

Persons and Family Law

Professor Pascale Fournier

University of Ottawa

FACULTY OF LAW

DRC 4392 Persons and Family Law

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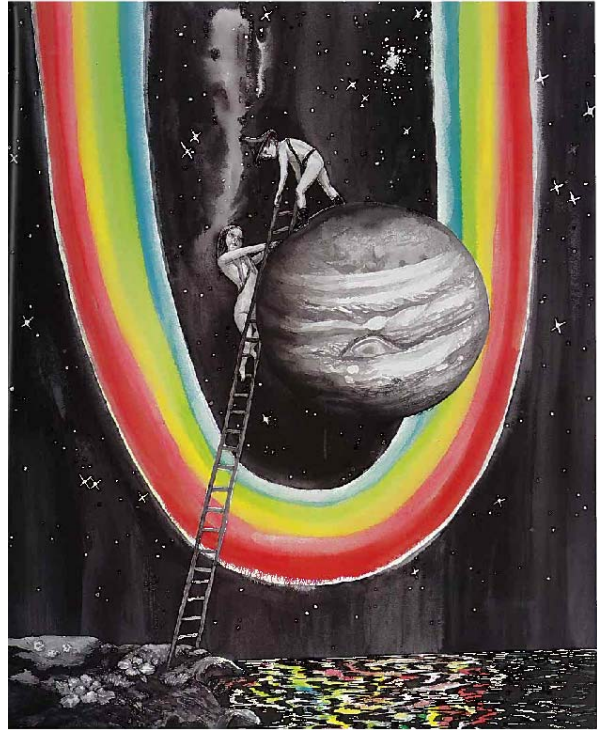
Class Meetings: Tuesday, 13h-16h

Professor: Pascale Fournier

Office: Human Rights Center (556)

Phone: (613) 562-5800 (3083)

E-mail: Pascale.Fournier@uottawa.ca



Sheila Heti

Course Description and Objectives

This seminar examines conceptions of person(s) and families as regulatory orders and as relationships constituted in part by the legal domain in which shadow they interact. In particular, it will study the Quebec family law rules relating to persons, the household, marriage and its dissolution, parent-children relationships and other intimate relations, by simultaneously questioning the specificity and peculiarity of “civil law” in relation to other family law disciplinary fields, such as common law, comparative law, Islamic law, rabbinical law, etc. Some of the questions we will address include: What is the relationship between persons, altruism and our socio-legal conception of families? Does the Quebec civil law tradition treat “family law” as a distinct area of legal analysis? How does Quebec family law discursively interact with other legal domains such as contract law, constitutional law, criminal law, and public law more generally? What is comparative family law? How does family law influence conceptions of minority citizens, the regulation of gender, the distribution of power between groups and individuals and the definition of national insiders/outsideers? Our conversation will also inquire into the ways in which theoretical approaches (feminist, queer, identity politics, post-colonial, law and economics, etc) have dealt with person(s) and families as legal discourses and as social practices.

Evaluation

- **Class Participation (10%):** regular attendance and active participation in class discussion are required.
- **Three Reaction Papers (30%)** of one page each (single spaced), consisting of your critique or comments on the assigned readings for the week in question. No external research is required. Please note that your reaction paper must be submitted to me by email (Pascale.Fournier@uottawa.ca) 24 hours before the session you have chosen to write about.
- **Final Essay (60%)** of 20-25 pages (double spaced). Your paper should directly involve two or three of the critical readings discussed during the course. You must identify an actual case issue not included in the course material and contrast, critique, or work to reconcile the positions of the authors you have chosen to analyze. The only “research” involved in this assignment is to find good cases to reflect upon. You are of course invited to think “outside the box”. The cases should involve “Persons and Family law”, though this theme need not be explicitly part of the cause of action that initially brought the case into adjudication. Ensure that a copy of the case is attached to your paper. Please feel free to meet with me to choose and discuss your paper topic. You are asked to submit your topic and a one-paragraph abstract at the beginning of the class session of **October 27th, 2009**.

