

TRIANGULATING SOCIAL LAW REFORM

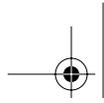
Roderick A. MACDONALD*

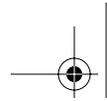
INTRODUCTION.....	119
I. MEDIATING STATES OF “FACT” AND STATES OF “LAW”.....	119
II. SOME FOUNDATIONAL PRECEPTS.....	121
III. RE-IMAGINING CLOSE PERSONAL ADULT RELATIONSHIPS.....	127
IV. RE-IMAGINING SECURED TRANSACTIONS	135
V. RE-IMAGINING RECREATIONAL DRUG CONSUMPTION.....	144
CONCLUSION	151



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The key regulatory instruments of contemporary state law are not the specific norms that are enacted, incorporated by reference, imposed by contract, or announced in judicial and administrative decisions. Rather, state law achieves its most profound cartographic effects by the conceptual structure that it seeks to impose on human interaction.

This paper first examines two non-criminal law fields where the regulatory effect of legal concepts has been highly attenuated in practice: family law and secured transactions law. Recent attempts to reconfigure the scope of marriage and to reorganize the structure of secured rights reveal both the potential and the perils of social law reform.

In both cases, the legislature is being invited by reformers to deploy a functionalist logic to re-order a legal concept initially cast in formalist and essentialist terms. In both cases, human interaction and socio-economic practice continue to drive, and in some measure, overtake the attempt. These examples then lead to a discussion of recent legislative initiatives to reform the regulatory regime governing non-medical drugs.

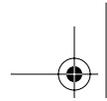
The paper develops a thesis about the relationship between law's conceptual structure and social practice. The aim is to suggest how characterisation, concept and rules are together deployed as vehicles of law reform. The paper concludes with some hypotheses about the situations when social law reform can be successfully triangulated through functional rather than formal approaches to legal regulation.

I. MEDIATING STATES OF "FACT" AND STATES OF "LAW"

Law, and more particularly law reform, can be cast as the endeavour of mediating states of "fact" and states of "law", an endeavour expressed by Lon Fuller as "the enterprise of subjecting human conduct to the governance of rules".¹ One finds a rich illustration of the complex relationship between fact and law in the everyday academic interactions between colleagues in different Universities. Take my own case. Since 1979 I have, formally, been a professor at McGill University; informally I have had almost as intense a scholarly relationship with colleagues at the Université of Montréal. For two decades I have collaborated with members of the Centre de recherche en droit public on numerous research projects, many of which

¹ Lon L. FULLER, *The morality of law*, 2nd ed., New Haven, Yale University Press, 1969, p. 106.





DESSINER LA SOCIÉTÉ PAR LE DROIT
MAPPING SOCIETY THROUGH LAW

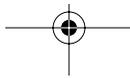
are ongoing. Indeed, friendships with professors, administrators and students of this Faculty have been a central part of my professional life and I cherish them deeply.

Let me begin to puzzle through the paradoxes of states of “fact” and states of “law” in law reform by considering (in a continuation of the professorial example) what it actually means to be a colleague. Should we say that the concept “colleague” refers to relationships defined by “law”—who is my employer and who are my co-workers? Or ought it to refer to relationships of “fact”—with whom do I engage in the everyday activity of learning, teaching and research that constitutes an academic career?

Part of my aim in this paper is to suggest that even framing the question in such terms is to misconceive what is at stake in most law reform exercises. Here is why. It is not immediately obvious upon what basis the distinction between law and fact is being taken. Not only is it true that the relevant law for defining “colleague” could just as well be that which focuses on learning, teaching, scholarship and research financing as opposed to employment status, but it is also true that the relevant factual basis could just as well be that which focuses on geography and location—an office and an e-mail or postal address—as on research collaboration. The lesson of legal pluralism is that what is law and what is fact both depend on how one conceives the organising normative order. Both depend, that is, on the characterisations given by the chosen (lexically prior) order to myriad human interaction.

In other words, that I feel psychologically as at home in the Pavillon Maximilien Caron as I do in Chancellor Day Hall attests not only to the warmth of your invitation and your reception, but also to the significance of identity and relationships to the manner in which people go about conceiving both law and facts. Only if one has already adopted the theoretical position of legal centralism—that law is exclusively the product of the political state—is it even possible to propound *ex ante* differentiations between prescriptive (legal) law reform and experiential (social) law reform.

The title of this essay already points to my rejection of state legal positivism as an organizing theoretical motif. Indeed, I use the idea of “triangulating” social law reform to pursue the spatial metaphor of cartography suggested by the English-language title of this seminar series—Mapping Society Through Law. Unlike Boaventura de Sousa Santos, however, and true to my commitment to a legal pluralist theoretical perspective I see the





TRIANGULATING SOCIAL LAW REFORM

nouns of the title as interchangeable: we might just as easily speak of mapping law through society.²

II. SOME FOUNDATIONAL PRECEPTS

Before I consider the case studies meant to illustrate my primary thesis, I should like to set out several foundational precepts upon which the conception of law advanced in this essay is built. I have discussed these at length in various other places, so I shall present them here in only a summary fashion—as a series of cascading postulates.³

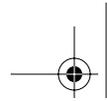
Law, like other cultural artefacts such as religion, ritual, literature, art, work, play, science, architecture, furniture design, food, and so on, is a hypothesis about (and a means of apprehending and interpreting) the social. Law's distinctive character lies in the manner by which human interaction is held up for assessment in the mirror of rules. The rules in question are not rules of economic efficiency. Nor are they rules of power and domination. Nor are they rules of psychological determinism. Nor are they rules of self-interest. Nor are they rules of aesthetics, nutrition, or good grammar. Not all rule-systems are law. The rules we associate with law, like the



² Compare Boaventura de SOUSA SANTOS, "Law: A Map of Misreading", in B. de SOUSA SANTOS, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition*, New York, Routledge, 1995, p. 456.

³ See, in particular, R. A. MACDONALD, *Lessons of Everyday Law*, Montreal, McGill-Queen's Press for the School of Policy Studies, 2002; *Access to Justice in 2003: Scope, Scale, Ambitions*, Law Society of Upper Canada, unpublished, 2003; *The Governance of Human Agency*, Senate Committee on Illegal Drugs, unpublished 2002; "The Fridge-Door Statute", (2002) 47 *McGill Law Journal* 13; "Epistles to Apostles", (2001) 39 *Alta L. Rev.* 668; "Law Reform and Its Agencies", (2000) 79 *Can. Bar Rev.* 99; "Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism", (1998) 15 *Ariz. J. Int'l & Comp. L.* 69; "What is a Critical Legal Pluralism?", (1997) 12 *C.J.L.S.* 25; "ReCommissioning Law Reform", (1997) 35 *Alta L. Rev.* 831; "Legal Bilingualism", (1997) 42 *McGill L.J.* 119; "The Governance of Human Agency Through Federal Security Interests", in Howard KNOPF (ed.), *Security Interests in Intellectual Property*, Toronto, Carswell, 2003, p. 577; "Normativité, pluralisme et sociétés démocratiques avancées: l'hypothèse du pluralisme pour penser le droit", in Carole YOUNÈS and Étienne Le ROY (eds.), *Médiation et diversité culturelle: Pour quelle société?*, Paris, Karthala, 2002, p. 21; "Transdisciplinarity and Trust", in Margaret A. SOMERVILLE and David J. RAPPORT (eds.), *Transdisciplinarity: Recreating Integrated Knowledge*, Oxford, EOLSS Publishers, 2000, p. 61.





DESSINER LA SOCIÉTÉ PAR LE DROIT
MAPPING SOCIETY THROUGH LAW

precepts of religion and ethical principles, are rules of just conduct—of justice.

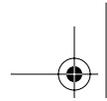
Law supposes both actions and intentions. Frequently, our agency as human beings is expressed against a backdrop of a diadic relationship of just intentions. It is in this sense that the expression “*le contrat fait la loi des parties*” should be understood. Where these specific diadic intentions fail or are absent, normative communities deploy law to presuppose socialized intentions—*e.g.* reasonable care—that arise in group settings and that can be used to measure the justness of human actions.

Still, not all intentional actions are normative; nor are all just. Here is an example to illustrate the point. To say that, as a rule, I put on my left sock first, is (without more) merely a descriptive, not a normative statement. My action is no more than a habit. To say that, as a rule, I put on my left sock first because I ought to do so moves us to the terrain of normativity. Still, not all oughts are equivalent. To say that I ought to put my left sock on first because it is more efficient to do so, or because my parents told me to do so, or because I believe generally in the *karma* and superiority of the left side of the body, or because my favourite painter (or playwright, or singing idol, or sports hero) does so, are not oughts that bring us to the normativity of law. To say that I put on my left sock first because it is more just to do so does, however, move us to the law’s realm. But, even at that, a general claim of justice is insufficient on its own to identify when a norm is a legal norm. There is something unique about the way in which claims of justice are framed as law.

How, then, do we know what kinds of claims of justice should count as law? Consider the way in which social action is typically analyzed and judged by reference to some standard of evaluation. I use economics and law as illustrative examples.

