Why Canada Has No Family Policy: Lessons from France and Italy

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Abstract
This paper uses a comparative legal history approach to examine the "private" law of the family in France, Italy, and the major English-speaking countries in order to clarify the fundamental notions of the family which predated the welfare state. It is suggested that a major cleavage exists, historically, between an autonomous family law in France and Italy oriented around notions of familial solidarity, sibling interdependence and equality, and intergenerational continuity, and a family law in the English-speaking countries marked by a preoccupation with the protection of property rights and the independence of individual family members. These contrasts reveal differing societal conceptions about the importance of family life, and resulted in the earlier emergence and higher legitimacy of maternal and child benefits in France and Italy than in the English-speaking countries.
WHY CANADA HAS NO FAMILY POLICY: LESSONS FROM FRANCE AND ITALY

By Philip Girard*

This paper uses a comparative legal history approach to examine the "private" law of the family in France, Italy, and the major English-speaking countries in order to clarify the fundamental notions of the family which pre-dated the welfare state. It is suggested that a major cleavage exists, historically, between an autonomous family law in France and Italy oriented around notions of familial solidarity, sibling interdependence and equality, and intergenerational continuity, and a family law in the English-speaking countries marked by a preoccupation with the protection of property rights and the independence of individual family members. These contrasts reveal differing societal conceptions about the importance of family life, and resulted in the earlier emergence and higher legitimacy of maternal and child benefits in France and Italy than in the English-speaking countries.

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* Professor of Law, Dalhousie University, Halifax, Nova Scotia, and James L. Lewtas Professor of Law, Osgoode Hall Law School, York University (1993-94). This paper was given as the Lewtas Lecture, 9 March 1994, and was subsequently revised for publication. I would like to thank the Lewtas Trustees for making my stay at Osgoode possible, and the Law Library staff for their assistance. Gratefully acknowledged are comments received when earlier versions of this lecture were presented at the University of Victoria, Faculty of Law and the McGill Legal Theory Workshop, and from colleagues at Osgoode. Reuben Hasson, Douglas Hay, Mary Jane Mossman, and Mariana Valverde provided useful references. My ideas on this topic have been stimulated by students and faculty whom I have met in my ten-year association with the Civil Law/Common Law Exchange, funded by the Department of Justice Canada. I especially want to acknowledge discussions with Professor Marlène Cano of the University of Ottawa (Civil Law Faculty), who contributed so much to the Exchange over the past four years. Professor Cano’s untimely death on 6 September 1994 has deprived Canadian family law scholarship of a vital and brilliant presence, and I would like to dedicate this article to her memory.
A company in France recently announced that it would offer three-year parental leaves to any of its employees wishing to take them and that the remuneration would be $660 per month. Extended parental leave is already available as a state benefit in France, but only after the birth of a third child, whereas the company would provide this leave after the birth of a first or second child as well. The benefit is to be financed 80 per cent from company funds and 20 per cent from a company-financed fund normally used to finance leisure activities for employees. The objective of the company is to open 40 new positions in this way.¹

I mention this programme as a way of linking my chosen topic to the broad theme of the Lewtas endowment: economic and business policy. The link between the title of this paper and this theme may not be immediately apparent, but that lack of connection serves only to illustrate my point. I want to suggest that the absence, in Canada and other English-speaking countries, of what the Europeans call "family policy," results in part from a tendency to see individuals where the Europeans see families. The result is that a whole range of issues relating to family life and family structure are simply defined out of existence in our literature and our legislation relating to economic and business policy, and in other areas of life as well. I want to explore how that has come about using the methodology of comparative legal history. The tools of comparative sociology and comparative political economy are usually employed to investigate this question, but I will argue that an analysis of comparative notions of the family will shed some new light on this problem.

Let me define what is meant by "family policy" and then restate the problem before proceeding to the argument. Family policy, as understood in continental Europe, refers to a whole range of measures aimed at assisting parents in raising their children.² Initially these


² For a country-by-country overview, see W. Dumon, ed., Family Policy in EEC Countries (Luxembourg: Office for Official Publications of the European Communities, 1990). A more extensive analysis of theoretical issues can be found in several of the contributions to J. Aldous & W. Dumon, eds., The Politics and Programs of Family Policy: United States and European Perspectives
Family Policy

measures were purely economic and aimed at socializing, to a certain extent, the cost of bearing and raising children. Increasingly they came to include wider forms of support, so that today family policy would include family allowances, maternity and parental leave, child care and pre-school education programmes, housing allowances, and subsidized family vacation resorts, among other things. By looking at family support policies in a comparative context, a definite pattern can be found. The continental members of the old European Economic Community (EEC) and Scandinavia consistently provide the most generous, extensive, and effective benefits; the United States consistently provides the least; and the United Kingdom, Canada, Australia, and New Zealand show up in the middle, leaning more toward the United States with regard to particular benefits and more toward Europe on others. Historically, France has spent more than twice as much as Britain on comparable benefits, and many times what Canada or the United States has spent. Why do countries which have reasonably comparable economies and standards of living set their priorities so differently?

In answering this question, the predominant analysis looks to the tools and language of comparative political economy. Various authors have developed typologies of the welfare state: they find that countries vary along an axis which runs from liberalism on one end to corporatism on the other, with the countries most influenced by liberalism having the least generous benefits and those most influenced by corporatism or socialism having the most generous benefits. Another way of stating this

(Notre Dame, Indiana: Center for the Study of Man, University of Notre Dame, 1980).

The classic study is S.B. Kamerman & A.J. Kahn, eds., Family Policy: Government and Families in Fourteen Countries (New York: Columbia University Press, 1978). The authors distinguish three categories of countries: those with an explicit and comprehensive family policy, such as France and Sweden; those with an explicit but more narrowly focused family policy, such as Germany and Denmark; and those with an implicit or reluctant family policy, or where the notion of such a policy is rejected, such as the United Kingdom, Canada, and the United States. More recently, see J. Bradshaw et al., Support for Children: A comparison of arrangements in fifteen countries (London: HMSO, 1993) (Canada not included).

From a Canadian perspective, see F. Lesemann & R. Nicol, “Family Policy: International Comparisons” in M. Baker, ed., Canada’s Changing Families: Challenges to Public Policy (Ottawa: Vanier Institute of the Family, 1994). The authors distinguish between “family-oriented” (France), “privacy-oriented” (England, Canada, and United States), and “statist” (Sweden) social policy.

would be to say that there is greater tolerance of inequality in the states more committed to liberal political ideals.\(^5\)

It is hard to quarrel with these conclusions, framed as they are at quite a high level of abstraction. I want to suggest, though, that there is another important variable in this equation when one isolates the family support measures of the welfare state from the whole range of measures normally included under the rubric of the welfare state. That variable is the conceptualization of the recipients of state benefits as poor individuals, or as families with children. Some of the European welfare states, such as France, actually redistribute much more income from the childless to those with children than from the rich to the poor—horizontal rather than vertical redistribution, if you will, and this fact seems to have been overlooked in most existing analyses of the welfare state.\(^6\) We will miss something essential about the French welfare state in particular if we are not attuned to the importance, both historical and contemporary, of the notions of familial, as well as individual, entitlements. For this reason, too, feminist analysis has been unable to explain satisfactorily the difference between, for example, English and French family provisions.\(^7\) A broader focus, which looks at different familial ideologies as well as gender ideologies, seems to be called for.

A family policy cannot exist without some idea of what a family is, and this takes us back to basic social and legal ideas about the family. My own research in the comparative legal history of family law and family property has revealed some rather marked differences in approach between the common law countries\(^8\) on the one hand, and

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\(^8\) I will not be referring to Quebec or Louisiana when speaking of Canada or the United States, and hence will refer to them as "common law countries" for the purposes of this paper. By England I mean England and Wales. Quebec has recently begun to develop its own family policy: C. Le Bourdais & N. Marcil-Gratton, "Quebec's Pro-Active Approach to Family Policy: 'Thinking
France and Italy on the other. In contrast to French and Italian law, the common law, at least since the early modern period, has not treated the family as a juridical entity with a collective interest which might be measured against that of individual family members. The law of family maintenance, family property, and successions, viewed in historical context, reveals that the common law has theorized family law as a series of relationships between individuals, unleavened by any concept of solidarity or equality. Its prioritization of property as the pre-eminent legal relationship, I will argue, impeded the development of an autonomous domain of family law. Pre-codal law on the continent had some similarities with this view, but nineteenth century jurists articulated an idea of the family as a collective juridical entity which served as a brake on the liberty and autonomy of all members. This notion was obviously not nearly as much a restraint on the husband's liberty as it was on the wife's, but the fact that continental jurists never lost sight of the purpose of paternal and marital power was significant for future developments. With the evolution of spousal equality in the twentieth century, the notion of the "family interest" has become more, rather than less, evident in French and Italian law, even if social mores have admitted more autonomy for individual family members.  

