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ALL FAMILIES ARE EQUAL, BUT DO SOME MATTER MORE THAN OTHERS? HOW GENDER, POVERTY, AND DOMESTIC VIOLENCE PUT QUEBEC'S FAMILY LAW REFORM TO THE TEST

Suzanne Zaccour[*]

Who needs family law? While it is tempting to answer "everyone", the stakes are not the same for all. I propose to evaluate family law rules in terms of how they address high-stakes situations—that is, the condition of vulnerable women. Thus, the test of good family law should be how well it deals with poverty and domestic violence, factors that directly constrain women's ability to negotiate fair outcomes.

To explore this method, I take the example of a recent proposal, developed by Alain Roy's reform committee (the "Comité consultatif sur le droit de la famille"), and regarding which the Quebec government held public consultations in 2019. I show that this reform proposal, which purports to respond to the diversity of Quebec families, rather prioritizes a single ideal of the modern, equal, and autonomous family. The reform's supposedly autonomy-enhancing rules would especially penalize poor and victimized women—thus failing my proposed test of good family law. These women, I argue, should be considered model test cases, not exceptions.

INTRODUCTION: THE PUZZLE OF FAMILY LAW

Denise, of thirty-two years, is a white, middle-class dentist. Irma is a racialized immigrant housekeeper who does not know French or English. Victoria is unemployed and the victim of conjugal violence. Odile is a sixty-seven-year-old widow.[1]

These are but a fraction of the life circumstances that family law must tackle. Diversity in age, gender, sexual orientation, race, class, ability, legal knowledge, and many more areas makes designing family laws suitable for all a monumental challenge. Can the law be equally responsive to all personal circumstances and family relationships, and, if not, whose interests should come first?

One response to this puzzle is minimalistic regulation, where individuals are free to adjust the fit. Another option is to regulate for paradigmatic cases and hope that residual freedom and discretion will accommodate other needs. Before endorsing one approach over the other, let us ponder: who, among our four characters, needs family law the most? Who needs it the least?

Here, I propose that family law should focus on *difficult* cases—in particular, women with little legal

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1 Tips for recalling the names of our characters: Denise: dentist; Irma: immigrant; Victoria: victim; Odile: old.

knowledge or economic power, and women in violent relationships—rather than building schemes around an ideal of the equal and independent couple. Poverty and domestic violence raise the stakes of family regulation and exacerbate the need for good law. We must, then, legislate for Victoria, not for Denise.

To illustrate this argument and put it to the test, I critique, with the help of our protagonists, a proposal for the reform of Quebec family law. The project, presented in the recommendations of Alain Roy's reform committee and in a public consultation held by the Quebec government in 2019, would slash important family law protections.[2] It proposes abolishing the mandatory sharing of family patrimony, changing the default matrimonial regime from the sharing of acquests to the sharing of only family patrimony, and introducing a scheme for regulating cohabiting parents based on the compensation of some relationship-generated disadvantages.

This public consultation attracted strong opposition.[3] While purporting to respond to the diversity of relationships in modern society, the reform speaks to an

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2 See Québec, Ministère de la Justice, *Public Consultation on Family Law Reform*, by Sonia LeBel (Québec: Gouvernement du Québec, 2019), online (pdf): <www.justice.gouv.qc.ca/fileadmin/user_upload/contenu/documents/En__Anglais_/centredoc/publications/ministere/dossiers/consultation/document_consultation-a.pdf> [Ministère de la Justice, "Family Law Reform"].

3 See "Submitted briefs", online: *Ministère de la justice* <www.justice.gouv.qc.ca/en/department/issues/family/submitted-briefs>. These are the briefs sent in response to the public consultation.

archetypical autonomous, egalitarian family. This overly optimistic appraisal of family life in modern Quebec society could have dramatic consequences for families who deviate from this ideal and who are the most vulnerable.

In this article, I first expose the proposed reform and its assumptions of formal equality and individualistic autonomy. I then develop what I suggest should be the test of good family law: how well it deals with the situation of women who have little economic power or who are in violent relationships. I apply this test to the reform proposal and call on our four protagonists to help us see how the changes would penalize women, especially those who cannot exercise a fantasized autonomy due to poverty or intimate partner violence. Finally, I expose three fatal flaws in how the reform proposal deals with autonomy, the public/private interaction, and inequality, before pointing to fairer alternatives.

My conclusions have implications beyond Quebec's latest reform proposal: regulating stubbornly unequal yet rapidly changing family relationships in a fair manner is a challenge that still confounds jurisdictions across the world.

THE CONTEXT: WHERE WE MEET A PROPOSED REFORM SERVING AUTONOMY, FORMAL EQUALITY, AND THE *IDEAL* LEGAL SUBJECT

My analysis is based on a reform proposal put together by the Comité consultatif sur le droit de la famille (the "Roy Committee").[4] In June 2019, the Quebec government held public consultations on some of the Roy Committee's recommendations. At the time of writing this article, no bill has been made public. Hence, we do not know what the expected reform will ultimately look like. Nevertheless, the Roy Committee's report (the "Roy Report") is a great starting point to present my argument on the test of good family law, the importance of domestic violence, and the meaning of autonomy. Moreover, the Roy Report will likely continue to constitute a tempting starting point for family law reforms in the years to come. Hence, my arguments will remain relevant regardless of the fate of this particular reform project. Before getting into these arguments, some context is called for.

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4 Comité consultatif sur le droit de la famille (sous la présidence de Alain Roy), *Pour un droit de la famille adapté aux nouvelles réalités conjugales et familiales* (Québec: Ministère de la Justice du Québec, 2015), online (pdf): <www.justice.gouv.qc.ca/fileadmin/user_upload/contenu/documents/Fr__francais_/centredoc/rapports/couple-famille/droit_fam7juin2015.pdf> [The Roy Report].

THE CONTEXT FOR THE ROY REPORT

Family law reform is long-awaited, as "[t]he last major reform of family law took place in 1980."[5] A 2013 Supreme Court decision intensified the need for reform: the Court had to decide whether the differential treatment of married and unmarried couples in Quebec was unconstitutional.[6] Supreme Court Justice Abella's camp found unjustified discrimination of unmarried couples,[7] while Supreme Court Justice LeBel's camp saw no infringement of the *Canadian Charter of Rights and Freedoms*.[8] Chief Justice McLachlin's deciding vote that the Quebec regime constituted a justified infringement of the right to equality sealed the fate of the case.[9]

This decision left Quebec as the only Canadian province not to recognize any default obligation between unmarried partners. The government tasked a committee (the Comité consultatif sur le droit de la famille), led by notary Alain Roy, with reviewing the entirety of family law. Although more modest in scope, the government's proposed reform can be traced back to identical proposals in the Roy Committee's report, submitted in June 2015.[10] Given this context, it is surprising that the proposed

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5 See Ministère de la Justice, "Family Law Reform", *supra* note 2 at 5.

6 See *Quebec (Attorney General) v A*, 2013 SCC 5.

7 See *ibid* at para 377 (Deschamps, Cromwell and Karakatsanis JJ found that only the exclusion from support was not justified: para 382).

8 See *ibid* at para 282.

9 See *ibid* at para 449.

10 See The Roy Report, *supra* note 4.

changes do so little for de facto couples and rearrange so much of a matrimonial regime that was not generating commotion.

Indeed, the reform proposes ending the mandatory sharing of family patrimony, changing the default matrimonial regime from a partnership of acquests to family patrimony,[11] and establishing minimal imperative protections for parents, married or not.[12] Under the new imperative parental regime, all couples with children would have to contribute to the expenses of the family, the family residence would be protected, and economic redress would be possible through a compensatory allowance.[13]

THE PROPOSED REFORM'S THEORETICAL UNDERPINNINGS

The proposed reform is based on neo-liberal assumptions. For instance, it echoes the Roy Committee's faith in contractualization and personal autonomy as central values in family law.[14] These principles fall squarely within a formal equality approach: "family law must reflect the formal equality of the spouses, whether married or not, by leaving them free to arrange the legal aspects of their relationship."[15] The couple is imagined as "a space of

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11 See Ministère de la Justice, "Family Law Reform", *supra* note 2 at 19.

12 See *ibid* at 8.

13 See *ibid* at 9–10.

14 See *ibid* at 14.

15 *Ibid* at 7.

autonomy of will and freedom of contract."[16] Whether the couple is indeed a space of autonomy is, of course, debatable. Victoria might disagree.

Further, the reform project is centred on a specific model of family life: independent partners and interdependent parents. The Committee views "[s]hared responsibility for a child as the main source of interdependence":[17]

> The fact that two spouses live together in a marriage or de facto union does not necessarily mean that they are interdependent; this is not the case, for example, for two people who form a couple at the age of [sixty-five] or two young adults who both have a career and are financially independent. However, the birth of a child will generally create a situation of interdependence for the parents.[18]

Here we can recognize Odile and Denise. Odile is past the age of childbearing. Denise represents the young professional who is too modern to carry in their relationship the *passé* marks of inequality. The Committee

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16 Québec, Ministère de la Justice, *Consultation publique sur la réforme du droit de la famille* (Québec: Gouvernement du Québec, 2019) at 7, online (pdf): <www.justice.gouv.qc.ca/fileadmin/user_upload/contenu/documents/Fr__francais_/centredoc/publications/ministere/dossiers/consultation/document_consultation.pdf> [Author translation].

