal, Faculty of Law, McGill University, 31 March 1995.

63. See A. ROY, « Les relations entre conjoints mariés ou unis de fait dans une perspective de droit préventif », unpubl. LL.M. thesis, Montreal, Université de Montréal, 1995, pp. 10-17, 41-47 and 105-107.

64. Again social historians of law have blazed a small trail: see esp. J. LELIÈVRE, *La pratique des contrats de mariage au Châtelet de Paris de 1769 à 1804*, Paris, Éditions Cujas, 1959.

65. R. SAVATIER, « Sociologie et droit de la famille », in *Droit, économie et sociologie: Travaux du VI^{ème} colloque des Facultés de droit et des sciences économiques de Toulouse*, Paris, Dalloz, 1959, p. 97.

66. See, e.g., R. COMTOIS, « Pourquoi la société d'acquêts? », (1967) 27 *R. du B.* 602, 611; and C. CHARRON, « La séparation de biens comme régime légal? Un essai de bilan », (1972) 74 *R. du N.* 307, 317, 319, 323, 326.

a modified form of community⁶⁷ ». The reference is not to a mass of property held in indivision by reason of the choice of the spouses or as a consequence of an evidentiary rule where spouses find themselves disinclined to keep accounts⁶⁸, but instead may be seen as the effect of a norm that stands outside the casings of enacted law.

By adopting an understanding of law that encompasses informal expressions of normativity, the *de facto* community of spouses in separation must be entirely rethought. Indeed, the term used to describe the phenomenon is a hopeless misnomer: this *de facto* community is eminently *de jure*, albeit a common mass of the *lex non scripta*. This practice of pooling resources, notwithstanding the invitation of the matrimonial regime to do otherwise, is the material dimension of a customary norm that brings sharing to marriage, even to those spouses who are separate as to property. Custom introduces a norm that is *praeter legem* in that it completes the patrimonial situation of the spouses as revealed by their matrimonial regime and their marriage contract.

Here are some of the scattered signs that would suggest that the Civil Code cannot in itself account for the whole of the behaviour of the spouses in respect of their property. Indeed, the search for signs of informal law of family property, where confined to the resources of a law library, is likely to uncover nothing more reliable than scholarly hunches. « La coutume ne peut être que « gestuelle »⁶⁹ », as a leading expert has written; it thus most likely lives beyond the books, electronic or otherwise, that lawyers know best. And as long as law's literature remains preoccupied with accounts of the *lex scripta*, we are rather more likely to discover evidence of the material dimension of everyday law in other texts, surveys, songs, films and the like which depict family life in Quebec⁷⁰.

67. J.E.C. BRIERLEY, « Husband and Wife in the Law of Quebec: A 1970 Conspectus », in D. MENDES DA COSTA (ed.), *Studies in Canadian Family Law*, vol. II, Toronto, Butterworths, 1972, 795, pp. 829-830.

68. Undivided co-ownership may arise between the spouses as a consequence of the matrimonial regime in two discrete instances: first, by presumption, where the spouses are unable to establish an exclusive right of ownership over property that is owned by one or another of them (art. 486 C.C.); and, second, where indivision arises by contract, succession, judgment or otherwise by operation of law between them (art. 485 C.C., when read with art. 1012 C.C.).

69. See J. VANDERLINDEN, « Contribution en forme de mascaret à une théorie des sources du droit au départ d'une source délicieuse », (1995) *R.T.D.C.* 69, 71 and 74.

70. For one such sign, see « La ballade du renvoi (contrat de mariage) »:

« Les époux sont séparés ...
 Suivant que le permet le code ... »
 — « Pardon, notaire, le curé »

But even the law library contains enough evidence to suggest that there is an alternative to the conclusion so regularly arrived at that love and trust invite spouses to behave irrationally as legal actors ; or noting that some behaviour is best accounted for as a matter of « fact » rather than of « law » ; or still again that rogue conduct can be explained away on the strength of a fine distinctions between « law » and « morality » or « droit » and « non-droit ». The kind of studies that seem obvious to social historians of family property⁷¹ must be undertaken more systematically by lawyers to upset this prejudice⁷². In advance of this work, it does seem possible that an alternative vision of the patrimonial relations between the spouses can be brought about by expanding the compass of matrimonial law beyond the usual texts and inquire whether there is, in what historian E.P. Thompson has called « ambience⁷³ » of ordinary living, a normative phenomenon. It is when the practice of sharing is coupled with a sense, among those engaged therein, that they are obliged to do so that practice is transformed — by custom — from « fact » into « law ».

1.2 *Opinio juris* Requiring Spouses to Share Family Property

Custom is more than habit ; it is also a belief in the force of habit. It is not enough to ask whether spouses share property in marriage when the texts would suggest that they are free to do otherwise. One must examine whether they do so out of a sense of « conviction⁷⁴ », consciously or unconsciously, and locating this conviction outside of the black-letter universe is

N'aime pas beaucoup cette mode ;
Rien qu'un lit ! » — « Hé ! c'est un oubli ... »
(Quel est le chat qui m'égratigne ?)

From (notary) G. VALOIS, *Minutes retrouvées*, Montreal, Fides, 1953, p. 167.

71. See, e.g., G. POSTOLEC, « La reproduction sociale à Neuville au XVIII^e siècle : l'apport foncier au mariage », in R. BONNAIN, G. BOUCHARD and J. ROY (eds.), *Transmettre, hériter, succéder : la reproduction familiale en milieu rural France-Québec, XVIII^e-XX^e siècle*, Lyons, Presses universitaires de Lyon, 1992, p. 43, and, by a legal historian, J. VANDERLINDEN, « Contrats de mariage à Port-Royal au début du XVIII^e siècle », unpubl. manus., Moncton, Université de Moncton, 1995.
72. This work has been begun elsewhere in Canada. See, for New Brunswick, D. POIRIER and L. CASTONGUAY, « Formal vs Real Equality in Property Division on Marriage Breakdown: An Empirical Study », (1994) 11 *Can. Fam. Law Q.* 71.
73. E.P. THOMPSON, *Customs in Common*, New York, New Press, 1991, p. 3 and in chap. 3, *passim*. Thompson also used the term *mentalité* to the same end.
74. J. CARBONNIER, *Droit civil. Introduction*, 17^e éd., Paris, PUF, 1988, para. 25, used this term in his account of custom. The psychological dimension of custom is explained in M. TROPER, « Du fondement de la coutume à la coutume comme fondement », (1986) 3 *Droits* 11.

the task of the jurist who seeks to document everyday law. This phenomenon is generally described as the psychological component of custom — what Jean Carbonnier has depicted as the « sentiment de l'obligatoire » in his work on the emergence of customary law⁷⁵. The inquiry as to the existence of *opinio juris* also provides the principal opportunity for denying the obligatory character of custom for sceptics of the theory of informal law. Often it is argued that the belief in law is simply not present. More often still, behaviour is characterized as rooted in a belief in something less « binding » than law, styled variously as morality, goodness, charity, social convention, usage, mere fact and the like⁷⁶. Again the rules of positive law relating to separation of property pose the most formidable challenge to the customary lawyer. A husband and wife who are entitled to individual enjoyment and free disposal of all their property — at least if we take the Civil Code at its word — may decide to pool their resources anyway. But do they do so because they sense they have no choice in the matter ?

In the family property's great tradition of legal positivism, lawyers have been dismissive of this kind practice as more sentimental than juridical. Yet the spouses' belief that they really must share property may be as much a matter of law as it is a matter of soft-heartedness. In fact, duties « imposed » by the heart and by the law may coincide completely in the theory of informal sources of matrimonial property. Certain cultural attitudes to married life may not simply encourage spouses to share property as a happy way to express how they feel about one another, but also provide them with a sense that they must do so as a matter of legal obligation.

A belief in law not consecrated by text is, at the best of times, difficult to discern for the outsider not under its sway. It is of course a feeling — Carbonnier's word *sentiment*⁷⁷ is especially right for custom in the family setting — something alive in the head and heart of the spouses obliged. And since the devil himself knoweth not the thought of man, the work of the legal

75. See J. CARBONNIER, « La genèse de l'obligation dans l'apparition de la coutume », in *Flexible droit*, 5^e éd., Paris, LGDJ, 1983, p. 99. The Latin maxim *opinio juris seu necessitatis* is generally encountered in the classical literature: H. ROLAND and L. BOYER, *Expressions latines du droit français*, 2nd ed., Lyons, L'Hermès, 1985, p. 330.

76. The classical exposition of the parameters of the debate are sketched by H.L.A. HART, « Positivism and the Separation of Law and Morals », (1958) 71 *Harv. L. Rev.* 593, and L. FULLER, « Positivism and Fidelity to Law — A Response to Professor Hart », (1958) 71 *Harv. L. Rev.* 630. For paper anticipating the Fuller thesis which draws on Civil law sources for family property, see M. RHEINSTEIN, « What Should be the Relations of Morals to Law ? », (1952) 1 *J. Pub. L.* 287.

77. He further elucidated the notion of the « sentiment de la règle » in J. CARBONNIER « Sur le caractère primitif de la règle de droit », in *Mélanges en l'honneur de Paul Roubier*, t. 1, Paris, Dalloz et Sirey, 1961, pp. 116-121.

sociologist of documenting these feelings is especially difficult. No doubt this problem is more acutely felt in family matters, notably family finances, where values of privacy set up a great barrier to useful inquiry. Ironically, the *lex non scripta* of the family is obscured by the very love and trust that promote the sharing of property between spouses in the first place.

