Rethinking 'the Nation' in National Legal History: A Canadian Perspective

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In 1929, when Lorna Parsons tired of her four-year marriage to a London, Ontario tailor, she decided to seek a divorce—in Reno, Nevada. Even though Lorna's divorce was not generally recognized in Canada, obtaining it was important to her and to the hundreds, if not thousands, of Canadians who similarly sought United States divorces at a time when Canadian law was extremely restrictive. The choices of Parsons and her compatriots should be of interest to legal historians. They problematize the idea of national legal history by reminding us that law does not always remain in the tidy jurisdictional containers constructed by legal authorities and academics. National boundaries are more porous, and the nature of law itself more fluid, than we often admit.[1]

It is not surprising that legal history, as it has been practiced in academic settings over the last century, is almost always written as national legal

1. Lorna Parsons is a pseudonym; her divorce and the general phenomenon of Canadians seeking divorce in the United States are discussed by James G. Snell, *In the Shadow of the Law: Divorce in Canada 1900–1939* (Toronto: University of Toronto Press, 1991), 231 et seq.

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history. National institutions such as courts and legislatures have a comforting boundedness about them, law schools teach national law, and most lawyers practice it. Our sources tend to be located in national archives and in the national language(s), and our legal literatures limit themselves to their nation of origin. All of these factors lead legal historians to assume as normative the shape of the modern nation–state and to project it backwards, thus assuming the exceptionalism of their own nation. It may also be observed that scholars have not rushed to embrace comparative legal history, which again is probably related to the assumption that nations are exceptional and cannot be profitably compared.[2] Certainly this was Montesquieu's view. Writing in the 1740s, he observed that as laws should be framed to suit the people whom they are to govern, "it should be a great chance if those of one nation suit another."[3]

It cannot be denied that national cultures help to shape their laws, but it is also the case that nations and national cultures do not exist in hermetically sealed silos. They share features with other nations as well as possessing distinctive traits. Our argument is not that there is no such thing as national law, that studying the history of national legal orders is unimportant, or that individual nations do not have distinctive legal traditions. Rather, it is that national legal traditions as they may exist today are themselves the product of ongoing exchanges of legal and cultural ideas and practices within and beyond national boundaries. National boundaries are more like nets than walls; they are porous barriers that may block the entry of some ideas but not others. This porosity is itself subject to historical flux. At some times the holes in the net may be larger or smaller, but there are always some holes. In the early national period and down to the mid-nineteenth century, for example, the United States was particularly receptive to foreign law and continued to draw significantly on English law even though it fought a second war with Britain from 1812 to 1815. Bernard Hibbitts has shown how United States law reviews displayed perhaps surprising interest in Canadian legal developments down to the beginning of the twentieth century, after which that interest waned rapidly. Broadening the point, he goes on to cite "a substantial modern literature

2. There are of course exceptions to this generalization: see Peter Karsten, *Between Law and Custom: "High" and "Low" Legal Cultures in the Lands of the British Diaspora—The United States, Canada, Australia, and New Zealand, 1600–1900* (Cambridge: Cambridge University Press, 2002). Michael Burrage, although not a legal historian as such, uses the comparative method to explain differences in the development of the legal profession in three jurisdictions in *Revolution and the Making of the Contemporary Legal Profession; England, France, and the United States* (Oxford: Oxford University Press, 2006).

3. *The Spirit of the Laws*, translated by Thomas Nugent (London: Nourse and Vaillant, 1750; New York, 1949), 6.

that has begun to describe the nineteenth century's legal pantheism and to relate its demise to factors like the consolidation of nation states, the imperial use of discretely metropolitan law for empire-building purposes, the triumph of legal positivism, and the proliferation of locally oriented legal publishers."[4]

Building on these ideas, we wish to make two arguments using the Canadian experience as a case study. First, Canada provides a particularly clear example of a porous legal order. Although what are now the common law provinces all received, at different times, English law and English-style legal institutions, and although that law and the ideologies underpinning it long remained powerful, Canadian legal history is far from a tale of monolithic transplantation of the imperial inheritance. Basic concepts were inherited not only from England, but also from the French and Aboriginal traditions. In addition, as social, economic, and political changes called for legal reform, Canadians were presented with a choice of models not restricted to those of the "founding" traditions but including the United States, other settler societies, and continental European countries other than France.

Second, Canadian legal history may be fruitfully invoked in a comparative perspective to provide insights about the legal history of other nations. Why Canadians chose to follow or not follow a United States legal innovation, for example, may tell us something about the history of United States law as well as of Canadian law, as we will demonstrate later on. The Canada–United States comparison is especially interesting because both nations share the heritage of the English common law; a unified legal profession; a continental geography with an open border until 1930; long interaction with indigenous peoples; significant multicultural immigration; a tradition of religious diversity inflected with a strong Protestant ethic; and similar economies, patterns of landholding, transportation and communication networks, and leisure pursuits. Where they differ is in Canada's rejection of the American Revolution and its commitment to incremental legal and political change within a parliamentary system based on British ideas of liberty and order.[5] The Canadian example therefore presents a fruitful terrain for examining the relative influence of formal legal

4. Bernard Hibbitts, "'Our Arctic Brethren': Canadian Law and Lawyers as Portrayed in American Legal Periodicals, 1829–1911," in *Essays in the History of Canadian Law, Volume VIII: In Honour of R.C.B. Risk*, eds. G. Blaine Baker and Jim Phillips (Toronto: University of Toronto Press and Osgoode Society for Canadian Legal History, 1999), 268.