17 Ministère de la Justice, "Family Law Reform", *supra* note 2 at 7.

18 See *ibid* at 8.

rejects a default regime based on needs or income sharing, preferring a clean-break compensatory regime that treats inequality within the couple as an exception to the norm.

By leaving tremendous space for couples to create their own rules, the reform presumes informed and proactive legal subjects with the financial means, cognitive capacity, and time to make these decisions. The minimalistic regime reflects the idea that the couple knows what is best and can achieve fairness even if the weaker party is less protected. After all, there is no weaker party in a *modern* couple.

The reform strives for "[a]n inclusive response adapted to the diversity of couples and families."[19] We might think of "inclusive" as protecting even the most vulnerable, but here "inclusive[ness]" stands for recognizing new and *modern* forms of family (for example, young professionals, same-gender couples) who presumably do not need protection. The reform committee writes:

> Family law must not be used to legitimize one model for couples or families to the detriment of others. Instead, it must adapt to the diversity of and differences between families that are characteristic of Québec society.[20]

However, because the rules are centred on the autonomous, equal, and independent legal subject—an idealized model—the Committee does the opposite of

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19 *Ibid* at 7.

20 *Ibid*.

recognizing a diversity of families and needs. It abandons those who cannot pay the price of contractual freedom: people without legal knowledge or financial means (like Irma), and people within unequal relationships who cannot negotiate on equal footing (like Victoria).

Finally, the Committee anticipates "[c]itizens aware of their rights and obligations" who can make enlightened decisions in "[a]n accessible family justice system"[21]—another excess of optimism which clashes with reality.[22]

All in all, the reform presents a rosy narrative of the free and autonomous legal subject. A logic of atomistic liberalism augurs badly for ordinary women living under conditions of patriarchy. While "[p]rivate ordering is not *per se* a bad thing, provided it is done fairly," the reform fails to ensure these conditions of fairness and "sacrifices substantive fairness to formalistic notions of choice."[23]

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21 *Ibid*.

22 See Hélène Belleau, *Quand l'amour et l'État rendent aveugle: le mythe du mariage automatique* (Québec: PUQ, 2012) [Belleau, *le mythe du mariage automatique*] on how and why unmarried partners are unaware of their rights and obligations.

23 Martha Shaffer, "Domestic Contracts, Part II: The Supreme Court's Decision in *Hartshorne v. Hartshorne*" (2004) 20:2 Can J Fam L 261 at 289 (discussing *Hartshorne v Hartshorne*, 2004 SCC 22).

THE METHOD: TESTING FAMILY LAW BY FOCUSING ON GENDER, POVERTY, AND DOMESTIC VIOLENCE

How should we evaluate a reform proposal to decide if it is *good law*? I suggest that rules should be put to the test of gender, violence, and poverty. That is, a law that ignores poor women suffering domestic violence cannot be good law, while a law centred on their needs is more likely to work for everyone. Thus, thinking about law requires particularization, rather than abstract and gender-blind concepts of *legal subjects* and *families*.

WHY GENDER MATTERS: AVOIDING SEXIST BIASES IN FAMILY LAW

Laws that are insensitive to gender generate biases against women.[24] Law reform is an already complicated and unpredictable process: it should not, on top of that, be grounded on a myth, such as the existence of gender equality. Thus, feminist scholars have called for family law to be thought of from the perspective of women, consistent with the legislative method of gender-based analysis that "[s]eek[s] to ensure that before policy decisions are taken,

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[24] See e.g. Susan B Boyd, *Child Custody, Law, and Women's Work* (Don Mills: Oxford University Press, 2003) on gender biases in family law. See also Suzanne Zaccour, "Crazy Women and Hysterical Mothers: The Gendered Use of Mental-Health Labels in Custody Disputes" (2018) 31:1 Can J Fam L 57; Suzanne Zaccour, "Parental Alienation in Quebec Custody Litigation" (2018) 59:4 C de D 1073.

an analysis of their impact on women and men, respectively, is carried out."[25]

Gender-sensitivity is called for not because women and men are essentially different, but because their realities are distinct. John Langston Gwaltney wrote in 1980 that "[t]he mind of the man and the mind of the woman is the same . . . but this business of living makes women use their minds in ways that men don't even have to think about."[26] Women are more likely to suffer intimate partner violence, earn less than their male partner, and undertake more unpaid domestic work. In Quebec, sixty percent of minimum-wage workers are women, and women earn $2.55 less per hour than men.[27] Women who work full-time like their partners do sixty-two percent of domestic work; working women whose partner does not work still do forty-nine percent of that work.[28] Susan Boyd also calls attention to the fact that "the oft-mentioned 'child poverty' is

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25 World Conference on Women, "Beijing Declaration and Platform for Action" The IV World Conference on Women, 1995, 16th Plen Mtg at 86, online (pdf): *United Nations* <www.un.org/en/events/pastevents/pdfs/Beijing_Declaration_and_Platform_for_Action.pdf >.

26 John Langston Gwaltney, *Drylongso: A Self-Portrait of Black America* (New York: Random House, 1980) at 33.

27 See Observatoire de la pauvreté et des inégalités au Québec, "Femmes et pauvreté" (12 October 2015) at 1, online (pdf): *Collectif pour un Québec sans pauvreté*, <pauvrete.qc.ca/IMG/pdf/151015-femmespauvretemontage.pdf>.

28 *Ibid*.

inextricably linked to women's poverty."[29] Indeed, one in three woman-led single-parent families are poor, compared to one in seven man-led single-parent families.[30]

A law that does not recognize gender differences cannot remedy, and indeed risks aggravating, these inequalities. As put by Kimberlé Crenshaw, the mother of intersectionality, "[i]t is fairly obvious that treating different things the same can generate as much an inequality as treating the same things differently."[31] As such, feminist family law scholars have exposed "[t]the pitfalls of a formal equality approach in family law . . . on both theoretical and empirical levels."[32] Boyd concludes that "gender-neutral legal norms . . . sit uncomfortably next to familial realities that remain stubbornly gendered and unequal."[33]

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29 Susan B Boyd, "Can Law Challenge the Public/Private Divide? Women, Work, and Family" (1996) 15 Windsor YB Access Just 161 at 173.

30 See Observatoire de la pauvreté et des inégalités au Québec, *supra* note 27 at 2.

31 Kimberlé Williams Crenshaw, "Color blindness, history, and the law" in Wahneema Lubiano, ed, *The House That Race Built* (New York: Pantheon, 1997) 280 at 285.

32 Susan B Boyd, "Equality: An Uncomfortable Fit in Parenting Law" in Robert Leckey, ed, *After Legal Equality: Family, Sex, Kinship* (New York: Routledge, 2015) 42 at 43.

33 *Ibid* at 42.

THE CHALLENGE OF MARGINALIZATION AND INTERSECTIONALITY

The necessity of gender-sensitive analyses is nothing new, and indeed the current challenge for feminists is rather to engage in truly intersectional thinking that does not subordinate other identities (particularly race) to gender. Centring family law exclusively around privileged white women fails to challenge interlocking power structures. Intersectional legal scholars thus propose evaluating the law in terms of the situation of marginalized women. For example, black feminism advocates centring racialized women in the fight against patriarchy and white supremacy in order to free all women. As Patricia Hill Collins explains in her book *Black Feminist Thought*, centring black women does not mean decentring others or engaging in a merely comparative exercise.[34] It means going to the root of the oppression of women and black people, recognizing the dual allegiances of black women to both their race and their gender, and understanding the deep interdependence between the structures of patriarchy and other forms of power relations.[35]

These teachings are relevant to my project of testing and criticizing autonomy-centric reform proposals.

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34 See Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (New York: Routledge, 2000) at vii–viii, 124–25.

35 See *ibid*. See also Chris Weedon, 2nd ed, *Feminist Practice and Poststructuralist Theory* (Oxford: Blackwell, 1987); Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) U Chicago Legal F 139.

Indeed, one of the consequences of centring reflections about the family around white, middle-class women is the assumption that women and children enjoy the economic security and the racial privilege that enable them "to see themselves primarily as individuals in search of personal autonomy, instead of members of racial ethnic groups struggling for power."[36] Such assumptions fall prey to the "decontextualization of Western social thought overall."[37] Thus, the feminist project of centring the margins is intrinsically linked to the feminist project of challenging neo-liberal conceptions of autonomy.

WHY POVERTY MATTERS: RAISING THE STAKES IN FAMILY DISPUTES

Among the circumstances represented in my characters' stories, I want to draw attention to poverty and domestic violence because of how directly they affect a person's autonomy to utilize the law for their benefit, safety, and well-being.