Integrity

The University of Ottawa values academic integrity. Therefore all students must understand the meaning and consequences of cheating, plagiarism and other academic offences. For more information on the definition, sanctions, decisions, procedure, fraud concerning more than one student and suspension, see:

<http://www.uottawa.ca/plagiarism.pdf> and
<http://www.commonlaw.uottawa.ca/en/list/academics-affairs/academic-fraud/>

Acknowledgements

Many people have assisted in the production of this course, from early conversations about its theoretical content to critical exchanges about the significant role of comparative family law in the academic curriculum. For their insights and generosity, or for sharing syllabus and unpublished materials, I am thankful to Janet Halley, Duncan Kennedy, Jeannie Suk, Fernanda Nicola, Philomila Tsoukala, Moria Paz, Kerry Abrams, Havva Guney, Linda McClain, Robert Leckey, Angela Campbell, Eric Reuter, Marie-Andrée Jacob, Dayna Scott, Sophie Thériault and Xavier M. Milton. I am grateful to the University of Ottawa faculty of law for its financial support and to Stéphanie Bélanger for her research assistance.

Detailed Course Outline and Readings

I. What is a Person in Law?

1. Introduction

2. Personality Rights I: State Regulation of the Person, the Individualization of Physical Persons and the Right to Life (Canada and Belgium)

This first session focuses on state regulation of the person and the individualization of physical persons under the *Quebec Civil Code*. In exploring the ethical dimensions of state intervention in what constitutes a “person” under the law, we will inquire into the specific circumstances in which a person can ethically and legally end her life. In ***Nancy B v. Hôtel-Dieu de Québec***, the Québec Superior Court recognized that Mrs. Nancy B. had the capacity to give free and informed consent regarding the decision to end her treatment, thereby holding that it is illegal for the State to keep a person alive when he or she demanded to cease medical treatments. Failing to respect a person’s will of ceasing treatments can, in fact, cause serious prejudice. However, in ***Rodriguez v. British Columbia (Attorney General)***, the Supreme Court of Canada took a different approach. The majority constitutionally justified the criminal law prohibition of assisted suicide on the principle of the sanctity of life. Hence, Mrs. Rodriguez did not enjoy the right to end her life when she would no longer be able to benefit from it. In your opinion, is it the role of the court to decide on the capacity of a person to make decisions concerning his or her own life? Does a prohibition without exception on the giving of assistance to commit suicide constitute the best approach to protect life and those who are vulnerable in society? Read the Belgium legislation on assisted suicide (***Loi sur l’euthanasie***) and ask yourself whether we should favour the decriminalization of assisted suicide in Canada; if so, on what grounds and what are the possible dangers? In the current regulatory and legislative context, explore the text of ***Nelson Mandela*** “I am Prepared to Die” as a way of thinking about civil disobedience. Does it apply to the context of assisted suicide? In the service of what is considered a “higher law”, can the State morally accept that laws be broken if violence is not used?

Positive Law:

State Regulation of the Person:

CCQ: arts. 1-9, 42-49, 84-85, 92, 94-98, 122, 192, 298-309, 314, 616, 617, 625, 1610, 1814, 1840, 2447

Quebec Charter: preamble, arts. 1, 2, 4

The Individualization of Physical Persons:

CCQ: arts. 1-3, 5, 50-60, 65, 67-69, 71-72, 75-78, 80-82, 104, 107-108, 111-128, 393, 576

The Right to Life:

- *Criminal Code*, R.S.C., 1985, c. C-46, ss. 14, 45, 215, 217, 219, 222-236, 238-241, 265
- *Canadian Charter of Rights and Freedoms*, ss. 1, 7, 12, 15(1), 24(1)
- *Quebec Charter*: art. 1
- CCQ: arts 1; 10

Critical Readings:

- *Nancy B v. Hôtel-Dieu de Québec*, [1992] R.J.Q. 361 (C.S.).
- *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 R.C.S 519. (excerpts)
- *Loi relative à l'euthanasie*, Begium, May 28 2002
- Nelson Mandela, “I am Prepared to Die”, statement from the dock at the opening of the defence case in the Rivonia Trial Pretoria Supreme Court, 20 April 1964