5. There is a large literature comparing Canadian and United States politics and society, which we do not intend to cite here, but for some recent contributions on the precise point in the text, see Jason Kaufman, *The Origins of Canadian and American Political Differences* (Cambridge: Harvard University Press, 2009); and Philip Girard, "Liberty, Order, and

and constitutional ideas and assumptions versus those deriving from the culture at large.

We will pursue the two branches of our argument using the example of family law, which seems appropriate for two reasons. First, there is often an assumed homology between the nation and the family.[6] The family is often seen as the nation in miniature, or put another way, the nation is the family writ large. Second, family law has long been viewed by historians as one of the most deeply-rooted areas of law in a given society, one that is most reflective of deep cultural assumptions and therefore most resistant to change. Although this view may itself be exaggerated,[7] as indeed parts of this article amply demonstrate, the fact remains that at least some aspects of family law can be argued to reflect deep cultural values.[8] It is also the case that the perceived importance of family law has produced an ample literature that we can exploit for this foray into comparative legal history. If we can demonstrate the utility of our approach to the development of family law, it suggests that this perspective would have an even wider impact in other areas of law.

Time and space do not permit an examination of all areas of family law. We consider a number of suggestive examples, drawn from the eighteenth to the later twentieth centuries, which illustrate these themes.

Aboriginal Marriage and Intercultural Marriage

Until well into the eighteenth century, intermarriage between Europeans, whether French or British, and indigenous inhabitants, was not uncommon in the northern reaches of North America, leading ultimately to the creation of a new people, the Métis of western Canada. It became less common in the Laurentian valley of New France after the arrival of more French women in the latter part of the seventeenth century helped to balance the sex ratio within the European population, but it continued to be practiced in Acadia until the deportation of 1755 and remained important in the upper Great Lakes, Rupert's Land, and British Columbia well into the

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Pluralism: The Canadian Experience," in *Exclusionary Empire: English Liberty Overseas, 1600–1900*, ed. Jack P. Greene (New York: Cambridge University Press, 2009), 160–90.

6. Nancy Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge: Harvard University Press, 2000).

7. Masha Antokolskaia, "Family Law and National Culture. Arguing Against the Cultural Constraints Argument," in *Debates in Family Law Around the Globe at the Dawn of the 21st Century*, ed. Katharina Boele-Woelki (Antwerp and Oxford: Intersentia, 2009), 37–51.

8. Philip Girard, "Why Canada Has No Family Policy: Lessons from France and Italy," *Osgoode Hall Law Journal* 32 (1994): 579–612.

nineteenth century. These pairings usually involved male Europeans and native women, but not always. Some European women married native men after being captured in the raids on New England by the French and their native allies, the most famous example being Eunice Williams, the daughter of a Puritan minister carried off after the raid on Deerfield, Massachusetts in 1704. Williams converted to Catholicism, married a Mohawk warrior, and became a well-known figure in the Kahnawahka settlement near Montreal.[9]

Some of these intercultural pairings were transient relationships but many were actual marriages celebrated according to native customary law.[10] Eventually courts administering both the French-derived civil law of Quebec and the common law had to decide whether mixed marriages celebrated according to native custom were legally valid. In *Connolly v. Woolrich*, decided in 1867, the Quebec Superior Court held that such a marriage, celebrated in 1803 at Rivière-aux-Rats in what would later become the Northwest Territories, was valid by Cree law and recognized by Quebec law, rendering a subsequent Christian marriage by Mr. Connolly bigamous. His attempted divorce of his first wife according to Cree law, however, would not be recognized by Quebec law.[11] Two decades later the Northwest Territories Supreme Court had to decide whether a marriage according to native customary law between a Native American man and woman was valid after the date of reception of English law (15 July 1870) into the Northwest Territories. In *R. v. Nan-e-quis-a-ka*, Justice Wetmore not only decided that it was, but stated that it would be "monstrous" to expect Native American people to marry according to English traditions and laws at that point in the history of the Canadian West.[12]

There were some conflicting precedents in later decades but ultimately it was *Connolly v. Woolrich* that formed the cornerstone of federal policy toward native marriage for decades, as articulated in an 1887

9. John Demos, *The Unredeemed Captive: A Family Story From Early America* (New York: Knopf, 1994). Williams, who soon lost her mother tongue, visited New England several times but refused to resettle there.

10. See, generally, Jennifer S.H. Brown, *Strangers in Blood: Fur Trade Company Families in Indian Country* (Vancouver: University of British Columbia Press, 1980); and Sylvia Van Kirk, *"Many Tender Ties": Women in Fur Trade Society, 1670–1870* (Winnipeg: Watson & Dwyer, 1999).

11. *Lower Canada Jurist* 11 (1867) 197. See, generally, Constance Backhouse, *Petticoats & Prejudice: Women and Law in Nineteenth-Century Canada* (Toronto: Women's Press and Osgoode Society for Canadian Legal History, 1991), 9–28.

12. *Canadian Native Law Cases* 2 (1889) 368; 1 *Terr. L.R.*, 211. The validity of the marriages had to be decided in order to determine whether evidence from one or both of the defendant's wives should be accepted.

order-in-council. That policy had three elements: yes to marriage by native law, whether between Native Americans or a mixed couple, and even if the marriage was potentially polygamous under native law[13]; no to native divorce; and no to polygamous native marriage. There was also a fourth, invisible, element to this policy, which was the failure of the law to proscribe racially mixed marriages. In her recent book *The Importance of Being Monogamous*, Sarah Carter argues that federal policy was not motivated by any particular solicitude for Native Americans, but was instead part of a larger effort to shore up the institution of monogamous marriage from threats by Mormons and polygamous immigrant communities as well as polygamous native peoples.[14] We are less interested in the motivations, however, than in the underlying assumptions about the validity of native law and native marriage as co-existing with European law.