But above all things, the most formidable hurdle before the jurist seeking out signs of obligation that stands beyond the reach of the legislature is a lawyers' disease. Decried by champions of custom as a plague on the modern Civil law⁷⁸ and common law⁷⁹ houses, legal positivism seems to bring about, as its principal symptom, a measure of blindness to unwritten feelings about what law is⁸⁰. The exalted status of the written word in the French Civil law tradition—the *prestige du droit écrit*, as it is sometimes styled—apparently legitimizes the first-order place that positivism reserves for text in the lawyers' world of ideas⁸¹. Indeed, civilian or not, today's lawyers are the natural allies of *lex scripta* and, as if by conspiracy in support of the economic value of their monopoly on legal services, they discount the people's law as a matter of professional ethic. State-sponsored positivism dominates the world view of those of us charged with documenting the sources of the law of family property and, not surprisingly, those of us who make a living reading the law in books find that « la coutume blesse notre vanité⁸² ».

This predilection for formal law among lawyers notwithstanding, there is a nagging sense among experts in family law that a mysterious force in marriage obliges spouses to pool their resources. This force may reside in husbands' and wives' own understanding of their shared life as a legal idea. If the spouses' appreciation of the essence of their relationship is that in order to sustain the community of interests that marriage incarnates, they must contribute to one another's well being, this contribution may result in a conviction that the pursuit of their common life requires them to share property. This sentimental thought is conveyed in the language of the

78. J. CARBONNIER, *op. cit.*, note 74, para. 136, wrote of « le culte du texte de loi et de la légalité » as a driving force in the theory of sources of French law.

79. L. FULLER, *loc. cit.*, note 76, 660, denounced the lawyers' preoccupation with the « tinsel of legal form » as inhibiting a full understanding of law.

80. One expert in the theory of everyday law recently pointed out that legal education is often responsible for not developing jurists « capacity to observe »: W.O. WEYRAUCH, « Book Reviews: Legal Anthropology », (1994) 42 *Am. J. Comp. L.* 807.

81. For an example of this aspect of conventional civilian doctrine in a classical exposition, see G. RIPERT, *Le déclin du droit*, Paris, LGDJ, 1949, pp. 99 s, where a particular distaste for custom in conflict with enacted law is detailed.

82. É. LAMBERT, *Du contrat en faveur du tiers: droit coutumier contemporain*, Paris, Girard & Brière, 1893, p. vii.

French Civil law tradition as the *obligation de faire vie commune*, generally regarded as an imperative effect of marriage. The obligation to establish a « shared life » is sometimes awkwardly rendered in English civilian parlance as an « obligation to live together », as in art. 392 C.C., but it is, of course, at once more and less than mere cohabitation⁸³. As spouses who take marriage seriously no doubt understand better than their lawyers, the obligation of *vie commune* is part of the unspoken affective core of their relationship and, as a result, almost defies (wordy) definition. It is the consecration of the personal, physical, emotional, metaphysical—and financial—union of marriage⁸⁴, but not surprisingly judges and others, forgetting if necessary their own life experiences, typically reduce it to the banality of cohabitation. Very recently, the Civil Code has decided to evoke it, bashfully, along with the equally ephemeral duties of « succour and assistance », « fidelity » and « respect » that are said to characterize all marriages⁸⁵. Yet however difficult to define, these obligations may sustain the *opinio juris* for customary norms for family property.

Whatever the content of these duties beyond the expression of an aspiration, it is undoubted that consortium and the rest bring a sense that marriage necessarily imports some blending of patrimonial interests. The language traditionally used by scholars to give juridical colour to the financial dimension of *vie commune* is telling in this regard : for Pothier, it was the basis for community of property⁸⁶ ; for Batiffol, « la communauté de vie entraîne inévitablement une communauté — au sens générique — de biens et des intérêts⁸⁷ » ; Louis Baudouin said that married life triggers automatically « un certain mécanisme d'ordre pécuniaire auquel les époux se trouvent

83. While spouses who live up to the *obligation de faire vie commune* generally do live under the same roof, courts have occasionally noted that this is not the essence of the duty : see, e.g., *Dame Trudeau v. Ouellette*, [1972] C.S. 699.

84. See the proposed definition in P.-A. CRÉPEAU (ed.), et *Dictionnaire de droit privé* and the *Private Law Dictionary*, 3rd editions, Montreal, in preparation at the Quebec Research Centre of Private and Comparative Law, McGill University. The editors have, neologistically at least for the Civil Law, proposed the word « consortium » as the English-language equivalent of *vie commune*.

85. First added to the codal exposition of family law by S.Q. 1980, c. 39, this idea was accepted as a doctrinal reality long before : see, e.g., R.H.E. WALKER, « The Disintegrating Marriage », in *W.C.J. Meredith Lectures : Family Law*, Montreal, Wilson & Lafleur, 1965, 8 at 11 (styled « common life »).

86. POTHIER, *Traité de droit civil*, vol. 3, [1781], 497, cited with approval in *Sura v. M.N.R.*, [1960] Ex. C.R. 83 at 87.

87. H. BATIFFOL, « Existence et spécificité du droit de la famille », (1975) 20 *Arch. phil. dr.* 7, 10-11. The expression « communauté de vie » is current in French law to explain a legal idea similar to *vie commune* in the *Civil Code of Québec*.

soumis en fait⁸⁸ ». Accounting for the content of consortium is something that lawyers have traditionally shied away from, but even the Civil Code hints that it plays a more significant role in describing marriage as a relationship that shapes property rights than would a mere obligation to live together. It can be invoked, for example, as the date at which the court fixes the effects of the dissolution of the partnership of acquests⁸⁹ or for the purposes of the date at which the net value of the family patrimony is to be calculated⁹⁰. In each case, the legislature suggests that it is the existence of the *vie commune* to which marriage as a joint economic venture is allied.

One further way in which to gauge the impact of the obligation to pursue a common life upon the informal law of marriage is from the outside. As consortium is often said to be a property of both marriages and *de facto* marriages, one might expect to see signs of the juridical context of the common life fleshed out in the family property law of unmarried couples⁹¹. Scholars have often pointed to how so-called *de facto* unions can be instructive for the purpose of understanding marriage⁹² and this is especially true in respect of the informal law of matrimonial property given that the civil codes have left this aspect of cohabitation wholly in the hands of unwritten law⁹³. Often characterized as proceeding on a financial footing similar to the matrimonial regime of separation as to property, the *de facto* union is, like those marriages, subject to intense regulation despite the apparent absence of rules. Judges' sure sense, sometimes awkwardly expressed, that cohabitantes are wrapped up in a joint economic venture is a palpable acknowledgment that legislative text often fails to explain the finances of love relationships⁹⁴. There are, most assuredly, unseen rules inherent in the *de*

88. J.-L. BAUDOIN « À propos de la réforme des régimes matrimoniaux en droit québécois », (1969) 71 *R. du N.* 279, 279. Could Professor Baudouin's reference to the sharing that exists « en fait » be seen as one that existed based on informal law ?

89. Art. 466 C.C.

90. Art. 417, para. 2 C.C.

91. Legislative texts outside the civil codes speak more boldly to the obligation to share property in *de facto* unions, typically fixing on living « as husband and wife » (« vivant maritalement »). See, e.g., *An Act respecting income security*, R.S.Q. c. S-3.1.1, s. 2.

92. See P. MALAURIE, « Mariage et concubinage en droit français contemporain », (1975) 20 *Arch. phil. dr.* 17, 27-28.

93. A tip of this iceberg is to be gleaned from contractual and testamentary practices of *de facto* spouses. See, in respect of the former, J. SYLVESTRE, « Les accords entre concubins », (1981) 1 *C.P. du N.* 195.

94. Courts have generally relied in Quebec on devices from the law of obligations (such as unjust enrichment in *Droit de la famille — 359*, [1987] R.D.F. 156 (Sup. Ct.)), or commercial law (such as undeclared partnership in *Beaudoin-Daignault v. Richard*, [1984] 1 S.C.R. 2) for the juridical basis upon which sharing might be imposed.

facto union⁹⁵ which, like in marriage, reflect a sense that sharing is required by the shared life which drives the partnership.

Whether understood through the various hints given in the Civil Code and statutory law or the sparse literature treating consortium for unmarried persons, the notion of *vie commune* seems to carry with it an important patrimonial dimension. Insofar as the legislature has decided to leave this aspect of married life to the spouses' imagination, it may well be that their imagination has filled the gap with law. The conviction that both married and unmarried couples have that they must create a fund of family property to sustain their relationship materially quite likely has its locus in this imagined sense of what is at the core of this marriage. Others have remarked on the evanescent character of the legal idea of consortium⁹⁶, and it may be that informal law is best suited to expressing the binding character of this aspect of the law of family property⁹⁷. At the very least the legislature, which took it upon itself to give shape to this patrimonial side of the « common life » in 1989 with the enactment of the family patrimony, should be recognized for having given written shape to a Cheyenne way.

2. Custom Revealed in the Family Patrimony

Do articles 414 to 427 C.C. merely codify existing custom in respect of family property in marriage? If it is indeed true, as Otto Kahn-Freund wrote in 1953, that married life generates a « family fund between husband and wife that is ignored by legislation⁹⁸ », the enactment of the family patrimony in 1989 might well be seen as the text that fills that void. And if the family patrimony has carried forward into the realm of state-made law existing informal norms for sharing property in marriage, it should be seen as super-

95. This is evidenced by the development of the constructive trust as a remedy for unjust enrichment, in relationships tantamount to spousal, in Canada's « other » legal tradition. See, e.g., *Peter v. Beblow*, [1993] 1 S.C.R. 980.

96. G. BRIÈRE, « Réflexions à l'occasion d'une réforme », (1970) 73 *R. du N.* 55, 56, expressed this very well: « Ce n'est pas le mariage qui rend le droit commun inapte à régler les problèmes pécuniaires des époux, c'est leur vie commune. »

97. The inadequacy of formal law in this regard was explained recently by French notary J. CHARLIN, « Introduction », in *Couples et modernité: gestion et transmission du patrimoine (84ième Congrès des notaires de France)*, Paris, Litec, 1988, p. 13, in the following terms: « la loi ne sera jamais adaptée dans le détail aux besoins des personnes vivant en couple ».