As we know, the law is inaccessible to most citizens. In 2012, the Canadian Department of Justice estimated that "between [forty percent] and [fifty-seven percent] of parties are self-represented when they appear in

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36 Patricia Hill Collins, "Shifting the Center: Race, Class, and Feminist Theorizing about Motherhood" in Evelyn Nakano Glenn, Grace Chang & Linda Rennie Forcey, eds, *Mothering Ideology, Experience, and Agency* (New York: Routledge, 1994) 45 at 48.

37 *Ibid* at 45.

court for family law issues."[38] This proportion is on the rise,[39] and most self-represented litigants cite lack of means as their reason for self-representing.[40]

Poverty also means comparatively higher transaction and outcome costs for litigants. For rich couples, the difference between one matrimonial regime and another is significant in amount, hence the practice of signing prenuptial agreements in higher social classes. Relative to their finances, however, affluent people do not face high risks. For someone in a situation of precarity, alimony or protection of family patrimony can dramatically impact their standard of life, their health, and their ability to care for their children. Money has diminishing returns, as empirical studies in positive psychology and behavioural economics have demonstrated.[41] Should family law not primarily concern itself with people whose well-being and survival, rather than third car, is at stake?

For the state, the stakes in family disputes are also higher with regard to underprivileged legal subjects. Different legal rules can decide between private and state support. A more protective regime frees state resources by ensuring that indigent litigants receive basic assistance.

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38 Canada, Department of Justice, *JustFacts: Self-Represented Litigants in Family Law* (Ottawa: DOJ, June 2016), online: <www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/jf-pf/srl-pnr.html>.

39 See *ibid*.

40 See *ibid*.

41 See e.g. Daniel Kahneman & Angus Deaton, "High Income Improves Evaluation of Life But Not Emotional Well-Being" (2010) 107:38 Proceedings of the National Academy of Sciences 16489.

While private solutions to poverty are disputable,[42] they may be the *only* solution in the context of right-leaning governments.

The access to justice discourse connects poverty to the challenges of law-making at the procedural level: we need accessible courts, legal education, legal aid, etcetera. My article draws attention to the ways in which centring preoccupations about poverty informs substantive law, and especially the choice of default protective rules.

WHY DOMESTIC VIOLENCE MATTERS: SAFETY OVER AUTONOMY

I want to add conjugal violence to the intersectional mantra of gender, race, class, and sexuality.[43] Granted, domestic violence is not a permanent identity along an axis of oppression. Yet I argue that it is an important category that must be recognized and centred in feminist thought and not merely seen as a circumstance among others that happens to certain women. Domestic violence is *central* to family law. With my proposed test of family law, I am calling for scholars to treat domestic violence not as an exception, but rather as a paradigmatic case.

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42 See e.g. Brenda Cossman, "Family Feuds: Neo-Liberal and Neo-Conservative Visions of the Reprivatization Project" in Brenda Cossman & Judy Fudge, eds, *Privatization, Law, and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002) 169; Susan B Boyd, "Family, Law and Sexuality: Feminist Engagements" (1999) 8:3 Soc & Leg Stud 369 at 380.

43 I voluntarily omit ability and species from this list as they are far from systematically integrated to even intersectional analyses.

First and foremost, we need to end the process of denial that allows most of society to see domestic violence as rare. Countless studies across the world have documented its ubiquity.[44] Hence, intimate partner violence cannot be treated as an exception, even less so among litigating families[45] where an even higher proportion of women has been victimized by their partner.[46]

Another reason to give conjugal violence more attention is that in situations of violence, getting the law right is of paramount importance—possibly a matter of life or death. When the law communicates to victims of domestic violence that a separation would have disastrous consequences, they are dissuaded from leaving. Thus, a law that does not help separating women achieve fair and safe outcomes is complicit in their entrapment.

Moreover, in direct opposition to the reform's atomistic liberalism, agreements negotiated within coercive relationships are unlikely to be any more autonomy-enhancing than state-imposed solutions.[47] This is important because the ability to contract out of default

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44 See e.g. Eline Leen et al, "Prevalence, Dynamic Risk Factors and the Efficacy of Primary Interventions for Adolescent Dating Violence: An International Review" (2013) 18:1 Aggression & Violent Behavior 159.

45 See e.g. Douglas A Brownridge, "Violence Against Women Post-Separation" (2006) 11:5 Aggression & Violent Behavior 514.

46 See e.g. Boyd, *supra* note 32 at 44.

47 See Demie Kurz, "Separation, Divorce, and Woman Abuse" (1996) 2:1 Violence Against Women 63. The article provides insight into how domestic violence impacts divorce negotiations.

rules is cherished precisely based on the assumption that freedom of choice enables people to enhance their well-being. However, this assumption does not hold for women in violent relationships, as they are not negotiating from a position of equality. Men in coercive relationships can use the children as bargaining chips to force women to agree to unfavourable deals. They can assert control and dominance through physical, psychological, economic, or sexual violence. In an era of formal equality where shared custody is normative,[48] women are made increasingly vulnerable to unequal results, as their efforts to protect themselves and their children from dangerous custody outcomes further disrupts their ability to negotiate fair economic outcomes.[49]

FOCUSING THE LAW ON THE NEEDS OF THOSE WHO NEED IT

The proposals I make throughout this article depart from Quebec family law's 150-year-old grounding in voluntarism and liberal individualism reaffirmed in the recent *Quebec v A*[50] decision and the 600-page Roy

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48 See Denyse Côté & Florina Gaborean, "Nouvelles normativités de la famille: la garde partagée au Québec, en France et en Belgique" (2015) 27:1 CJWL 22 at 24.

49 See Dale Bagshaw et al, "The Effect of Family Violence on Post-Separation Parenting Arrangements: The Experiences and Views of Children and Adults from Families Who Separated Post-1995 and Post-2006" (2011) 86 Family Matters 49 at 59; Miranda Kaye, Julie Stubbs & Julia Tolmie, "Domestic Violence, Separation and Parenting: Negotiating Safety Using Legal Processes" (2003) 15:2 Current Issues in Criminal Justice 73 at 73.

50 *Quebec (Attorney General) v A, supra* note 6.

Report.[51] This change of paradigm is called for by a reflection on family law reform that centres women's realities. At the intersection of poverty and violence, we find women unable to afford equal and autonomous bargaining. Affirming the importance of autonomy and formal equality does not change this reality.

Thinking through the law from the perspective of someone who cannot afford optimal, informed, and free legal choices is not centring the margins, but being realistic. It is the rich, white, autonomous, free-from-violence woman who is the exception—not Irma or Victoria. Centring real rather than idealized family circumstances is also pragmatic. Because people and families have varied needs and vulnerabilities, family law needs to be centred around those who need it the most. It is only logical to centre family law, by default, around the position of groups of people who are unable to opt out, for whom the stakes are higher, or who represent an important fraction of legal subjects. Centring poverty and domestic violence means paying attention to the needs of particular groups to make for better law for everyone. The proposed reform does the opposite.

What about women who have the means to tailor the law to their needs and who are in equal relationships—would it be unfair and perhaps paternalistic to impose on them presumptions that they are vulnerable and in need of protection? It is safer to err on the side of treating *modern* couples as burdened by traditional unequal roles than to treat unequal partners as independent and autonomous. Indeed, *modern*, equal, financially comfortable couples are

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51 See The Roy Report, *supra* note 4.

more able to make authentic legal choices and to effectively derogate from default rules. Denise's couple has access to legal services and can negotiate on a near-equal footing. She needs good defaults the least because, contrary to Irma and Victoria, she can create a law of her own. Certainly, her independence is not absolute and, even for privileged people, atomistic autonomy remains more myth than reality. Yet in contrast with other characters, she can adapt the law to her circumstances. Why, then, would we design our default rules for her condition?

Based on this reasoning, we need a regime that Denise can tailor to her lucky situation and that respects Odile's couple's lesser degree of interdependence, but we also need a law that protects Irma by default against inaction, and we *especially* need a law that protects Victoria by default *and* against her own consent. In other words, we need a law that is protective by default, allowing some opting out while maintaining a core of inalienable entitlements to protect people in unequal relationships.

With the proposed reform's excessive emphasis on autonomy, Quebec deviates from this goal. Legislating for Denise and Odile puts Irma and Victoria at risk. The proposed reform fails the test of good family law.

THE TEST: WHERE WE EVALUATE THE REFORM PROPOSAL FROM THE PERSPECTIVE OF MARGINALIZED WOMEN

In this section, I apply my proposed test of family law to three important changes proposed by the reform and the Roy Report: the end of the mandatory sharing of family patrimony, the change of the default matrimonial regime,

and the limited protection of de facto partners. I use our four characters to connect the anticipated consequences of these changes to fictional but realistic women's stories.