There were, or would soon be, several choices available to lawmakers. In 1888 the English Chancery Division decided that a potentially polygamous marriage in South Africa between an Englishman named Bethell and a woman named Teepoo of the Barolong tribe was invalid according to English law even though it may have been valid according to Barolong law.[15] Therefore, when Bethell died in the course of fighting against the Boers, his estate went to his brother in England and not to his wife in South Africa. Critics of Canadian federal policy often cited *Bethell v. Hildyard* in an effort to persuade the Department of Justice to withdraw its recognition of native marriages, but to no avail.[16]

In the United States, the law on native marriages depended upon the racial identity of the parties. Consistent with its broad approach to tribal sovereignty in many areas, United States law recognized both marriage and divorce according to tribal laws, even polygamous marriage, so long as the parties in question were Native Americans and resident on a reserve. As the Michigan Supreme Court stated in *Kobugum v. Jackson Iron Co.* in 1889, "We must either hold that there can be no valid Indian marriage, or we must hold that all marriages are valid which by Indian usage are so regarded. There is no middle ground which can be taken, so long as our

13. That is, native law would have permitted the husband to take another spouse even though he had not actually done so at the moment in question.

14. Sarah Carter, *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915* (Edmonton: University of Alberta Press, 2008).

15. *Bethell v. Hildyard* (1888), 38 Ch. D. 220.

16. Revisions to the federal *Indian Act* in 1951 made the transmission of Indian status dependent upon formal legal marriages for the first time, but for other legal purposes (bigamy, for example), native marriages continued to be recognized; see *Statutes of Canada* 1951, c. 29.

own laws are not binding on the tribes."[17] Marriages between whites and Native Americans according to native custom were recognized in some states at some times, but after the Civil War they faced increasing resistance; courts began to overturn or ignore earlier favorable precedents on the subject, and eight states passed laws proscribing Native American–white marriages altogether.[18]

The recognition of native marriage law by the Canadian government and Canadian courts undoubtedly sprang in part from the particular circumstances of European–aboriginal relations, such as the economic interdependence that was the hallmark of those relations in many places and periods, and the fact that the "subjugation" of many native groups was a planned and relatively nonviolent process in the prairie West. But Canadian policy was also based on views about law and specifically the acceptability of a degree of legal pluralism in the crucial period in which native marriage law was debated and decided. Perhaps as a result of long experience with a dual system of law among the European population, it was seen as acceptable for law to occupy precisely the "middle ground" castigated by the Michigan Supreme Court. Canadian authorities recognized native law not as a separate and distinct law radically different from Canadian law itself, but as a body of law at least partially incorporated into Canadian law. How else to explain that federal authorities felt able to recognize parts of native marriage law but not others, such as divorce?[19] Unlike the "all or nothing" stance taken by United States courts, or the non-recognition position taken by the English courts, Canadian courts did not treat native marriage law as radically "other." Timing and settlement patterns were also significant here.[20]

17. As cited in Linda Lacey, "The White Man's Law and the American Indian Family in the Era of Assimilation," *Arkansas Law Review* 40 (1986): 364.

18. Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (New York: Oxford University Press, 2009), 94–108.

19. To be precise, a white man who had married a native woman according to the custom of the country could divorce her according to that custom while both parties remained in Indian country. The mistake of Mr. Connolly in *Connolly v. Woolrich* was to bring his native wife to Montreal and then purport to divorce her there according to native custom; see Jennifer S. H. Brown, "Partial Truths: A Closer Look at Fur Trade Marriage," in *From Rupert's Land to Canada: Essays in Honour of John E. Foster*, eds. Theodore Binnema, Gerhard J. Ens, and R.C. McLeod (Edmonton: University of Alberta Press, 2001), 59–80.

20. See, for example, the different pattern of development in British Columbia, which did not become a formal part of the British empire until 1846, and many of whose early settlers came from the United States. The colony, and from the early 1870s the province, were unwilling to recognize any law other than English law, a fact that brought the province into conflict with the central government over native title. But by then the native marriage issue had been resolved at the federal level. See Hamar Foster, "'The Queen's Law is Better Than Yours': International Homicide in Early British Columbia," in *Essays in the*

Later courts would be more explicit about how native customary law was related to Canadian common law. In a case dealing with Inuit customary adoption in 1972, the Northwest Territories Court of Appeal decided that native customs could be regarded in the same way that the common law regarded other customs such as gavelkind: custom did not have to extend to time immemorial, rather "a continuous, peaceable, and uninterrupted user of the custom" as far back as living memory goes was sufficient to establish it.[21] And although marriages according to native customary law are seldom encountered today, adoptions under native customary law continue to be recognized for most legal purposes; indeed, *Connolly v. Woolrich* was cited with approval as recently as 1994 in this context.[22]

Moral Visions of the Family vs. Family Economy

On the question of which family law would govern the European population, Canadian courts and legislators again were faced with choices, this time not only about marriage and divorce, but also about parent–child relations, marital property, and inheritance. Provinces with a common law tradition had at least two models open to them: English family law, strongly marked by marital and paternal authority, the protection of legitimate lineage as determined by primogeniture, and by male authority over property; and United States "republican" family law, with its more egalitarian impulses, which began to chip away at marital and paternal authority;

History of Canadian Law, Volume V: Crime and Criminal Justice, eds. Jim Phillips, Tina Loo, and Susan Lewthwaite (Toronto: University of Toronto Press and Osgoode Society for Canadian Legal History, 1995), 41–111, and Hamar Foster, "Letting Go the Bone: The Idea of Indian Title in British Columbia, 1849–1927," in *Essays in the History of Canadian Law, Volume VI: British Columbia and the Yukon*, eds. Hamar Foster and John McLaren (Toronto: University of Toronto Press and Osgoode Society for Canadian Legal History, 1995), 28–86.