98. O. KAHN-FREUND, « Inconsistencies and Injustices in the Law of Husband and Wife », (1953) 16 *Mod. L. Rev.* 34, 48. This family fund, observed by Kahn-Freund to be a « living reality », was alluded to in the context of a review of anglo-american and civilian sources of matrimonial property law.

imposed upon existing rules and thus as an enactment «*secundum custom*». On the other hand, if the family patrimony and informal law do not coincide, the new rules (or the old custom) may be viewed as completing or in conflict with the other normative form. The provisions of the Code should therefore be measured against the informal law of family property to determine to what extent the new basis in enacted law for treating marriage as a joint economic endeavour is, in fact, new law (2.1). Deciding whether the family patrimony piggy-backs onto a *patrimoine familial* that was already flourishing within the Quebec legal order as a matter of customary law poses the essential question of the law of family patrimony during marriage. Why do spouses share property (2.2)?

2.1 New Basis in Enacted Law for Treating Marriage as a Joint Economic Endeavour

There is little direct evidence that the rules adopted in 1989 constitute what legal anthropologists have called an «incorporating norm⁹⁹» whereby the state brings into formal law part or all of an existing custom¹⁰⁰. On the contrary, the legislature congratulated itself on enacting the family patrimony as a juridical invention, touting it as new law that would impose a partnership on all marriages in order to promote economic equality¹⁰¹. At one level this is no doubt true—as a public order injunction for married people to share the value of assets not held by them jointly in actual or deferred indivision, it is certainly quite unlike the positive law in force in 1989. While then existing mandatory rules also sought to underscore the nature of marriage as a joint economic endeavour, they did not in principle impose the sharing of property on spouses against their wishes. True, the provisions dealing with family residence have effectively required the spouses to share the enjoyment of the matrimonial home and its contents during marriage, but the rules do so by regulating administration as opposed

99. On «incorporating norms» with particular reference to aboriginal custom in Canada, see B.W. MORSE and G.R. WOODMAN, «Introductory Essay: The State's Options», in B.W. MORSE and G.R. WOODMAN (eds.), *Indigenous Law and the State*, Providence, R.I., Foris Publ., 1988, p. 11.

100. See, however, the «Explanatory Notes» to QUEBEC, *Bill 146. First Reading*, Quebec City, Éditeur officiel, 1989, enacted as S.Q., 1989, c. 55, where the object of the legislation establishing the family patrimony is described as follows: «to underline the character of marriage as a partnership». The choice of the word «underline» (in French, «de marquer») suggests the recognition of an existing a proprietary interest rather than the creation of a new one out of whole legislative cloth.

101. See ASSEMBLÉE NATIONALE, *Journal des débats* (8 June 1989) pp. 6486-6487 (per Hon. M. GAGNON-TREMBLAY).

to title to such property¹⁰². The compensatory allowance has provided a public order remedy for unjust enrichment during marriage since 1980, but there sharing does not proceed as a matter of right but depends on a proven and unrequited contribution¹⁰³.

None of this equivocation bedevils the family patrimony. These new rules at arts 414 to 426 treat marriage as a partnership in respect of the net value of certain property closely associated with the marriage when contemplated as a shared economic life. This is true for all marriages whether or not they are coloured by unjust enrichment and notwithstanding the effect of the matrimonial regime, or of the law of property generally, on the spouses' respective fortunes¹⁰⁴. In this sense, the principles embodying the family patrimony do seem very new. By including it as part of a matrimonial public order, the legislature announced that the new institution which imposes sharing in value of certain family property stands outside tradition as theretofore understood by positive law.

But the idea that sharing property is an inherent feature of marriage is not, of course, new at all. The family patrimony draws on the same values of commonality that have always sustained the shared-property matrimonial regimes of the civil codes¹⁰⁵. The cardinal ethic of the family patrimony is akin to that of community of property and partnership of acquests: certain rights and obligations, when allied with the marriage as a joint economic endeavour, are presumed to be « acquest » property, in the broadest sense of that term. The family patrimony should thus be shared, like the masses of acquest property in the shared-property regimes, given its notional status as family or, more precisely, marital property. Certainly in parliamentary commission, many experts argued that the proposed law should recognize the family character of certain property in the way that the spouses themselves did, both in respect of property to be included¹⁰⁶ and

102. See arts 400-413 C.C., enacted in substantially the same terms by S.Q. 1980, c. 39. Exceptionally, a court can make an order affecting title to the family residence and its contents at the end of marriage.

103. See art. 427 C.C. Moreover, the Code gives the remedy an uncertain place as against the so-called secondary regimes, which establish the manner and extent to which spouses share property, since the allowance is to be fixed « taking into account, in particular, the advantages of the matrimonial regime and the marriage contract ».

104. See arts 391 and 431 C.C., subject to the special remedy at art. 422.

105. These connections are canvassed in D. BURMAN and J. PINEAU, *op. cit.*, note 18, para. 2.

106. See, e.g., P. ISSALYS, « Observations présentées à la Commission des institutions de l'Assemblée nationale sur le document intitulé « Les droits économiques des conjoints » », unpubl., Quebec City, 1988, pp. 14-17, who argued forcefully (and successfully) in favour of the inclusion of certain pension rights in the family patrimony on this basis.

excluded¹⁰⁷ in the then mooted family patrimony. Acquest property has changed its meaning over time¹⁰⁸ but has always embodied a same reality: certain property should be shared—at least in value—based on a presumption that its acquisition results from the joint efforts of the partners in marriage. Unlike the compensatory allowance, for which contribution by a non-owner spouse must be established, articles 414 *et seq.* fix only on origin and the timing of acquisition of value, as is traditionally the case for acquest property. The designated property is excluded only where, by reason of provenance, it cannot be allied with the partnership; otherwise its net value is included in the mass to be divided as long as it was acquired during the shared life which characterizes marriage¹⁰⁹. By treating the assets in the family patrimony, at least in terms of value, as acquest property at the end of marriage, the family patrimony draws on the communitarian spirit said to be a time-honoured animating feature of Quebec matrimonial law.

Therein lies the paradox of the family patrimony as against tradition. While its mandatory character suggests it is a new legislative idea, the communitarian ethic at its core is by no means an invention for Quebec matrimonial law. The stand-off of new and old tends to fade away, however, as one expands the compass of matrimonial law beyond its usually acknowledged sources to include the informal law of family property. The net value of the family patrimony susceptible of partition should not merely be allied with the concept of acquest property as spoken to by the shared-property regimes of the Civil Codes, but also to the legal idea of acquests that transcends the usual rules, finding expression in spousal practice and their own sense of obligation.

We have seen that informal law embodies, like the family patrimony, a similar idea of marriage as a joint economic endeavour. Both custom and enactment justify, in the minds of the spouses who contemplate their marriage as an economic partnership, the sharing of property generated by their combined efforts notwithstanding their chosen matrimonial regime. The

107. See, *e.g.*, M. CASTELLI, «Mémoire sur les droits économiques des conjoints présenté à la Commission des institutions», unpubl., Quebec City, 1988, p. 3, who argued that successional property was rightly excluded from division since it was not a «bien familial».

108. See J.E.C. BRIERLEY and R.A. MACDONALD (eds.), *Quebec Civil Law: An Introduction to Quebec Private Law*, Toronto, Emond Montgomery Publications, 1993, para. 316, where the transition of «acquests» from the *ancien droit* to the partnership of acquests is sketched.

109. See the rules of calculation at arts 414-418 C.C. Thus, for example, successional property is excluded.

interesting feature that informal law shares with the family patrimony, as opposed to the matrimonial property rules set out elsewhere in the codes, is that couples do not opt in or opt out of the common mass by a visit to the notary. While informal law does not dictate the sharing of property in all marriages by necessity, it does seem to establish a mass of acquest property spontaneously as a result of the economic partnership inherent in a certain conception of consortium. In this sense, the communitarian values inherent in the family patrimony bears comparison with a parallel customary norm for sharing property in marriage. Thus by consecrating a modified concept of acquest property, the new rules echo both existing formal and informal regimes for the pooling of family assets by wife and husband.

Indeed the new legislative texts themselves, no doubt unwittingly, seem to hint at the alliance between the family patrimony and the *patrimoine familial* of everyday law. In fact the Civil Code's apparently novel device for a joint economic venture that brings sharing to all marriages, notwithstanding the effect of formal law on title to property, is cast in legislative language that sounds like a veritable definition of a family fund established by customary law: « Marriage entails the establishment of a family patrimony consisting of certain property of the spouses regardless of which of them holds a right of ownership in that property¹¹⁰. » Is the family patrimony, new as it is to positive law, a genuine juridical invention or merely the consecration of informal law's existing *patrimoine familial* ?

The turn of legislative phrase at article 414 is indeed an unusual one. It confirms that the legislature itself understood family patrimony to be at odds with positive law, and at the very least the texts confirm that the family patrimony serves as an antidote to the law in the books at the time of its enactment. Not only is the family patrimony a new legislative basis for sharing, it also purports to be corrective of misfortunes brought about by application of the ordinary rules of matrimonial law. The manner used to describe its intended scope — « certain property of the spouses regardless of which of them holds a right of ownership in that property » — can be seen as an injunction to recognize the familial character of certain property where enacted law does not. This, as we have seen, has been one of the functions of informal family property law. Indeed part of the message of articles 414 to 426, like that customary law, is that legislated law has gone awry — the vocation of the property in the mass is connected to marriage as a partnership, notwithstanding the manner in which formal title to the property is

110. Art. 414 C.C.

treated by the general law of property and by the spouses' matrimonial regime¹¹¹.