Imagine that efficiency were to be accepted as the relevant guide to human interaction. While anyone can, theoretically, assert that some course of conduct is efficient, we have economists to tell us whether the assertion stands up. Even in cases where they disagree on outcomes, economists nonetheless typically agree on a set of questions and problems that they take to define the field of economic analysis. If we genuinely wish to orient our behaviour by reference to efficiency norms, we could simply read the textbooks and heed the counsel of the economist in deciding what efficiency entails in particular cases.





TRIANGULATING SOCIAL LAW REFORM

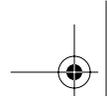
Similarly, imagine that justice were to accepted as the relevant barometer of interpersonal action. While anyone can, theoretically, assert that some action is just, we have legion philosophers, ethicists, rabbis, priests, imams and ministers to tell us whether the assertion stands up. Here also, even in cases where they disagree on outcomes, these sages usually agree on a set of questions and problems that they take to define the field of inquiry about justice. If we genuinely wish to orient our conduct by reference to justice norms, we could study the texts to distil the wisdom of these thinkers, spiritual advisers and prophets in order to decide individual conundrums.

This said, most of us, most of the time, do not wish either to have to think through the merits of competing justice claims on our own, or to have to embark upon a research endeavour to find and sift through expert advice about how to act either efficiently or justly. To avoid doing so we rely on three surrogates. Let me explore each of these as they relate particularly to claims of justice.

First, we follow specific behavioural conventions. Whether learned in the family, or in the routine of socialization in the neighbourhood and in school, these social practices help us to structure our everyday interaction in co-ordination with others in a manner that we presume is responsive to norms of justice. Over time we internalize these practices, and the processes and forms of social ordering in which they are manifest, so that they become “second nature”. We also come to internalize strategies for extrapolating these practices when confronted with new situations for which the implicit counsel and maxims of our usual cultural resources provide no guidance. Typically these extrapolations involve informal discussions with, and reliance upon friends, parents, neighbours, co-workers, and so on.

In modern society, however, for reasons of scale, scope and efficient co-ordination, we have developed a second strategy to relieve the burden of individual decision. This involves the elaboration of institutions to take over numerous tasks of just social co-ordination. Some of these we seem to be born into; others we believe that we consciously choose. Historically, the family and organized religion served as an important authoritative voices of just conduct. So too did guild, caste, clan and social hierarchy—the last most palpably reflected in gender, age and ethnicity. These institutions achieve their normative effect in three ways: directly, by apparently setting out rules and codes and catechisms to orient behaviour; mediately, by offering us social roles that set boundaries and expectations within which we are to make our various life choices; and structurally, by providing and





DESSINER LA SOCIÉTÉ PAR LE DROIT
MAPPING SOCIETY THROUGH LAW

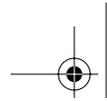
designating authoritative persons whose counsel we take as highly persuasive, if not conclusive, on a given question.

Today, we invest much effort in a third surrogate that combines elements of the first two: the interactive character of conventions, and the structural character of institutions. This surrogate is the political state. We expect the state to establish normative institutions—typically Parliament, the courts, regulatory agencies, and the police; to elaborate and to model different processes of social ordering—legislating, adjudicating, contracting, mediating, voting; and, through these institutions and processes, to announce, interpret, apply and enforce presumptive rules of interpersonal conduct. When functioning at its highest aspirations, the political state gives us hypotheses about just social institutions, about just processes of social ordering and decision-making, and about just rules of interpersonal conduct.

These various components of state law, then, are institutional shortcuts that enable people to determine what action is collectively imagined to be just in what circumstances. They are not, however, the final word on these matters. The individual conscience can neither be coerced nor dictated to by any external rule of just conduct. Of course, the modern state, just like the church before it, is not powerless, even in the face of conscientious dissent. At the limit, both the state and the church can sanction breaches of their determinations of just behaviour; this goes even to the point of killing the offender in this world, or condemning the offender to eternal death in the next. Nonetheless, the rules of just conduct elaborated by and through the institutions and processes of the state, just like rules of just conduct flowing from social conventions or institutions of civil society, must always be seen as no more than hypotheses about or approximations of, justice. All obedience to law is, in this light, the fruit of personal reflection—greater or lesser, conscious or tacit, according to the case—and judgement about what justice requires.

This is a central point for my analysis of social law reform. It can be elucidated by thinking through the several possible relationships that can arise between human action and official law. Take first, action in conformity with the prescriptions of state (or any other institutional form of) law. Sometimes we act in a particular way without awareness that a specific rule of law requires, counsels, permits or even advantages the behaviour in question. Sometimes we are aware of the norm of state law, but act as we do for our own reasons having little or nothing to do with that norm. Sometimes we act in the manner required by the state norm out of convenience,





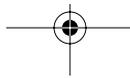
TRIANGULATING SOCIAL LAW REFORM

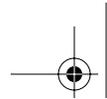
because doing so is of no great consequence to us. Sometimes we consciously elect to act as a rule prescribes because we consider the rule to be just and appropriate in the circumstances. Finally, sometimes we choose to follow a rule that we genuinely believe unjust, because of the larger claim that it is just to obey the rules of the state that aim at justice (even when they fail, in individual cases, to do so). Only in the last of these cases can it be said that there is a significant weight attaching to the normative order of the state.

Consider next human action not in conformity with the prescriptions of state (or any other institutional form of) law. Sometimes we act contrary to a rule of state law because we are ignorant of it. Sometimes, as in much regulatory law, we do so unreflectively and carelessly. Sometimes contrary action is grounded simply in opportunistic and self-interested reasons. Sometimes we accept the justice of the rule as a general proposition, but not of its application in the particular case we are confronting. Sometimes our dissenting behaviour is based on our belief that the rule is unjust. This dissent finds different modes of expression depending on the type of law in question: so, for example, refusing to acknowledge a prohibition of the criminal law thought to be unjust is not the same as refusing to get married because one believes that the current legal configuration of the institution of marriage itself is unjust, or as refusing to make a will because one believes that inter-generational wealth transfer upon death is unjust.

The substantive sections of this paper explore how these exercises of personal judgement work themselves out as exercises of law reform across three different social fields: the law of high-affect interpersonal relationships; the law of secured transactions law; and the law relating to the consumption of recreational drugs. What are the different strategies that states deploy for reframing legal concepts that come under pressure from dissenting social behaviour? and how do these bear on the manner in which people react to their different quests to instantiate justice through law? More generally, what are the mechanisms and tools by which religions, social castes, families and communities, as well as states, attempt to work through and announce the norms of justice that they seek to pursue and to uphold?

Three mechanisms for undertaking law reform are especially worthy of note. First among these are processes of characterization. All normative systems rely on a relatively small number of characterization symbols. In law, some of the most familiar to us are mid-level categorizations that we take for granted. For example, is this a matter for the public law or the private





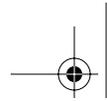
DESSINER LA SOCIÉTÉ PAR LE DROIT
MAPPING SOCIETY THROUGH LAW

law? Is this a matter of contract law or property law? Prior to deciding these internal legal categories, however, we take decisions about social categories. For example, is this a matter for politics or markets? Or is this a matter of personal or public morality, of public health, or social solidarity, or of economics? When we decide that “the state has no place in the bedrooms of the nation” we are making a choice about the category of human action into which a particular behaviour should be placed. So too when we decide that decisions about abortion, surrogate parenting and cloning are issues of science rather than issues of morality. In brief, social and legal characterisation operates at two levels. We accept that the categories are meaningful and appropriate: it makes sense to distinguish between science, public health, economics and morality. And we accept that human action can be best understood and judged by assigning it to one or the other of these categories.

The second element in the activity of instantiating justice involves the invocation of legal concepts. By legal concepts I mean more than legal principles and legal rules. Legal concepts are organizing structures that enable us to establish a relationship between the world of phenomena, and a series of reactions, reflections and judgements that we personally bring to bear on the meaning of these phenomena. The notion of legal subject is a concept; so too are the notions of filiation, a succession, property, a usufruct, a contract, and a trust. Like social characterizations, but at a more detailed level of assessment, legal concepts permit us to locate a series of particular normative outcomes within a presumably coherent framework. Like the pedigree of a legal rule in Kelsen’s normative pyramid, concepts permit us to determine whether any given prescription is or is not, and more generally should be or should not be, a member of the relevant normative universe.

The third element in the enterprise of triangulating social law reform is most familiar. It comprises the norms—rules, principles, and standards—that we invoke in the formulation of prescriptive premise, factual determination, and legal outcome. These norms are typically directed to human action or motivation, and seek to channel or frame the way in which people are meant to interact with their fellows. Even when these norms appear to relate to unilateral relationships—say, as between an owner and property, or a master and his or her animals—they have as their background referent, the actions and reactions of other persons. In the end, though





TRIANGULATING SOCIAL LAW REFORM

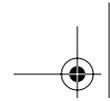
people acknowledge that much normative freight is carried by characterisation and legal concepts, they nonetheless usually judge their sense of fidelity to law by whether they think they are following the prescriptions of these legal rules, principles and standards. This perception also affects how law reform is perceived. Today, because of its strongly instrumentalist orientation, most attention in official law reform is focused on changing the rules applicable to any given human situation. In fact, however, these legal rules are only a minor part of business of law reform.