21. *Re Deborah E4-789* (1972), 28 D.L.R. (3d), 488. In *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 the Supreme Court of Canada refined this test by suggesting that such customs must have been integral to the cultural life of the nation in question at the time of contact.

22. *Casimel v. Insurance Corp. of British Columbia*, (1994) 2 C.N.L.R. 22 (B.C.C.A.) (Adoption by grandparents of grandson according to customs of Carrier Nation sufficient to entitle them to insurance benefits as "dependent parents" under provincial insurance statute upon accidental death of grandson.) S. 46 of the British Columbia *Adoption Act*, R.S.B.C. 1996, c. 5 now provides that "the court may recognize that the adoption of a person effected by the custom of an Indian band or aboriginal community has the effect of an adoption under this Act." We thank Susan Boyd for this reference. It should be noted that the practice of judging the validity of each custom individually prevents the problems associated with a system of personality of laws, such as that observed in India.

abolish primogeniture; liberalize divorce; and blur the distinctions between legitimate, illegitimate, and adopted children. Although the role, function, and ideology of the family were broadly similar in English and United States life there were some divergences based on underlying economic, social, and cultural differences between the two societies. To put it starkly, the imagined community of English family law was one of landed gentlemen and their dependent ladies, whereas that of United States family law one of white yeoman farmers and their helpmates.

The imagined community of Canadian family law was an amalgam of these two visions. From the eighteenth to the early twentieth centuries Canadians were open to United States-inspired changes in inheritance and marital property law that recognized the reality of widespread landholding and family capitalism, while adhering strongly to the ideal of the English patriarchal family in matters of divorce, illegitimacy, and custody. Perhaps the best example of this gap is in the province of New Brunswick, which abolished primogeniture in 1786 and pierced the veil of coverture by statute in 1851 by shielding a wife's assets from her husband's creditors, but continued to insist upon fathers' rights in custody law until at least 1975, long after they had been abandoned in England and virtually everywhere else in the Western world.[23]

The origins of the New Brunswick married women's property law remain obscure, but those of a similar statute of 1859 passed in Upper Canada have been better documented.[24] The statute, as was common with the "first wave" of married women's property statutes, did not grant full dispositive powers to a wife who had brought property to a marriage or acquired it afterwards. Rather, the Act simply declared that such property would be "free from the debts and obligations of her husband, and from his control or disposition without her consent," implying that he still had to consent to any disposition of her property. It also set out a process whereby a married woman could obtain a protection order for her earnings and those of her minor children, and could actually spend them without her husband's consent, in a variety of cases in which the husband was unfit or in which she was living apart from her husband for any reason "which by law justifies her leaving him."

While earlier versions of the Act were being debated in the later 1850s, legislators made clear their familiarity with a variety of laws, including

23. *Statutes of New Brunswick* 1786, c. 11; *Statutes of New Brunswick* 1851, c. 24; and *Oakes v. Oakes* (1975), 11 N.B.R. (2d) 170 (S.C.A.D.). On the history of custody law in Canada, see Susan Boyd, *Child Custody, Law, and Women's Work* (Don Mills: Oxford University Press, 2003), 20–72.

24. *Statutes of Upper Canada* 1859, c. 34.

those of New York State, the English Matrimonial Causes Act of 1857 (which pioneered the protection orders mechanism), and both French and Quebec civil law. Upper Canadians were particularly interested in the French concept of *marchande publique*, by which a married woman could engage in business on her own account and contract in her own right without her husband's consent for business purposes, although they did not ultimately go that far in the 1859 Act. Closer to home, they were aware of the possibility of marrying while keeping separate property under Quebec law, a regime that provided the benefits of the equitable separate estate with none of the complications. As Lori Chambers concludes, "the legislators borrowed selectively from the other jurisdictions, adapting their ideas to fit the perceived needs of the Upper Canadian community."[25] Later reforms tended to imitate the English Married Women's Property Act 1882, but the initial breaches in the doctrine of coverture had been inspired by United States innovations, and to a more limited extent, by French and Quebec law.[26]

Another United States innovation along these lines that spread to Canada was homestead protection law.[27] This law, which mimicked common law dower but also went well beyond it, protected the family homestead from creditors, required the wife's consent to its *inter vivos* disposition, and directed that it be passed on to the widow and/or children after a husband's death. The first such example occurred in the colony of Vancouver Island in 1865 and the law was reenacted and amplified the following year after the island united with the mainland colony to form British Columbia. Although the desire to insulate families from economic distress was a major concern, so also was the desire to attract United States immigrants with capital. Given the existence of generous homestead exemptions in neighboring states, it was argued that "similar advantages" would have to be provided if British Columbia were to retain United States immigrants.[28] This notion, that Canadian law in the economic field should mirror the incentive structure of United States law, or at least not be too alienating to a United States audience, is one that resonates throughout Canadian legal history, far beyond the field of family relations.

25. Lori Chambers, *Married Women and Property Law in Victorian Ontario* (Toronto: University of Toronto Press and Osgoode Society for Canadian Legal History, 1997), 83.

26. See, generally, Constance Backhouse, "Married Women's Property Law in Nineteenth-Century Canada," *Law and History Review* 6 (1988): 211–57.

27. On what follows, see Chris Clarkson, *Domestic Reforms: Political Visions and Family Regulation in British Columbia, 1862–1940* (Vancouver: University of British Columbia Press, 2007). For the prairie provinces, see Margaret McCallum, "Prairie Women and the Struggle for a Dower Law, 1905–1920," *Prairie Forum* 18 (1993): 19–34.