Does this mean that the new rules simply bring into the books a family fund heretofore extant in everyday law? If that were the case, one might have expected the new institution to establish a fund of family property on an on-going basis through the marriage rather than simply « in the event of separation from bed and board, or the dissolution or nullity of marriage », as art. 416 provides. Until now, we have assumed that if there is a family fund created by everyday law in which both spouses have an equal share, its establishment is not triggered by death or divorce but by the creation of the affective partnership itself. If marriage is a joint economic endeavour that justifies the pooling of certain assets in customary law, this sharing proceeds from the first day of the economic union, not from the last. The *communauté de fait*, or *communauté taise* or *communauté coutumière* — whatever one may choose to call this fund that is invisible to enacted law — must be a fund that the spouses create in order to run the marriage rather more than a pot established retrospectively to deal with the misfortune of break-up or death, like the Civil Code's family patrimony.

At first blush, then, the new institution seems to take shape at arm's length from any existing mass of family property arising as a matter of customary law. Despite the ambiguous language of art. 414 which suggests that « marriage », as opposed to marriage's end, entails the « establishment » of the fund, it is only at the financial equivalent of death or divorce that art. 416 provides that the spouses can share the net value of the mass of designated assets¹¹². Before that time, conventional wisdom has it that neither spouse has a right *in rem* in property held by the other, nor do either of them have a perfected personal right as creditor of their partner prior to the end of marriage¹¹³. Only at the end of the partnership does the non-owner spouse become the titular of a right, and then it is a mere claim; even though the court has the power to order « partition » by way of giving-in-payment, the transfer of property is viewed as attributive rather

111. This reading finds confirmation in the document proposing the family patrimony, presented for public consultation by the Ministers of Justice and for the Status of Women: H. MARX and M. GAGNON-TREMBLAY, « Les droits économiques des conjoints », unpubl., Sainte-Foy, Ministère de la Justice, 1988, pp. 9-10 and 16.

112. Nullity of marriage and separation as to bed and board are treated as triggering events in art. 416 C.C. on the unspoken theory that, like death and divorce, they represent an end to marriage as a partnership.

113. See *Droit de la famille* — 977, [1991] R.J.Q. 904, 909-910 (C.A.) (Baudouin J.).

than declaratory of ownership¹¹⁴. In this sense the family patrimony seems very unlike a *patrimoine familial* established by informal law which would give each spouse some kind of proprietary stake in its value as the property was acquired in pursuit of marriage as an on-going partnership. This would suggest that the family patrimony takes shape not only at odds with existing positive law of matrimonial property, but also at arm's length from custom.

But is it true that spouses have no proprietary claim — be it a principal or accessory real right, a personal right, or some variation on these categories — in the family patrimony prior to the triggering event? Upon closer examination, the texts in question come far closer to acknowledging some sort of «actual» interest in the designated property before the family partnership dissolves. In addition to the suggestion, at art. 414, that the mass is «established» at the outset of marriage, the technical make-up of the family patrimony seems to confirm the popular belief that an interest in family property does not turn on individual title. The rules for the calculation of the net value of the mass operate on a modified basis. Thus, article 415 includes the value of pension plan earnings amassed «during the marriage»; articles 417 and 418 fix on the value of property associated with the period between the beginning of the marriage and the designated end of the joint economic venture when the mass is evaluated for partition; and, importantly, article 417, para. 2 allows either spouse to petition the court to establish the value of the family property on the date the spouses ceased «living together¹¹⁵». These are, of course, mere rules of accounting, unlike their historical cousins in the law of community of property where spouses' undivided rights in the common mass rose and fell as the marriage flourished or floundered¹¹⁶. But while the rules for calculation of the share in the family patrimony do not, in themselves, create any recognizable patrimonial right for the spouses during the marriage, they do seem to acknowledge the reality that the claim takes shape as a gradual process, shadowing a popular belief in the on-going process of amassing a shared fund of family property.

More difficult to explain, for those who contend that the non-owner spouse has no rights relating to the family patrimony before the end of

114. *Ibid.* at 910 where the Court of Appeal gave this interpretation to art. 462.6 C.C.Q. (now art. 419, para. 2 C.C.). See, generally, M. DUCHESNE, «Les créanciers, le patrimoine familial et les autres dispositions du projet de loi 146», in SERVICE DE LA FORMATION PERMANENTE, BARREAU DU QUÉBEC, *Le partage du patrimoine familial et ses conséquences juridiques* (1990), Cowansville, Éditions Yvon Blais, 1990, p. 3-7.

115. The French version refers to the «date où les époux ont cessé de faire vie commune» which may or may not coincide with the end of cohabitation *stricto sensu*.

116. See former arts 1272 C.C.L.C. *et seq.* as interpreted in *Sura v. M.N.R.*, [1962] S.C.R. 65, 71-72.

marriage, is the remedy set forth at art. 421. Where property in the family patrimony has been alienated or misappropriated in the year preceding the end of the marriage as a joint economic endeavour, the court may order a compensatory payment to the non-owner spouse. On what possible basis can the non-owner make this claim? If it is in fact correct that he or she has no real right in the property prior to the event which provokes partition, then the owner spouse has merely dealt with property over which he or she had full powers of *abusus*, subject only to the underlying matrimonial regime. Yet even though the non-owner has no actual right in or in relation to that property — at least no real or personal right as those ideas are conventionally understood — a remedy is provided at art. 421. This reality may not be a real or personal right as conventionally understood but it is nonetheless a proprietary interest. Not unlike the actual right of the substitute in property owned by the institute in the law of substitutions¹¹⁷, greater than the expectancy of the heir prior to the opening of the succession¹¹⁸, here the Code seems to be alluding to a new species of matrimonial property. And this novelty may not be the only example in the provisions dealing with the family property where law's texts may have been stretched out of shape to accommodate an idea of informal law¹¹⁹. Could it be that the Code is acknowledging the reality understood by everyday law that the spouses in fact both have a stake in family property during the marriage?

If one takes law reformers at their word, there is little direct evidence that the addition of arts 414 *et seq.* amounts to a codification of customary law. But in a sense this is not surprising — most law reformers are state agents of some description, specializing in the made-law variety of law making. Their parlance is by virtual necessity benthamite whereby social ordering is best achieved by way of legislative enactment; it reflects, in the final analysis, a conception of law according to which what has been

117. While the institute is the «owner» of the substituted property before the opening of the substitution (art. 1233 C.C.), the substitute has an «eventual right» in the property substituted, which, at least on a reading of art. 1235 C.C., appears to be an actual right in his or her patrimony and not a mere expectation.

118. The combined effect of the principles of revocability of wills and freedom of willing means that a prospective heir (whether testate or intestate) has no actual right in property of the «succession» prior to the death of a person but rather a mere expectation. (While not a present real or personal right, the expectation may yet have some status as property in informal law if freedom of willing is limited by custom, notwithstanding the apparent absolute character of arts 703 to 706 C.C.)

119. As it may be the case, for example, where a spouse makes a successful claim under art. 422 C.C. where the owner spouse merely dealt with property during marriage as positive law would allow. A similar ambiguity arises where the court alters the valuation of the net value of the family property pursuant to art. 417, para. 2.

described here as « custom » or « informal law » is characterized as falling outside the state-driven legal universe, into a non-law realm of « usages », « sentiments », « attitudes » or, most often, « morals ». Yet if one reviews the history of matrimonial law reform with a view to correcting for the linguistic biases of state positivism, « les mœurs » — which law reformers always claim to take into account — might be thought of a code-word for everyday law¹²⁰.

One possible explanation of the failure of the family patrimony to rally support — beyond the explanation that the ideological distaste for interventionism in family finance provides — is the failure, when the new rules were first designed, to connect it with prevailing attitudes to family property sitting outside the bounds of enacted law. While the legislature did engage in active solicitation of opinions in respect of the original proposal as deposited in parliamentary commission, there is no evidence of comprehensive sociological study that might have shaped a legislative device more in step with prevailing morality — and the prevailing state of everyday law¹²¹. Enthusiasts of customary law have always held firm to the view that sociological study is a necessary feature of law reform. Henri Lévy-Bruhl argued in the 1940s that this was essential to good law-making¹²²; Lon Fuller promoted an understanding of customary law as a prerequisite to an understanding of made law¹²³; and this approach has had special favour in family property law, notably in France¹²⁴ but also elsewhere¹²⁵, from the 1950s. Importantly, Jean Carbonnier wrote of the importance of a « consensus sociologique » in advance of matrimonial law reform, and brought that message with great

120. See, generally, J.-M. BRISSON and N. KASIRER, « La femme mariée et le Code civil du Bas Canada : une commune émancipation ? », in H.P. GLENN (ed.), *Droit québécois et droit français : communauté, autonomie, concordance*, Cowansville, Éditions Yvon Blais, 1993, p. 227 and *passim*.

121. There are, however, references to the numbers of spouses in separation of property cited in the original proposal for the family patrimony: see H. MARX and M. GAGNON-TREMBLAY, *op. cit.*, note 111, p. 9.

122. As a means, said H. LÉVY-BRUHL, « Variétés : une enquête sur la pratique juridique en France », (1946) 44 *R.T.D.C.* 298, of drawing attention to « la révolte des faits sur le Code ».

123. L. FULLER, *loc. cit.*, note 17, 213.

124. See, generally, F. TERRÉ, « La méthode sociologique en droit comparé », in *Études de droit contemporain (nouvelle série)*, Paris, Éditions de l'Épargne, 1970, p. 46, and, with special reference to the French reform of 1965, L. SÉBAG, « La méthode quantitative en droit civil et la réforme des régimes matrimoniaux », D.1963.Chr.23.203.

125. The school of « sociological jurisprudence », often associated with continental Europe, had an influence in the English reform of the law of intestate successions from the 1950s. See J.G. MILLER, *The Machinery of Succession*, Abingdon, Professional Books, 1977, p. 92.

effect to Quebec on the eve of the enactment of the partnership of acquests¹²⁶.