This historical dichotomy is significant because since 1950 most of the comparative law literature on family law has focused on the "convergence" of family law among all western countries.  

It is true that in the last thirty years there have been strikingly similar developments in all western countries regarding spousal equality, the equalization of status for children born inside and outside marriage, the liberalization of divorce, and the availability of abortion and contraception. Yet within the French and Italian legal traditions these changes have been seen as providing more autonomy for family members without doing away with the basic notion of family solidarity. A certain convergence in the formal expression of family law may conceal, I will suggest, differing socio-legal conceptions of the "family."  

and Acting Family," in Baker, ed., supra note 3, 103. Quebec family law is formally civilian but in substance is strongly marked by common law and Scandinavian ideals of the independence and autonomy of family members. It is a distinctive hybrid which I hope to examine at a future date.  

9 See infra note 64 and accompanying text.  


These underlying concepts of the family have historically played an important role in shaping the differing contours of the continental and Anglo-American welfare states.

The body of this paper is divided into three parts. First, I examine the private law of the family (I), looking in turn at the autonomy of family law (A), the integrity of its concepts (B), and the influence of other normative orders (C), with a view to elucidating underlying notions of the family. I will then consider the notion of the family underlying certain family benefits in public law (II), namely family allowances and maternity leave, before concluding (III). The terms “private” and “public” are nowhere more slippery than in a discussion of the family, and I use them here as convenient labels, not as possessing any inherent truth.

I. THE ETHOS OF FAMILY LAW: PRIVATE LAW

A. Autonomy

Family law in the common law world has only recently begun to acquire any recognition as a distinct field of law.\(^\text{12}\) The nineteenth century treatise writers invariably spoke of the “law of domestic relations” as opposed to “family law.” Those works which surveyed the field as a whole, Tapping Reeve’s *Law of Baron and Femme,*\(^\text{13}\) James Schouler’s *A Treatise on the Law of the Domestic Relations,*\(^\text{14}\) and William Pinder Eversley’s *The Law of Domestic Relations,*\(^\text{15}\) treated in separate chapters husband and wife, parent and child, guardian and ward, and master and servant, and also included a general chapter on infancy. Each chapter was essentially an aspect of the law of persons, and the reason for grouping them together was the functional nexus of the

\(^{12}\) I will treat the “common law world” as a unity, at the risk of some oversimplification. Such differences as exist between, say, English and United States law on particular points of family law are relatively unimportant when both are compared with French or Italian law.

\(^{13}\) (New Haven: Oliver Steele, 1816). Its full title nicely illustrates the point made in this paragraph: *The Law of Baron and Femme; of Parent and Child; of Guardian and Ward; of Master and Servant; and of the Powers of the Court of Chancery, with an Essay on the terms, Heir, Heirs, and Heirs of the Body.*


household rather than any overarching legal concept of the family. Indeed, none of these texts attempted to give any general definition of "family." Nor had Blackstone, and to this day English, Commonwealth, and United States law persist in treating the meaning of the term "family" as a question of fact rather than law. As Katherine O'Donovan says, its meaning is taken for granted.16

Thus, when R.H. Graveson entitled his retrospective work *A Century of Family Law 1857-1957*,17 he was guilty of an anachronism. He was correct in stating, however, that "family law" was not a term of art in English law, but rather "a conventional means of referring to so much of our law, as directly affects the family."18 Coinciding with the publication of Graveson's work was the first edition of P.M. Bromley's *Family Law*, and so we may regard family law in the modern sense as having been officially discovered in England only in the 1950s.19

General works on English law were more sceptical of the "new kid on the block." Philip James waited until the 8th edition of his *Introduction to English Law*20 to add a section on family law to his chapter on private law. A passing commentary spoke volumes about English attitudes to the subject. "[O]f recent years," he observed, "'family law', formerly something of a tiresome child to the lawyers, has become a field of diligent interest and earnest reform."21

Surprisingly, there is to this day no fully comprehensive text on family law in Canada. The one text which possesses the title *Family Law in Canada* is better described by its sub-title, "Fourth edition of Power

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18 Ibid. at vii. Thus the work includes chapters on tort, criminal law, evidence, and taxation as well as the more traditional areas of domestic relations.

19 Although the term had been in informal usage for at least half a century, A.V. Dicey had used it in his *Lectures on the relation between law and public opinion in England during the nineteenth century* (London: Macmillan, 1905) at 394 when discussing changes in married women's property law. A slightly earlier work than Bromley's which used the same title, J. Hamawi's *Family Law* (London: Stevens, 1953), seems to have died without issue.

In retrospect it is surprising to realize that the sixth and last edition of Eversley, *supra* note 15, with its antique organizational framework intact, appeared as late as 1951.


on Divorce and other Matrimonial Causes." It is heavily slanted toward matrimonial law and has relatively little coverage of the parent-child relationship, most notably nothing at all about how one establishes the tie of paternity. We have books on children and the law, matrimonial property, and divorce, but no actual treatise on family law as a whole in Canada.

In the civil law traditions of France and Italy, family law has been recognized as an autonomous field for at least a century and a half. As early as the seventeenth century Domat singled out the legal obligations created by birth and marriage as distinct from all other types of obligations. The lesser scope afforded to individual will and the correspondingly greater place occupied by the notion of public order—in other words, the centrality of status as opposed to contract in family law—were said to set it apart from the rest of the droit civil. Demolombe, in his magisterial thirty one volume commentary on the Code Napoléon, agreed, to such an extent that he was willing to label all of family law as public law. In France we find an 1867 text on "family law," and in Italy two works dating from 1914 and 1915, although there are probably earlier examples. Even this early French text insisted on the autonomy

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22 C. Davies, *Family Law in Canada* (Toronto: Carswell, 1984). This is meant as no reproach to Professor Davies, who labours under certain constraints as the editor of an inherited text.


26 J. Domat, *The Civil Law in its Natural Order*, trans. by W. Strahan, vol. 1 (Boston: Little Brown, 1853) at 8-21. I am not suggesting that Domat (1625-1696) himself had isolated "family law" in the modern sense, but his work clearly provided the conceptual basis upon which an autonomous family law might be built.


28 J. Oudot, *Du droit de famille* (Paris: A. Marescq, 1867). This work was the published version of lectures given at the University of Paris by Oudot, who bequeathed his notes to his former student Charles Demangeat upon his death in 1862, with the injunction to publish them in book form. It thus appears that "family law" was understood as a coherent field considerably earlier than 1862, perhaps as early as 1838, when Demangeat began his studies under Oudot.

of family law, saying that it would be an error to include under the label "droit de famille," all dispositions of private, public, and criminal law having something to do with the family; in these branches of law, "l'idée de famille ne serait ... qu'un accessoire." 29

It is important to realize that it was largely treatise writers who created the category of "family law" in France and Italy, since the concept of family as such did not play a prominent role in either the Code Napoléon of 1804 or the Italian Civil Code of 1865. These codes treated marriage and family relations as part of the law of persons, and did not set out a separate book or title on family law. The strong emphasis on the husband's paternal authority over his children and marital authority over his wife seemed almost to blot out any independent notion of family. Yet doctrine and jurisprudence insisted that the husband's extensive powers were not granted to him as a feudal prerogative, but rather in the interest of the family as a whole. 30

Jurists were able to synthesize a "family law" quite easily for two reasons. The first, sociological, was simply the cultural significance of the family, both nuclear and extended, in strongly Roman Catholic societies with large peasant populations. Despite the principle of secularisation in both codes, their provisions "remained profoundly marked by the canonical conception of marriage and the family." 31

Neither code shrank from including essentially moral injunctions derived from religious precepts: thus, children owe honour and respect to their parents and spouses owe each other fidelity, succour, and assistance. 32 Yet, those provisions are far from being considered just nice words. In 1981 a 300 page book was published in France on the latter provision of the Civil Code. 33

29 Oudot, ibid. at 4.

30 Although the Code Napoléon gave the father an apparently unlimited usufruct over any property of his minor children, doctrine and jurisprudence agreed that his administrative powers should be assimilated to those of a tutor. He was allowed to spend any revenues for the benefit of the family, but could not make gifts, compromise legal actions, etc. See J. Thabaut, "L'Evolution de la Législation sur la Famille depuis 1804," doctoral thesis (Toulouse, 1913) 79.