CHANGES FOR MARRIED COUPLES

The Context of Quebec's Matrimonial Regime and Family Patrimony

If it is not broken, fix it anyways is a reasonable appraisal of the proposed changes examined in their historical context. Until 1970, the matrimonial regime in Quebec was one of community of property. The regime was unpopular, with seventy percent of couples opting out to choose a full separation of property.[52] This choice was highly detrimental for women and left many of them entirely destitute upon separation.[53] The situation was so critical that the legislator had to intervene. In 1970, the legislator changed the default matrimonial regime to the sharing of acquests[54] and, in 1989, it imposed the equal sharing of family patrimony for married couples, with limited exceptions.[55] These changes dramatically reduced the use

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52 See Danielle Burman, "Politiques législatives québécoises dans l'aménagement des rapports pécuniaires entre époux: d'une justice bien pensée a un semblant de justice – un juste sujet de s'alarmer" (1988) 22:2 RJT 149 at 155.

53 See Miriam Grassby, "Nouveau regard sur les contrats de mariage au Québec à la lumière de l'arrêt *Hartshorne*" (2008) 292 Développements récents en droit familial, 45 at 63–4.

54 *Loi concernant les régimes matrimoniaux*, LQ 1969, c 77.

55 *Loi modifiant le Code civil du Québec et d'autres dispositions législatives afin de favoriser l'égalité économique des époux*, LQ 1989, c 55.

of marital agreements. In 2005, only ten percent of couples signed a marriage contract.[56] The briefs and parliamentary debates on the family patrimony rules show a preoccupation regarding the consequences of a "contractual freedom" that is not gender neutral. As one brief puts it: "without purporting to be sexist, we however must realize that most of the time, in the choice of a matrimonial regime, it is the man who sets the tone."[57] The freedom to contractually opt for a full separation of property has been experimented with in Quebec, and deemed a failure, while the separation of acquests has proved an adequate regime for most couples.

The concerns that led to the 1989 reform, meant "to mitigate the injustices produced by the implementation of a **freely adopted** matrimonial regime,"[58] were known to the Roy Committee. In his dissent, Dominique Goubau argues that "we can label as a myth, especially in the conjugal context, the belief that what has been negotiated and mutually consented is necessarily fair."[59] He concludes that "it is with circumspection that contractual freedom

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56 See Alain Roy, "Le contrat de mariage en droit québécois: un destin marqué du sceau du paradoxe" (2005) 51:4 McGill LJ 665 at 667.

57 Christine Morin, "La contractualisation du mariage : réflexions sur les fonctions du *Code civil du Québec* dans la famille" (2008) 49:4 C de D 527 at 540 [translated by author], citing Tribune unique et populaire d'information juridique, *Mémoire du partage à l'intention de la commission parlementaire sur le partage des biens entre les époux* (Québec: TUPIJ, 1988) at 2.

58 *Lacroix v Valois*, [1990] 2 RCS 1259 at 1276, 74 DLR (4th) 61 [emphasis added].

59 The Roy Report, *supra* note 4 at 584 [Dominique Goubau's dissent, author translation].

must be given space in the domain of family and conjugal relations."[60]

The Proposed Reform for Married Couples

Abolishing the mandatory sharing of family patrimony and rejecting the default sharing of acquests would turn back the clock for women and heighten poor and victimized women's vulnerability.[61] Protections that cannot be opted out of would be limited to federal alimony rules (the committee deplores that it cannot abolish them due to constitutional constraints) as well as a new mandatory parental regime that would only apply to parents and include the possibility of a compensatory allowance. Granted, the economic position of women in society has changed since the 1970s. However, women still own less, still earn less, and are still victimized by their partners to a high degree. Because we have not yet reached a state of equality between women and men, the proposed changes would primarily penalize women and benefit men.

The proposal also invents autonomy problems where none exist. Couples who want to escape the equal sharing of family patrimony can already renounce it at the end of the relationship. Real autonomy is not curtailed, but rather sheltered from couples' optimism bias and inability

60 *Ibid* [author translation].

61 I deliberately use *victimized* and not *abused* to avoid euphemizing and normalizing connotations. See Michaël Lessard & Suzanne Zaccour, "Quel genre de droit? Autopsie du sexisme dans la langue juridique" (2017) 47:2/3 RDUS 227.

to predict the future.[62] Moreover, the law already permits unequal sharing in certain circumstances to avoid injustices.[63] Instead of tweaking the conditions for this exception, the proposal needlessly opts for the more extreme avenue.

In cases of so-called traditional marriages, compensation regimes leave surpluses with the employed partner rather than equalizing the position of breadwinner and homemaker as sharing regimes do. If the Committee wanted to soften sharing rules, less drastic avenues could have been pursued, such as changing presumptions of equal and unequal sharing of family patrimony. Allowing a full opting out of family patrimony protections increases the economic power of men over their (generally) poorer partner. No adequate mechanisms to ensure that such opting out does not result from or create opportunities for coercive control are proposed.

Abandoning partnership of acquests as the default regime is also misguided, given its popularity. Shifting the default regime when the current one has a low rate of opting out creates an undue burden on financially precarious couples. Indeed, contracting out of a default regime is expensive. The costs are not only financial but also emotional, as marital contracts may create a "'me

62 See e.g. Belleau, *supra* note 22; Hélène Belleau, "D'un mythe à l'autre : de l'ignorance des lois à la présomption du choix éclairé chez les conjoints en union libre" (2015) 27:1 CJWL 1.

63 See Art 422 CCQ.

versus you' mentality" and have negative signalling[64] to which violent men can react particularly badly.

Sharing acquests is also valuable socially because it attenuates economic inequalities between breadwinner and homemaker as well as between unequally remunerated women and men. This regime has been adopted in numerous civil law jurisdictions, including France, Poland, and Spain, and is considered more appropriate to modern life than a full community of property.[65] It sometimes includes residual discretion for judges to order an unequal sharing of acquests in exceptional circumstances. While the sharing of acquests is not appropriate for all couples, those who wish to maintain a higher degree of financial independence should bear the burden of opting out of the protective regime, rather than the other way around. As I have argued, protective defaults make better law than non-protective defaults because of the relative ease of opting out experienced by those who do not need protection compared to those who do.

The change proposed by the Roy Committee cannot be brushed aside as an inconsequential decision that leaves couples with the freedom to reproduce the previous regime.

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64 See Helen Reece, "Leaping Without Looking" in Robert Leckey, ed, *After Legal Equality: Family, Sex, Kinship* (Abingdon, UK: Routledge, 2015) 115 at 120.

65 See e.g. Joanna Miles & Jens M Scherpe, "The Legal Consequences of Dissolution: Property and Financial Support Between Spouses" in John Eekelaar & Rob George, eds, *Routledge Handbook of Family Law and Policy* (Abingdon: Routledge, 2014) 138; Jens M Scherpe, "The Financial Consequences of Divorce in a European Perspective" in Jens M Scherpe, ed, *European Family Law Vol III – Family Law in a European Perspective* (Cheltenham: Elgar, 2016) 146.

Defaults are too sticky, not only for the reasons we have seen but also due to optimism bias. Couples consistently underestimate the likelihood of separation. Couples' inaction is not entirely irrational, as optimism satisfies marital expectations, turning into a self-fulfilling prophecy.[66] In that context, could not having to choose be more valuable than the freedom to choose?[67]

Voices of Four Married Women

In a society in which women continue to earn less than their male partners and to provide more domestic and emotional labour, it is not hard to see that it is women who will pay the price of the new regime's purported "modernity." But women are not all similarly situated, as we can explore through the fictional testimonies of our four characters.

> Denise:
>
> My partner and I discussed signing a marital agreement, but our notary told us that with the default regime we would remain financially independent regarding our income and share our family home and car. This matched what we both wanted, so we didn't bother with making a contract.
>
> Ten years later, we are about to divorce. We have two young children. Even though we

66 See Sandra L Murray & John G Holmes, "A Leap of Faith? Positive Illusions in Romantic Relationships" (1997) 23:6 Personality & Social Psychology Bulletin 586 at 598.

67 See e.g. Reece, *supra* note 64 at 121.

decided to share the parental work, I have had to take a maternity leave and work part-time. My ex now earns thirty percent more than I do. I am told by my lawyer that I may receive a compensatory allowance, but it won't be high because my ex also refused a promotion due to our situation.

I am now looking for a new home with three bedrooms, close to the children's school and to my work. It won't be easy to find a place I can afford, and I'm told child support will be low due to us sharing custody, but I think I can make it work.

Odile:

Chris and I were both married before and had children of our own. We decided to think things through before making it official. Chris still resented the support he was paying his ex. I wanted to make sure that what my late husband left me would be my children's when I died.

After consulting a notary, we chose to sign a marriage contract. Separation of property. Chris and I agreed we both wanted to protect our children. We were past retirement and were not planning on buying a house, so I thought it would make no difference either way.

When we got married and moved in together, I stopped receiving aid from the government.

I did not have a lot of money of my own, because I raised four children. Chris supported me.