3. Personality Rights II: Integrity and the Legalization of the Pregnant Body/Foetus Relationship (Canada)

This session will be devoted to the notion of the integrity of the person and to the complex issue of whether a foetus can, under certain conditions, be considered a legal person. The *Quebec Charter* makes no reference to the foetus or foetal rights, nor does it include any definition of the term “human being” or “person”. Some provisions of the *Quebec Civil Code*, however, provide for the granting of patrimonial interests to children conceived but yet unborn, on the condition that they are born alive and viable. In your opinion, do these provisions implicitly recognize that a foetus is a juridical person? Should we accord the unborn child the juridical personality? What are the costs and benefits to such recognition? These fundamental questions were brought before the Supreme Court of Canada in ***Daigle v. Tremblay***, ***Dobson (Litigation Guardian of) v. Dobson*** and ***Winnipeg Child and Family Services (Northwest Area) v. D.F.G.*** In all three decisions, it was ruled that a foetus does not enjoy juridical personality. Accordingly, the pregnant body is *one* and, as such, only the mother-to-be can decide whether to end a pregnancy, and the ways in which she is to behave until birth. Hence, under the legal regimes of tort law, civil law or constitutional law, neither the father-to-be nor the State can legally speak on behalf of the foetus to impose a duty of care, grant an injunction to force a woman to pursue a pregnancy or permit an order for the detention and treatment of a pregnant woman for the purpose of preventing harm to the unborn child. Do you agree with the right to autonomy enjoyed by pregnant women? In your opinion, does **Bill C-484** recognize foetus rights; if so, can it have the perverse effect of reopening the debate over the criminalization of abortion in Canada? Is there something that we do not see from the reading of these decisions? Does it matter to us that the pregnant woman in ***Daigle v. Tremblay*** is a victim of domestic violence and, in ***Winnipeg Child and Family Services***, that she is an aboriginal woman suffering from serious glue addiction? Should the State bear any social responsibility vis-à-vis women and aboriginal people as historically disadvantaged groups? Could we rewrite the decisions

differently, emphasizing the fact that the State has failed to protect these women in the past? In asking these questions, read **Dayna Scott**'s article as an critical intervention focusing on the role of power and colonialism in the legal constitution of female injured bodies.

Positive Law:

Integrity:

CCQ: arts. 3, 10-30, 1398-99; 625, 1610

Quebec Charter: arts. 1, 2, 48

The Legalization of the Pregnant Body/Foetus Relationship:

- *Charter of Human Rights and Freedoms* R.S.Q. c. C-12, ss. 1, 2, 3, 4, 5, 6, 7, 8, 9, 9.1 [ad. 1982, c. 61, s. 2].
- *Canadian Charter of Rights and Freedoms*, ss. 7, 15(1).
- *Declaration of the Rights of the Child* (1959), preamble.
- *Civil Code of Quebec*, S.Q. 1991, c. 64, ss. 1, 192, 61, 617, 1814,

Critical Readings:

- *Tremblay v. Daigle*, [1989] 2 S.C.R. 530. (excerpts)
- *Winnipeg Child and Family Services (Northwest Area) v. D.F.G.*, [1997] 3 R.C.S. 925. (excerpts)
- *Dobson (Litigation Guardian of) v. Dobson*, [1999] 2 S.C.R. 753. (excerpts)
- *Bill C-484*, An Act to amend the Criminal Code (injuring or causing the death of an unborn child while committing an offence), *Unborn Victims of Crime Act*
- Dayna Scott, "Gender-Benders": Sex and Law in the Constitution of Polluted Bodies, forthcoming in (2009) 18(3) *Feminist Legal Studies*.