Italian jurists stressed that the husband's status as "head of the family" under the Codice Civile of 1865 was not a feudal prerogative of his sex, but a power necessary to safeguard the family as a unit: V. Librando, "Italian Law" in A.G. Chloros, ed., The Reform of Family Law in Europe (Deventer, The Netherlands: Kluwer, 1978) 151 at 152.

31 J. Foyer, "French Law" in A.G. Chloros, ibid., 75 at 77. For Italian law, see Ungari, supra note 28 at 128-36. See also section I.C, below.

32 See Arts. 371 and 212 C. Civ. (France), Arts. 315 and 143 C. Civ. (Italy).

The second reason, juridical, was the clarity of the codes in defining the nature and effects of the two primary relationships in family law, marriage and filiation, and I will have more to say about them when I consider the integrity of family law's conceptual apparatus.

To return to English law and ask why family law did not develop a similar autonomy, I believe we have to look at the conceptualization of property. Although it is often said that the history of England's constitutional law can be found in its property law, it is less often noted that family law also has its roots in property. In matrimonial law, in parent-child relations, and in the law of succession, the flourishing of absolute property rights from a relatively early date in the common law led to a constant undertheorization of family law and a virtual metastasis of property notions, which had grave consequences for wives and children. The totalitarian legal fiction of marital unity led to an analysis of the husband-wife relationship as one involving powers rather than duties while the marriage subsisted, which impeded the emergence of an effective support obligation between husband and wife for centuries. Contrary to what one might think, the husband had only a moral obligation to support his wife at common law. As Eversley put it bluntly in 1885, the wife "has no claim on her husband, even starving and deserted by him." And not until 1950, according to Otto Kahn-Freund, did a wife in England gain "an enforceable claim to maintenance without limitation as to amount and without the need for bringing proceedings for divorce, separation or restitution of conjugal rights in order to enforce it."34

Mary Jane Mossman has noted a tendency in modern Canadian legal academic writing to prioritize "property" over "family": "Toward 'New Property' and 'New Scholarship': An Assessment of Canadian Property Scholarship" (1985) 23 Osgoode Hall L.J. 633 at 646-48.

See Eversley, supra note 15 at 251, where he makes it clear that the husband's duty only arose out of the Elizabethan poor law, and was thus owed not to the wife but to the overseers of the poor. English authors would typically dance around this doctrine by saying that the husband had a duty to maintain his wife, but that it was unenforceable by her while the marriage lasted. See, for example, S.M. Cretney, Principles of Family Law (London: Sweet & Maxwell, 1974) at 217-18. The question of how one can characterize a legal relation as an unenforceable right went unanswered and unexamined.

The agency of necessity was only an apparent exception to this state of affairs. This doctrine allowed the wife to pledge the husband's credit for household necessities, and it did not depend on the husband's volition in the sense that he could not countermand orders placed with suppliers, either specifically or in general. It is obvious that this doctrine provided only de jure and not de facto comfort to the wife. There was no obligation on a trader to continue to supply credit if the husband indicated any resistance to payment. Far from a "right" to support, the agency of necessity was a mere power, with no correlative duty on anyone.

Similarly, with regard to children, the common law recognized no duty on the father's part to support his minor children. Or rather, in the euphemism of the common law, there was a duty of imperfect obligation—i.e., one that was unenforceable. In 1952 Lord Chief Justice Goddard observed sheepishly that "anomalous as it may seem, a father is not by the civil [i.e., non-criminal] law liable for a child's maintenance."37 A father could only be obliged to support a child in need if the poor law authorities intervened, i.e., if the child was in danger of being thrown on the parish.

And here we intersect with a sub-theme in English family law: the prioritization of duties owed to the state as opposed to those owed to family members. William Blackstone illustrates this perfectly. He speaks of the father as having a general legal obligation to support his children, but then refers to the Elizabethan poor law as the source of that duty. That statute38 imposed a liability on a father toward the poor law authorities and no one else—it was not enforceable by the child or the mother. In discussing a provision of the same statute, which creates a penal obligation for fathers to provide necessaries to their children incapable of working, Blackstone states approvingly that the "policy of our laws, which are ever watchful to promote industry, did not mean to compel a father to maintain his idle and lazy children in ease and indolence."39 In other words, the father's property is subject to no moral claim by the family; the state will intervene if the dependents are starving and unable to work, but in no other case, and even then it is not the dependent but the state agency which can enforce the obligation.

Likewise, an adult had no duty to support his or her parents except through the mechanism of the Elizabethan poor law. At no point, apparently, was even this indirect support obligation extended to in-laws or siblings. United States law diverged somewhat from the English approach and began to recognize a mutual obligation of support between parent and child by statute or judicial reform, but even by 1940 this position was by no means unanimous among the states.40

38 An Acte for the Releife of the Poore 1601 (U.K.) 43 Elizabeth 1, c. 2, s. 7.
40 J. W. Madden in Handbook of the Law of Persons and Domestic Relations (St. Paul: West Publishing, 1931) says that state decisions are "conflicting" on the existence of such a duty at common law, but that the general current of authority is to recognize the power of the infant to bind his father for necessaries. As we have seen in the context of the wife's agency of necessity, this is not
In terms of succession law, freedom of testation as to realty was effectively established in England by the seventeenth century, enabling the propertied to determine for themselves the contours of their family obligations after death.\footnote{41} Interestingly, even Blackstone, the great apologist for absolute property, was uneasy about this limitless freedom, observing that “perhaps it had not been amiss, if the parent had been bound to leave [his or her] children at the least a necessary subsistence.”\footnote{42} Where a decedent left no will, realty descended to the eldest male child under English law until 1926, according to the rule of primogeniture. Although primogeniture was increasingly controversial toward the end of the 19th century, this inequality was justified almost to the very end by the same argument Blackstone used in the context of support: the necessity of maintaining work incentives for younger sons.

In the nineteenth century, English and continental law diverged more and more in their legal conceptions of the family. French and Italian law accepted economic liberalism in all areas of law outside the family, but resolutely banished it from the hearth. In fact, in one important respect French and Italian law became less liberal in the nineteenth century. The Code Napoléon of 1804 and Italy’s Codice Pisanelli of 1865 both severely restricted freedom of testation by adopting forced heirship (this refers to mandatory equal sharing of a deceased’s property among his or her children, whether the deceased died with a will or not, and it remains the cardinal feature of French and Italian succession law to this day).\footnote{43}

English law, on the other hand, had long ago abolished mandatory shares of personalty for a deceased’s widow and children.\footnote{44}
and in 1833 it effectively abolished the widow's right to dower and her life interest in one-third of the deceased's realty, by providing that the husband could override it by will. Postmortem familial obligation was thus finally severed from property. And with the married women's property acts of the 1870s and 1880s, English law embraced economic liberalism within the very bosom of the family by declaring that husband and wife were totally separate in relation to property. Historians have pointed out that English feminists shared the mid-Victorian optimism about the beneficial effects of an expanding market economy; this belief buttressed their argument that the only way for married women to participate fully in society was to ensure their recognition as totally autonomous economic actors.

This dichotomy between English and continental law can be seen most clearly in the work of Henry Maine, whose 1861 opus *Ancient Law* provided the ideological basis, along with John Stuart Mill of course, for a new family law shorn of the feudal prerogatives of marital unity. Maine was as severe a critic of the existing common law of matrimonial property as he was of the French law of forced heirship: both, in his view, were contrary to the "movement of the progressive societies [which] has been ... distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place." One United States historian of the family vulgarized Maine's


45 *Dower Act 1833* (U.K.), 3 & 4 William 4, c. 104. Nineteenth century United States law went in quite the opposite direction, when most states instituted a minimum share (generally one-third) which the surviving spouse could elect for if the deceased spouse's will provided less: C. Shammas et al., *Inheritance in America: from Colonial Times to the Present* (New Brunswick, N.J.: Rutgers University Press, 1987) at 224-58. In Canada, dower vanished fairly quickly in the West, where it was in some provinces replaced by "homestead rights" or a revived statutory form of dower, and in Newfoundland, where it was not. It proved more tenacious in the Maritime colonies and Ontario, where my impression is that it remained an important part of the "moral economy" of these agricultural societies. In all jurisdictions, however, common law dower could be avoided by various techniques and no empirical studies exist to verify how extensively it was used (or avoided) in practice.