And yet while, for a time, the sociological school seemed to be in the ascendant in Quebec law reform circles, it did not have a prominent part in the 1989 law reform process. Certainly there was historical precedent for taking the pulse of people's law before proceeding with reform. Even in the most conservative circles in the past, sociological arguments were advanced in support—and in horror—of law reform, occasionally cast in the language of informal law¹²⁷. It was, after all, the sudden realization that « law » was out of step with social practice that finally prompted a rethinking of community of property¹²⁸. Moreover, with the workings of the Civil Code Revision Office, this interest in social practice formalized for a time, competing with comparative law methodology as the most scientific manner of modernizing law¹²⁹.

Is it possible that the legislature overstepped its province and, as a result, enacted a family patrimony so out of step with the popular understanding of the *patrimoine familial* that it runs the risk of failing to generate consensus? Arguments were raised, in discussions preceding the enactment of the new rules, that the family patrimony was too far removed from family needs, expectations and practices to make good law. Most opposition to the proposal in parliamentary commission fixed upon its mandatory character and one way to understand this objection is that an unbending rule, for all of Quebec spouses, would be insufficiently sensitive to established patterns for sharing that varied across the province. Quebec is not, of course, a

126. See his lesson before a Quebec audience in J. CARBONNIER, « Quelques remarques sur l'esprit de la loi française du 13 juillet 1965 portant réforme des régimes matrimoniaux », (1968) 14 *McGill L.J.* 590, 593 and 595-596, as well as J. CARBONNIER, « Un essai de statistique de la répartition des régimes matrimoniaux conventionnels à la veille de la réforme de 1965 », *Année sociologique*, 1964, p. 443.

127. See, e.g., COMMISSION DES DROITS CIVILS DE LA FEMME, « Droits civils de la femme, Premier rapport des commissaires », (1930) 32 *R. du N.* 230, 231-232, where law reformers, in support of their traditionalist posture, stated that enacted law is « la sanction par le législateur d'une habitude de penser, de sentir, d'agir qui s'est généralisée et qui est devenue une *coutume* ».

128. See P.-A. CRÉPEAU, « Les principes fondamentaux de la réforme des régimes matrimoniaux », in *Lois nouvelles II*, Montreal, PUM, 1970, p. 13. Then president of the Civil Code Revision Office, Crépeau cited a well-known survey conducted by notary Roger Comtois, which revealed that upwards of 70% of spouses chose separation of property over community of property in the 1960s, as highly influential on the reform process.

129. See M. RIVET, « La popularité des différents régimes matrimoniaux depuis la réforme de 1970 », (1974) 15 *C. de D.* 613. This study was undertaken at the behest of the C.C.R.O. to determine whether spouses were adopting the partnership of acquests.

cultural monolith, and it may be that a single norm for sharing essential assets did not allow for the multiple *patrimoines familiaux* generated by informal law to constitute an effective codification of existing practice.

Assuming informal law does consecrate a norm for sharing in marriage with which the family patrimony can be allied, there is no reason to believe that the customary rule is of even application across Quebec. While the family patrimony, as one of a series of mandatory effects of marriage, is unforgivingly uniform, informal law can be expected to be more sensitive to uneven attitudes to family property throughout Quebec. Unlike state-made law, everyday law is not constrained by political geography or the chance boundaries of formal legal traditions. It seems inevitable that in Quebec, as elsewhere, regional and cultural attitudes to family property will vary and thus so too will the practice of sharing property. Notaries in France have long recognized regionalisms in their matrimonial property law — northern France tending to community of property; whereas *communauté universelle* predominates in the east; and separatist matrimonial property regimes are said to be disproportionately popular in the south and west¹³⁰. In the same way, there is no reason to think that the social group around which custom coalesces in Quebec will coincide with the whole of Quebec society, whether the variables be geographic, economic, or some other facet of cultural life. By way of example, informal matrimonial law might be expected to have its own *édit de secondes nocés* whereby spouses in second or subsequent marriages who are less concerned with establishing homes and families practise sharing property differently¹³¹. Whether unevenness occurs on this basis or according to other cultural variables, there is certainly no reason to assume that customary norms acquire their obligatory force in social groups identical to that represented by the state¹³². Informal law may align itself instead with autonomous institutions and groups, creating in

130. See G. CHARRAS and D. DUMAN, « Patrimoine et mariage », in *Couples et modernité: gestion et transmission du patrimoine*, op. cit., note 97, p. 39. For an example of a struggle between the boundaries of formal and informal law in family property law, see D. BASTIAN and A. WEILL, « Une tentative d'unification législative entre le droit français général et le droit local d'Alsace et de Lorraine: le régime matrimonial », in *Études juridiques offertes à Léon Julliot de la Morandière*, Paris, Dalloz, 1964, p. 23.

131. See the arguments of academic and notary P. LAQUERRE, « Mémoire sur les droits économiques des conjoints », unpubl., Quebec City, 1988, p. 5, before the parliamentary commission in support of the view that property is shared on a « separatist » basis in second and subsequent marriages with no children.

132. This point is explained by J. GILISSEN, « La coutume : essai de synthèse générale », in *La coutume 4^e partie, Recueil de la société Jean Bodin*, vol. 54, 1989, p. 445, who noted that custom arises in respect of a « groupe social donné » which has no necessary relationship with the State.

some instances microlegal systems within the nation-state¹³³, or macrolegal systems extending beyond it.

The mandatory character of the family patrimony has patience for none of these niceties, choosing a single norm, within a fixed pattern for variation, for all Quebec marriages¹³⁴. While it is no doubt impossible to allow for all the variables of informal law in provisions that are designed to be of public order, it may be that the designated «common ground» for all Quebec marriages was mischosen. Sociologists have remarked on multiple definitions for economic partnerships providing different models for marriage which can coexist within a given society, each anchored in a defensible socio-cultural reality¹³⁵. Arguably the legislature had an obligation to isolate precisely the «consensus sociologique», to return to Carbonnier's phrase, if it had any hope of the family patrimony meeting popular favour. Of course, the legislature may not have sought to coat-tail onto existing everyday law, but lead — or put on the brakes — by way of example. But even if this was the case, radically original law reform — if we can style it so — is a perilous affair. Where a legislature imposes an invention of positive law without regard to existing informal law, it may find that the «new» law never properly takes root¹³⁶. Everyday law, including customary law of family property, is a powerful thing, arguably even more potent than rules of public order found in a civil code. The relevant question for Quebec law reformers, whether looking at the law of family property before or after the advent of arts 414 and following, should be the same : what law brings about sharing in marriage ?

133. For a splendid account of this phenomenon, with examples taken from family law, see W.O. WEYRAUCH and M.A. BELL, «Autonomous Lawmaking: The Case of the Gypsies», (1993) 103 *Yale L.J.* 323, 326-331.

134. It is of course wrong to see the family patrimony as a uniform norm for sharing, despite its mandatory character. The rules for calculation of the net value of the mass, especially since they were amended by S.Q. 1990, c. 18, give rise to immense variation, both in the size of the mass and its relationship to excluded property, from marriage to marriage. Moreover renunciation is contemplated, albeit in a limited cadre (arts 423-424 C.C.).

135. See, e.g., for Switzerland, J. KELLERHALS *et al.*, «Les couples et leur justice», *Autrement*, n° 105, 1989, pp. 105-107.

136. The classical treatment of this problem is offered by legal anthropologists: see, e.g., T.O. ELIAS, «The Problem of Reducing Customary Law to Writing» [1958], reprinted in A.D. RENTELN and A. DUNDES (eds.), *Folk Law: Essays on Theory and Practice of Lex Non Scripta*, New York, Garland, 1994, pp. 320-321.

2.2 Sources of *opinio juris* Requiring Spouses to Share the Family Patrimony

An image is beginning to take shape of two parallel bodies of family property law for marriage. First is that of formal matrimonial law, reflecting the state-made legal order which comprises the texts of law of property, matrimonial regimes and marriage contracts, the primary regime and, as of 1989, the family patrimony. Shadowing the formal law and, on occasion, overlapping with it, is the informal matrimonial law that flows forth from spousal practices which generate everyday funds of family property and other customary manifestations of the *patrimoine familial*. The rules of the family patrimony may be on the cusp between law of the made and everyday varieties, part of an overlay between these collateral orders whereby the legislature endeavoured to follow the dictates of informal law in constructing the state-made machinery for economic equality in marriage¹³⁷. To complicate matters more, there are further bodies of family property law originating elsewhere that must be identified and factored into the Quebec legal order as part of a full understanding the law of the *patrimoine familial*¹³⁸.

This expansive sense of the sources of matrimonial law is understood, it would seem, by everyone but the lawyers¹³⁹. There is no doubt that prevailing attitudes in respect of the theory of sources of the Civil law, at least as related by the twentieth century professional literature, rank custom behind written law. Opinions vary, but civilian enthusiasts for informal law are not in the ascendant¹⁴⁰, and some perspectives are radically dismissive

137. Occasionally, theorists present both these phenomena as manifestations of «positive law», often in aid of the argument that state-made law trumps everyday law within a single legal order: see, e.g., B.S. MARCOVIĆ, «De la dualité du droit positif», (1995) 1, *R.I.D.C.* 138, 139.

138. Religious law, both institutional and popular, includes rules of family property that can influence, alongside and at times intersecting with state-made law, how persons bound up in love-relationships share wealth. For an evocation of this idea for Quebec, see D. LEMIEUX, «La religion populaire et les classes sociales — Quelques réflexions», in B. LACROIX and J. SIMARD, (eds.), *Religion populaire, religion des clercs ?*, Quebec City, Institut québécois de recherche sur la culture, 1984, p. 297.

139. There are many exceptions, including imaginative French expert G. CORNU, *Les régimes matrimoniaux*, 7th ed., Paris, PUF, 1995, pp. 38-43, who has recognized the complex matrix of sources as including «la science des notaires et la pratique du ménage».