I have presented these three components of law reform using three contemporary illustrations. I do not mean to suggest, however, that they must be apprehended and decided by law reformers in the same order I have adopted. There is a dialogic relationship among characterisation, concept and rule. Often, we play back decisions about the specific rules we announce into a larger conceptual structure, and decide that the conceptual structure needs revision. So too, we often play back conceptual structures into larger questions of characterization and decide that we need to revise our characterisation of certain acts or events. The lesson, if lesson there must be, is this. There is no fail-safe procedural protocol and no infallible path-dependent recipe for successfully triangulating social law reform.

III. RE-IMAGINING CLOSE PERSONAL ADULT RELATIONSHIPS

For the better part of a decade, governments, courts and law reform agencies in Canada have been recasting the law relating to close adult relationships of dependence and interdependence. The Law Commission of Canada has published a major report in the field. Both the federal and provincial legislatures enacted statutes following upon the decision of the Supreme Court in *M. v. H.* The National Assembly of Quebec has modified the *Civil Code of Québec* to introduce the concept of “civil unions”. Finally, as a result of decisions rendered in test-cases have been brought in Quebec, Ontario and B.C. to determine whether the opposite-sex requirement in marriage legislation is constitutional under the equality provisions of the *Charter of Rights and Freedoms*, the government of Canada has announced that it will introduce legislation to authorize the celebration of same-sex marriages. These are all significant substantive law reform initiatives. But they are even more revealing for what they tell about the tech-





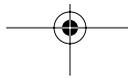
DESSINER LA SOCIÉTÉ PAR LE DROIT
MAPPING SOCIETY THROUGH LAW

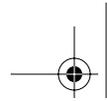
niques and processes by which the conceptual reform of state law can be managed.⁴

Today, even after the decision of the government of Canada to amend federal law relating to marriage, there remains a sharp disjuncture between the sociological reality of contemporary adult relationships of dependence and interdependence and the official legal concepts and definitions by which these relationships are acknowledged and sustained. Consider how Parliament and provincial legislatures ought to react. Should they even be concerned about the disjuncture between the regulatory frame of their statutes and social fact? And if so, should their strategy for reconciling states of law and states of fact be to reinforce the former as a disciplining factor or constraining force upon the latter? Or should it be to adjust the former so that it reflects, channels and reinforces the latter?

Most, although not all (and the minority view is especially popular among those who characterize themselves as “post-modern” scholars), jurists answer the first of these three questions in the affirmative. For them, the law of the state is a society’s most important institution of normative ordering and must, therefore, be reasonably aligned with everyday human experience. The debate raised by this question is fundamentally about the nature of legal concepts and the interrelation of legal concepts arising in non-state legal orders with those articulated by the state. I return to this issue later.

⁴ In this section I use the expressions “close adult relationships of dependence and interdependence” and “close personal adult relationships” interchangeably. For the rationale, see LAW COMMISSION OF CANADA, *Discussion Paper: Recognizing and Supporting Close Personal Relationships Between Adults*, Ottawa, Supply and Services Canada, 2000. The literature on these developments is massive. In the interests of manageability I refer her only to recent sources that have extensive bibliographies. See LAW COMMISSION OF CANADA, *Beyond Conjugalities*, Ottawa, Supply and Services Canada, 2001; Pierre-Claude LAFOND and Brigitte LEFEBVRE (eds.), *L’union civile: nouveaux modèles de conjugalité et de parentalité au 21^e siècle*, Cowansville, Éditions Yvon Blais, 2003; Robert LECKEY, “Harmonizing Family Law’s Identities”, (2002) 28 *Queen’s L.J.* 221; “Chosen Discrimination”, (2002) 18 *Supreme Court Law Review* 445. See, for a dissenting view, D. CARE, “Redefining Marriage? A Case for Caution”, a brief to the Standing Committee on Justice and Human Rights: On Same-Sex Unions, February 12, 2003. I have explored some law reform facets of this issue in my essay “Perspectives on Personal Relationships”, presented to the Conference on Domestic Partnerships sponsored by the Law Commission of Canada at Queen’s University on October 21-23, 1999. The text is available on the Website of the Law Commission: www.lcc.gc.ca. See also R.A. MACDONALD, “All in the family”, (2000) 30 *Transitions* 3.





TRIANGULATING SOCIAL LAW REFORM

As for the second and third questions, opinions are quite divided. Here, political ideology counts heavily in the balance. Those who self-describe themselves as “conservatives” tend to see state law as a instrument of social control. Law must be deployed to constrain behaviour, especially behaviour tinged with moral overtones. The state should be called in aid of religion and morals to strictly regulate and repress non-conventional human agency.

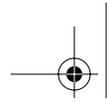
Nevertheless, many jurists believe (at least in those circumstances where constitutional norms of liberty, equality and solidarity are not in play) that the law of the state must take cognizance of a changing society. Its role is to facilitate self-directed interaction, not to repress it. Within the general framework of the constitution, and excepting the core proscriptions of the criminal law and restrictions intended to limit abuse of power and exploitation in the marketplace, state law should be directed only to providing the normative institutions through which human creativity may flourish. Its motif is the mirror, not the mould.

How do these two approaches to law and law reform play out in relation to the concept of marriage? Here I want to address two points. One concerns the structure of marriage regulation and the uses to which this concept has been put by governments in the organization of public policy over the past 100 years. The other concerns the manner in which legislation should be recast in order to address the continuing disjunctures between law and fact in close personal adult relationships.

Marriage has long been a highly structured social institution. It was not so long ago that seven distinct requirements or preconditions were imposed on those who wished to get married: (1) the imposition of a minimum age; (2) the consent of the intending spouses; (3) in some cases, the necessity of parental or judicial consent; (4) consanguinity prohibitions; (5) the opposite-sex requirement; (6) the bigamy prohibition; and (7) the polygamy or polyandry prohibition. Together, these prohibitions structured a social institution on premises that had roots in Roman Catholic canon law, and in the feudal practices meant to secure intergenerational wealth transmission.

Initially, very few additional state-sanctioned legal consequences flowed from marriage as such. Most were either prohibitive or disabling—the fiction of the “unity of personality of husband and wife”, the absorption of a wife’s property into the estate of her husband, and the general contractual incapacity of married women being among the most important. Over time,





DESSINER LA SOCIÉTÉ PAR LE DROIT
MAPPING SOCIETY THROUGH LAW

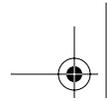
however, many of these legal disabilities came to be attenuated. Moreover, and conversely, legislatures began to craft a number of social policies to benefit persons (especially women) who were married. One of the first was the enfranchisement of spouses of men on active service in World War I as voters in the 1917 federal election. Later, as the state began to take a much more active role in social regulation, it began to deploy the concept of marriage as the means to elaborate beneficiaries of a wide range of social welfare measures, tax deductions, and numerous other distributional policies.

Yet in many of these cases no functional congruence between the policy being pursued in these various governmental programmes and the legal status of marriage was discernable: while most people in a marriage relationship may well have been appropriate beneficiaries, many in unmarried relationships were equally appropriate targets of the social policy. For example, the policy of providing pensions to female survivors of soldiers killed on duty in World War II (especially in cases where the female survivor was the mother of the child of the deceased soldier) could not be justified as applicable only to those who were formally widows. As a result, the government was obliged to move away from using the concept of marriage as the sole means for identifying those who were meant to benefit from many of its social programmes. The classic example of legislative innovation of this sort was, of course, the common law (or *de facto*) marriage. In this case it was decided to extend social policy to those cohabiting in certain circumstances because their situation was considered functionally to resemble a regular marriage.

The use of an existing concept as a surrogate for a tailor-made definition of the beneficiaries of a particular policy has been a common legislative strategy for decades. But doing so has two perverse consequences. To begin, it requires the identification of a, typically, false rationale for the policy: in the case of social benefits, promoting the sanctity of marriage (or at the margins, marriage-like relationships), rather than the policy goal actually in issue. Second, the policy consequence imagined as an accessory, comes to define the concept itself: rather than pension survivorship benefits being a consequence of marriage (or some other marriage-like relationship), the meaning of marriage comes to be seen as driven primarily by the range of relationships for which a pension survivorship benefit would be an appropriate outcome.

As a matter of law reform, the signal lesson is that when governments deploy concepts that have a deep social meaning in order to achieve policies that have no necessary connection with the initial concept, the concept





TRIANGULATING SOCIAL LAW REFORM

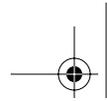
itself (and in particular the expectations that others visit upon the concept) begins to change. So, for example, the concept of marriage no longer comes to be understood or defined by reference to what are called its “essential” characteristics as these have been inherited through time within the diverse non-state normative communities—social practice, religion, *etc.*—where it had most impact. Rather, because these programmes have such salience, there has great pressure to line up the consequences of the programmes with the intended targets.

This led to incremental adjustments to the definition of eligibility built around some notion of functional equivalence which, in turn, led to the concept of marriage being reconceived in terms of the instrumental normative work that it accomplishes. Of course, the problem with functional equivalence is that there is no independent benchmark for deciding the equivalence. In the case of surrogates to marriage, what is significant is that the extension often did not rest on a conjugal rationale at all, but rather was grounded in a dependency rationale.