4. Protection of the Person and Fundamental Rights: Doctors, Best Interest of the Child, and Organ Transplants (Canada, the United States and Israel)

This session will introduce you to the ethical debates concerning one's right of making decisions regarding her body vis-à-vis the State's interest (whether through judges, doctors or hospital authorities) in ensuring control over such decisions. Under the *Quebec Civil Code*, every person is inviolable and entitled to the integrity of her person. A person who is fourteen years old or older has the autonomy to refuse medical treatment; however, the consent of the tutor is required if the care entails a serious risk to her health and may cause her grave and permanent effects. *A.C. v. Manitoba (Director of Child and Family*

Services) is a recent Supreme Court decision involving a fourteen year old Jehovah's Witness refusing blood transfusions when such transfusion was necessary to avoid severe consequences to her health. In this case, the trial judge had ordered that "C" receive blood transfusions despite her refusal, concluding that it was in her best interests. The Supreme Court held the legislation constitutional on the basis that a young person's "best interests" were interpreted in a way that respected her mature medical decisional capacity. What rationales are given by the Supreme Court for the recognition of "the best interests of the child"? Are they "legal" arguments? Who decides what is best for *that* particular child? Can the State correctly translate the needs and aspirations of the many diverse children coexisting in Canadian society? In ***Buck v. Bell***, a 1927 U.S. Supreme Court decision, Justice Holmes constitutionally justified the State's forced sterilization of "mental defectives" in these terms: "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind." How was "the best interests of the child" used in this case to promote forced sterilization? Similar ethical debates arise in the medical and legal context of organ transplants, where kinship is generally valorized. **Marie-Andrée Jacob** suggests that this type of relationship can easily be imitated through fictive kinship. Do you agree with her enlarged conception of kinship? Should biological kinship be encouraged instead? What normative vision of the family is being reproduced under each approach?

Positive Law:

Protection of the Person:

CCQ: arts. 6-9, 153-159, 161, 167-168, 170-178, 192, 208, 255, 256-261, 268-269, 277-278, 281-284, 285-287, 289, 291-292, 295, 434, 436, 1309, 2131, 2166, 2167.1, 2169, 2170, 2172, 2177

Quebec Charter: art. 49

Doctors, Best Interest of the Child, and Organ Transplants:

- *Canadian Charter of Rights and Freedoms*, ss. 1, 2(a), 7, 15.
- *Child and Family Services Act*, C.C.S.M. c. C80, ss. 1(1), 2, 17, 21(1), 24, 25, 25(8), 25(9), 27(1).
- *Age of Majority Act*, C.C.S.M. c. A7, s. 1.
- *Health Care Directives Act*, C.C.S.M. c. H27, s. 4(2).
- *Infants Act*, R.S.B.C. 1979, c. 196.
- *Mental Health Act*, C.C.S.M. c. M110, s. 2.
- *Charter of human rights and freedoms*, R.S.Q., c. C-12, ss. 1, 2.
- *Civil Code of Quebec*, S.Q. 1991, c. 64, ss. 3, 10-31.
- *An Act Respecting Health Services and Social Services*, R.S.Q. c. S4.2, s. 7.

Critical Readings:

- *A.C. v. Manitoba (Director of Child and Family Services)* [2009] S.C.J. No. 30 (excerpts)
- *Buck v. Bell*, 274 U.S. 200 (1927) (summary)

- Marie-Andrée Jacob, “The Shared History: Unknotting Fictive Kinship and Legal Process” (2009) 43:1 *Law & Society Review* 95 (excerpts)