When we separated, I found myself poorer than I ever was. A legal clinic worker told me since I had no children with Chris I could not get compensatory support. They told me to negotiate spousal support, but Chris says he owes me nothing since we were married only for a few years.

Irma:

We got married when I became pregnant with our first child. I never thought about the legal stuff. It was important for us and our families that we got married. So, we did. We couldn't afford for me to stop working. We always worked hard to make it to the end of the month. We have three beautiful children.

For a while, our marriage was not going well. He says he wants to divorce. I did not know how it worked here in Quebec. I asked for help at the women's centre. They said we share family patrimony but not income. We do not own our apartment or a car. They say I can apply for child and spousal support. We had some money saved but now he says it's all his money because he earned it. I could not save up from what I made as a housecleaner, we needed to pay rent and the groceries. I

thought we shared what we both earned for the family.

Victoria:

When we got married, he convinced me to sign a marriage contract. He said it was for tax purposes. I wanted us to share earnings, but he said it was not necessary. He said I was the love of his life and he would always take care of me.

The violence started when I was pregnant. I miscarried. I lost my job due to my depression. He asked me not to look for a new job. He wanted me at home.

I have been thinking of leaving him. I went to a women's centre for a few nights. He says I am nothing without him and I should come back. A volunteer helped me assess my options. She said because I signed that marriage contract, the house is all his. I might not have a roof over my head if I leave him. I don't want to live on the streets. She says he does not owe me compensation because we don't have children. Even though I lost my job after my miscarriage. I have a shot at spousal support though, if I can convince the Court. If I had not signed that stupid contract, we would automatically have shared the house. I feel betrayed.

My friend says I should still leave him. I'm not sure I can make it on my own.

CHANGES FOR UNMARRIED COUPLES

Context for Cohabitation Reforms

For many in Quebec, cohabitation is equivalent to marriage. Almost two-thirds of children are born to unmarried parents.[68] In 2013, seventy-one percent of cohabitants believed they were as good as married in terms of mutual obligations and inheritance rights, despite media coverage of the *Quebec v A* decision.[69] Yet, cohabitants who have lived together for thirty years and raised three children are still not truly "family" in the eyes of the law. While Quebec law has adapted the doctrine of unjust enrichment to allow for compensation in extreme cases of unfairness, this mechanism is costly and uncertain.[70]

Debates regarding the regulation of unmarried family members include how broad to cast the net, how deep the obligations should be, and whether the regime should be opt-in or opt-out.[71] These questions are interrelated, as an opt-in regime justifies deeper obligations, and a wide opt-out net (for example, applying not only to committed unions but also to siblings living

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68 See The Roy Report, *supra* note 4 at 36.

69 See Chambre des notaires du Québec, "Plus de 50 % des conjoints de fait se croient protégés alors qu'ils ne le sont pas !" (Survey conducted by Ipsos Descaries, Montreal, November 2007), cited in *ibid* at 275. See also Belleau, *supra* note 62.

70 See The Roy Report, *supra* note 4 at 75.

71 See Joanna Miles, "Unmarried Cohabitation in a European Perspective" in Jens M Scherpe, ed, *European Family Law Vol III – Family Law in a European Perspective* (Cheltenham: Elgar, 2016) 82.

together) calls for shallower regulation.[72] There is no single *modern* solution to juggle these factors, although the functional assimilationist approach to cohabitation has been gaining ground. Equality considerations first led New Zealand to assimilate certain cohabitants to married couples, with Australia slowly following suit in all but one state. Some Canadian provinces adopt this position, with Balkan states as figurehead for the assimilationist model.[73] Non-assimilationist defaults extend some but not all consequences of marriage to de facto couples—generally maintenance but not property sharing.[74] Opt-in regimes such as the French civil solidarity pacts (PACS) provide some cohabitants (generally the rich and educated) a thinner set of obligations. In general, opt-in solutions do not solve the "cohabitation problem," which includes lack of awareness of legal consequences, legal inaction even when people would prefer mutual obligations, and power differences between the spouse who wants and the spouse who does not want to formalize the union.[75]

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72 See Joanna Miles, "Should the Regime be Discretionary or Rules-Based?" in Jessica Palmer et al, eds, *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Cambridge: Intersentia, 2017) 261.

73 See Miles, *supra* note 72; Noel Semple, "In Sickness and in Health? Spousal Support and Unmarried Cohabitants" (2008) 24:2 Can J Fam L 317; Lindy Willmott, Benjamin P Mathews & Greg Shoebridge, "Defacto relationships property adjustment law - a national direction" (2003) 17:1 Austl J Fam L 37.

74 See Miles, *supra* note 72.

75 See Anne Barlow, "Cohabitation Law Reform—Messages From Research" (2006) 14:2 Fem Leg Stud 167.

The Proposed Reform for Unmarried Couples

The Roy Report proposes a limited default regime that would only apply to cohabiting parents. Founded on the shared responsibility to contribute to the expenses of the family, the regime would be purely compensatory, with no default sharing or support obligations. The proposal would presume that partners who have lived together for twenty years without having common children are financially independent.

The preference for a very limited default regime rests on the autonomy argument: the argument that the law should respect the choice of cohabitants to remain unmarried and that remaining unmarried means choosing to be free from mutual financial obligations. This logic fails to account for the impact of the parents' "choice" on the child's life.[76] Indeed, opt-in regimes that perpetuate unmarried women's poverty upon separation create poor children, yet these children had no say in their parents' marital status.[77]

The autonomy argument has also lost credibility in recent years as new research has exposed the reasons why people do not get married. Indeed, research shows that cohabitants have varied attitudes toward marriage. The cohabiting population includes:

> (i) those cohabiting short-term, perhaps early in life and largely for convenience, rather

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[76] See The Roy Report, *supra* note 4 at 586 (Dominique Goubau's dissent).

[77] See e.g. *ibid.*

> than in consequence of a long-term commitment; (ii) those cohabiting by way of trial-marriage, contemplating but having not yet made a long-term commitment analogous to marriage; (iii) those cohabiting with a new partner following the dissolution of a marriage to another person, deliberat[ely] choosing not to make the specific commitment of marriage again; (iv) those who choose cohabitation in preference to marriage but who regard their relationship in many respects, including long-term commitment, as analogous to it.[78]

It is one thing to deny mutual obligations to couples in a trial marriage (a short-term, fragile relationship) or to those who purposefully do not marry to avoid mutual obligations. It is another when people refuse to marry for ideological reasons (rejecting the symbolism, but not the legal obligations of marriage, or rejecting some but not all rules) or for financial reasons (for example, they cannot afford a wedding and are waiting for the right time to marry, cohabitation is not chosen but marriage is continually delayed).[79] For some cohabitants, "cohabitation replaces marriage as a long-term living arrangement."[80] Among the many differences between

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78 Miles, *supra* note 71 at 88.

79 See Anne Barlow & Grace James, "Regulating Marriage and Cohabitation in 21st Century Britain" (2004) 67:2 Mod L Rev 143 at 158.

80 Nicole Hiekel, Aart C Liefbroer & Anne-Rigt Poortman, "Understanding Diversity in the Meaning of Cohabitation Across Europe" (2014) 30:4 Eur J Popul 391 at 405.

marriage and cohabitation—religious, legal, social, economic—why assume that it is specifically the legal support and property sharing aspects that cohabitants are rejecting? As Barlow puts it, "[c]ertainly there is no evidence that the majority of cohabitants are seeking to avoid the legal implications of marriage. Rather the majority believe they are already subject to them."[81]

What about couples in which one person wants to marry and the other does not? This was the case in *Quebec v A*, yet the Supreme Court used the rhetoric of choice and autonomy to justify the discriminatory treatment of the claimant.[82] As Masha Antokolskaia explains, "sometimes the economically stronger partner deliberately frustrates the institutionali[z]ation of cohabitation or the registration of marriage in order to deprive the weaker party of legal protection."[83] Thus, poverty and lack of power (including power imbalance due to intimate partner violence) strip from categories of women the supposed "autonomy" of choosing one's conjugal status. This means that it is dangerous to generalize about *what* cohabitants choose to justify rules which have damaging social and distributive consequences. Such an approach also contradicts my proposed centring method by treating women with

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81 Barlow, *supra* note 75 at 173. See also Belleau, *supra* note 62.

82 See *Quebec (Attorney General) v A*, *supra* note 6 at paras 435, 438, 442.

83 M V Antokolskaia, "Economic Consequences of Informal Heterosexual Cohabitation From A Comparative Perspective: Respect Parties' Autonomy or Protection of the Weaker Party?" in Alain-Laurent Verbeke et al, eds, *Confronting the Frontiers of Family and Succession Law: Liber Amicorum Walter Pintens* (Cambridge: Intersentia, 2012) 41 at 48.

diminished power in their relationship (be it due to poverty or intimate partner violence) as exceptions rather than central cases.