Today, recognition of the dependency rationale has led to further difficulties with the definition of marriage. If neither conjugality nor procreation, but rather interdependence, affection and mutual support, are the foundational rationale for these governmental programmes, should not any high affect close personal relationship involving adults qualify for equal support and treatment? In other words, marriage, and the definition of marriage, should actually have little to do with how beneficiaries of these programmes are identified. This lesson is only slowly percolating into legal policy. And often it does so only indirectly. For example, legislative drafters are now asking whether it is appropriate for Parliament to reconsider its use of definitions grounded in moral-religious ideals when it has available other ways of identifying the beneficiaries of its social policies meant to ensure the physical, economic, emotional and psychological security of adults living together. Were Parliament to abandon its traditional approach of incrementally extending the contours of marriage-law relationships in favour of a tailor-made definition tied to the specific situations it had in view when elaborating any particular legal regime of benefit or burden, this would enable it to implement its policy goals coherently across Canada, and without regard to the sectarian attachments of any particular group of citizens.

Nevertheless, even were it possible to pursue social policies by defining entitlement solely by reference to the policy being promoted, rather than be reference to traditional socio-cultural-religious definitions, it is





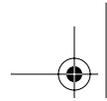
DESSINER LA SOCIÉTÉ PAR LE DROIT
MAPPING SOCIETY THROUGH LAW

not clear that this would change the contours of much contemporary policy debate. Of course, in so far as the issues of physical, emotional, psychological and economic security are concerned, the policy question could then be seen as no longer involving an attempt to determine the “true definition” of marriage, but rather as identifying the scope of legitimate state interests in structuring and nurturing healthy close personal adult relationships. But the state still continues to recognize the symbolic status of marriage, and that concept carries significant socio-cultural-religious baggage. Even though all of the substantive policy questions could be resolved in a functional, non-discriminatory way, the issue of status remains unresolved. Bigamy, polygamy, polyandry and same-sex marriage remain proscribed, and long-term sibling relationships, for example, cannot be characterized as marriages. What, then, are Parliament and provincial legislatures to do?

One might begin an answer by considering various aspects of current “preconditions” to marriage. First, none of these preconditions are naturally given; all are socially constructed. Second, the fact that they are contested means that they are important to people; definitions that are not important are usually dealt with pragmatically. Third, the various requirements are not inextricably linked; it is possible to permit same-sex marriages without permitting polygamy and polyandry, or *vice versa*. Fourth, with the exception of the consanguinity prohibition, none are directly tied to any other social policy that the state is currently pursuing; while at one point some may have been developed because the state was trying to reinforce a particular religious vision for society, this is no longer the case.

In reconsidering how the divergence between states of fact and states of law should be worked out in relation to the “status” aspects of marriage a number of options are open to Parliament. To begin, it could simply do nothing and maintain the *status quo*. Alternatively it could redefine marriage to overcome certain prohibitions; presently, there is one area where there exists a significant pressure to do so—the recognition of same-sex marriages—and one where there is some call to do so—the recognition of polygamy and polyandry. Again, it could complement the concept of civil marriage with an additional, parallel concept for relationships now excluded; most proposals to establish “registered domestic partnerships” or “*pactes de solidarité civile*” are of this nature. It could also replace the concept of civil marriage with an alternative concept; were such an approach were to be taken, Parliament would abandon marriage as a legally significant status. Finally, it could simply withdraw from the marriage business; it would eliminate the concept of marriage from the statute book without replacing





TRIANGULATING SOCIAL LAW REFORM

it and pursue all legal policies now organized around marriage, or analogies to it, by reference to functional concepts.

In large part for constitutional reasons, the National Assembly adopted the third of these five approaches in its recent codal amendments instituting the civil union. As it stands now, a civil union is framed as a type of substitute marriage, available to those who cannot get married and, although not explicit in the text of the code, also to those who can. Two points are noteworthy about the way the provisions governing civil unions are framed.

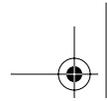
One is this. The concept of civil union apparently embraces all the principles and limitations relating to marriage except the same-sex limitation: requirements of capacity and consent, and prohibitions relating to bigamy, polygamy and polyandry, and consanguinity continue to apply to civil unions. Moreover, a civil union can only be entered into by two people. Since much of the rationale for acknowledging same-sex marriage is to accept that the affective (including sexual) choices that people make can be various, it is difficult to see on what basis consensual polygamy and polyandry should be excluded. And if the point is mutual support and affection, then it is difficult to see on what basis the consanguinity restriction can be retained. In brief, should not a civil union be open to all adults who wish to make a home together?

Amendments to the code relating to civil unions reveal what happens when a poorly thought-out functionalism is deployed to achieve social policy by indirection. The dominant legal basis for permitting same-sex marriage (and by ricochet, for establishing the civil union) is found in the equality guarantees of the *Canadian Charter of Rights and Freedoms*. But what exactly is the inequality that is in issue? Today, the key limitations on eligibility to marry are three, namely gender, number and consanguinity: why does the former generate section 15 inequality and not the latter two?

This thought leads to a second observation about the way in which the codal amendments instituting the civil union are drafted. The National Assembly determined to add the civil union to Book Two of the *Civil Code of Québec*—The Family—as Title 1.1, complementing Title 1—Marriage. Although the civil union is established as a free-standing, alternative civil status to marriage (one cannot simultaneously enjoy both statuses), in its substantive provisions it is organized as a *calque* upon marriage. Symbolically, of two legal co-equals, marriage remains the privileged institution.

Consider other options that could have been selected. The National Assembly could have made the civil union Title 1 and placed all substantive





DESSINER LA SOCIÉTÉ PAR LE DROIT
MAPPING SOCIETY THROUGH LAW

rules in that title, relegating marriage to Title 1.1 and making its regulatory regime parasitic upon the rules governing civil unions. Of it could have made the civil union the default category for all close personal relationships among adults, and elaborated marriage simply as one its instantiation. This is not as far fetched an hypothesis as one might think. Those of us who studied the matrimonial regimes of the *Civil Code of Lower Canada* recall that what we now know us as the separation of property regime was initially cast as a conventional modification to the community regime—a regime that excluded the community.

Let me continue in this vein. The 1969 reform of matrimonial regimes in Quebec was not accomplished by simply adding on another “conventional modification” to the community regime. The reform actually changed the default matrimonial regime to partnership of acquests. Imagine if the National Assembly were to have created a general default regime of interpersonal affect called the civil union, and then announced a series of conventional modifications to that regime: two-person regimes; multiple-person regimes; same-sex regimes; opposite-sex regimes; consanguineous regimes; and so on. In doing so, it could also have created a default set of *de facto* alternatives to each of these formal, registrable regimes. Such alternatives would be just like the default “quasi-contract”, *negotiorum gestio*, as complemented by ostensible mandate, ostensible partnership, ostensible deposit, and so on, seen as fact-based relationships surrogate to the formal law of contract.

What then to conclude? The lessons are two. Simply trying to reconfigure essentialized concepts by reference to functional criteria gives no automatic answer to the question of what functionality should govern. Functional equivalence must be found in a separate inquiry about the justness and justice of any particular claim to equality. Functionality is an approach to law reform, not an outcome.

Moreover, where the essentialized concept in question relates to status, rather than to a legal characterization of a marketplace relationship or the attributes and prerogatives of property, significant historical-cultural-religious-social atavisms will bear on the range of possibilities open to the state. The use of concepts that have a deep social meaning in order to achieve policies that have no necessary connection with the concept actually comes to change the “essential” characteristics of the concept, often in a way that conflicts with the understandings of the diverse non-state normative communities where it had its origins.



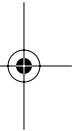


TRIANGULATING SOCIAL LAW REFORM

These two lessons, it might be added, apply not just to marriage, but to every other status concept known to the law—including official statuses like citizenship, majority, interdiction, and filiation—and unofficial identities like gender, race, sexual orientation, class, religion, and disability.

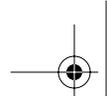
IV. RE-IMAGINING SECURED TRANSACTIONS

I turn now to my second example of a situation where the state has been asked to re-define a legal concept originally cast in formalist and essentialist terms, by reference to a functional logic. This example is drawn from the field of secured transactions. The particular set of definitional issues I consider has two main dimensions. First of all, what is security and what is a security device? Secondly, how ought to the law to deal with transactions that do not fit the formalist or essentialist conception of security, but that are deployed by creditors to achieve like purposes? To appreciate the importance of the definitional challenges at hand, it is helpful to begin with a comparison of common law and civil law approaches to the regulation of secured transactions.⁵



⁵ The most comprehensive comparative discussion of the issue to be addressed in this section is Jean-François RIFFARD, *Le Security Interest ou l'approche fonctionnelle et unitaire des sûretés mobilières*, Paris, L.G.D.J., 1997. For a historical review of the question in the United States, see Grant GILMORE, *Security Interests in Personal Property*, Boston, Little and Brown, 1965; and COOGAN, KRIPKE, and WEISS, "The Outer Fringes of Article 9: Subordination Agreements, Security Agreements in Money ...", (1965) 79 *Harv. L. Rev.* 229. A general discussion of formalism and functionalism in contemporary common law and civil law systems is provided in M.G. BRIDGE, R.A. MACDONALD, R.L. SIMMONDS and C. WALSH, "Formalism, Functionalism, and Understanding the Law of Secured Transactions", (1999) 44 *McGill L.J.* 567. See also Martin BOODMAN and Roderick A. MACDONALD, "How Far is Article 9 of the Uniform Commercial Code Exportable? A Return to Sources", (1996) 27 *Can. Bus. L.J.* 249; and H. R. SASCHE, "Report to the Louisiana Law Institute and Article 9 of the Uniform Commercial Code", (1967) 41 *Tul. L. Rev.* 506. The difficulties of modernizing secured transactions law in Quebec are discussed in R.A. MACDONALD, "The Counter-Reformation of Secured Transactions Law in Quebec", (1991) 19 *Can. Bus. L.J.* 239; "Change of Terminology? Change of Law?", (1992) 23 *R.G.D.* 357; "Faut-il s'assurer qu'on appelle un chat un chat? Observations sur la méthodologie législative à travers l'énumération limitative des sûretés, la présomption d'hypothèque et le principe de l'essence de l'opération", in Ernest CAPARROS (ed.), *Mélanges Germain Brière*, Montréal, Wilson & Lafleur, 1993, p. 527; and "Reconceiving the Symbols of Property", (1994) 39 *McGill L.J.* 761.