28. Ibid., 32.

Inheritance too quickly departed from English norms, with primogeniture abolished everywhere by the mid-nineteenth century, whereas dower, essentially abolished in England by the Dower Act 1833, was not only maintained but expanded in the eastern provinces.[29] In the western provinces, where the English Act of 1833 was received, a statutory form of dower was reinstated in the form of homestead laws, as noted earlier.

In these three areas, then, all concerning property and the family, Canadians largely preferred solutions that emanated from the United States. It seems tempting to attribute legal developments here to the socioeconomic similarities between Canada and the United States, particularly the more widespread and diffuse pattern of land ownership and more equal gender relations in the exploitation of the land. Indeed Lawrence Friedman has argued that this difference between the Old World and the New World was precisely the impetus to family property reform in the United States[30] But whereas socioeconomic structure may well have provided the motivation for reforms that departed from the English inheritance, their particular shape and direction was also influenced by a legal culture in which pluralism played a significant role. Canadians looked to the United States for models, but as Chambers points out, there was selective borrowing from a variety of jurisdictions.

The picture becomes more complicated, however, when we turn to the core features of family law— divorce, custody, and legitimacy. Here we find a marked reluctance by Canadians to adopt United States reforms. Although the Maritime provinces had adopted judicial divorce almost a century before it was available in England, the number of divorces successfully obtained was extremely small, certainly no greater than the numbers in those provinces that relied on legislative divorce. In Nova Scotia, for example, only thirty-four divorces are known to have been granted between 1750 and 1890.[31] In 1901 the total number of divorces obtained in all of Canada was exactly eleven. Meanwhile, 55,000 divorces were granted in the United States in 1900. The United States population was fourteen times larger than Canada's at the time, but its divorce rate was

29. Philip Girard, "Land Law, Liberalism, and the Agrarian Ideal: British North America, 1750–1920," in *Despotic Dominion: Property Rights in British Settler Societies*, eds. John McLaren, A.R. Buck, and Nancy E. Wright (Vancouver: University of British Columbia Press, 2005), 120–43.

30. Lawrence Friedman, *Private Lives: Families, Individuals and the Law* (Cambridge: Harvard University Press, 2004), 32.

31. Kimberley Smith Maynard, "Divorce in Nova Scotia, 1750–1890," in *Essays in the History of Canadian Law, Volume III, Nova Scotia*, eds. Philip Girard and Jim Phillips (Toronto: University of Toronto Press and Osgoode Society for Canadian Legal History, 1990), 245.

5000 times higher.[32] In the field of custody law, judicial and later legislative cutting down of the father's common law rights began as early as 1809 in the United States, whereas legislative changes came much later in Canada and were only reluctantly implemented by the judiciary until late in the nineteenth century, and in some provinces, much later yet, as we have seen with the New Brunswick example.[33] Relaxation of legal strictures against illegitimate offspring in the United States, meanwhile, began as early as 1785 in Virginia, and by 1886 thirty-nine states and territories had granted them the right to share in their mothers' estates; in Canada such changes would not begin to arrive until the 1920s and 30s.[34]

Canada was also reluctant to adopt the anti-miscegenation laws that proliferated across the United States in the nineteenth and early twentieth centuries. These laws prohibited marriages not just between blacks and whites, which might be thought to be a particular United States preoccupation because of the heritage of slavery, but between Native Americans and whites, and between whites and a variety of Asian and Pacific peoples.[35] Although such laws inspired some degree of support in Canada and legislators were lobbied to adopt them, none were ever passed.[36]

Peggy Pascoe's analysis of the anti-miscegenation laws suggests indirectly the factors that were at work in Canada. She points out that the main impetus to anti-miscegenation laws in the United States

32. The incidence of family breakdown or self-divorce in Canada would of course have been considerably higher than the formal divorce rate, making the contrast between the two countries less stark. The figures on formal divorce come from Snell, *Divorce in Canada*, 9, and Friedman, *Private Lives*, 33.

33. On the United States, see Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (Chapel Hill and London: University of North Carolina Press, 1985), 234–88; Jamil Zainaldin, "The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796–1851," *Northwestern University Law Review* 73 (1979): 1038–89; and Mary Ann Mason, *From Father's Property to Children's Rights: The History of Child Custody in the United States* (New York: Columbia University Press, 1994). On Canada, see Backhouse, *Petticoats & Prejudice*, 200–227 and Boyd, *Child Custody.*

34. For the United States, see Grossberg, *Governing the Hearth*, 204, 224. There is no convenient survey for Canada, but the earliest statutes in the common law provinces seem to be the *Legitimation Act*, *Statutes of Ontario* 1921, c. 53, allowing legitimation *per subsequens matrimonium*, and *Statutes of Nova Scotia*, 1924, c. 20, to the same effect, and also allowing a mother to inherit from her illegitimate child (although the converse would not be the case until 1966). Art. 237 of the *Civil Code of Lower Canada* of 1866 permitted legitimation *per subsequens matrimonium*.