48 *Ibid.* at 168. Views on this subject identical to Maine's can be found in F.H. Lawson, *The Rational Strength of English Law* (London: Stevens & Sons, 1951) at 38. Maine's biographer suggests that he was from humble parentage and "consciously secretive" about his ancestry throughout his life, with one exception. His godfather, the Reverend John Bird Sumner, was a
views in the following way: "the new view," said Arthur Calhoun in 1917, "is that the higher and more obligatory relation is to society rather than to the family; the family goes back to the age of savagery while the state belongs to the age of civilization."49 English, United States, and Canadian law all evolved within twenty years in the direction advocated by Maine, but his influence on the continent was negligible. By 1900 the elements of status left in English family law had been reduced to the barest possible minimum, as absolute property rights and freedom of contract picked up the slack. French and Italian law, by contrast, had been thoroughly familialized.

The doubts and hesitations of the English-speaking world about whether family law is "real" law find no counterpart in French or Italian academic literature. Not only is the tradition of writing about family law a venerable one, it is also a rich one. The sophistication of Jean Carbonnier's treatise on family law, which incorporates extensive references to the relevant literatures in history, sociology, demography, psychology, and legal theory, simply cannot be compared with any legal text yet produced in the English-speaking world.50

The autonomy of family law is so much taken for granted today on the continent that the debates are not about whether it is autonomous but how. One author has argued that this autonomy resides in the ultimate goal of family law, which is the full development of the human person.51 Others suggest that this ideal is too abstract, that what sets family law apart is its basic principle of the satisfaction of needs rather than the reward of merit.52 In other words, family law demarcates a zone of altruism, solidarity, and economic welfare in a world of competition, alienation, and meritocracy.

cousin to Maine's mother, and ultimately became Archbishop of Canterbury in 1848. His intervention was crucial in getting Maine admitted to Christ's Hospital, a well-known charity school, where he began his brilliant academic career. See G. Feaver, From Status to Contract: A Biography of Sir Henry Maine 1822-1888 (London: Longmans, 1969) at 4-5.


52 Carbonnier, supra note 50 at 6.
B. Integrity

The basic corpus of legal rules governing the family has been found in the civil codes of France and Italy from 1804 and 1865 respectively, supplemented by an ever-increasing amount of case law and doctrinal literature, and nourished by other orders of normativity (especially religious). All of family law, however, is organized around two fundamental juridical concepts: marriage and filiation.

"Tout le droit de la famille," writes Jean Carbonnier, "peut réellement se construire à partir de ces deux notions premières." These legal states give rise to relationships of affinity and kinship, as we would say in English, alliance and parenté in French law, and affinità and parentela in Italian law. Legal relationships arising from marriage subsist not only between spouses, but also between in-laws. The relationship arising from affinity is most important in determining support obligations and marriage prohibitions, but it has legal effects in a number of other contexts, both inside and outside the respective civil codes of France and Italy. The obligation of support extends to parents-in-law, sons-in-law, and daughters-in-law in both French and Italian law. It ends only when the person "responsible" for the affinity and all issue of the relationship in question have died; in other words, a son-in-law would continue to be legally liable for the support of his mother-in-law even after the death of his wife, provided children had been born of the marriage and at least one was still alive. With regard to marriage prohibitions too, the relationship of affinity continues after death, such that it is still prohibited to marry one's deceased spouse's sibling.

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53 Ibid. at 16.
54 Art. 206 C. civ. (France).
55 Art. 433 C. civ. (Italy).
56 For French law, see Art. 206 C. civ.; for Italian law, see Art. 434 C. civ. In Italian law, the obligation will also cease between affines when the creditor of the obligation remarries. It is quite true that there is very little litigation aimed at enforcing the support obligation, and that its continued existence in the civil codes is largely for symbolic reasons. Yet these symbols remain important: 77 per cent of the French population approved of the retention of these provisions in their current form, according to a 1969 survey, after their legal effects were clearly explained. J. Commaille, Familles sans justice? Le droit et la justice face aux transformations de la famille (Paris: 1982), c. 4.
57 Although in France (Art. 164 C. civ.) it is possible for the President of the Republic, "pour des causes graves," to override this prohibition, as well as the prohibition on the marriage of affines in the direct line, provided the marriage producing the affinity has been dissolved by death; in the case of divorce, the dispensing power is not available. In Italy, the court may grant this dispensation (Art. 87 C. civ.), again only where the marriage has been dissolved by death rather than divorce.
Filiation refers to establishing the parenthood tie, either paternity or maternity, and has no exact counterpart in the common law.\textsuperscript{58} It has always been regulated with much more attention to detail on the continent than in the common law world, probably because of its impact upon succession. As Carbonnier writes, "Le droit de succession est l'effet le plus tangible de la parenté, de la communauté de sang."\textsuperscript{59} The law of succession is deeply impregnated with the importance of solidarity, equality, and continuity in family life. Whereas the operative legal metaphors in the common law come from business law and contract (liquidation of a deceased's estate is like winding up a corporation and often done by non-family members; and testamentary freedom echoes freedom of contract), succession law in France and Italy is totally dictated by the importance of blood (and more recently, marital) relationships. The deceased is entitled to leave by will a certain proportion of his or her estate, called the "free" share, but the mandatory share to which a deceased's spouse or child\textsuperscript{60} is entitled is calculated by taking into account the value of all substantial gifts made during life. If the deceased has exceeded this "free" portion, the heirs are entitled to claim the excess from the inter vivos donees.

The rules of succession law are not pressed into service simply at the moment of death, but are seen to have an impact throughout life as well; to quote Carbonnier once again, "[c]'est sur une idée de copropriété familiale que se fonde le droit de succession \textit{ab intestat}."\textsuperscript{61}

Curiously, state law is now more strict than canon law. The new code of canon law in 1983 removed the prohibition on marrying one's deceased spouse's sibling.

\textsuperscript{58} For a clear and succinct treatment of the topic in English, see G.L. Certoma, \textit{The Italian Legal System} (London: Butterworths, 1985).

\textsuperscript{59} \textit{Supra} note 50 at 575. Elsewhere he has criticized the Soviet Civil Code for presenting the law of succession as involving only patrimonial concerns: "Mais qu'est-ce qui fait les héritiers? la certitude des filiations. Qu'est-ce qui rend les filiations certaines? la preuve des mariages. Il est contre nature de dissocier du droit de la famille le droit des successions, qui est conditionné par lui": \textit{Le droit non civil de la famille}, Publications de la Faculté de Droit et des Sciences Sociales de Poitiers (PUF, 1983) at vii.

\textsuperscript{60} It is not only the surviving spouse and children of the deceased who are able to claim a share in the hereditary reserve: the parents may as well if the deceased leaves no issue. Thus it is only where the deceased leaves no spouse, issue, or parents that complete testamentary freedom exists (see Art. 916 C. civ. (France) and Art. 536 C. civ. (Italy)). The surviving spouse in Italy may share in the reserve, but not in France. Since 1972, however, a surviving spouse in actual need in France may claim support from the deceased's estate within a year of the latter's death (Art. 207 C. civ.). The philosophy of the French system has traditionally been that the surviving spouse's share in the marital community of property is sufficient protection.

For a convenient overview of recent developments, see D. Waters, "Invading the Succession on behalf of the Family—Europe, and Common Law Canada and Québec" in E. Caparros, ed., \textit{Mélanges Germain Brière} (Montréal: Wilson & Lafleur, 1993) 71.

\textsuperscript{61} \textit{Supra} note 50 at 575.
And as Jack Goody has said, "transmission mortis causa is not only the means by which the reproduction of the social system is carried out...; it is also the way in which interpersonal relationships are structured." Even the mechanics of transmitting a deceased's estate reflect the importance of family relationships. The heirs are seized by the law alone, since they are seen to carry on the deceased's personality, including personal responsibility for his or her debts unless they have accepted the succession with benefit of inventory. The role of testamentary executors is much weaker than in the common law, where they are said to have a kind of defeasible ownership in the property of the deceased's estate.