DESSINER LA SOCIÉTÉ PAR LE DROIT
MAPPING SOCIETY THROUGH LAW

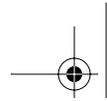
I begin with the idea of a security right itself. Historically, common law systems possessed relatively impoverished regimes of secured transactions. Apart from the possessory pledge, there was no device that permitted creditors to obtain a security right in their debtor's property. Indeed, the paradigmatic security right that developed prior to the industrial revolution—the mortgage—was, in fact, a distortion of title to serve stead for a proper non-possessory security. Until the development of Torrens systems for charges upon land, the “equitable floating charge” over business assets, and later the “security interest” of Article 9 of the *Uniform Commercial Code*, the common law had to make do with the judicially-developed mortgage and chattel mortgage.

By contrast, the romano-germanic tradition developed the concept of a non-possessory security right—the hypothec—well before Justinian's codification. A security was conceptualized as a right in a debtor's property made liable for the fulfilment of an obligation that enabled the creditor to follow the property upon its disposition, to seize it, to sell it, and to obtain a preference in the price received. Of course, by the late renaissance, the rule “*les meubles n'ont pas de suite par hypothèque*” was also part of the civil law inheritance, such that apart from specific legislative exceptions enacted to facilitate commercial practice, non-possessory security over moveables was not permitted.

During the 20th century, both common law and civil law traditions were faced with a pair of major challenges in relation to secured transactions. The first was modernization: how to develop a proper conception of a security right that would facilitate the grant of non-possessory security over moveable (or personal) property. The second was rationalization: how to regulate other transactions by which creditors sought to deploy title to property as a means to acquire something analogous to a secured right over their debtors' assets.

The technical law reform issue is whether there are better or worse ways of drafting legislation in order to accomplish these goals. Article 9 of the *Uniform Commercial Code* and its Canadian equivalents—the *Personal Property Security Acts* of various common law provinces—provide one approach to meeting this challenge. Book Six of the *Civil Code of Québec* provides another. Two distinct inquiries must be kept in mind when working through the implications of these contrasting approaches: what new concepts of law can be imagined? and what are new ways to imagine concepts of law? Let me clear about the difference. The first is an instrumental inquiry: how ought one to better line up policy and legal definition?





TRIANGULATING SOCIAL LAW REFORM

The second is a profoundly symbolic inquiry: how ought one to do reform law so that the exercise captures the loyalty and fidelity of citizens to the implicit values being advanced?

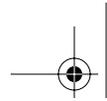
For several decades commercial law reformers and Parliaments have been preoccupied with the first inquiry. Today, we are coming to the realization that it is the second that is, in fact, more important. Let me explore the point by briefly considering the usual ways by which legislatures have sought to redraft legislation that has become over-, or as is most often the case, under-inclusive.

A first technique is simply to extend the existing definition of a problematic concept through a legislative analogy or by an express statutory fiction. An example of the former can be found in the law relating to adoption. An adopted child is, with only a very few exceptions (such as eligibility to marry a biological sibling adopted by another family), treated as if he or she were the biological offspring of the adopting parents. An example of the extension of a concept by statutory fiction can be seen in the way that the civil law used to extend the idea of immoveables to declare certain property (such as sums accruing to a minor from the sale of immoveables during his or her minority) closely associated with land as if it were, in fact, immoveable property.

In both these cases, the legislature is making a policy choice about the scope of a legal concept. It determines that a situation not obviously falling within a historical (adoption) or material (immoveable) definition should, nonetheless, be treated thereafter as if it did. It is worth noting that in both cases, but especially in the second, the extension of the concept significantly contorts the root ideas associated with the initial concept: it is hard to imagine, for example, that many people would automatically think that money received by a minor from the sale of an immoveable falls within the same legal category as a piece of land.

There is another well-known technique by which legislation that has become over- or under- inclusive can be re-drafted. It is possible to rewrite a statute in a way that abandons an existing concept as the reference point for the policy to be pursued and institutes a new concept. Normally, when they choose this route, legislatures focus on the substance of the desired policy objective: in defining the new concept, they identify criteria of inclusion and exclusion that relate to the facts of a human situation or to the purposes that people are pursuing, rather than to the formal categorization of that situation.





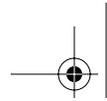
DESSINER LA SOCIÉTÉ PAR LE DROIT
MAPPING SOCIETY THROUGH LAW

Many examples of this approach to rewriting statutes are found in the field of administrative law. For example, the courts historically held that their power to review whether the manner in which administrative decisions were taken respected the “rules of natural justice” was limited to cases when the decision-maker was performing a judicial or quasi-judicial function. This was because the prerogative writs of *certiorari* and prohibition, the sole means by which judicial review could be sought, were only available in such cases. By statute, however, many legislatures created a new legal procedure embracing a new legal concept—the application for judicial review—which incorporated all the relief that could be previously obtained through *certiorari*, prohibition, *mandamus*, injunctions or declaratory relief. The consequence was that soon afterwards, the courts decided that they had authority to impose due process norms on all manner of administrative decision under the general principle of “procedural fairness”.

To understand the definitional choices actually open to legislatures attempting to modernize and rationalize the law of secured transactions, it is necessary to take a little detour into the archaeology of western legal concepts. Since at least Roman times European private law has typically been grounded in a definitional approach that lawyers call “legal formalism”. Legal concepts were initially defined by reference to things in the material world—physical persons, land, objects, and so on. However intuitively appealing it may be to see legal concepts as simple reflections of the purely physical characteristics of things and human beings, no great insight is required to see that in modern law the concepts of “property” and “person” have only a loose connection to material facts. For example, it is hard to imagine that some “persons” recognized by the law—such as business corporations—are really like human beings; and it is also hard to imagine that some contemporary objects of property—such as chemical formulae—are just like rocking chairs.

Once it is understood and accepted that even obvious legal concepts do not automatically line up with material things, alternative means for fixing their scope have to be found. That is, in order to include and exclude certain social facts or legal relationships from any given concept, new criteria for defining the concept need to be announced. Historically, the law moved away from definitions based on the physical properties of things by adopting definitions based on the “true characteristics” or the “essential nature”. These new definitions were then expanded or contracted over the years in order to produce desired policy outcomes without legislatures having to create novel regulatory regimes. In this technique of defining the





TRIANGULATING SOCIAL LAW REFORM

essential features of a concept one sees a total reversal of the approach that rests on relating legal concepts to material things. Far from the “social facts” driving the definition of a legal concept, the legal definition of the concept comes to drive how “social facts” are understood.

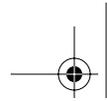
Over a large range of legal fields, people usually accept extensions of concepts as long as they perceive the underlying logic. Commercial and consumer transactions are domains where the underlying logic of a concept tends to be relatively transparent. A good example of the process can be seen in the evolution of the legal rules governing the common law mortgage. The idea of the mortgage is to transfer title to property conditionally to a creditor as security for a debt. What is interesting about the mortgage is that it reflects the most primitive of legal ideas (ownership) perverted into an independent and more sophisticated legal purpose (security). For obvious reasons, courts immediately began to interfere with the contractual freedom that such a right implied, and hence developed the notions of equity of redemption, foreclosure, and the debtor-protection principles “no clogs on the equity of redemption” and “once a mortgage, always a mortgage”

For present purposes, two features of this common law development are especially interesting. First, the absence of a concept of non-possessory security in the common law, meant that courts had to build up the various attributes of the idea on a step-by-step along a functionalist logic. Not having an *ex ante* conceptual frame to guide their law-making activities, the courts of equity were not constrained by essentialist conceptions of what constraints—registration, notice requirements, preserving the right to remedy or to reinstate—they might logically impose on creditors.

Second, the fact that courts of equity were pursuing a functionalist logic to transform a legal transaction that rested on the transfer of ownership to a creditor also meant that they were not constrained by legal form in applying their conception of a mortgage to any other legal transaction that had a similar purpose. These courts did not, that is, see a radical, unbridgeable distinction between conditional ownership as a guarantee and true security and were able to insist that creditors deploying any transaction that functioned like a mortgage respect the debtor-protection rules applicable to mortgages.