35. Pascoe, *What Comes Naturally*.

36. Carter, *Being Monogamous*, 184. At one point the Canadian state considered criminalizing sexual intercourse between white men and Native American women *unless* the parties were married: Ibid., 157.

was the end of slavery and the need to shore up white supremacy by removing the patina of respectability provided to black–white unions by marriage. Intimate unions between blacks and whites would continue of course, but would remain stigmatized as concubinage or worse. Such laws contained an important contradiction, however, in that they necessarily curtailed the right of white men to choose their marriage partners. Only a countervailing consideration of overriding importance, the shoring up of white privilege itself, could justify this incursion on the "natural" right of the white male.[37] Seen in this light, the Canadian experience is not evidence of an enlightened stance on interracial marriage but rather a confirmation of male privilege consistent with the otherwise patriarchal nature of nineteenth-century Canadian family law.[38] The "price" of this upholding of male privilege was that non-white males might, in theory, choose marriage partners of other races without seeing their unions legally stigmatized. Without the same history of slavery and its abolition, there was no particular reason for Canadian law to curb marriages between whites and blacks, or indeed between those of any other races.[39] Native American–white marriages had been accepted for so long that there was little desire to proscribe them. The one place where one might have expected to see such laws emerge was in British Columbia, where a whole battery of discriminatory laws against the Chinese and Japanese were passed; but even there disapproval of white–Asian intermarriage was left to the social realm and never given legal imprimatur.[40]

To explain these differences between the United States and Canada we turn explicitly to comparative legal history, which can not only suggest why Canada adopted some family law reforms and not others, but also provide insight into the jurisdiction being used for comparison, the United States. Consider three of the main explanations that have been advanced as crucial to the making of United States family law after the

37. Pascoe, *What Comes Naturally*, 27–46.

38. See generally Constance Backhouse, "'Pure Patriarchy': Nineteenth-Century Canadian Marriage," *McGill Law Journal* 31 (1986): 264–311.

39. Although slavery did exist in eastern Canada, it is generally considered to have died out by about 1810 and did not play the same economic or, with the possible exception of New Brunswick, ideological role as in the United States: D.G. Bell, "Slavery and the Judges of Loyalist New Brunswick," *University of New Brunswick Law Journal* 31 (1982): 9–42.

40. See, generally, Renisa Mawani, *Colonial Proximities: Crossracial Encounters and Juridical Truths in British Columbia, 1871–1921* (Vancouver: University of British Columbia Press, 2009). The author remarks at 174: "Unlike other colonial jurisdictions, the Canadian response to interracial intimacies was remarkably late" but does not interrogate why this should be so.

Revolution. Michael Grossberg argues for the centrality of the Revolution in shaping what he calls a "republican" family law, one marked by an increasing emphasis on contractualism and the autonomy of family members, a reconfiguration of authority in the family, an intensification of intimate relations centered on the home, and a sharper division of gender roles, with virtuous women reigning at home while combative men fought it out in the marketplace.[41] Lawrence Friedman, meanwhile, has seen economic factors, especially widespread landholding, as the main stimulus to changes in family law. With the New World having much larger numbers of smallholders than had the Old World, the need to clarify title to property during marriage and after divorce was much more pressing.[42] Peggy Pascoe, for her part, asserts that family law, or at least marriage law, was shaped principally by the imperative of race: United States society needed to mark out the legitimate white family as the only respectable and valued form of family life.[43]

Grossberg's concept of the republican family is indirectly supported by the wide variation in core family law principles as between the United States and Canada. Given the broad similarity in family life and family structure in the two societies, it is hard to explain the legal differences just mentioned without reference to some larger ideological or political variable, such as the impact of the Revolution in the United States and the absence of one in Canada. However, the notion of the republican family seems to have little explanatory power with regard to the adoption of married women's property laws, which crossed the border to Canada with relative ease, where a decidedly non-republican family ethos reigned in the legal sphere. Nor can Friedman's suggestion that widespread property-holding drove changes in divorce law in the United States be correct, because Canada had very similar patterns of landholding but a very different experience regarding divorce. The Canadian experience with divorce was, as we have suggested, arguably shaped by non-revolutionary principles. The fundamentally conservative familial ideals held by both Anglo and French Canadians formed an almost impregnable barrier to divorce reform.[44] For Anglo-Canadians, an enduring self-perception of their fundamental "Britishness" inspired loyalty to an imagined ideal that was being abandoned in Britain itself, whereas French-Canadians did not dissent strongly from the position of their clerical leaders with regard to the indissoluble character of marriage. Something this powerful was needed

41. Grossberg, *Governing the Hearth*, 4–30.
42. Friedman, *Private Lives*, 32.
43. Pascoe, *What Comes Naturally, passim*.
44. Snell, *Divorce in Canada.*

to overcome the legal pluralist tradition that seems to have marked other areas of reform. Yet legal culture probably mattered in the lack of racial proscriptions in Canada. Pascoe's interpretation of United States anti-miscegenation law as being aimed at shoring up white privilege after the abolition of slavery may well be correct, and if so would apply in reverse in Canada—no slavery, no need to find an alternative. But there may well also be another factor rooted in legal culture—the British ideology of the rule of law, which stressed formal equality under the law, even though "in the shadow of the law" many white Canadians found other ways to discourage interracial unions.[45]

Moral Visions and Economic Realities in Late Twentieth-Century Family Law

The later twentieth century presents a similar kaleidoscope of similarities and contrasts across national borders. The great trend of the postwar period has been the rise in no-fault divorce throughout the developed world, such that the divorce laws of many nations resemble each other very closely. So too with the abolition of patriarchal and paternal authority: marriage is now seen as a partnership of equals, and the best interests of any children are to be the key legal consideration if custody arrangements cannot be agreed upon in case of marriage dissolution. This change was perhaps most marked in Quebec, where the French-inspired patriarchal family enshrined in the Civil Code of Lower Canada of 1866 was rapidly discarded in favour of a looser Scandivanian-inspired community of autonomous individuals in reforms of the 1960s and 70s.[46] Gender neutrality has become de rigueur in the drafting of all family-related legislation, and distinctions between legitimate and illegitimate children are now forbidden by international law as well as most national laws. The interracial marriage prohibitions contained in United States law have disappeared in the wake of the Supreme Court's

45. See, for example, Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900–1950* (Toronto: University of Toronto Press and Osgoode Society for Canadian Legal History, 1999), 173–225 (account of prosecution of Ku Klux Klan members' attempt to discourage an interracial union in Oakville, Ontario in 1930); Velma Delmerson, *Incorrigible* (Waterloo: Wilfrid Laurier University Press, 2004) (account of white woman whose family had her committed to a refuge under the *Juvenile Delinquents Act* in the 1930s in order to prevent her marriage to a Chinese man).