A final concept which rounds out this tour of French and Italian family law is the "interest of the family," a term which has entered the civil codes in the last fifty years. A number of the provisions dealing with the rights and duties of marriage and parenthood refer to the "interest of the family" as a factor which must be taken into account before a particular act can occur, or a certain decision can be made. In France, since 1965 it has been possible for a married couple to change their matrimonial regime if this is "in the interest of the family." The notion that the spouses together determine "the orientation of family life" in Italian law gets at the same idea as does the obligation of the spouses to "collaborate in the interest of the family" when making decisions concerning its welfare. It is worth noting that this corporate conception of the nuclear family's interests has remained constant notwithstanding the shift from paternal and marital authority to spousal and parental equality. Where doctrine and jurisprudence formerly constrained, at least to some extent, the patriarch's potentially despotic power under the nineteenth-century codes, subsequent legislation has extended these constraints to the newly equalized spouses.


64 Art. 1397 C. civ. This article has prompted a fair amount of doctrinal controversy. After some initial cynicism about its utility, doctrine and jurisprudence have now admitted that a couple's request for a change in regime can be denied if it will adversely affect inheritance rights of the children, for example. See Cass. civ. 1re, 8 June 1982, D. 1983, Jur. 19 (Annot. M. Beaubrun).

65 Arts. 144-145 C. civ.
I turn now to the common law. Unlike jurisdictions with civil codes, there is no legislatively sanctified account of the parameters or essentials of family law in common law jurisdictions. In recent years, *Family Law Acts* have begun to proliferate, but they seldom purport to be complete statements of the law, and on closer examination may in fact deal only with matrimonial property. In particular, the private and public law relating to children tends to be found in distinct *Children's Law Acts* and not in *Family Law Acts* at all. Even within a subset of family law such as that governing parent and child, one must consult a whole variety of sources. As Brenda Hoggett has said in her book on this subject, “the law does not provide us with a neat little list of [parental rights, powers and duties]. There is only a patchwork of legislation and decided cases on particular points.”

So enured has the common lawyer become to this state of affairs that one may detect a certain cynicism about whether the “neat little list” would work. Legal academic writing has seen its role as primarily glossatorial, and has provided little theoretical underpinning to assist in the synthesis of the disparate sources of family law. Peter Mann Bromley’s first edition devoted one page to “The Scope of Family Law,” and subsequent English texts provide a maximum of two pages of introduction or skip the preliminaries altogether. The United States author James Schouler lamented this tendency in the first edition of his work, but his complaint went unheard and he relegated much of his own preliminary and reflective material to footnotes in subsequent editions of his book, which came more and more to resemble the standard hornbook treatise.

We have already seen that the common law tends to define family as a question of fact rather than law. But the basic legal relationships of marriage and parenthood or kinship have also been, historically at least, very muddled. With regard to marriage, it took the English four centuries to do what the Council of Trent did in 1563 for Catholic Europe: establish a clear set of formalities for a legally valid

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68 *Supra* note 14, 6th ed. Schouler was an historian as well as a lawyer, and this may explain his initial willingness to explore larger questions of family law which “ordinary” lawyers tended to avoid.
marriage. According to Lawrence Stone, "the marriage law as it operated in practice in England from the fourteenth to the nineteenth centuries was a mess. ... leaving in a fog of uncertainty rights to property, dower, jointure, inheritance, and the legitimacy of children." Even today, the view is tenaciously held by many cohabiting couples that their consent and community recognition are sufficient to constitute "common law marriage."

With regard to parenthood, the situation has become less, rather than more, clear over time. Many common law jurisdictions now recognize statutory support and other obligations towards children to whom one stands in loco parentis as well as towards one's biological children. To the legal tie of biological and adoptive kinship can be added legal obligations arising out of purely factual situations of somewhat uncertain parameters. It would thus appear that there are really two species of childhood in the common law, although no one has really explored this in any detail.

Australian writers also agree that the family has no general legal definition. Anthony Dickey states that

neither the common law nor equity has ever concerned itself specifically with families. Instead, each has concerned itself only with the relationships and the essential status, rights, duties, powers and liabilities that exist between particular members of families.

He goes on to note that not even the federal Family Law Act 1975 is concerned with families generally. Frank Bates's Introduction

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69 In France, the prevailing gallican doctrine demanded that these canon law requirements be promulgated by royal edict as state requirements for the validity of marriage, but in fact the two were virtually identical. In fact, the state requirements were slightly stricter than the canon law requirements, leading to a few situations where a marriage validly recognized under canon law would not be held to produce civil effects: J. Imbert, "Les témoins au mariage du Concile de Trente à 1792, en France" in R. Ganghofer, ed., Le droit de la famille en Europe: son évolution de l'antiquité à nos jours (Strasbourg: Presses Universitaires de Strasbourg, 1992) at 307.


71 This is actually a survival of the medieval canon law theory of marriage, which was stamped out on the continent by the Council of Trent, but persisted in England with sufficient strength to be carried throughout the empire in succeeding centuries.

72 See, for example, Family Law Act, R.S.O. 1990, c. F.3, s. 1(1) (definition of "child") and ss. 31-32.

73 Family Law (Sydney: Law Book, 1985) at 3.

74 Australia (Com).
to Family Law\textsuperscript{75} has its first chapter entitled “Australian Family Law: The Background,” but it turns out that this background is mainly to do with constitutional law. The eclectic nature of family law is well illustrated by Bates's decision to make the first substantive chapter of his book one on families outside of marriage.

An Australian text provides us with a clue as to why writers in the common law tradition are reticent to elaborate on the theoretical basis or fundamental policy choices embedded in family law. Frank Bates observes that “the legal issues which are involved are concerned with matters deeply based in the human condition, however pompous that may sound.”\textsuperscript{76} The writer is clearly embarrassed to discuss matters which are so “deeply personal.”\textsuperscript{77} A profound cultural block prevents him from discussing openly the values which underlie family law. It is simply not done. The contrast with French and Italian writers, who regularly begin their texts with a ritual invocation of the life course and panegyrics to family life, is quite striking.\textsuperscript{78} One must admit that there is at times a heavy dose of ideology in the French and Italian descriptions of family life, and a desire to believe that life really is lived in the categories defined by the civil code. Nonetheless, even a study of the comparative rhetoric of these texts is quite revealing about underlying ideas.

On a different note, the relatively eclectic nature of family law in the common law world has meant that treatise-writers have been able to incorporate chapters on domestic violence in recent editions;\textsuperscript{79} in this way they have recognized the growing legislative concern with the topic, which has begun to appear even in some “core” family law statutes.\textsuperscript{80} One might also hypothesize that the recognition of homosexual couples for at least some purposes of family law will be accomplished more easily...

\textsuperscript{75} (Sydney: NSW Law Book, 1987) at 2. To be fair, Bates also makes some useful points about the recent origins of family law as an academic subject and its traditional devaluation by the legal professions. See also O'Donovan, \textit{supra}, note 16 at c. 2.

\textsuperscript{76} Ibid. at 2.

\textsuperscript{77} Ibid.

\textsuperscript{78} See, for example, Carbonnier, \textit{supra} note 50 at 26; P. Malaurie & L Aynès, \textit{Cours de droit civil. La Famille}, 2d ed. (Paris: Cujas, 1989) at 13.