140. But see H. LÉVY-BRUHL, *Sociologie du droit*, 4^e éd., Paris, PUF, 1971, pp. 40-41, who argued the minority position forcefully in presenting the view that all law can be reduced to custom, and, for the same perspective with examples from the family law setting, R. DEKKERS, «Moïse», in *Mélanges en l'honneur de Jean Dabin*, Brussels, Bruylant, 1963, p. 79.

of custom¹⁴¹. In the main, Quebec lawyers give in to the temptation to see legislation as snuffing out the custom extant at the time of enactment, notwithstanding the local lessons of the history of sources of law in its codal expression. Even jurists who admit the usefulness of custom find it hard to contemplate it alongside of state-made law on an identical topic. There is a strong lawyerly sense, as Weber has pointed out, that « [t]outes les codifications déclarent la guerre au droit coutumier¹⁴² ». This would encourage the view that the advent of the Civil Code's family patrimony has displaced customary law's *patrimoine familial* insofar as the two speak to the same idea.

Yet it is only a conventional, modernist prejudice that associates state law with advanced ideas and customary law with primitive ones¹⁴³: made law is, to revert to a Lon Fullerism, not an answer to the question « what is law? » but just a why-stopper. The necessary predominance of formal over informal law is especially hard to justify on the basis of any real life sense about how people behave and feel bound to behave— « le droit instinctif » remarked Lambert at a time that this kind of world view was particularly unpopular, « n'a jamais cessé d'avoir une place à côté du droit de réflexion¹⁴⁴ ». Even Quebec's new Civil Code recognizes a place for custom in the legal order¹⁴⁵, although not without some mixed

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141. See, e.g., B. NICHOLAS, *The French Law of Contract*, London, Butterworths, 1982, p. 5, who sketches the primacy of « legislation » in the French theory of sources as follows: « In the conventional French analysis there are only two sources of law: legislation and custom. The latter is only interstitial and in the present context can be ignored. »
142. M. WEBER, *Sociologie du droit*, transl. by J. Grosclaude, Paris, PUF, 1986, p. 204. For a confirmation of Weber's sad suspicion, see M.I. DE KOSCHEMBAHR-LYSKOWSKI, « Le Code civil et la coutume. Révision de la notion de coutume », in *Études de droit civil à la mémoire de Henri Capitant*, Paris, Dalloz, 1939, pp. 412-415.
143. This reductionist view of custom is often presented in sophisticated terms: see, e.g., A. WATSON, « An Approach to Customary Law », (1984) 3 *Univ. Ill. L. Rev.* 561. But see, for the counterpoint, A. ALLOTT, « Popular Law Making in Western Society », in A. ALLOTT and G.R. WOODMAN (eds.), *People's Law and State Law The Bellagio Papers*, Dordrecht, Foris Pub., 1985, p. 13, who bases his argument as to the vigour of informal law in industrialized countries largely on family property law.
144. É. LAMBERT, *op. cit.*, note 81, p. vi. For the (post) modern perspective, see B.S. JACKSON, « Code and Custom », in R. KEVELSON (ed.), *Codes and Customs Millennial Perspectives*, New York, Peter Lang, 1994, 119, p. 135: « for all the modern privileging of code over custom, the latter—the uncontrollable internalization of the social—is necessarily implicated in all our legal problems ». (The term « code » is used in a non-civilian sense.)
145. See, e.g., the recognition of a body of « customary international law » at art. 2807 C.C. The best textual argument in favour of the recognition of *lex non scripta* in the *Civil Code of Québec* is perhaps found in its Preliminary Provision, including the reference to extra codal « general principles of law ».

signals¹⁴⁶. To return to the context of family property, one might test whether customary law can coexist alongside the family patrimony by asking why spouses share the net value of essential family assets from the twin perspectives of formal and informal law. Does the *opinio juris* that one must share come from the texts of the Code, as imposed — if it comes to that — by a court? Is the conviction that one must share rooted instead in the *lex non scripta* of the family? It is a bit of both?

Ironically, while there is a broadly felt indifference, if not to say hostility, towards the idea that the patrimonial law of the family may be created spontaneously, there is a strong sense among lawyers that law — that is to say enacted law — cannot properly explain spousal behaviour in respect of family property. Rather than acknowledge that formal law does not represent the full normative texture of matrimonial property law, experts generally prefer to explain its apparent disfunctional character by invoking libertarian values connected to the privacy of family living. *La famille heureuse ne connaît pas de droit*, says an old French saw, which has currency among lawyers as a means of accounting for the apparent breakdown of the Rules when the family is in circumstances other than that of apparent breakdown¹⁴⁷. The same kind of adage is invoked by positivists of various political stripe for their own purposes in differing accounts of family law. Conservatives lay claim to it to justify keeping «law» (and, by necessary implication, the state) out of the bedrooms and the joint bank accounts of the nation; progressives invoke the same idea to denounce the family as an impenetrable hell (*i.e.* impenetrable to «law» and thus to state action) in which lawlessness leaves economically vulnerable actors free to be exploited. Critics and free-market family lawyers find themselves in an unholy alliance, bemoaning or celebrating, as the case may be, a world without «law».

This unlikely union is cemented by a same and, frankly, impoverished conception of family law as an exclusively state-generated body of rules. To say that a happy — or muzzled — family «knows no law» is a crazy idea to the everyday lawyer who sees the family (happy or otherwise) as rife with

146. The word «custom», which appears relatively frequently in the English text (see, *e.g.*, 976, 2004, 2025, 2027, 2062, 2064 C.C.), is matched with its distant cousin «usage» in the French, creating an opportunity for law and non-law to meet in argument before the courts. Both terms appear in both linguistic texts of art. 1139, para. 25 to complicate the law of usufruct.

147. P. MALAURIE, *Cours de droit civil: la famille*, 2nd ed., Paris, Éditions Cujas, 1990, para. 15, explained this view as follows: «[l]es idylles et la famille heureuse se passent parfaitement du droit». Note, however, his presentation of a counterpoint at para. 21.

rules of everyday law. At best the view that law cannot explain behaviour in family life is an admission of the limits of state-made law as an account of legal relations in the family — as one French jurist has observed, « [i] est vrai que les « familles heureuses » ont rarement affaire à la justice ; cela ne signifie nullement qu'elles échappent au droit¹⁴⁸ ». It is far more plausible to see informal law completing the account, positively flourishing in the family setting where social ordering proceeds otherwise than on a wholly legislative basis¹⁴⁹. State law may abandon the family but, as Jean Carbonnier has explained, it does not leave it to the « chaos d'un vide normatif, mais aux régulations moins mécanistes que les hommes ont toujours su se donner en dehors de l'autorité publique¹⁵⁰ ».

Indeed it would seem that, if anything, the family is an especially fertile ground for the emergence of everyday norms given that it is custom, as Fuller argued, that better designate the roles and functions so central to the legal relations in family matters than do the word-heavy, non-narrative directives of state law¹⁵¹. Experts have fixed on the relevance of custom to the extra-patrimonial side of family living in accounts of the law relating to, for example, the name¹⁵², divorce¹⁵³ and parent-child relations¹⁵⁴. More obviously, where positive law abandons a sphere of family relations because of its own short-sightedness, informal law moves in to fill the gap or,

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148. H. GAUDEMET-TALLON, « De quelques paradoxes en matière de droit de la famille », (1981) 80 *R.T.D.C.* 719, 721, who was, it should be noted, not writing on customary law. But in this prescient paper, the author astutely saw the « incompatibilité d'humeur entre la notion de famille et celle de droit » (p. 720), and suggested that the latter idea must be rethought in the family context.
149. For a further suggestion that the « flou amiable » existing during marriage is a normative phenomenon, see G. CORNU, *op. cit.*, note 139, pp. 29-30.
150. J. CARBONNIER, « Préface [to special issue devoted to reform in family law] », (1975) 20 *Arch. phil. dr.* 1, 3.
151. L. FULLER, *loc. cit.*, note 17, 243.
152. See, e.g., S. SHINDLER-VIGUIE, « La liberté du nom des personnes physiques », (1994) 114 *Rép. du Not. Québécois* 1409 and references therein. For an early suggestion in Quebec law, see J. BEETZ, « Attribution et changement du nom patronymique », (1956) 16 *R. du B.* 56, 59.
153. See, e.g., M. RHEINSTEIN, « Our Dual Law of Divorce: The Law in Action versus the Law in Books », in *Marriage, Stability, Divorce and the Law*, Chicago, University of Chicago Press, 1972, p. 51.
154. Raised by J. VANDERLINDEN, « Vers une nouvelle conception du pluralisme juridique », (1993) *R.R.J.* 573, 575-578, whose perspective stands in happy contrast to the view of parent-child relations as a closed world where law cannot reach. In respect of an obligation of support in the absence of a formal bond of filiation, see D. GOUBAU, « Le caractère contraignant de l'obligation alimentaire des parents psychologiques », (1991) 51 *R. du B.* 625, 628, 642-643.

more precisely, informal law stands alone, unobscured by text. The plainest example is the legal account of relations between *de facto* spouses¹⁵⁵. Indeed the very expression *de facto* union is another misnomer: it is a union of law, of course, and not of mere « fact », notwithstanding the virtual silence, in Quebec at any rate, of the *droit commun*¹⁵⁶. Informal law essentially occupies the field for family living in same-sex unions¹⁵⁷, family relations based on minority conceptions of kinship¹⁵⁸ and among people who live on the street¹⁵⁹. It is perhaps not surprising that where family life is on the margins of society as imagined by the state through law, custom will have free reign. But this hardly excuses the lawyers for their disinterest in the everyday law of the family.

Not only is it plausible that formal and informal rules for family property coexist, but it may be that they feed upon one another as enacted law stimulates new customary practice and custom moves the legislature to recast its texts¹⁶⁰. By the same token, formal law can be deployed by the state in an effort to contain or reorient everyday law. This seems very likely to have been part of the project of the Dorion Commission in the 1930s when conservative law reformers sought to curtail practical advances of married

155. For an avant-gardiste suggestion, see A. LEBRUN, *La coutume, ses sources, ses autorités en droit privé*, Paris, LGDJ, 1932, para. 413.