46. Jean-Maurice Brisson and Nicholas Kasirer, "The Married Woman in Ascendance, the Mother Country in Retreat: From Legal Colonialism to Legal Nationalism in Quebec Matrimonial Law Reform, 1866–1991," in *Canada's Legal Inheritances*, eds. DeLloyd Guth and W. Wesley Pue (Winnipeg: University of Manitoba Press, 2001), 406–49.

decision in *Loving v. Virginia* in 1967, although two states only got around to repealing constitutional provisions on the subject in 1999 (South Carolina) and 2000 (Alabama).[47] The position of different nations on recognition of relationships functionally similar to marriage reveals more diversity, with some mandating spousal-like status after a certain period of cohabitation, others maintaining a strictly hands-off position, and others somewhere in between. But the moral economy of the marriage-based family, as revealed in law, no longer displays the transnational variety within Western society that it did in the nineteenth century, subject only to the hot-button issue of same-sex marriage, to which we will return in a moment.[48]

Curiously enough, the area of family law in which there now appears to be the most diversity between nations relates to property division and support upon divorce. England and most of the states of the United States employ a system of judicial discretion (called "equitable distribution" in the United States) with regard to sharing of assets post-divorce. A small minority of states have laws that are founded upon a presumption of equal sharing, but the rest do not, and a majority of even the "community property" states actually practice equitable distribution rather than equal distribution. The authors of a recent overview declare that "[i]n the final analysis, judicial discretion is the hallmark of equitable distribution," and observe that the issue of "whether equal division is the most equitable . . . is far from resolved and perhaps never will be."[49] In Canada, by contrast, when the Married Women's Property Acts were being replaced with new family law legislation in the late 1970s, no province opted for a divisional regime based upon judicial discretion; all adopted a model combining separate property during marriage with a deferred communal pool of family or matrimonial assets, or a sharing of their increase (or decrease) in value over the course of the marriage. There is a strong presumption of equal sharing that will seldom vary; hence there is very little room for judicial discretion.[50]

47. Pascoe, *What Comes Naturally*, 307–10.

48. It is revealing that the issues discussed in Boele-Woelki, ed., *Debates in Family Law Around the Globe*, relate almost exclusively to parent–child relations (eight chapters) and same-sex marriage (five chapters).

49. John DeWitt Gregory, Janet Leach Richards, and Sheryl Wolf, *Property Division in Divorce Proceedings: A Fifty State Guide* (New York: Aspen Publishers, 2003), 11–13.

50. James G. McLeod and Alfred A. Mamo, eds. *Matrimonial Property Law in Canada* (Toronto: Carswell, 1980). In some provinces there is a tendency to use judicial discretion to permit postponement of the sale of the matrimonial home to allow the custodial parent to remain in it until any minor children have reached the age of majority. All the statutes contain a long list of factors that can be invoked to justify an unequal division in cases in which an equal division would be unconscionable, but the courts have been consistently unwilling

In some ways this is the obverse of what one might expect between the United States and Canada—one would expect the United States, with its strong rights tradition, to be attracted to what is now the Canadian model, whereas one might have thought that Canada, where concepts of need rather than entitlement have traditionally been more important, would have been more enamoured of judicial discretion in post-divorce property division.[51] However, the availability of the Quebec model of partnership of acquests, essentially a deferred community property model adopted there in 1970, seems to have been quite influential when reforms to matrimonial property law were being debated elsewhere in Canada in the mid-1970s. The Ontario Law Reform Commission observed in its 1974 *Report on Family Property Law* that the Quebec reform "combines the best features of the systems of separation of property and community property without attracting the disadvantages of either, . . . thereby allowing a degree of equality that is unattainable under present Ontario law."[52] That observation of course assumes that equality is the goal of property division on marriage breakdown, whereas in the United States the importance of basing division on the parties' respective contributions has continued to structure the exercise of judicial discretion.[53]

Turning to same-sex marriage, it should be clear that the existence of laws permitting it in Canada and several European countries will be highly relevant to the unfolding of the debate in those countries where it is not yet allowed. Yet some scholarly commentary still takes place within an

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to upset an equal division without a very compelling factual basis such as improvident depletion of marital assets by one spouse, fraud, or an egregious renunciation of the marital relationship.

51. In fact, even in the field of child and spousal support in Canada, where need is a highly relevant consideration, much effort has been put into devising guidelines for support awards that will reduce judicial discretion as much as possible.

52. Ontario Law Reform Commission, *Report on Family Law. Part IV, Family Property Law* (Ontario: Ministry of the Attorney General, 1974), 52. The Ontario reform in turn became hegemonic across the country.