\textsuperscript{80} \textit{Family Law Act}, \textit{supra} note 72, s. 29(3)(f).
in the common law world precisely because of the tendency to adopt functional, rather than legal, definitions of the family.\textsuperscript{81}

C. Polyphony

I have been proceeding as if formal state law were the only source of "family law" relevant to the present inquiry—an assumption which is clearly incorrect. Before the French Revolution, both in England and on the continent, there were at least two other normative orders which not only influenced but constituted important areas of family law. Religious and aristocratic conceptions of the family were articulated in distinct bodies of law applied in autonomous courts. In France, England, and Italy, ecclesiastical courts decided the validity of marriages, which in turn had important effects on dower rights, inheritance in general, and the legitimacy of children. In England, the High Court of Chivalry had exclusive jurisdiction to deal with various matters relating to the right to bear arms (for example, coats of arms), which implicated it in matters of succession and genealogy.\textsuperscript{82} It applied a body of heraldic law which was civilian in procedure, but primarily English custom (distinct from the common law) in substance. Similar institutions existed on the continent.\textsuperscript{83}

Religious norms, whether encountered directly in the ecclesiastical courts or indirectly in the common law of the land, strongly influenced conceptions of marital and familial obligations. Thus, the French historian Flandrin uses the canon law notion of "prohibited degrees" of consanguineous marriage to understand how far people of the early modern period might have understood their kinship group to extend.\textsuperscript{84} Religious teaching reinforced the importance of the


\textsuperscript{83} R. Chabanne, \textit{Le régime juridique des armoiries} (1954).

alimentary obligation between spouses and near relatives, which an encyclical of Leo XIII did not hesitate to qualify as a "sacred duty." 85 This duty extended not just to maintaining children during their youth, but obliged the father to "provide them with a patrimony to help them in defending themselves against the surprise attacks of ill fortune." 86 Catholic teaching thus supported the idea of forced heirship out of a concern for family unity, stability, and continuity. These concerns, of course, also underlay the long resistance to the introduction of divorce in Italy. Its reintroduction in France in 1884 was due to the actions of the avowedly anti-clerical government of the Third Republic.

Religious teaching did not simply support or justify particular doctrines of family law; it provided a moral basis for family law as a whole. This did not really change even after the French Revolution claimed the whole of family law as a field of exclusively secular regulation and abolished all traces of official ecclesiastical power. Secular form and largely clerical content characterized family law in both France and Italy after their respective codifications. The continuing relevance of religious norms can be seen in a certain literature which uses Catholic ethical precepts to critique the whole of family law, a scholarly genre which has no real counterpart in the common law world. 87 This literature does not always adopt the positions which a late twentieth-century observer might predict. The French theologian Pierre Mélîne, for example, disapproved in the 1920s of the extensive incapacities of women married in community of property, lamented the widow's subordination to the children in succession law, and thought that a father's legal powers over his children were too extensive. To an ideology of individualism he opposed the notion that the rights of both spouses should be seen as subordinate to the objects of domestic society, although he tempered this view with the injunction that "marriage does not abolish the principle, 'To every one his own.'" 88 These views ultimately lived on in the codal adoption of "the interest of the family" as a means of arbitrating family disputes. 89

86 Ibid.
87 A concern with maintaining the indissolubilist view of marriage inspired a number of Anglican tracts on this particular subject, but studies of the whole of family law from a Protestant perspective are rare, perhaps non-existent.
88 Mélîne, supra note 85 at 136.
89 See text accompanying notes 64 and 65.
The Reformation began to alter the content of norms of familial behaviour, both reflecting and in turn reshaping new conceptions of the family. In its initial phases, the Reformation insisted on the centrality of the nuclear family over the wider web of kinship connections and emphasised individual standards of ethical behaviour over the ties of blood. While the Church until 1917 prohibited marriages between blood relatives up to the fourth degree of kinship (third cousins) and between affines to the third degree, the Reformation dramatically reduced the scope of these prohibitions to include only siblings, direct ascendants and descendants, and their spouses. This privileging of sentiment over blood and duty can be seen most clearly in the widespread adoption of divorce in Protestant jurisdictions in both the Old and New Worlds and even in England where the Anglican Church opposed the move.

The circumscription of the family during the Reformation did not end with its living kin: the dead too were also abandoned. The Reformation resolutely opposed the practice of anniversary Masses dedicated to the memory of deceased family members, and, crudely put, advised people to forget their dead and concentrate on the future. This reshaping of the relationship between living and dead family members had an impact not only on mourning practices but on succession law. The notion of the heirs carrying on the personality of the deceased came increasingly into disrepute, as they came to be seen merely as trustees of the deceased's assets pending distribution.

A second set of norms which both constituted and infused "family law" was the aristocratic code. In pre-revolutionary France and Italy and in England, aristocratic conceptions of the family directed marriage and inheritance strategies toward "accumulating and maintaining a family material and symbolic capital in the person of a single child"—normally the eldest son. In England, primogeniture was

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90 S. Ozment, *Protestants: The Birth of a Revolution* (New York: Double Day, 1993) c. 7. There is considerable historical controversy over the precise role of the Reformation with regard to shifts in attitudes towards women and children. In what follows I try to confine myself to some fairly general and uncontroversial observations.


93 M. Segalen, "'Avoir sa part': sibling relations in partible inheritance Brittany," in H. Medick & D. W. Sabean, eds., *Interest and emotion: Essays in the Study of Family and Kinship* (Cambridge University Press, 1984) 129 at 138. Classes beyond the nobility in southern France and parts of Italy also practiced primogeniture under the ancien régime, either as a mandatory mode of
the normal mode of inheritance for all freehold land until 1926, but the aristocracy usually buttressed it with *inter vivos* settlements which entailed land exclusively on male issue in order to avoid the fragmentation of land through the coparcenary interests of females. On the continent, inheritance laws were more variable but always provided sufficient flexibility to allow the nobility to settle their estates in tail male if they wished. The eldest son often inherited a set of obligations towards younger siblings, but it was never expected that the latter would attain a standard of equality, in material wealth or prestige, with their privileged brother.

The aristocratic ethos was thus totally at odds with egalitarian notions about the family and the revolutionaries of 1789 sought to stamp it out in the new code. Bourgeois notions of sibling equality were mandated for everyone, high and low, North and South, with the only concession to parental caprice being the relatively small "free share," which might be used to advantage particular children above their forced share. Indeed, the one (unsuccessful) attempt to alter this distributional scheme in nineteenth-century France was aimed at prohibiting a gift of the free share to anyone who benefitted from mandatory inheritance rights. Equal inheritance rights for siblings have long had a highly political resonance in France and Italy. When reinforced by traditional Catholic teaching it is no surprise that these ideas have become deeply entrenched in the general culture.

Within the common law world one must of course distinguish between England, where aristocratic norms, especially in the form of primogeniture, long retained some influence, and the United States, Canada, and Australia, where they were largely irrelevant. In England, aristocrats with substantial landed estates still tend to entail them on the eldest son, since this device was carefully preserved for them even as

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94 E. Spring, *Law, Land, and Family: Aristocratic Inheritance in England, 1300 to 1800* (Chapel Hill: University of North Carolina Press, 1993). For a good study of the rigor with which these practices were maintained, see L. Stone, "Inheritance strategies among the English landed elite 1540-1880" in *Le modèle familial Européen: Normes, déviances, contrôle du pouvoir, Actes des séminaires organisés par l’École française de Rome et l’Université di Roma* (Rome: École française de Rome, 1986) 267; (90-95 per cent of all transfers of gentry’s country houses in two English counties passed within the family over 340 years).

95 Younger sons in Languedoc were left in a particularly vulnerable position, which commonly led to an explosion of family tensions in the eighteenth century: Y. Castan, "Arbitraire du droit de tester et révolte des fils en Languedoc au XVIIIe siècle" in *Le modèle familial, ibid.* at 165.

96 B. Schnapper, "La droite, la gauche et le Code civil: la réforme du droit familial sous la IIème République" in Ganghofer, ed., *supra* note 69, 193.
primogeniture was finally abolished in the Law of Property Act 1925.\textsuperscript{97} One would not be surprised if the practices of the rest of English society, and of Canada and Australia, began to conform with those observed in the United States. Historians of inheritance have found no discrimination between the shares provided to sons and daughters in United States wills by the end of the nineteenth century.\textsuperscript{98} Nonetheless, the fact that such testamentary treatment remains within the realm of discretion, rather than right, gives a different cast to this aspect of family relations than one finds in France or Italy. So strongly is it felt that testamentary disposition should remain within the discretion of the testator, that the forced heirship provisions of the Civil Code of Louisiana\textsuperscript{99} (unique in North America in this respect) are sometimes cited as preventing people from moving into the state.

This brief review of the historical impact of different normative orders on legal ideas about the family leaves us with an irony. In jurisdictions with state churches (Anglican England and Puritan New England) there is today little discernible residue of religious norms in family law. In France and Italy, where the revolution abolished the state church, Catholic norms have continued to influence the contours of family law, and to help justify public provision for families at an early date, as we shall see in the next section. A strong reaction to the inegalitarian aristocratic family led to the adoption of bourgeois family norms in the new civil codes, based on the importance of kinship ties over lineage, mutual support of all family members, and the equality of all siblings.