5. Privacy, Personality Rights, and the Respect of the Body after Death (Canada and Great Britain)

This session will be devoted to the legal principles regulating privacy, personality rights and the respect of the body after death under the *Quebec Civil Code* and comparative law. The possession of a name is an integral part of the personality. The *Quebec Civil Code* states that in marriage, both spouses retain their respective names, and exercise their respective civil rights under those names. The registrar of civil status has competence to authorize a change of name, but only for a serious reason. In *Gabriel v. Directeur de l'état civil*, the Québec Superior Court held that a woman can require to change her name to her husband's if she can prove serious prejudice or psychological suffering that would be eliminated by the change of name. In your opinion, does the *Quebec Civil Code* ensure gender equality by guaranteeing that both spouses retain their respective names in marriage? What are, if any, the consequences of such legislation for women belonging to minority groups? In thinking about these issues, read the *Montreuil c. Directeur de l'état civil* decision and ask yourself how the current regime of proving harm to change one's name impacts on the rights of transsexual and transgendered individuals. Personality rights also protect the respect of the body after death. Indeed, the mourning rituals performed when someone has passed away often involve the respect of that person's beliefs, culture and religion. In *Ghai v. Newcastle City Council Secretary of State for Justice*, a recent decision from Great Britain, the Hindus claimed that in order to respect their right to freedom of religion, as well as their private and family life, the British government should allow them to have open air crematorium. What meanings seem to be given to “freedom of religion” under article 9 of the *European Convention of Human Rights* (ECHR)? What do you think of the court's interpretation that only religious belief enjoys absolute protection under ECHR, whilst the State may legitimately adopt regulations to control its manifestation? What is the existing relationship between religious practices and activities which constitute family life, particularly for religious minorities living in Western States? Should family law better protect the manifestation of religious beliefs?

Positive Law:

Privacy:

CCQ: arts. 3, 35-41, 1457

Quebec Charter: arts. 4-9, 39, 44

Personality Rights and the Respect of the Body after Death:

- *Burrial Act*, R.S.Q. c. I-11.

- *Act to establish a new Civil Code and to reform family law*, (1980) S.Q. c. 39, s. 1, s. 65, s. 79
- *Canadian Charter of Rights and Freedoms*, 1982, s. 2
- *Charter of Human Rights and Freedoms* R.S.Q. c. C-12, s. 3.
- *Civil Code of Quebec*, S.Q. 1991, c. 64, ss. 42-49, 50-70, 393, 442
- *Code of Civil Procedure*, R.S.Q., c. 25 s. 846.

Critical Readings:

- *Gabriel v. Directeur de l'état civil* [2005] Q.J. No. 145.
- *Montreuil c. Directeur de l'état civil*, 2002 CanLII 41257 (QC C.A.), 2002-11-07
- *Ghai v. Newcastle City Council Secretary of State for Justice* [2009] EWHC 978 (Admin). (excerpts)

II. What is the Family in Law?

6. Changing Conceptions of Marriage and Families: Surrogate Mothers (Canada, the United States and Europe)

Surrogacy arrangements are the subject of very controversial debates, as they challenge traditional conceptions of the family structure and alter the “natural” process of female reproduction. In 2004, Canada adopted the *Assisted Human Reproduction Act*, which regulates different aspects of reproductive technologies, from stem cell research to cloning and the collection/distribution of sperm and eggs for reproductive purposes. Our current legislative regime forbids the *commodification* of sperm and eggs, thereby prohibiting commercial surrogacy while avoiding the issue of non-commercial surrogacy. In your opinion, is the prohibition on commercial surrogacy arrangements defensible? Is the fear that surrogacy contracts result in the exploitation of women legitimate? Can the non-enforcement of surrogacy contracts produce harm to women’s status and women’s autonomy? Do you agree with the public policy assumption that “altruistic” surrogacy respects the “free choice” of women in the (private) family context? In your opinion, is there less exploitation in non-commercial surrogacy contexts? If not, what conception of the family is being portrayed by this assumption?

In her article, **Susan B. Boyd** introduces a feminist approach to our understanding of legal parenthood and explores a gendered approach to bio-genetics ties. What meaning(s) should be given to reproductive freedom? In the American decision ***In the Matter of Baby M***, the New Jersey Supreme Court invalidated a commercial surrogacy contract on the basis of public policy: “While we recognize the depth of the yearning of infertile couples to have their own children, we find the payment of money to a “surrogate” mother illegal, perhaps criminal, and potentially degrading to women.” The Court granted custody to the natural father, restored the “surrogate” as the mother of the child (with the issue of visitation rights to be determined by the trial court) and voided the adoption of the child by the wife. If the

State cannot prevent surrogate arrangements from being secretly implemented, how can it best safeguard the interests of the gestational mother, the child and the intended parents? Read the document introduced by the **Council of Europe's Parliamentary Assembly** on the recognition of surrogacy as an alternative to sterility. In your opinion, does it provide a convincing argument for the legalization of surrogacy?