If the choice argument fails, a minimalistic regime cannot be presumed to be any more autonomy-enhancing than a denser regime. Realism and pragmatism are also absent from the reform. The proposed opt-in regime "assume[s] a degree of self-interest, legal knowledge and common sense that is in fact lacking at the crucial time."[84] In the real world, "most people do not make relationship choices based on the rational criteria assumed by legislators and policy makers, but rather according to a rationality prevailing in their own lives."[85] Couples' confusion would be exacerbated by increased complexity in the law: replacing two statuses (married or unmarried) with four (married with a child, married without a child, unmarried with a child, or unmarried without a child).

In deciding to let cohabitants fend for themselves in defining their union, the Government of Quebec and the Roy Committee want to avoid imposing unwanted obligations on modern relations. However, considering the impacts of inequality, optimism bias,[86] misinformation,[87] irrationality, and the costs of contracting,[88] this approach

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84 Gillian Douglas, Julia Pearce & Hilary Woodward, "Cohabitants, Property and the Law: A Study of Injustice" (2009) 72:1 Mod L Rev 24 at 36. See also Belleau, *supra* note 22.

85 Barlow, *supra* note 75 at 174.

86 See Reece, *supra* note 64 at 121–22.

87 See *ibid* at 116.

88 See *ibid* at 119–21.

sacrifices the one-size-fits-most approach for the one-size-fits-none.

Voices of Four Unmarried Women

Denise

When we started dating, neither of us was ready to get married. Things became more serious and I moved in with him. We decided to wait before planning a wedding. We kept our finances partially separate, and I rented rather than sold my apartment in case things did not work out.

After two years, we decided to separate—it was better that way. Thankfully, we had no children. I just packed my things and left. I'm happy I don't have to go through a long and painful divorce, although I wonder if one of the reasons that we broke up is that we never fully committed. I am back in my old place and trying to move forward with my life.

Odile

When I met Chris, I was not in a rush to get remarried. He said he didn't want to for legal reasons. I thought it made sense and that it might be a good way to honour my late husband. I asked my notary if my relationship with Chris would affect my will, and he said no. I wanted to make sure my children were

protected, even though they are now grown up.

We moved to a fancy neighbourhood, and I had to use my savings to pay my part of the rent. The idea of getting married resurfaced, but he did not seem to want that, and I did not push it. He never proposed despite my hints. He said that when we moved to our new condo, we would own it together. That way, I would be protected. When we did, I assumed he remembered the plan. He was stressed, and I did not want to complicate matters. He always got so sensitive when he thought I was protecting myself in case I wanted to leave him.

He kept his finances separate, but he provided for me. He passed suddenly six years into our relationship. That's when I learned the condo was only in his name. He had no will, so everything went to his children, and I had to leave our home. I am now living with my daughter, who is not thrilled but doesn't say anything. She helps pay my medical bills. Funny how you always think these things only happen to others.

Irma

We wanted to get married when I got pregnant with our first child. Money was tight—we decided to wait until we could afford a small wedding. Life got in the way,

and we never married. We had three children. We worked double shifts to provide for them.

He said last week he wants to separate. He said I should leave the apartment. I asked for help at a women's centre. They said I will not get spousal support because we are not married, and I will not get compensation because I did not stop working for the children. They helped me calculate the child support I can get. I do not know how I will be able to afford a roof over my head and my children's. I am trying to convince Damien not to leave me.

Victoria

My partner and I had been living together for almost a year when I started speaking of marriage. I thought it would be more romantic, but for him, it was out of the question. I was never able to convince him.

When he became violent, I started to fear that he did not love me like I loved him. After I miscarried, my friends told me I should leave him, but he promised to change. He seemed to deeply regret what had happened.

After my depression, I did not return to work. I became worried about what would happen to me if he left. I was anxious to address the question directly, and one day, I got the courage to ask that we get married or sign a cohabitation contract. I was pregnant again,

> and I thought it was a good moment to fortify our relationship. He got so mad. He said: "Why are you talking about a contract? Are you about to leave me? Are you cheating on me?" He said, if I left him, he would kill himself, and it would be my fault. I did not bring up the topic again.
>
> Since my second miscarriage, he has become very controlling with what I do, what I can buy. I have no money—I cannot find a job, and I no longer qualify for assistance because he earns a lot. What I had saved is now long gone. He owns the house and the car, and he has invested for his retirement. Even if I could leave him, where would I go?
>
> I feel trapped.

THE RESULTS: WHERE WE IDENTIFY THREE FUNDAMENTAL PROBLEMS WITH THE AUTONOMY-CENTRIC REFORM

The reform promises difficulties for people affected by poverty, domestic violence, and the very much related inability to engage in paid work. It fails to centre the needs of vulnerable women and instead creates more vulnerability due to three fundamental errors, which I will discuss in the following sections.

PROBLEM 1: A QUESTIONABLE CONCEPTION OF AUTONOMY

The reform's recognition of "diversity"[89] actually favours a golden model of independence. The cost of autonomy is not evenly distributed among legal subjects. While Denise (educated and financially independent) and Odile (having experienced a first marriage) can make more autonomous—albeit unfavourable—legal choices, Irma (lacking financial resources) and Victoria (being in a controlling relationship) are penalized by increased *autonomy*. The reform project takes freedom of contract as proxy for autonomy and as the perfect solution to family law problems. Yet, history teaches us that contractualization can betray married women[90] and is of little assistance in solving the cohabitation problem.[91] In fact, the whole point of family law is that regular contract and property law are ill-adapted to the family context.[92]

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89 See Ministère de la Justice, "Family Law Reform", *supra* note 2 at 3, 7.

90 See Grassby, *supra* note 53.

91 See Louise Langevin, "Liberté de choix et protection juridique des conjoints de fait en cas de rupture: difficile exercice de jonglerie" (2009) 54:4 McGill LJ 697; Louise Langevin, "Liberté contractuelle et relations conjugales: font-elles bon ménage?" (2009) 28:2 Nouvelles questions féministes 24.

92 See e.g. American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (St Paul, MN: American Law Institute, 2002) at 1063ff (comment c on § 7.02, "Special circumstances applicable to agreements about family dissolution"); Scherpe, *supra* note 65.

Relational autonomy theorists contest the association of autonomy with independence and self-sufficiency.[93] Giving effect to interdependent relationships and promoting equality within relationships is more autonomy-enhancing than mere freedom to contract. Is Victoria really more autonomous when she has the choice to opt out of protections than when she has the choice to leave a violent relationship? The Roy Committee itself recognizes that more freedom does not always lead to autonomy, since it argues for keeping and even strengthening the impossibility for Quebec women to take their husband's name.[94] Unfortunately, this insight does not carry to proposals regarding the financial consequences of unions.

However, it is true that some people can and want to make autonomous legal decisions. The problem is that the people most likely to be autonomous in their choice of regime are also the ones who model for the default. A more protective default regime would be better adapted to Victoria's unequal relationship without infringing on Denise's and on independent couples' capacity to choose their own regime—a form of asymmetric paternalism.[95] As Justice Abella argues in *Quebec v A*:

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93 See e.g. Catriona Mackenzie & Natalie Stoljar, *Relational autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (Oxford: Oxford University Press, 2000) at 4.

94 See The Roy Report, *supra* note 4 at 130.

95 See Colin Camerer et al, "Regulation for Conservatives: Behavioral Economics and the Case for 'Asymmetric Paternalism'" (2003) 151:3 U Pa L Rev 1211 at 1212.

> opt *in* protections may well be adequate for some *de facto* spouses who enter their relationships with sufficient financial security, legal information, and the deliberate intent to avoid the consequences of a more formal union. But their ability to exercise freedom of choice can be equally protected under a protective regime with an opt *out* mechanism. The needs of the economically vulnerable, however, require presumptive protection no less in *de facto* unions than in more formal ones.[96]

In terms of autonomy, we have little to gain and much to lose in restricting protective default regimes.

Moreover, default entitlements affect outcomes of negotiations.[97] A default protective regime can attenuate unequal power distributions (due to economic disparities and controlling behaviour) by giving the weaker partner bargaining chips to arrive at a fairer solution, even if the protections allow for opting out. For example, if Victoria has property entitlements, she can use them to negotiate spousal support (or custody if she had a child). When she has nothing to bargain with, her ability to negotiate opting into property sharing is minimal and certainly not comparable to Denise's ability to opt out of it.

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96 *Quebec (Attorney General) v A*, *supra* note 4 at para 372 (Justice Abella).

97 See Robert H Mnookin & Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88:5 Yale LJ 950 at 968.

The reform would not allow everyone to tailor their own regime to their needs. Behind a façade of choice for all hides a normative preference for independent conjugal life that, in a society still marked by profound gender (and race, and class, and ability) inequalities, is wishful thinking.

In conclusion, we do not make wins on the autonomy front by approaching family law with minimalistic obligations and freedom of contract. Nor do we appropriately respond to the diversity of families that includes situations of poverty and violence. The reform proposal fails on its own evaluative standards.