These religious and social ideologies provided a strong counterpoint to the "possessive individualism" which increasingly characterized other areas of French and Italian law and the common law in the nineteenth century. Protestantism, whether of the Anglican or Dissenting variety, tended to provide little opposition to the increasing tendency to dissolve the family into individual rights-bearing subjects. Indeed, the general Protestant orientation toward individual salvation may have assisted this process. Certainly the most "Protestant" society


\textsuperscript{98} C. Shammas \textit{et al.}, supra note 45 at 108-12. L. Davidoff & C. Hall, in \textit{Family Fortunes: Men and women of the English middle class, 1780-1850} (University of Chicago Press, 1987) at 205-07, find a preference for partible inheritance among the middle classes in their study of early nineteenth century wills, but it is clear from their evidence that daughters are given less than sons.

\textsuperscript{99} Arts. 1493-1518.
of the nineteenth and twentieth centuries, the United States of America, was the place where there first emerged the "legal concept of the family as a collection of separate legal individuals rather than an organic part of the body politic."100

II. THE FAMILY IN PUBLIC LAW: IMAGES AND REALITIES

What images of the family does one discern from the public law of these states? First of all, the constitutions of the English-speaking countries make no mention of the family,101 in sharp contrast to the French and Italian constitutions, which direct the state to safeguard the interests of families as well as individuals. Nor are the sometimes substantial social benefits afforded in the English-speaking countries articulated around any central notion of, or goal for, the family. The allocation of these benefits may of course have effects, positive or negative, on the "family;" or, more likely, on particular groups of families. But these social programmes have developed in a more or less ad hoc manner as a response to particular crises or perceived problems. By and large, it can be said that the main spurs to these programmes have been problems of poverty or sex inequality rather than problems relating to family or population. If, in the common law world, family law has been hidden in the interstices of property law as it relates to the affluent, family law has been found mainly in poverty law (the Elizabethan poor law and its successors) as it relates to the poor.

Some may be dubious about the idea of any continuity between the "private" law of family relations and the "public" law of the family as contained in social security law.102 One example will have to suffice. Susan Pedersen notes that England and France took different approaches to the "family circle" when providing allowances to the


101 With the exception of the Republic of Ireland: arts. 41 and 42 of the constitution direct the state to protect the family and guard with particular care the institution of marriage. See, generally, A.J. Shatter, Family Law in the Republic of Ireland, 3d ed. (Dublin: Wolfhound, 1986) c. 1.

102 I am not suggesting that there is always a perfect fit between the "private" and "public" law of the family. It is clear that at present in some common law jurisdictions there is a lack of fit between the fundamental ideas underlying these two "halves" of family law, as Mary Jane Mossman and Morag MacLean have shown: "Family Law and Social Welfare: Toward a New Equality" (1986) 5 Can. J. Fam. L. 79. Yet this is arguably because "private" family law has been reformed and social welfare law has not caught up. Formerly, the two shared a common set of ideas about the male breadwinner/female dependent model of family life.
families of soldiers away at the front during the First World War. In England all soldiers' wives, but no other dependents, were provided with a living allowance, regardless of need. This was consistent with the private law, since even affluent wives were under no legal obligation to contribute to their own support during marriage. In France, applicants had to demonstrate need, but parents and children of the soldier as well as wives were allowed to apply, on the basis that the Civil Code imposed an obligation of support in these cases. As well, under French law the wife had an obligation to contribute to the "household charges" to the extent that she was able, and so had no right to be maintained irrespective of her own resources.

A comparative history of the welfare state is beyond the scope of this paper, but I do want to look at the specific examples of maternity benefits and family allowances as suggestive of significant differences in the conceptualization of the family. It was, of course, the tremendous anxiety about the declining population, especially in France, that motivated early state action in that country. In 1913, French law gave an allowance to all family heads with over three children who could not support them. This was followed by widespread payment of child allowances in the civil service and by private industry, until in 1932 all employers were required to pay them, and in 1938 an allowance was paid to women who stayed at home with their children. It is true that there were many illiberal and sometimes racist features to these child allowances in their early development, which was even more true of the child allowances introduced under Italian fascism in the 1920s.

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103 See Pedersen, supra note 7 at 116; and Collet v. Nash (1923), 39 Times Law Reports 292.


105 S. Pedersen, "Catholicism, Feminism, and the Politics of the Family during the Late Third Republic" in Koven & Michel, eds., ibid.

106 See C. Saraceno, "Redefining maternity and paternity: gender, pronatalism and social policies in fascist Italy" in Bock & Thane, eds., supra note 104, 196.
Nonetheless, as these features were suppressed over time, the basic philosophy behind these allowances became clearer: the raising of the next generation was a social labour which required social support. In spite of, at times, sharp differences over the role of working mothers, this basic idea was one which socialist trade unions, conservative Roman Catholics, feminists, and politicians across the spectrum could support.

In England and most Canadian provinces, the 1920s saw the development of mothers’ allowances, but in spirit and practice they were entirely different from the child allowances of France and Italy.\textsuperscript{107} They were meant to replace an absent male wage-earner, and were thus paid only to widows or in some cases to married women whose husbands had deserted them. The amounts were miniscule and the opportunities for social surveillance at least as great as existed in France and Italy. In England, a fairly active campaign for motherhood endowment in the 1920s was consistently resisted by the men of the Labour party, who feared that child allowances would undermine their claims for a family wage. There was certainly some justification for this fear both in England and on the continent, yet the French and Italian labour movements in the end supported the child allowances, arguably because of a different conceptualization of the family. The pervasive Malthusianism of English social thought meant that the idea of social support for all children was viewed with some unease. One of the supporters of the motherhood endowment campaign of the 1920s, the Eugenics Society, thought that any allowance should be restricted to those mothers having an income of over 500 £ per annum, so that a “true aristocracy” could be created.\textsuperscript{108}

Universal family allowances finally came into existence in England at the end of the Second World War only because employers warned they could not keep up with wage demands in the wake of wartime inflation. Even then, at a time when the cost of maintaining a child was determined to be 7s./week, the benefit was set “deliberately and substantially lower,” at 5s./week, in order to maintain work

\textsuperscript{107} D. Guest, \textit{The Emergence of Social Security in Canada}, 2d ed. (Vancouver: University of British Columbia Press) at 48-63. Pedersen, supra note 7 at 17 sums up the difference between the British and French models as follows:

[T]he evolution of British social policy [articulates] ... a male breadwinner logic of welfare, [while] French policies came to rest on a very different logic, [the] ... ‘parental.’ Parental policies do not assume that women are necessarily dependent, nor that men always have ‘families to keep’; rather, they presume the dependence of children alone and hence redistribute income primarily across family types and not along gender lines.

\textsuperscript{108} J. Lewis, “Models of equality for women: the case of state support for children in twentieth-century Britain” in Bock & Thane, eds., \textit{supra} note 104, 73.
incentives. In the end, the benefit was insufficient to substantially alleviate child poverty, to provide incentives to parenthood, or to provide any independence for women and children, and has been allowed to erode substantially in value until the present day, with the exception of a half-dozen years in the 1960s.\footnote{109}

The United States has never had a universal family allowance. The main income support is the Aid to Families with Dependent Children, which is aimed at poor families with children. It began in 1935 as a poverty programme rather than a family programme, and its main goal, aside from the amelioration of poverty, is limiting family size among the poor. In many states no benefit is available after the third child, a prohibition which has proved invulnerable to constitutional challenge. It is hard to believe that the deliberate avoidance of universal family benefits in the United States is not at some level motivated by racist fears of an explosion in the Black population.\footnote{110} In this case, general ideas about the privacy of the family and particular concerns about race coalesce to keep family policy issues off the United States agenda.

The position with regard to maternity benefits has followed similar lines in both sets of countries. The movement for female emancipation, which grew up in Italy after 1890, expressly adopted the idea that “the work of motherhood ... was a ‘real social labour.’ ”\footnote{111} Female employment was high in Italy and France and working women had developed mutual aid societies to assist in each other’s confinements by the last third of the nineteenth century. The Italian state took up this idea in 1910 by creating the Cassa Nazionale di Maternità, a fund supported by female employees, employers, and the state, which provided a daily allowance of 4/5 of the average wage to (mainly industrial) working women for the first month after confinement.\footnote{112} This was extended to 10 weeks in 1934, 3 1/2 months in 1950, and ultimately to 5 months in 1971, with remuneration set at 80 per cent of one’s normal pay in 1950. In 1971 it became possible to add another 6

\footnote{109}Ibid. at 86-88.