Positive Law:

- *Assisted Human Reproduction Act*, S.C. 2004, c.4, ss. 6.
- *Civil Code of Quebec*, S.Q. 1991, c. 64, ss. 541.

Critical Readings:

- Susan B. Boyd, "Gendering Legal Parenthood : Bio-Genetics Ties, Intentionality and Responsibility" (2007) 25 *Windsor Y.B. Access Just.* 63 (excerpts)
- *In the Matter of Baby M*, New Jersey Supreme Court, 1988, 109 N.J. 396, 537 A.2d 1227 (summary)
- Michael Hancock, United Kingdom, LDR, "For Recognition and supervision of surrogacy as an alternative to sterility", Parliamentary Assembly, Council of Europe, Social, Health and Family Affairs Committee, AS/Soc (2005) 9 revised 2, 5 July 2005

7. Changing Conceptions of Marriage and Families II: Same-Sex Marriage (Canada and the United States)

This session will examine changing conceptions of marriage and families in Canada and the United States, through the specific landscape of family regulation affecting same-sex partners. In Canada, courts and legislation have expanded rights of same-sex partners in family law matters, most importantly regarding the institution of marriage. While the definition of marriage falls under federal responsibility, it remained a matter of common law until the issue of same-sex marriage was brought to Parliament's legislative agenda. This definition, contained in a dictum of Lord Penzance in *Hyde v. Hyde* (1866), L.R. 1 P.D. 130 at 133 (Eng. P.D.A.), provided that marriage is "the voluntary union of life of one man and one woman, to the exclusion of all others." The reference to "one man and one woman" which excluded same-sex marriage was challenged for breach of the equality guarantee in s. 15 of the *Canadian Charter*. The Government of Canada proposed to introduce, for civil purposes, a statute changing the definition of marriage to "the lawful union of two persons to the exclusion of all others." The draft bill was referred to the Supreme Court of Canada in ***Same-Sex Marriage, Re*** for an opinion as to its constitutionality. The Court held that the proposed law was constitutional under s. 91(26) of the *Constitution Act of 1867*, stating that the accommodation of same-sex marriage meets today's Canadian pluralistic society.

In 2002, Quebec created legally recognized non-marital relationships by adopting a “civil union” between “two persons”, which consisted of a formally solemnized and registered relationship with similar attributes to marriage. **Robert Leckey** provides an overview of Quebec’s reforms to filiation and identifies the policy implications to such legal regulation. Contrary to Canada, several American States have supported a ban on same-sex marriage on the basis that marriage is intended to favour a space for “accidental heterosexual reproduction”. In her article, **Kerry Abrams** examines the genealogy of the accidental heterosexual reproduction argument through the lens of anthropological theory. In your opinion, should the State privilege a normative “two-parents” family structure, or support a plurality of family formations? How do you view **Michael Warner**’s critique of queer conformity? Do you agree that the gay and lesbian movement is in “retreat from its history of radicalism into a new form of post-liberationist privatization”?

Positive Law:

Marriage, Civil Union and their Effects:

Québec:

- CCQ: arts. 82, 365-413, 521.1-521.19, 585.
- Québec *Charter*: art. 47
- *Rules respecting the solemnization of civil marriages and civil unions*, M.O., 2152-03, 2003 G.O. 2, 1217.
- *Civil Law Harmonization Act, No. 1*, S.C. 2001, c. 4.

Ontario:

- *Family Law Act*, R.S.O. 1990, c.-F.3.

Federal (Canada):

- *Civil Marriage Act*, S.C. 2005, c. 33.
- Divorce Act (R.S., 1985, c. 3 (2nd Supp.))