PROBLEM 2: THE PUBLIC/PRIVATE INTERACTION

Régine Tremblay observes that "[w]hile being technically outlaws to civil law, de facto unions nonetheless produce various effects in Quebec."[98] The all-important *choice* of financial independence by unmarried partners is for instance disregarded by the *Taxation Act*, the *Individual and Family Assistance Act*, and other social laws.[99]

Consider Victoria's situation in the cohabiting scenario. Victoria can lose welfare benefits or even spousal support from a former husband on the

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98 Régine Tremblay, "Sans Foi, Ni Loi. Appearances of Conjugality and Lawless Love" in Anne-Sophie Hulin, Robert Leckey & Lionel Smith, eds, *Les apparences en droit civil* (Cowansville: Yvon Blais, 2015) 155 at 161.

99 *Taxation Act*, RLRQ c I-3, art 2.2.1; *Loi sur l'aide aux personnes et aux familles*, RLRQ c A-13.1.1, art 22.

irrebuttable presumption that her partner shares his resources. However, family law does not command such sharing. Erez Aloni labels the public law recognition of Victoria's union as "deprivative recognition".[100] People who "belong to particularly vulnerable populations, such as those who qualify for means-tested programs"[101] and couples (including lesbian couples) "where both partners are at a low income level"[102] are likely to experience partial recognition as producing disadvantages overall.[103] Quebec family law thus maintains a double-standards system that penalizes low-income people without consideration for their conjugal choices.

In Victoria's case, the interaction between public and private law creates forced dependence—not individual autonomy. At the intersection of poverty and violence, women are made vulnerable to economic violence, especially if they cannot work due to disability, precarious status, or conjugal violence. Hence, "the legislature's inclusion of *de facto* spouses in social and fiscal laws during their union exacerbate[s] their exclusion from the private law's obligation of support."[104]

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100 Erez Aloni, "Deprivative Recognition" (2013) 61:5 UCLA L Rev 1276 at 1281–82.

101 *Ibid* at 1276.

102 Boyd, *supra* note 42 at 378.

103 See Claire FL Young, "Taxing Times for Lesbians and Gay Men: Equality at What Cost" (1994) 17 Dal LJ 534 at 535.

104 Robert Leckey, "Strange bedfellows" (2014) 64:5 UTLJ 641 at 655; See also Langevin, "Liberté de choix", *supra* note 91 at 714.

Upon separation, shallow family obligations not only exacerbate economic disparities between women and men, but also tie up state resources, as seen in Odile's case. Nordic countries are a case on point to understand the interaction of public and private responses to poverty. In Nordic countries, "covering post-marital 'need' is not necessarily the responsibility of the former spouse."[105] Rather, "any citizen in need (even as the result of a relationship breakdown), is entitled to state support."[106] In Sweden, for example, maintenance after divorce is limited, and obligations between separating cohabitants are minimal. This contrasts with the Balkan states where even for cohabitants, support obligations are mandatory.[107]

The reform would introduce Nordic-like family law without Nordic-like welfare. Poverty has important societal, economic, and public health consequences. Poor women (and their children) must be assisted, be it through socialization or privatization.

The former may be preferable to the latter, especially when considering the limits of privatized remedies for black women.[108] Boyd also writes that assigning responsibility for women's poverty to individual

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105 Jens M Scherpe, "Contracting Out of the Default Relationship Property Regime – Comparative Observations" in Jessica Palmer et al, eds, *Law and policy in modern family finance: property division in the 21st century* (Cambridge, UK: Intersentia, 2017) at 367.

106 *Ibid* at 392.

107 See Miles, *supra* note 71 at 108.

108 See Andrea H Beller & John W Graham, *Small Change: The Economics of Child Support* (New Haven: Yale University Press, 1996); Boyd, *supra* note 29 at 178.

men with whom they have recognized relationships means that "responsibility for the costs of social reproduction and for economic hardship remains privatized, and the gendered relations of dependency are thereby reinforced."[109] A possible counter-argument is that dense family responsibilities could incentivize men to support rather than hinder their partner's career and quest for financial security. In any case, until a reform of social laws is on the table, rejecting the private solution results in continued precarity—a position from which underprivileged women cannot enjoy their high-priced autonomy.

PROBLEM 3: A REDUCTIVE VIEW OF INEQUALITY

The reform advances a reductive view of inequality, recognizing only relationship-generated and children-related disadvantages. This project may suit the needs of Denise, who is financially independent until she bears children (although she will still end up undercompensated). Our other characters show different vulnerabilities.

Odile enters her relationship having already suffered relationship- and gender-related disadvantages. She "has suffered the economic differential within the labour market of being both a woman, once-a-wife and a mother,"[110] while her partner has benefitted from the financial benefits of being a man and husband. Irma's

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109 Boyd, *supra* note 29 at 177.

110 Anne Bottomley, "From Mrs. Burns to Mrs. Oxley: Do Co-Habiting Women (still) Need Marriage Law?" (2006) 14:2 Fem Leg Stud 181 at 191.

salary is affected by gender and racial discrimination, making her unable to afford maternity leave. The effects of child-bearing on her earning capacity are subtler than for Denise. The compensation model fails these characters, and would also fail "the wife who did not acquire marketable skills before marriage, precisely because she intended to be home with children and to make that substantial marital investment."[111] Women's poverty is multifaceted, and only granting relevance to the direct consequences of child-rearing is reductive.

Gender bias also surfaces in opt-in regimes that demand actions—insisting on a contract, negotiating in one's self-interest—that are at odds with expected feminine behaviour. As Anne Bottomley explains, "women and men deploy language, conversations and silences differently—and that this leaves women crucially disadvantaged in an area of law which requires express discussions on express issues."[112] Emotional vulnerability adds to economic vulnerability. Like Odile, "[w]omen will too often hope for the best"[113] and become vulnerable to a man's controlling behaviour,[114] while he secures his economic investments and decides whether the union should be formalized.

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111 DA Rollie Thompson, "Ideas of Spousal Support Entitlement" (2014) 34:1 Can Fam LQ 1 at 12, citing Justice L'Heureux-Dubé in *Moge v Moge*, [1992] 3 SCR 813.

112 Bottomley, *supra* note 110 at 196.

113 *Ibid*.

114 See *ibid* at 197 (discussing the situation of Mrs. Oxley from *Oxley v Hiscock*, [2004] EWCA Civ 546).

Lastly, the reform proposal ignores domestic violence as relationship-generated inequality. Violence makes it doubtful that any decision of *the couple* reflects the victim's autonomy. Women's vulnerability is worsened by both the reduction of mandatory protections and the opting-in logic. The law can nullify contracts signed under coercive circumstances,[115] but how can it protect Victoria against *not* signing a cohabiting contract due to her partner's violence? Further, the regime ignores the effects that domestic violence can have on earning capacity, irrespective of child-rearing.[116]

THE BETTER WAY: WHERE WE SEPARATE THE JUSTIFICATION MECHANISM OF COMPENSATION

How can these problems be remedied? The best option would be to abandon a vision of marriage based on individual responsibility and compensation. The proposed compensatory mechanism would perpetuate gender inequalities, create perverse incentives, substitute fairness for proportionality, rarely be applicable despite its supposedly mandatory character, and create a disadvantageous anchoring effect that would curtail awards.[117]

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115 See *Miglin v Miglin*, 2003 SCC 24 at para 81.

116 See The Roy Report, *supra* note 4 at 588 (Dominique Goubau's dissent); Kathryn Showalter, "Women's employment and domestic violence: A review of the literature" (2016) 31 Aggression & Violent Behavior 37.

117 See Suzanne Zaccour, "Pour un droit de la famille réaliste, équitable et accessible", Brief presented to the Quebec Minister of Justice in

In case the Roy Report's compensation logic gains traction, it is important to understand that a compensation logic can still lead to different results if we untangle justification, entitlement, and remedy.

SOLUTION 1: FIXING ENTITLEMENT CONDITIONS

Even on a compensation rationale, the Committee's eligibility rules are underinclusive. Compensation can be called for when spouses do not have common children. Here are a few examples of women who would be denied access to the new compensatory regime:

- Lucie has lived with Marc for ten years. She has experienced two miscarriages leading to depression and loss of employment.
- Clara has lived with Lucas for eight years. She has experienced constant conjugal violence affecting her ability to engage in paid work.
- Camilla quit her job and moved to a new city so that her partner John could accept a promotion. Finding a new job took her six months, and her salary dropped by twenty-five percent.
- Stephanie has lived with Eric for thirty years. Since they moved in together, she has not engaged in paid work. She took care of first Eric's children from a

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the context of public consultations on family law reform (28 June 2019) at 10–12, online (pdf): <www.justice.gouv.qc.ca/fileadmin/user_upload/contenu/documents/Fr__francais_/centredoc/publications/ministere/dossiers/consultation/cdf2019_zaccour_FFQ.pdf>.

previous marriage, then his demanding career, and finally his aging parents.