\footnote{110}Mary Ann Glendon alludes to this, noting that many states with large welfare populations have continued to provide public funding for abortions even though not constitutionally obliged to do so, but no state has significantly raised its level of support to families with dependent children: Abortion and Divorce in Western Law (Cambridge, Mass.: Harvard University Press, 1987) at 56.

\footnote{111}A. Buttafuoco, “Motherhood as a political strategy: the role of the Italian women’s movement in the creation of the Cassa Nazionale di Maternità” in Bock & Thane, eds., supra note 104, 178 at 181.

\footnote{112}Ibid.
months at 30 per cent of one’s pay, and women were given the right to unpaid leave to care for sick children until their third year. Two periods of daily rest are also provided for until the child is a year old.\footnote{113} In France maternity benefits began in 1913 and followed a very similar course. At present, leave is set at 16 weeks at 90 per cent of salary, with the possibility of a further two years of unpaid leave for either parent. As in Italy, the social security system finances the benefit.\footnote{114}

By way of contrast, paid maternity leave did not begin in Canada until 1971, where its placement in the \textit{Unemployment Insurance Act}\footnote{115} made it clear that the measure was conceived of as employment policy, rather than family policy. In Britain, paid maternity leave did not begin until 1977. It was already being cut back in the 1980s when it came to be described in a government Green Paper as “a form of reward for continuous service with one employer for a period of years,”\footnote{116} as opposed to an entitlement. Clearly, it is not seen as part of family policy in Britain either. Australia guaranteed a maternity benefit (not maternity leave), regardless of marital status or paid labour force participation, as early as 1912, but this benefit related to population policy rather than family policy. It was a racist, pronatalist measure designed to fill up the continent with whites: aboriginal, Pacific Islander, and Asian women were excluded.\footnote{117} The benefit was abolished in 1978, and it was only in 1990 that the Industrial Relations Commission, which administers Australia’s centralized wage-fixing system, adopted a principle of unpaid parental leave which allows men and women to share twelve months leave.\footnote{118}

In the United States, a few states provide for unpaid maternity leave for most working women, but at the national level coverage is only

\begin{footnotes}
\item[117] M. Lake, “A Revolution in the Family: The Challenge and the Contradictions of Maternal Citizenship in Australia” in Koven & Michel, eds., \textit{supra} note 104, 378. As Lake suggests, the lack of concern with family policy is shown by continued governmental resistance to any notion of child endowment until after the Second World War. For the later history of maternity allowances, see T.H. Kewley, \textit{Australian Social Security Today: Major developments from 1900 to 1978} (Sydney: Sydney University Press, 1980) at 88-90.
\end{footnotes}
available under the 1978 Pregnancy Disability Amendment to the Civil Rights Act,119 which forces those employers who have disability insurance programmes to treat pregnancy as an illness under those programmes.120 It is clear that the amendment was "related historically to civil rights [concerns], the women's movement, and the growth of United States social policy generally," rather than to any concern about family policy as such.121 It is sobering to realize that the following words of Julia Lathrop, head of the United States Children's Bureau, remain nearly as apt today as when she wrote them 75 years ago, in 1919. She had just compiled a study of international maternity benefits, which she transmitted to her superior "in the hope that the information might prove useful to the people of one of the few great countries which as yet have no system of state or national assistance in maternity—the United States."122

III. CONCLUSION

What can one conclude after this comparative overview? What are the "lessons" which I have promised in my title? Let me first observe that a certain interest in family policy seems to be reviving, if the amount of journalistic attention devoted to such issues is any indication. Even in this cynical age, there is still a temptation to believe that we might be able to do something worthwhile in this area by passing statutes and eking some scarce dollars out of the public till.

My point is that we must first decide what importance we attach to children and to family life, understood in its broadest sense. If we accept that law is a reflection of cultural values, albeit an imperfect one, then an historical overview of the family law and family policy of the English-speaking countries suggests that there is a tendency to value liberty and property at the expense of solidaristic and child-centred


120 S.B. Kamerman, A.J. Kahn & P. Kingston, Maternity Policies and Working Women (New York: Columbia University Press, 1983). The respected United States economist V.R. Fuchs has concluded in Women's Quest for Economic Equality (Cambridge, Mass.: Harvard University Press, 1988) at 130-138, that the adoption of family support measures, including a universal child allowance, would do far more to remedy child poverty and women's access to labour than all labour market initiatives which have taken place to date.

121 Ibid. at 6.

122 As quoted in "Introduction: Mother Worlds" in Koven & Michel, eds., supra note 104, 1 at 20.
values. This seems amply proven by the relative rates of poverty in households with children, especially in single-parent households. In Italy, where 22 per cent of households fall below the poverty line, 27 per cent of single-parent households fall in this category. There is a discrepancy, but it is not terribly large. In France, the relative figures are of a similar order, 15 per cent and 22 per cent; but in the United Kingdom the disparity rises to 17 per cent and 30 per cent; in the United States, 10 per cent and 50 per cent; and in Canada, 11 per cent and 62 per cent.²³

I realize that the phrase “solidaristic and child-centred” is susceptible of many interpretations: Mussolini would have said that his government’s policies were solidaristic and child-centred, but that is not what I mean, and the difficulty of articulating what I do mean indicates precisely the dilemma. Perhaps my meaning is best illustrated by recapitulating French family policy: the French have aimed, for historically pronatalist reasons, to support as much as possible, both economically and socially, the decision to bear and raise children. They have regarded the maintenance and socialization of the next generation as a kind of partnership between the family and the state, with social solidarity seen as an extension of familial solidarity. Over time, the coercive aspects of family policy attributable to pronatalist philosophy have disappeared, such that both the desires of women who wish to return to work relatively soon after birth and the desires of those who wish to stay home for an elongated period are equally supported by the state. The right of the child to a welcoming environment does not trump the mother’s right to work, nor is the mother’s right to work purchased at the cost of inadequate child care arrangements. That is a policy which I would describe as both solidaristic and child-centred.

Yet, if this kind of approach sounds even slightly attainable in Canada, we must still recall that in France it was the product of a particular set of cultural values and cultural conflicts, particularly those between conservative Catholics and socialists. In this regard, the experience of Italy is instructive, but in a somewhat negative way. Italy is

a country where, if anything, there is even more of a cultural commitment to the institution of the family than in France, and Italy had a reasonably effective family policy in the decades after the Second World War. Yet, in recent decades Italy's family policy has begun to unravel, for reasons which are too complex to detail here. Responsibility for family policy was devolved to the regions in 1970, so that there is little national presence in the area. Family allowances were abolished in 1983, and emphasis has rapidly shifted from supporting families to supporting only the poorest families. In the last decade the birthrate in Italy has fallen to the lowest of any country in the world; the average woman can expect to give birth to 1.3 children, far below the replacement level. It is not clear whether this phenomenon can be linked directly to the changes in family policy, but it does seem clear at least that there is not a very good fit between the value which Italian culture in general places on children, and state policies in the area.\footnote{124 For an historical review and critique of Italian family policy, see P. Donati, “Family and Population Policy in Italy” in Dumon, ed., supra note 2, 207; and his La famiglia come relazione sociale (Milan: Angeli, 1989).}

In thinking about the importance we place on the family in Canada, we must consider the strong attachment to the family which exists among the First Nations and virtually all the places which have contributed to our immigration inflow over the past 40 or 50 years, beginning with the Mediterranean countries, and more recently, Africa, Asia, the Caribbean, and South America. Concepts of family among the populations of these countries are probably more like those found historically in France and Italy, than those found in the English-speaking countries. Whether that fact will translate into support for more extensive family support policies is a moot point, but it is nonetheless a question worth asking. As the example of Italy shows, a strong cultural commitment to the family does not necessarily translate into a vigorous family policy; the former is perhaps a necessary but not a sufficient condition for the latter. My concluding point, though, is that Anglo-United States attitudes towards the family, as manifested in both our culture and our law, have very deep roots in English Canada, and only by examining these rigorously can we expect to think clearly about these issues.