156. M.A. GLENDON, « La transformation des rapports entre l'État et la famille dans l'évolution actuelle du droit aux États-Unis », in *Journées Jean Dabin, op. cit.*, note 61, p. 18, makes the point that *de facto* union obeys « son propre corps de droit ». See, for Quebec, M. GAUTHIER, « L'union libre, un état de droit, un état de fait, un état ambigu ? », in SERVICE DE LA FORMATION PERMANENTE, BARREAU DU QUÉBEC, *Nouveaux développements en droit familial*, Cowansville, Éditions Yvon Blais, 1989, p. 223.

157. See É. DELEURY, « L'union homosexuelle et le droit de la famille », (1984) 25 C. de D. 751; S. ALLARD, « Effets civils et organisation conventionnelle de l'union homosexuelle », (1985) 26 C. de D. 451; and A. ROBINSON, « Lesbiennes, mariage et famille », (1994) 2 C.J.W.L. 393, 395-397.

158. See, for Quebec, R. DAGENAI, « Le droit de la famille autochtone », in ASSOCIATION HENRI-CAPITANT, *Droit civil et droits autochtones*, Montreal, Association Henri-Capitant (section québécoise), 1991, p. 25. For an uncommonly sensitive judge's perspective on customary adoption and its relationship with state law, see *Re Katies Adoption*, (1961) 38 W.W.R. 100, 103 (Sisson J.) (N.W.T. Terr. Court).

159. See C. JENCKS, *The Homeless*, Cambridge, Harvard University Press, 1994, chap. 7: « Social Ties and Family Ties ». There is, of course, ample reason to see the complex relations of love, hate and kinship that grow out of street life as regulated by law within a microlegal system.

160. This phenomenon has best been observed in various fields of commercial law. See generally, in a civilian context, B. OPPETIT, « Sur la coutume en droit privé », (1986) 3 *Droits* 39, 41 s. For a recent account of the ways in which formal law can incorporate informal law and vice versa, see A. JACOBSON, « The Other Path of Law », (1994) 103 *Yale L.J.* 2213, 2215 s.

women's rights and powers by the token recognition of property reserved to the administration of married women¹⁶¹. On the other hand, legal anthropologists have remarked on how a more sophisticated and culturally-aware body of customary law can bend state-made law out of its intended shape¹⁶² or, in some cases, leave it entirely behind¹⁶³. One particularly telling example of this dissonance between formal and informal norms is to be found in accounts of family property law in planned economies where the cult of the State and the cult of Law constantly failed to coincide, revealing the vibrancy of custom¹⁶⁴. For present purposes, Quebec matrimonial law provides occasions to test for the presence of the phenomenon, notably the premature demise of dower¹⁶⁵, and the failure of reserved property to « save » community of property from desuetude¹⁶⁶.

There seems no reason to believe, as a matter of principle, that the mere presence of rules of enacted law, even in a civil code, displaces everyday law¹⁶⁷. The two regimes may entertain a peaceful coexistence, complementing one another to make up a bigger picture as to what the law in the broadest sense means to family finances. But, as we have seen,

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161. See, in the report of the Commissioners, the explicit acknowledgment that the law had to change so that the family would remain the same: COMMISSION DES DROITS CIVILS DE LA FEMME, *loc. cit.*, note 127, 230-233.
162. É. LEROY, « Le Code Napoléon révélé par l'Afrique », in J. FRÉBAULT (ed.), *Un droit inviolable et sacré : la propriété*, Paris, ADEF, 1991, p. 145, on how land law as imagined by the Napoleonic-Code exporting industry acclimatized poorly to customary rules for land-use in French colonial Africa.
163. See A.N. ALLOTT, « The Judicial Ascertainment of Customary Law in British Africa », [1957] reprinted in A.D. RENTELN and A. DUNDES, *op. cit.*, note 136, p. 308 s.
164. Even apologists for planned economies seem to acknowledge this. See, for family property law in the People's Republic of China, TSIEN Tche-hao, « L'influence politico-économique dans la transformation du système familial chinois », in *Journées Jean Dabin*, *op. cit.*, note 61, 121, para. 47-49. For a more complete overview of disorder inherent in formal sources of law and its contrast to the « normative strength » of folk law in Chinese society, see P. KELLER, « Sources of Order in Chinese Law », (1994) 42 *Am. J. Comp. L.* 711, 711-713 and 731-738.
165. While dower (styled « customary dower » by former art. 1426 C.C.L.C.) was formally abolished by S.Q.1969, c. 77, complications surrounding its registration meant that it was said to have been systematically avoided by spouses and their notaries several generations before: see M. CASTELLI, « Le douaire en droit coutumier ou la déviation d'une institution », (1979) 20 *C. de D.* 315, 328-330.
166. In France, the history of the parallel provisions to former arts 1425a C.C.L.C. *et seq.* provoked G. LEPOINTE, « La femme : deuxième partie », *Recueil de la société Jean Bodin*, vol. 12, 1962, p. 506, to comment « il y a parfois loin du texte officiel à la pratique ».
167. For a useful overview, from a civilian perspective, of the various relationships custom may entertain with codified law, see C. JOURNÈS, « Introduction », in *La coutume et la loi : étude d'un conflit*, Lyons, Presses universitaires de Lyon, 1986, p. 9 s.

custom may not be *praeter legem*. Where the family patrimony finds itself in conflict with existing informal law, the cohabitation becomes more shy-making. The state has said in no uncertain terms that its standards for economic equality are not negotiable and, by dint of the public order character of the new rules, it has announced that it will not tolerate less than this standard. What do the spouses do when they are pulled one way by the imperative effects of marriage in the Civil Code and yet another by the imperatives of custom ?

It is indeed the public order character of articles 414 to 426 that render the custom *contra legem* particularly vulnerable to being trumped. The «embarras extrême», as it has been so aptly styled¹⁶⁸, of custom that is in irreconcilable conflict with state-made law has haunted some enthusiasts of everyday law who have retreated to the view that mandatory law causes custom *contra legem* to give way. But once again the problem can be overstated in undue deference to text. In a conflict between state law and custom, the key question is not whether or not the former has a mandatory character, but instead whether the people to whom it is directed understand that to be so. Thus marriage may be deemed indissoluble except by death, as it has been in many jurisdictions throughout this century, but couples nevertheless continued to «divorce» on the basis of a recognizable body of informal law¹⁶⁹. Customary adoption rides roughshod over the public order rules of filiation, not just among certain aboriginal peoples in Quebec, but in places which are, theoretically, as culturally proximate to the Civil Code as the Beauce¹⁷⁰. Marriage itself may follow the dictates of customary law in

168. J. COMBACAU, «Ouverture [of special issue devoted to custom]: de la régularité à la règle», (1986) 3 *Droits* 3, 7. Combacau's own sympathy for custom as a source of law is no doubt nourished by his principal domain of research, public international law, where the nagging absence of a constitutionally recognized legislature has always given customary role a visible place in the theory of sources of law. For a fascinating review of custom in international law drawing on French civilian sources, see P.E. BENSON, «François Gény's Doctrine of Customary Law» (1982) 20 *Can. Yb. Int'l L.* 267 (reprinted in A.D. RENTELN and A. DUNDES, *op. cit.*, note 136, p. 883).

169. See H.H. FOSTER, JR. «Common Law Divorce», (1961) 46 *Minn. L. Rev.* 43, 58-66, where an author builds on Eugen Ehrlich's theory of «living law» in arguing for the existence of an informal law of divorce for the poor and divorceless in the United States. For a hint of this in Quebec, see A. MAYRAND, «Les conventions de séparation», (1960) 20 *R. du B.* 1, 3-7 and 20-24. Note however the interdiction for divorce at the time the latter article was written was itself part of a *lex non scripta*, relevant only for a part of the Quebec population.

170. See M. FERRON and R. CLICHE, *Les Beaucerons ces insoumis*, suivi de *Quand le peuple fait la loi*, Montreal, Hurturbise, HMH, 1982, pp. 291-295, in which adoption by a grandmother of the child of her minor daughter is presented as a ritual having informal legal character.

preference to the mandatory rules of state law¹⁷¹. One way of understanding the legal emancipation of married women in Quebec is to argue that the public order incapacity had been eclipsed by everyday law well before its final abolition in 1964¹⁷². In these instances, informal law is more potent than the mandatory injunction of the state and continues to flourish notwithstanding the constitutionally valid rule of positive law.

Have Quebeckers abandoned the Civil Code's family patrimony in favour of an informal legal regime more in step with prevailing sentiments for sharing property in marriage and at marriage's end? Strongly-stated objections to the family patrimony, coming from the highest authorities, have anticipated that the new rules pose a threat to the ordinary pursuit of family life. The Chamber of Notaries warned that when Quebec spouses came to understand the affront the family patrimony represented to their personal freedom they would choose to avoid marriage altogether¹⁷³. Leading author Jean Pineau has argued that spouses will soon begin to arrange their affairs with a view to avoiding the effect of the mandatory rules; and while there are no reports that sales of gold bullion have outstripped the sales of family homes, some early cases would suggest that Professor Pineau's predictions were not inaccurate¹⁷⁴. Yet it is worth noting that however strong this sense of the inappropriate character of the family patrimony might be, it is premised on the view that the rules of positive law will take root and effectively regulate those subject to them. In other words, the Chamber of Notaries and other critics assumed that, once enacted, the family patrimony would direct the behaviour of spouses who by virtue of their marriage would be legislatively held to its terms. The other rules of

171. For an historical account of how marriage celebrated according to popular custom persisted despite a legislative prohibition in Japan, see S. ANAN, «Mariage *extra legem* et la notion de droit au Japon», in *Mélanges en l'honneur de Paul Roubier*, t. 1, Paris, Dalloz et Sirey, 1961, p. 3-4.