A compensation logic does not take us to a single obvious set of rules. Because having a child is not the only cause of financial interdependence, many jurisdictions extend eligibility to cohabitation remedies to partners who have been in a stable relationship, meaning "passing as married"[118] in terms of the nature or specific duration of the relationship.[119] Manitoba defines three routes to remedies for unmarried spouses: registration, having lived together for a year and having a child, or having lived together for at least three years.[120] There are other possible definitions, such as having a child[121] or having suffered a relationship-generated disadvantage[122] (which should include intimate partner violence). Interestingly, Scotland imposes no minimum duration or child requirement, but uses self-limiting remedies that depend on the economic disadvantage linked to the relationship.[123] What the Quebec reform proposes to do through eligibility, Scotland does at the quantum stage. Since the proposed remedy

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118 Rebecca Probert, *The Changing Legal Regulation of Cohabitation: From Fornicators to Family, 1600-2010* (Cambridge: Cambridge University Press, 2012) at 52.

119 See Antokolskaia, *supra* note 83 at 60.

120 See *Family Maintenance Act*, CCSM c F20, s 1.

121 Wong argues that there should be no cohabitant requirement for unmarried parents to access remedies. See Simone Wong, "Cohabitation and the Law Commission's Project" (2006) 14:2 Fem Leg Stud 145 at 150.

122 See Antokolskaia, *supra* note 83 at 61.

123 See *Family Law (Scotland) Act 2006* (Scot), ASP 2, s 25.

requires evaluating the partners' disproportionate contributions, the bright-line rule suggested by the Roy Committee is not necessary to dissuade unmeritorious claims.[124] In other words, if a childless woman has suffered no disadvantage, she will be unable to satisfy the other conditions for claiming a compensatory allowance.

Eligibility responds to two categories of concerns. The practical concern calls for clarity and avoidance of messy disputes. The normative concern is to identify relationships deserving of marriage-like or other remedies. The reform proposal provides clear-cut rules but fails the normative test. A possible compromise would be to define a high length threshold (for example, five or ten years) or to allow cohabitants without children to qualify for remedies if they disprove a presumption of financial independence or lack of relationship-generated disadvantage. But since the remedy will depend on proving disproportionate contributions, there is little use in pre-identifying with categorical rules the kinds of relationships where disproportionate contributions may happen.

SOLUTION 2: FIXING THE REMEDY FOR DISPROPORTIONATE CONTRIBUTIONS

A compensation rationale does not, as the Roy Committee asserts,[125] preclude a remedy of property sharing or periodical payments. Consider the spousal support

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124 See also Robert Leckey, "Cohabitation, Law Reform, and the Litigants" (2017) 31:2 Intl JL Pol'y & Fam 131 at 136 on the floodgates argument.

125 See Ministère de la Justice, "Family Law Reform", *supra* note 2 at 10.

advisory guidelines, developed by Carol Rogerson and Rollie Thompson and widely used by courts and litigants. These guidelines have compensation as one of their main rationales. Thompson explains that "[o]ne of the fundamental problems of compensatory theory is the complexity of the evidence required."[126] The guidelines use other measures as proxies for gain and loss in the name of efficiency and access to justice. Thompson emphasizes that the guidelines "use 'income sharing' as a method of constructing formulas, but *not* as an adoption of a general philosophy of income sharing after separation."[127] As he further explains, "[i]t is important to distinguish the use of proxies . . . from the theory that underpins entitlement. The fit does not have to be perfect, as long as it produces tolerable results."[128]

Like Rogerson and Thompson, the Roy Committee recognizes the need for practical solutions and workable guidelines. We do not yet know what compensatory guidelines could look like, how monetary and non-monetary contributions would be compared, and how the different factors would come into play (including efforts to minimize loss, ability to pay, and the advantages of the matrimonial regime). However, we cannot cast aside the risk that guidelines focused on proportionality (rather than gain) would produce low awards. Compensatory regimes pose evidential problems and penalize women whose contributions tend to be less tangible (time rather than money, emotional labor, etcetera) and less visible

126 Thompson, *supra* note 111 at 27.

127 *Ibid* at 23.

128 *Ibid* at 28–29.

(groceries rather than a down payment). Note that existing compensatory mechanisms—the compensatory allowance for married couples and unjust enrichment for unmarried couples—are rarely used, hence the reform. As Laurence Saint-Pierre Harvey observes, "the disproportionate importance that evidence takes in cases of compensatory allowance seems to stand in tension, and even to be irreconcilable, with the idea of an accessible family justice."[129] Family litigants can rarely afford to produce adequate evidence of loss and gain, especially for careers that do not have clear salary scales.[130] Evidential difficulties are exacerbated for poor, self-represented litigants. This is why need-based analyses have often been privileged by courts since *Moge*, despite its compensatory rationale.[131]

Adopting another mechanism to fulfill the compensation goal could attenuate these quantification and evidential problems. Compensation can be achieved though periodical awards or property sharing. For example, English courts tend to apply the three fundamental principles of needs, sharing, and compensation through property allocation[132] rather than separating as Quebec does the pillars of property, maintenance, and compensation.

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129 Laurence Saint-Pierre Harvey, "Prestation compensatoire et union de fait en droit québécois: Étude critique du discours judiciaire" (2018) 31:2 Can J Fam L 127 at 162 [author translation].

130 See Thompson, *supra* note 111 at 10.

131 See Carol J Rogerson, "Spousal Support After Moge" (1996) 14 Can Fam LQ 281 at 285.

132 See Scherpe, *supra* note 105; *Miller v Miller; McFarlane v McFarlane*, [2006] UKHL 24.

Opting for property division or periodical payments as the remedy once litigants have passed the entitlement hurdle would benefit access to justice.[133] Discretionary and evidentially burdensome solutions penalize the weaker or marginalized party who is "likely to encounter barriers in her invocation of assistance from the judiciary."[134] Further, in compensatory support orders, "judges consistently ignore or underestimate the compensatory disadvantage going forward."[135] The logic of clean break embedded in the one-time compensatory allowance limits the compensation of the mother whose disproportionate contribution happens post-separation. Indeed, the reform would limit compensation after separation, requiring special circumstances such as neglect by the non-custodial parent or disability of the child.[136] If parents bear equal responsibility for common children, why does the requirement of proportional contribution weaken after separation?

A clean break logic is also limited by the payor's means at or around the time of separation, even though disproportionate contributions may continue to affect the mother (negatively) and the father (positively) for decades to come. Poor women would receive even less money than they are entitled to because their partner does not have the money *now*. The one-time payment also requires

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133 This is acknolwedged by the Roy Committee. See The Roy Report, *supra* note 4 at 76.

134 Boyd, *supra* note 32 at 51.

135 Thompson, *supra* note 111 at 30.

136 See Ministère de la Justice, "Family Law Reform", note 2 at 13.

hypothesizing about the future, while periodical payments can be reviewed if the parties' conditions change.

While noble, a clean-break objective is rarely realistic.[137] In a time when shared custody has become normative, it is ironic that mothers' autonomy can be curtailed over the long run by custody orders,[138] while their resources are slashed by a clean-break logic. In any case, it would be possible to have periodical payments as a default, while allowing for the payment of a one-time sum when it is adequate.

For a fair reform that truly compensates disproportionate contributions, we would need either refined eligibility criteria or a better choice of remedy. Extending the entitlement to spousal support or equal sharing of family patrimony to all couples who have children or who can prove a relationship-generated disadvantage would be one avenue to correct underinclusiveness and to truly start recognizing the diversity of families.

CONCLUSION: STILL WAITING FOR EQUALITY

Family law reforms are few and far between. Seemingly lacking political appeal, this area of law affects almost everyone, yet appears neglected in political campaigns, societal debates, and feminist activism. Quebec's reform

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137 See *Bracklow v Bracklow*, [1999] 1 SCR 420 at para 27, 169 DLR (4th) 577 (noting that many marriages fit neither of the mutual-obligation or clean-break models).

138 See Susan B Boyd, "Autonomy for Mothers? Relational Theory and Parenting Apart" (2010) 18:2 Fem Leg Stud 137 at 138.

project is, then, an important event. Unfortunately, what is proposed to women is a mixed bag, with small improvements being accompanied by high costs. Domestic-violence victims are not protected from opting out of sharing family patrimony, and the economic consequences of violence are not considered in the compensatory mechanisms. Underprivileged couples are also penalized by the change in default matrimonial regime and the perpetuation of an opt-in logic for de facto spouses.

If family law can be caricatured as "a Manichaean struggle between atomistic liberalism and a socially contextualized feminism,"[139] the reform project indubitably falls into the former camp. Quebec families deserve the protection of family patrimony, partnership of acquests, and default regulation of de facto unions. Yet, the Roy Committee's project chooses formal over substantial equality, idealism over reality, and men over women. Let it be buried six feet under until "all families are equal" can be said without irony.

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139 Robert Leckey, "Contracting Claims and Family Law Feuds" (2007) 57:1 UTLJ 1 at 1.