By the end of the 20th century, common law legislatures came to a similar conclusion. Rather than continue to build a patchwork of legal regulation or to extend old concepts to new and analogous legal situations





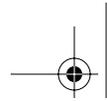
DESSINER LA SOCIÉTÉ PAR LE DROIT
MAPPING SOCIETY THROUGH LAW

where debtors also merited protection against unfair creditor practices, they chose to invent a brand new concept called “a security interest” and to define it without reference to existing legal concepts like chattel mortgages, conditional sales agreements, consignments, and long-term leases. The new concept was defined exclusively by reference to the substance of the commercial transaction in issue and the purposes being pursued by creditors and debtors. Hence the slogan applied to Article 9 of the *Uniform Commercial Code* and *Personal Property Security Acts* in Canada: “if it walks like a duck and it quacks like a duck, the law should treat it as if it were a duck.”

Contrast the civil law. A well-worked out conception of a security right—the hypothec—permitted courts and legislatures to focus directly on transactional fairness in the realm of security and to ensure an appropriate instantiation of the concept. But, as a consequence, little attention was devoted to these same questions of transactional fairness in situations where the right of ownership was used to secure an obligation. For centuries jurists in the civil law used the sale with a right of redemption to escape almost all the regulatory control attendant upon hypothecs. Likewise, the exercise of the right of resolution of contracts of sale for the buyer’s failure to pay the price, and the deployment of the instalment sale title-reservation contract were similarly unregulated. Only towards the end of the 19th century, when notaries began to insert transfer of title clauses—*clauses de voies parées*, *pactes commissaires*, and *clauses de dation en paiement*—into hypothecary agreements, did courts and legislatures react. The French *Cour de cassation*, although not courts in Quebec, declared these latter clauses void. Neither, however, applied a similar rationale to the panoply of sale transactions parading as security.

Nonetheless, the economic crisis of the 1930s, and the expanding consumer markets of the 1960s led the Quebec legislature twice to take steps (in 1938 and then again in 1963) towards creating something like an “equity of redemption” in respect of these title transactions. I refer, of course, to the 60-day notice requirement imposed on creditors seeking to enforce title security. At about this time, the Civil Code Revision Office proposed a legislative reform that had a certain resemblance to that adopted in common law *Personal Property Security Acts*. The Revision Office proposed, through an idea it characterized as recommended the “presumption of hypothec”, to abolish all forms of title security and to convert them into hypothecs. After much debate, this proposal was rejected by the National Assembly, largely on the basis that the proposal would confound the con-





TRIANGULATING SOCIAL LAW REFORM

ceptual distinction between owning (title deployed as security) and owing (true security in a debtor's property). For the National Assembly, property was property, security was security, and the two were totally different legal concepts.

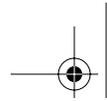
Of course, the National Assembly could not simply ignore the problem of title security. So, following the lead that it traced out in the 1930s and 1960s, and paradoxically, in a manner that followed the underlying rationale of the "security interest" it decided to engraft onto specific regimes of title security a number of procedural mechanisms that would protect a debtor's equity. Sadly, however, in two salient respects the National Assembly failed to learn from its prior law reform experiences, and only incompletely internalized the logic of Article 9 of the *Uniform Commercial Code*.

Most importantly, instead of announcing a general principle that every attempt to deploy title to secure the performance of an obligation would be subject to a uniform debtor protection regime, the *Civil Code of Québec* merely identifies paradigmatic transactions—security trust, right of resolution, instalment sale, sale with a right of redemption—to which this regime applies. The lesson of the reforms of the 1930s and 1960s, when only certain transactions are labelled and regulated, is that smart lawyers will invent new, unlabelled transactions to escape the intended regulation. Recall that it took a nine-person bench of the Quebec Court of Appeal in 1977 to finally determine that the laundry list of regulated transactions set out in article 1040d of the *Civil Code of Lower Canada* was actually just a list of examples and that, in fact, it presupposed an implicit general principle applicable to all types of title security.

In addition, rather than providing that the entire panoply of procedural constraints applicable to hypothecs are also applicable to the designated title transactions, it left various features of title security unregulated. So, for example, restrictions on those who can grant certain types of hypothecs (consider the prohibition of article 2683 on consumer non-possessory security, or the prohibition of article 2684 on consumer hypothecs on universalities of property) are not extended to sales under resolutive condition, instalment sales, or sales with a right of redemption. The consequence of this neglect are obvious; parties prohibited from hypothecating will invariably opt for title transactions simply to get around the prohibition.

In other words, however much the arguments for not adopting the recommendations of the Civil Code Revision Office could be justified on the



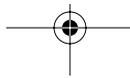


DESSINER LA SOCIÉTÉ PAR LE DROIT
MAPPING SOCIETY THROUGH LAW

basis that ownership is conceptually distinct from security, it does not follow that the regime chosen by the National Assembly to effectuate its regulatory had to adopt both a formalist and a nominalist conceptual structure. Here is the point. The *Civil Code of Québec* regulates only certain features of these title transactions. And it does this in a highly variegated way: sometimes by reference to the hypothecary regime—resolatory clauses in sales of immoveables, instalment sales, sales with a right of redemption, security trusts; sometimes only by regulating publicity—finance leases, ordinary leases of more than one year; and sometimes through an outright prohibition—giving-in-payment and like clauses. The Code ought to have, in the manner of Canadian *Personal Property Security Acts*, made the substantive regime of hypothecs (including limitations on capacity, formalities for constitution of the security, and rules governing publicity) applicable to all title transactions deployed as security. Then, having done so, if the legislature so wished, it could have differentiated the regime of recourses open to creditors according to the character of the transaction in question.

It is now up to the courts to arrive at such a result. That is, they can take the conceptual regime of the *Civil Code of Québec*—distinguishing title transactions from security, and differentiating the various conceptual types of title transactions—as an indication to develop regulatory models applicable to all similar transactions. In this manner, they will instantiate a bifurcated functionalist logic within a formalist conceptual framework. First principle: all attempts to create a security device in a debtor's property will be governed by the hypothecary regime. Second principle: all attempts to use title to property to secure the performance of an obligation will be governed by the title regime that applies to that type of transaction.

In such a framework, the regulatory regime adopted for instalment sales will apply wherever a person retains title to property until full payment—instalment sale, sale under suspensive condition, lease with option to purchase, promise of sale, and so on. Similarly, the regime governing resolatory clauses will apply to all such mechanisms—resolatory clauses, creditor repurchase agreements, resolatory conditions, and so on. And the regime for sales with a right of redemption should control all situations where a debtor transfers title with the expectation of a retransfer—sales with a right of redemption, sale-repurchase agreements, double sales, sale-leaseback, and so on. Finally, the regime governing finance leases and long-term leases should be imposed on all non-purchase title transactions—finance leases, loans, consignments, long-term leases, deposits, on so on.





TRIANGULATING SOCIAL LAW REFORM

What, then, are the lessons to be drawn from the uneasy marriage between functionalism and formalism in the characterization of transactions intended as security under the *Civil Code of Québec*? Three stand out. There is a significant difference between the way in which legal concepts can be reformed or recast depending on the field of law in issue. When concepts find their primary locus is normative orders that are tied to social-cultural-religious communities, the capacity of legislatures and courts to extend them through analogy and fiction is more constrained, than when concepts are shared as between markets and the law. This is in large measure because economic transactions are grounded in an instrumental logic, and with the signal exception of the idea of ownership itself, they do not carry enormous symbolic weight.

In addition, however much legislatures seek to build regulatory regimes by deploying concepts that are defined by their “essential” properties, the exercise of characterisation will always lead to asking what exactly a particular factual situation is. To say that the essential properties of a hypothec are that it is a right of a creditor in the property of a debtor meant to secure the performance on an obligation, implies that any a contractual attempt to create or reserve such a right—no matter how described legally by the parties—will be a hypothec. No legal concept, unless consecrated by a specific exclusionary form, can ever have its frontiers determined without reference to its *telos* or purposes.

And, whenever legislatures attempt to deploy purely functional definitions to legal phenomena, they wind up having to recreate formal distinctions within the boundaries of the new functional concept. Collapsing the distinction between owing and owning, between true security and title deployed to secure the performance of an obligation, does not relieve a legislature of the need to determine whether, in a competition between secured creditors, a distinction should be drawn between a creditor who was once an owner (a vendor) and a creditor who is merely a financier (a lender). Indeed, the priority afforded to the vendor’s hypothec (or a “purchase money security interest”) merely tracks the logic of an instalment sale or a sale under a resolutive condition in regimes that continue to distinguish between security and title devices.

Whatever the particular field of law, essentialized concepts find their frontiers in the language of functionality, and functional concepts will still have to be decomposed for certain purposes by reference to the “essences” of the discrete transactions that are deployed to achieve a supposedly identical function.