53. It is conceivable that a system based on judicial discretion may conduce to equality in practice, but United States researchers who investigated empirical outcomes of discretion-based marital property statutes in the 1970s and 80s found that wives were often awarded a third of the family property on the analogy to common law dower: Lenore Weitzman, "Marital Property: Its Transformation and Division in the United States," in *Economic Consequences of Divorce: The International Perspective*, eds. Lenore J. Weitzman and Mavis Maclean (Oxford: Clarendon Press, 1992), 85–142. The English model, although still based on judicial discretion, has begun to be more attentive to gender equality concerns since the House of Lords decision in *White v. White*, (2000) 2 F.L.R. 981, although not going so far as to institute a presumption of equal division. See the discussion in Alison Diduck and Felicity Kaganas, *Family Law, Gender and the State: Text, Cases and Materials*, 2nd ed. (Oxford and Portland, OR: Hart, 2006), 255 et seq.

exclusively national silo. Nancy Cott's fine book *Public Vows: A History of Marriage and the Nation*, is one such example.[54] Writing in the late 1990s, Cott did not predict one way or the other whether same-sex marriage would be allowed in the future, but seemed to accept that the 1996 federal Defence of Marriage Act would be conclusive in preventing any further spread of same-sex marriage at the state level. In fairness to her, at the time of writing no country had yet permitted same-sex marriage—the Netherlands was the first to do so in 2001—but the momentum for change internationally was clearly underway. Cott's discussion nonetheless takes place entirely at the national level. The existence of Canada as a marriage haven for gay and lesbian couples since 2003, along with legislative developments in Europe, will ultimately exert some influence on the direction of judicial and legislative change in the United States. We began with the story of Lorna Parsons, and in the short term, in the 1920s, the decisions of people like her to seek a divorce in the United States could be seen as a welcome safety valve by Canadian legislators, relaxing the pressure to alter Canadian law, and the United States could continue to be portrayed in Canada as a frivolous, hedonistic society uncommitted to preserving the family. But over the longer term, the presence of the United States model, along with a variety of other social and legal changes, helped to undermine the Canadian devotion to strict divorce laws. One might hypothesize a similar development with regard to same-sex marriage. Although the availability of "same-sex marriage havens" outside the United States may function to preserve the status quo in the short term, they may weaken the will to retain that status quo over the long term.

Foreign models can never exercise conclusive influence over developments within a particular nation, but their existence can help shape national discourses. Even the United States Supreme Court, traditionally highly resistant to recognizing legal developments outside the country, has begun to shift its position recently.[55] In *Lawrence v. Texas* in 2003,[56] the Supreme Court overturned its 1986 decision in *Bowers v. Hardwick* with regard to the constitutionality of state sodomy laws dealing with conduct between consenting adults. In *Bowers* Chief Justice Burger had noted that "Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeao-Christian moral

54. See note 6 above.

55. See, generally, Sarah K. Harding, "Comparative Reasoning and Judicial Review," *Yale Journal of International Law* 28 (2003): 409–64.

56. 539 U.S. 558 (2003).

and ethical standards."[57] In *Lawrence* Justice Kennedy observed that Chief Justice Burger's sweeping statements were incorrect even at the time, citing the venerable Wolfenden Report,[58] the decriminalization of most homosexual acts in Britain in 1967, and the decision of the European Court of Human Rights in *Dudgeon v. U.K.* in 1981 overturning Northern Ireland's sodomy law.[59] The claim put forward by Bowers, and by extension Lawrence, said Justice Kennedy, could not be said to be "insubstantial in our Western civilization."[60]

Conclusion

Our principal goal here is to seek to deepen our understanding of the idea of national legal history by suggesting that national legal traditions are often more porous than they seem, less national and more intercultural and international, and that, perhaps paradoxically, in some areas national legal culture is distinctive, and can resist material changes in society. The Canadian example shows how elements of native law, state law innovations from the United States, and Quebec law could be woven into the Canadian common law tradition, whereas Scandinavian legal developments could be influential in remolding basic concepts of matrimonial law in the Quebec civil law tradition. But we have also argued that national legal traditions can be defined as much by what they keep out as by what they let in, making legal culture at times resistant to broader changes. In Canada's case, liberal divorce laws and laws diminishing patriarchal authority were long resisted in the interest of promoting a particular conjugal ideal, whereas the failure of anti-miscegenation laws to find a foothold north of the border can be seen as motivated by the desire to uphold male privilege, and that aspect of the rule of law that stressed formal equality.

A second goal of this article is to propose more linkage between legal history and comparative law. A development examined from within the confines of a particular national tradition may look quite different when set alongside contemporaneous developments in other countries. Or the absence of legal change may become a research question in itself. One

57. *Bowers v. Hardwick*, 478 U.S. 186 (1986), 196.

58. *Report of the Committee on Homosexual Offences and Prostitution* (London: Her Majesty's Stationery Office, 1957).

59. *Dudgeon v. U.K.* (1981), European Court of Human Rights 5.

60. *Lawrence v. Texas*, 572–73. Justice Kennedy did not know or chose not to note that Canada (where criminal law is a federal matter) had decriminalized most homosexual acts in 1969: *Statutes of Canada* 1968–69, c. 38.

would never ask why Canada did not adopt anti-miscegenation laws if one were not aware that they swept across the United States in the nineteenth century. Likewise, the emergence of similar legal developments in different national jurisdictions, such as the various married women's property laws discussed here, suggests that explanations based on national exceptionalism will not always be persuasive, although it is of course true that the same innovation may be adopted in different societies for different reasons.

We do of course acknowledge that the porosity of a given national legal order is itself a historical phenomenon, subject to flux and change. As we have argued, the Canadian family law reforms of the eighteenth and nineteenth centuries may in part have reflected Canadian law's greater legal pluralism in that period, as it tried to negotiate the ways in which aboriginal law, common law, and Quebec civil law would interact in a given space.[61] And the relative porosity of different national legal traditions may also vary. But these caveats only serve to stress the importance and usefulness of legal historians being attuned to the benefits of a "transnational" approach to research and interpretive strategies in order to explore the full variety of forces— legal and more broadly cultural— that may motivate legal change in various historical periods.

61. G. Blaine Baker, "The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire," *Law and History Review* 3 (1985), 219–92; Eric Reiter, "Imported Books, Imported Ideas: Reading European Jurisprudence in Mid-Nineteenth-Century Quebec," *Law and History Review* 22 (2004): 445–92.