172. This was the position of advocates W.M. HOLMES and J. GILCHRIST, *You and Your Family under Quebec Law*, Toronto, McClelland and Stewart, 1954, pp. 5-6: «married women do not realize that in many cases the «letter of the law» is no longer followed. Certain incapacities have become obsolete in practice [...] The Civil Code of the Province of Quebec no longer defines the true status of the married woman in Quebec.»

173. In favour, one presumes, of the more socially acceptable dictates of the everyday law of the *de facto* union! See the indictment of Bill 146 in CHAMBRE DES NOTAIRES, «Mémoire portant sur «Les droits économiques des conjoints»», unpubl., Montreal, 1988, p. 23.

174. See J. PINEAU, *loc. cit.*, note 9, 123-124. The case reports indeed record instances where division of the family patrimony is alleged to be unjust under art. 422 C.C. because a spouse sought to circumvent the rules: see, e.g., *Droit de la famille — 1941*, [1994] R.D.F. 118 (Sup. Ct.).

family property law, including custom, would give way, trumped by the rules of public order.

While the disputes in the reported cases as to how the family patrimony operates would suggest to the casual reader that the new rules have indeed taken root notwithstanding the brouhaha surrounding their enactment, the reality might in fact be otherwise. The family patrimony is, of course, designed to be self-executing. As family finances are dismantled by the spouses themselves or even where liquidation is engineered by counsel, is it possible that the parties revert to their own understanding of what would be a just division of the *patrimoine familial* — and the family patrimony — that would not necessarily coincide with that suggested by the texts. In this case, the spouses lay to one side rules of mandatory state law which, for them, are animated by an *opinio juris* less compelling than the rules of popular custom. While there is, as has recently been said of the French legal system, some « lèse-majesté » in the suggestion that custom trumps imperative law, sociological study of the unravelling of finances far from the courthouse may reveal that, as was the case for Roman law for a spell in medieval French legal history, *coutume passe loi*¹⁷⁵.

Conclusion

Much of this essay has made light of the assertion that the family patrimony has, as advertised, transformed the economic partnership of marriage. Yet by rethinking the sources of family property law, it does seem plausible that the amendments to the *Civil Code of Québec* gave expression to a legal basis for sharing property already present in a combination of state-made law and custom in force at the time its enactment. It may be genuinely new law in the minds of its masters, but the family patrimony has similarities with shared-property regimes of the general law that cannot be ignored. And even if the novelty is reduced to manner (*i.e.* rules of public order) and form (*i.e.* technique copied from Common law family assets legislation), the legislature made no effort to inquire how spouses in Quebec already shared property as a matter of informal law when putting the reform in place. By turning to Ontario as an alternative to measuring the living law in Quebec, law-makers may have forgotten to consider how sharing proceeded according to local knowledge.

175. See H. ROLAND and L. BOYER, *Locutions latines et adages du droit français contemporain*, 3rd ed., Paris, Litec, 1993, pp. 121-124, where this adage is rehabilitated in service of a modern argument in favour of the validity of the custom *contra legem*.

The technical connections to the law of Equity in its statutory guise would tend to confirm rather than upset the idea that the family patrimony may have roots in local customary law. In the Common law cases where equitable title to property is recognized for women as a remedy against unjust enrichment by their partners, it takes the resources of the Chancellor to see the true family character of property that, from the perspective of formal law, is owned by their husbands or *de facto* husbands. While the Civil law's unitary conception of ownership is not, in theory, susceptible of division into legal and equitable title, it may be that in the past, like Equity in the Common law tradition, custom recognized that married women owned a share of their husbands' property where the formal law did not, especially for women separate as to property. In fact prior to the enactment of the family patrimony, the richness, imagination and morality of the Equity's invention for the sharing of title may have been present, if occulted, in the combination of the formal rules of the shared-property regimes and patterns of spousal behaviour which make up the living sources of Quebec family property law. It would seem that in the Civil law, the genius of Chancery is to be found in part outside the Civil Code in the fibre of customary law.

Most experts have viewed the rules of the family patrimony as springing to life as marriage itself expires and, indeed, the formal texts provide the spouses with little or no real sense of the encumbrance that the family patrimony can represent before the triggering events mentioned at art. 416 C.C. Invented to correct inequalities at the end of marriage, the family patrimony appears unconnected to the everyday law that regulates marriage as an on-going venture. Yet even if one takes the extreme view that the family patrimony exists merely for the financial consequences of death, divorce, separation and annulment, it may be still be understood in light of an informal law of marriage breakdown¹⁷⁶. Moreover, if the family patrimony is linked to a lived economic partnership, the new texts may simply carry forward the sharing the spouses established before breakdown into the new family setting that death or divorce brings about. This is certainly the case of the policy underlying new device, described by its inventors as « le prolongement, au moment de la dissolution du mariage, du principe de l'égalité des époux pendant le mariage¹⁷⁷ ». Indeed the provisions of the

176. There may well be a distinct body of customary law for family breakdown, just as there is one in respect of marriage itself, which regulates conflicts in ways in which the texts do not explicitly contemplate. See J. TENBROEK, « California's Dual System of Family Law: Its Origin, Development, and Present Status (Part III) », (1965) *Stanf. L. Rev.* 614, 617-621.

177. H. MARX and M. GAGNON-TREMBLAY, *op. cit.*, note 111, p. 17.

Civil Code appear to confirm this : while the partition of the family patrimony is linked to the formal end of the *vie commune*, the calculation of its value is premised upon the marriage as it was lived as a joint economic endeavour.

If the legislative design of the family patrimony does seek to mimic the property arrangement that the informal law of marriage brings about, the objections concerning the extent of the « net family patrimony » should, as a consequence, be rethought as a failed appreciation by law reformers of this existing everyday law. What can make the division of the family patrimony just, in the eyes of the spouses, is that it tracks a concept of acquest property that reflects how their marriage genuinely operated as a partnership. Thus, where the equal partition of the net value of the mass, as calculated by articles 414 to 418 C.C., falls outside their own understanding of what the family fund resembled during the marriage, one or another spouses can be expected to object in the formal and informal avenues provided by law¹⁷⁸.

By attributing *opinio juris* to the sentimental instinct that motivates much of the sharing in marriage, I have no doubt adopted what for many readers will be too generous a definition of family property law. There is indeed a great danger for the self-styled pluralists, as the more sober of their number are careful to point out, that they characterize phenomena as legal which are not usefully thought of as partaking of law at all. The ardour for informal law is a bit of a disease, as one of its most adept Quebec practitioners has pointed out to fellow-travellers¹⁷⁹, and one may easily fall prey to the excesses of « panjuridisme¹⁸⁰ ». Taking the measure of what the spouses themselves consider to be their legal obligations in respect of family property is plainly in order before the full ambit of the everyday law can be understood. But in anticipation of this sociological study, there is already a great deal of evidence that suggests ordering in the financial lives of married people is explained otherwise than through what Fuller called the « tinsel of legal form ».

178. This is one way of understanding the motivation of the spouses who petitions the court for an unequal partition of the family patrimony on the basis of art. 422 C.C. In these circumstances, dividing the property according to the « letter of the law » would constitute an « injustice », thereby entitling the judge to proceed otherwise.

179. « If the doorways to the Law are so numerous as to be particular to each of us, then the Law is closed to all of us »: R. JANDA, « What has emerged and what should we do about it ? », unpubl. manus. presented at colloquium « Théories et émergence du droit », Montreal, Faculté de droit, Université de Montréal, 31 March 1994, p. 1.

180. J. CARBONNIER, « L'hypothèse du non-droit », in *Flexible droit*, *op. cit.*, note 75, p. 24, used this term to describe the penchant of legal sociologists who see law created every time someone moves.

It is possible, of course, to suggest that this essay has mistaken mere convention or usage for law by losing sight of the role that sanction plays in making the law of family property work, particularly where the family is in breakdown. Sanction, as a measure of « what is law ? », is often invoked in argument against the existence of everyday law by asking the lawyerly question « would a judge recognize that as law ?¹⁸¹ ». But care should be taken not to confuse the question « what is law ? » with that very different one, « who says it is ? ». Sanction may be imposed elsewhere than in the courts¹⁸² and, in family property law, the definitive measure of what is constitutive of law insofar as sanction is at all relevant thereto is the sanction identified by the spouses who understand themselves to be subject to the rule. Where sharing does not proceed according to the full ambit of sources for family property law, marital life will change—it may even collapse—long before a judge enters the scene to observe the disaster and sort out the pieces, as judges do, with the rudimentary tools law gives them. Other sanctions may be less dramatic or less visible, but no less real. This is most important for customary law—it is, after all, « le monument que le peuple érige à sa gloire¹⁸³ », as two Quebeckers have noted, and not a monument the judges and other legal professionals erect in celebration of themselves.

On the other hand, the data may show that the family patrimony is not the people's law after all but does, in fact, belong to the bureaucrats. Awaiting an answer, it is best to be cautious about using sociological jurisprudence to speak too boldly to the unspoken relationship between love and money in marriage. To get a jump on the critics, it might be wise to turn Gide's jibe pointed at an aristocrat *savant* on everyday lawyers. Like monsieur le comte on his one-day pass to a sociology conference in *Les caves du Vatican*, the pluralists have, it might be said, « sur des questions sociales plutôt des convictions que des compétences ».

181. For the basis of a powerful answer, see H. HARTOG, « Pigs and Positivism », [1985] *Wisc. L. Rev.* 899, who argued that custom authorized and regulated the keeping of pigs in nineteenth century New York even when the judges explicitly refused to do so. It would seem that judges did not define what law was in that setting. Did sanction define it at all?

182. For the classic exposition of this position by a French private lawyer, see H. LÉVY-BRUHL, *op. cit.*, note 140, p. 46: « ce qui la [la coutume] caractérise, c'est moins la sanction judiciaire que la vigueur de la réaction provoquée par sa violation ».

183. M. FERRON and R. CLICHE, *op. cit.*, note 165, p. 245.