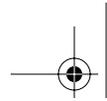
DESSINER LA SOCIÉTÉ PAR LE DROIT
MAPPING SOCIETY THROUGH LAW

V. RE-IMAGINING RECREATIONAL DRUG CONSUMPTION

My third illustration of the dimensions of social law reform speaks to the manner in which the state deploys the criminal law as a social resource. My particular concern is the law governing the non-medical consumption of recreational drugs. In a modern, culturally diverse, democratic society one of the key tasks of law is to establish, structure, stabilise and support non-exploitative and just human relationships. A key technique for doing so is the endeavour of classification and characterisation. What something or some activity is called—its label—organises human responses and provides connections with other ideas and sentiments associated with that label. The principal ambition of law reform, consequently, must be to determine the appropriate label by which social facts—in the instance the consumption of recreational drugs—should be understood.⁶

⁶ Once again there is an enormous literature on this topic—both as concerns the issue of recreational drugs and as concerns the manner in which legal policy should be developed to deal with non-medical consumption. The latter concern is usually expressed in the jargon of “choice of governing instrument”, itself a sub-set of the broader concern about “processes of social ordering”. The classic works are L.L. FULLER, *The Problems of Jurisprudence*, Mineola, Foundation Press, 1947; L.L. FULLER, *The Principles of Social Order*, 2nd ed., Oxford, Hart Publishing, 2001; and Henry M. HART and Albert SACKS, *The Legal Process: Basic Problems in the Making and Application of Law*, 1958 ed. presented by William N. ESKRIDGE and Philip P. FRICKEY, Westbury, Foundation Press, 1994. More recently see M. TREBILCOCK, D. HARTLE, J.R.S. PRICHARD, and D. DEWEES, *The Choice of Governing Instrument*, Ottawa, Economic Council of Canada, 1982; Christopher C. Hood, *The Tools of Government*, Chatham, Chatham House, 1986; Stuart S. NAGEL and W. DUNN (eds.), *Policy Theory and Policy Evaluation: Concepts, Knowledge, Causes, and Norms*, New York, Greenwood Press, 1990; B.G. PETERS, *Institutional Analysis in Political Science: The New Institutionalism*, London, Cassells, 1998; Marie-Louise BENELMANS-VIDEC, Ray C. RIST and Evert VEDUNG (eds.), *Carrots, Sticks and Sermons: Policy Instruments and Their Evaluation*, New Brunswick, Transaction Books, 1998; and Lester M. SALAMON (ed.), *The Tools of Government: A Guide to the New Governance*, New York, Oxford University Press, 2002. For a particular application of new governance theory to the regulation of recreational drugs see, R.A. MACDONALD, *The Governance of Human Agency*, *op. cit.*, note 3. For a discussion of developments in Canada since the 1973 Royal Commission on the Non-Medical Use of Drugs (LeDain Commission), see D. GOETZ, “Drug Prohibition and the Constitution”, online: <http://www.parl.gc.ca/37/1/parlbus/commbus/senate/com-e/fille-e/library-e/drugs-3.htm>; and D. RILEY, “Drugs and Drug Policy in Canada: A Brief Review and Commentary”,





TRIANGULATING SOCIAL LAW REFORM

One might begin with the observation that all human phenomena are capable of characterisation in multiple disciplinary registers. So, for example, an understanding of recreational drug consumption can be gained by applying economic analysis, or sociological, anthropological, psychological and educational perspectives, or an approach grounded in public health and harm reduction ambitions, or the tools of political theory and governance models, or the ethical frameworks of religion and morals. The legal optic, and the first objective of meaningful law reform, is to evaluate which of these registers most resonates with public expectations.

Legal classification has several dimensions. At one level it is the *ex ante* organisation of legal rules and concepts into more embracing regimes of regulation. For example, the division of legal rules relating to the transfer of property from one person to another into discrete packages entitled gifts, sales, mortgages, bailments, hiring, pledges, consignments, deposits and so on, is an exercise of classification. So too is the development of sub-categories of property called real estate, personalty, choses in action, intellectual property, family property, and so on. These categories are not always commensurable; nor are they always pre-emptive. Some particular action may well be, at the same time, a crime, a regulatory offence, and a civil wrong. Some thing may be at once a chose in action, intellectual property and family property.

At a more abstract level, deciding what it is that we are confronting, shapes how it is that we react long before we actually determine what might be the operative legal rule. In practical terms, of course, we are often aware of the applicable legal rules that flows from any particular exercise of characterisation, and devote our energies to convincing ourselves and others to adopt the characterisation that best serves our purposes. Unlike courts, of course, Parliament is not required on an *ex post facto* basis to determine the regulatory regime that actually applies to a given human situation. But Parliament is required on an *ex ante* basis to decide how any particular range of human endeavour should be understood. To legislate is to label.

This means that Parliament has to decide the broad parameters of the regime of legal governance that it seeks enact. Is, for example, abortion to

online: <http://www.parl.gc.ca/37/1/parlbus/commbus/senate/com-e/ille-e/library-e/riley-e.htm>. Finally, for a socio-economic conspectus of drug regulation during the 20th century see Desmond MANDERSON, *From Mr. Sin to Mr. Big*, Sydney, Oxford University Press, 1993.





DESSINER LA SOCIÉTÉ PAR LE DROIT
MAPPING SOCIETY THROUGH LAW

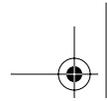
be understood in moral terms as a matter to be resolved through the *Criminal Code*, in public health terms as a matter for the *Canada Health Act*, or as a matter of choice, privacy and autonomy to be resolved through an appeal to the *Charter of Rights and Freedoms*? An identical set of classificatory choices confronts Parliament in deciding how to frame its responses to the recreational consumption of various kinds of drugs. Notice that while a particular decision about classification may incline policy debate in one way or the other, in itself the classification exercise does not actually decide policy. It is still possible to argue in moral terms that the *Criminal Code* ought not to proscribe abortions; and it is still possible to argue that decisions about abortion are not properly those embraced by human rights notions of privacy and autonomy.

One may begin inquiry by thinking through how Parliament now engages in first-order classification exercises. First-order classification arises when it has to decide, within any particular legal field, what concepts it will deploy in order to achieve its policy objectives. The crucial issue is the basis upon which classifications are made. Should Parliament classify drugs as, for example, legal-illegal, or medicinal-recreational, narcotic-non-narcotic, addictive-non-addictive, hard-soft, and so on? All these classifications are value-laden (some more obviously than others) and the values they reflect influence how they are deployed. Thus, a distinction between legal and illegal simply decrees without giving reasons. A distinction between medicinal and non-medicinal suggests a purpose behind the distinction. So does a distinction between narcotic and non-narcotic, or addictive and non-addictive. These latter distinctions point either to purposes or to consequences as the basis of the distinction.

But it must be remembered that other issues lurk just beneath the surface. Classifications unavoidably have class (even racial) implications. The moral panic of the 1920s and 1930s targeted the Chinese (in so far as opium was concerned), and afro-americans (in so far as “reefers” were concerned). Today heroin and crack are “lower-class” drugs particularly associated with user crime (as distinct from supplier crime), while cocaine and marijuana are linked less closely to crime and more to middle (or upper) class recreation.

These considerations raise the following questions in connection with the reform of regulatory policy governing “illegal” drugs. On what basis or bases ought Parliament to develop a taxonomy of drugs? In determining characterisations of drugs should social practices and expectations be dominant? Or should health and safety considerations be controlling? Or should





TRIANGULATING SOCIAL LAW REFORM

worries about the potential corruption of public life by the profits of “black markets” determine the regulatory stance? How does Parliament convince the Canadian public to itself recharacterise a particular branch of human conduct when large numbers do not see any problems with the governance regime flowing from current characterisations?

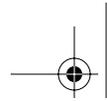
The difficulty of making sense of the concepts by which the law seeks to regulate diverse personal and social relationships reveals the difficulty of marshalling everyday legal concepts to achieve new ends. In the endeavour of macro-classification, even more than in the exercise of first-order classification just noted, Parliament is involved in deciding the deeper meaning of events in the world. In determining, for example, whether abortion should be understood in moral terms, in public health terms, in economic terms as a failure in the market for babies, or as a matter of privacy and autonomy Parliament is deciding much more than whether it should be resolved through an appeal to the governance regime of the *Criminal Code*, the *Canada Health Act*, the law of contractual obligations, or the *Charter of Rights and Freedoms*. It is actually making decisions about the symbolic construction of human agency and indicating how it wishes citizens to symbolise this kind of interaction with others.

As good a place as any to begin an inquiry into how Parliament ought to characterise events in the world according to their policy significance, is by contrasting the governance objectives of markets and the criminal law. After all, criminal prohibitions are typically designed specifically to withdraw certain types of human activity from market exchanges. One may begin this inquiry by reflecting on the evolution over the past 100 years of attitudes towards the scope of the criminal law.

Were we to place ourselves at the beginning of the last century, we would discover that, in addition to the traditional concerns of the criminal law with the protection of the public order, persons, and property, four other matters—typically emerging from concerns about public morality—were held to be transgressions (even sins) worthy of strict legal repression through the criminal sanction. What were these four areas of moral proscription? The consumption of alcohol. The ingestion of non-medical drugs other than caffeine and tobacco. Prostitution and other aspects of the sex trade. And gambling.

The 20th century has shown that in the domain of primarily self-regarding behaviour, criminalisation is typically a sub-optimal response. To begin, these crimes against public morals are hard to detect and to police.





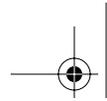
DESSINER LA SOCIÉTÉ PAR LE DROIT
MAPPING SOCIETY THROUGH LAW

Successive attempts to clamp down on alcohol consumption in Canada reached their apogee in the first quarter of the past century. Ultimately they failed, and a regulatory strategy was adopted. The same could be said of gambling, although the prohibition lasted longer both because of broad exemptions for “bingos and raffles”, and because it was even harder to police the Irish Sweepstakes, gambling dens, sports bookmakers and the like, than bootleggers. The broad criminalisation of non-medical drugs was a surprisingly late development in public policy, largely flowing from the moral panic of the 1920s and 1930s. And the unhappy attempts to control prostitution and the sex trade, like now-abolished attempts to proscribe homosexual acts between consenting adults, have shown the complexity of all forms of sexual regulation.

What these stories tell—especially when we consider that, today, pandering to two of these so-called sins (gambling and alcohol) has become either a government monopoly, or a governmental quasi-monopoly, complete with advertising and promotion associated with all other forms of leisure activity—is that what matters most is how an activity comes to be classified as it is. The perverse consequences of undue reliance on criminalisation are not to be dismissed. Reports from the Correctional Services of Canada indicate that the vast bulk of the population in federal penitentiaries can trace the reasons for their incarceration to “illegal” drugs: criminal conduct committed while under the influence of these drugs; criminal conduct perpetrated in order to feed a costly drug habit; criminal conduct of those involved in the manufacture and distribution of drugs, and money laundering; and criminal conduct of public officials corrupted by drug racketeers. One might well conclude that the current regime actually augments the problems caused by drugs by removing them from a regulated, competitive market and allocating their exploitation to a monopoly market controlled by organised crime.

In deciding a law reform strategy for the regulation of drugs, two complementary lines of inquiry must be engaged. One of these concerns the symbolism of the criminal law. In principle, all criminal laws are meant to exclude a market calculus from the considerations that frame human agency. For this reason, the first question to ask about modes of classification of drug-related activity and behaviour is this: on what basis do citizens choose between symbolising drug consumption as a moral matter, and symbolising it as a matter of personal autonomy that should be regulated, if at all, by market forces? The second question is closely related to the first: on what basis should the law acknowledge that certain relationships are primarily





TRIANGULATING SOCIAL LAW REFORM

economic and not moral, with the result that their negative social consequences are dealt with in a therapeutic-medical model or through redistributive welfare policies financed through consumption taxes?

The way in which Parliament designs and drafts legislation both presupposes and commits it to a particular understanding of law, society, human agency and the state. Choices it makes about classifying the everyday events of human interaction have much to teach about who it believes citizens are and what it believes they ought to aspire to be. Every legislative enactment is an exercise of social and moral pedagogy. Recognising the central pedagogic role of law suggests that Parliament should be looking closely at how existing enactments actually symbolise how our society understands human motivations. If human beings are moral agents, their actions must be in some measure be unpredictable; if they were not, human beings would be little more than automatons predictably responding to external stimuli. To conclude, because human beings have the capacity to make choices about the manner in which to live their lives, law should aspire to the symbolic governance of human agency primarily by establishing outer boundaries to the otherwise boundedlessness of human action and human purposes.

Existing drug laws are a legacy of assumptions about the properties of “illegal” drugs and beliefs about how “upstanding” citizens should feel about drugs having such properties. Today, however, the widespread use of certain drugs such as marijuana for reasons that exactly parallel those sustaining the use of tobacco and alcohol (relaxation, recreation, stimulation) indicates that large segments of the population do not see drug taking in the register of morality. Effective law requires that the regulatory register reflect and speak to the dominant societal register. In connection with what are now “illegal” drugs these registers are multiple. To a cancer patient, marijuana may be indistinguishable from palliative prescription drugs. To a concert-going late-teenager, marijuana and tobacco converge. At a private party among young adults, marijuana and alcohol converge. A governance regime that seeks to force such disparate behaviours into a unitary proscriptive mould is predestined to fail.

This is not to say that it would be easy to reform the law so as to “decriminalize” the consumption of recreational drugs. For example, if Parliament were to adopt a classificatory register other than morality, what would be the role of the criminal law in policing the frontiers of acceptable behaviours among those who engage in the regulated conduct? What would be the role of the criminal law in ensuring that the integrity of the authorized





DESSINER LA SOCIÉTÉ PAR LE DROIT
MAPPING SOCIETY THROUGH LAW

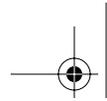
chain of production, manufacture, distribution and retail sale is maintained? Do characterisations based on social usage provide a sound basis for distinguishing between types of drugs? How should public health considerations such as addictive properties, correlation with other health-risk behaviour such as needle-sharing, emphysema or lung-cancer, and the potential to lead to violent behaviour shape the scope and framework of a reformed regime of regulation?

In other words, there is no governance recipe, no more than there is any economic calculus, that could tell Parliament, or any other deliberative body—formal or informal—that has the capacity to wield law in the pursuit of collective purposes, exactly how to regulate the production, distribution and consumption of non-medical drugs. Like economic analysis, which can model the effect of different policy options—on enforcement costs, on spill-over costs to third parties, on opportunity costs for entrepreneurs—and predict how prices will influence behaviour, a law reform governance analysis will point to various consequences of these same policy options. It will point to the dangers for concepts of human agency flowing from ill-advised criminal proscriptions on market transactions. It will point to the dangers of classifying types of human interaction by reference to frameworks not broadly accepted by citizens. And it will point to the dangers of drafting legal rules as if they were to be understood and enforced like the orders of an army commander.

Still, one simple fact cannot be ignored, and with this I should like to summarize this discussion of how classification operates as foundational a tool of law reform. We live today under a legal regime that criminalises the possession of a broad range of drugs that many Canadians routinely consume. This regime stigmatises otherwise law-abiding citizens as criminals. The broad-brush of this regime also makes it difficult to target and control the self-destructive behaviour associated with overindulgence or addiction. It stands in the way of educational programmes meant to encourage more healthy social practices around drug-taking.

Even though the point of the criminal law is to set the boundaries to anti-social conduct that undermines the agency of others, when it prohibits behaviour that large segments of the population consider benign, its largely unenforceable proscriptions undermine citizen confidence in the law generally. Moreover, for a state to compel large numbers of citizens to engage in active social intercourse with organised crime is to undermine democratic legitimacy. Finally, where current legal characterisations generate enormous illegal profits that risk corrupting all aspects of public governance





TRIANGULATING SOCIAL LAW REFORM

in Canada, the case for decriminalisation is irresistible. To conclude, changing the register of legal rules governing the consumption of recreational drugs from morality to public health and harm reduction is the necessary precondition to successful law reform of this type—that is, social law reform.

CONCLUSION

It is now opportune to bring this peroration on triangulating social law reform to a conclusion. I do so by advancing seven hypotheses that I believe may be drawn from my examples.

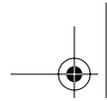
First, the most important regulatory instruments of state law (and of all law state or otherwise) are not the specific rules that are enacted, incorporated by reference, imposed by contract, or announced in judicial and administrative decisions. Rather, law achieves its most profound cartographic effects by the characterization that it gives to particular slices of life, and by the conceptual structure that it seeks to impose of human interaction.

Second, first order legal characterization is at the same time second order social characterization. While every type of human interaction, and every type of interpersonal relationship may be understood as having a legal dimension, in modern liberal democratic societies, the determination whether a particular range of human activity should be initially apprehended through the lens of law—rather than through the lens of economics, of love, of public health, of charity, of violence, of morality, of domination, of religion—is a decision that is grounded in deep principles of social and political theory.

Third, once it has been decided that the phenomenon under review can be meaningfully apprehended as a question of law, it next becomes important to decide what framework of law should be deployed. Human interaction does not come with ready-made labels identifying it as properly a matter for the criminal law, or public welfare law, or contract and property law, or health law. The choice among these adjectives classifying legal phenomena is also grounded in deep principles of social and legal theory.

Fourth, once a particular set of events has been framed as belonging to a particular field of legal regulation, it is necessary to organize the conceptual structure by which the regulatory purposes will be effected. Among the first decisions is that about whether the most general concepts will be





DESSINER LA SOCIÉTÉ PAR LE DROIT
MAPPING SOCIETY THROUGH LAW

framed in terms of essences, or in terms of functions. Traditionally, private law regimes in western Europe have built regulation on essentialized concepts. Recalcitrant social data have been relegated to the realm of fact, not norm—and parallel regimes of regulation *de facto* spouses, *de facto* children, *de facto* ownership (acquisitive prescription), quasi-contract, *de facto* mandate, *de facto* partnership, *de facto* leases, *de facto* security devices—have been erected.

Fifth, when the regime of the *de facto* becomes so significant that the essentialized legal concept loses its capacity to achieve a regulatory effect, legislatures seek for ways to reconfigure the attenuated concept. Most often this occurs by substituting a functionalist logic for a formalist logic in tracing the limits of the concept. Sometimes, it occurs by simply retaining the essentialised logic, but engrafting onto it a series of procedural or other requirements borrowed from the regime of regulation deemed to be the functional paradigm.

Sixth, in such cases, the legislature merely displaces the *de facto* problem to one conceptual level further down the logic tree. Social practice will simply put the same pressures on the boundaries of the concept upon which a functional graft has been made. All social law reform presupposes functionality—either in the replacement of essentialized definitions of existing concepts with functional definitions, or in creating new essentialized legal concepts whose essence is controlled by functional considerations.

Seventh, there is a dialogic relationship among characterization, concept and rule—the three central components of social law reform. All must be apprehended and decided by law reformers. But the key lesson, if lesson there must be, is this. There is no fail-safe procedural protocol and no infallible path-dependent recipe for successfully triangulating social law reform.