Critical Readings:

- *Same-Sex Marriage, Re* [2004] 3 S.C.R. 698
- Robert Leckey, "Where the Parents Are of the Same Sex?: Quebec’s Reforms to Filiation" (2009) 23 *International Journal of Law, Policy and the Family* 62 (excerpts)
- Kerry Abrams, "Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation" (with Peter Brooks), 21 *Yale J. L. & Human.* 1 (2009) (excerpts)
- Michael Warner, “Beyond Gay Marriage”, *Left Legalism/Left Critique*, (Durham: Duke University Press, 2002) 259-289

8. Break-up of Relationships: the Family Patrimony in Québec and Contractual Arrangements as an Alternative to State Division of Property outside Québec

The *Québec Civil Code* imposes a property regime based on an equal share of the family patrimony which will be determined when the relationship ends. The basic premise underlying the regime is that married spouses make a vital contribution to the economic viability of the family unit and hence to the acquisition of wealth by both parties. Section 585, 427, 401-413, 414-426 and 448-484 of the *Code* guarantee patrimonial rights only to married and registered civil union spouses, to the exclusion of *de facto* spouses. Recently, in **A v. B.**, the constitutionality of this family patrimony regime was challenged for the first time before the Québec Superior Court. In your opinion, do these regulations violate s. 15 of the *Canadian Charter*? Should unmarried or unregistered partners be treated as though they were married for certain distributive purposes? What are the public policy considerations at stake? Is the enactment of the family patrimony regime the appropriate response to gender inequality? Increasingly, both married and unmarried persons outside the province of Québec are structuring their personal relationships through private ordering. In several Canadian provinces, spouses can preclude the equalization of family properties by entering into a valid and enforceable domestic contract that deals with their property rights. Some provinces, however, specifically empower courts to override the property provisions in a domestic contract under certain circumstances. In **Moge v. Moge**, the Supreme Court of Canada held that the spousal support objectives of the *Divorce Act* are designed to achieve an equitable sharing of the economic consequences of marriage and marriage breakdown. This substantive conception of gender equality, which recognized the disadvantaging effects of unpaid domestic work and child care responsibilities, was not applied in **Miglin v. Miglin** and **Hartshorne v. Hartshorne**, where the Supreme Court preferred to emphasize the importance of individual choice in entering a domestic contract. In suggesting that the judiciary should respect private arrangements in the family context, does the Supreme Court favour a formal equality model based on “economic rational actors”? In your opinion, does the Court sufficiently address issues such as gender, race, national origin and discrimination in the workplace? What are the distributive consequences of this judicial trend towards an increasingly privatized response to economic inequalities?

Different economic theories of the household have developed in the last thirty years. According to the Nobel Prize of economics **Gary S. Becker**, female spouses should invest their time in household activities while male spouses should invest in the market. His theory on the division of labour, which privileges the economic concept of the housework as productive, has been highly criticized. In your opinion, is “economic rationality” an appropriate assumption to translate and explain the (emotional) relationship between spouses and women’s labour within the family unit? Can economic methodology enable us to transcend the male/female dichotomy? Is it desirable to do so? In their article, **Trebilcock** and **Keshvani** provide a law and economics analysis of the role of private ordering in family law. Is there a conflict between principles of freedom of contract and the courts’ desire to protect women from exploitation? Do you agree that economic methodology can help redirect attention to women’s agency and women’s autonomy? Why

has economic thought been so negatively received within feminist circles? Compare **Becker's** vision of the household to **Frances Wooley's**, which is based on field research of the ways in which couples in the Ottawa-Gatineau region manage their family wealth.

Positive Law:

Break-up of Relationships and the Family Patrimony in Québec:

- CCQ: arts. 380-384, 387, 389, 414-430, 448-451, 459, 465, 467, 471, 475, 480-481, 493-495, 499, 505-508, 511-521, 521.10-521.13, 521.17-521.19, 585-596, 2638, 2639
- *Loi modifiant le Code civil du Québec et d'autres dispositions législatives afin de favoriser l'égalité économique des époux*, L.Q. 1989, ch. 55.
- Divorce Act: ss. 8-11
- *Act Respecting the Conseil de la famille et de l'enfance*, R.S.Q., c. C-56.2 (preamble)

Contractual Arrangements as an Alternative to State Division of Property outside Quebec

Federal :

- *Canadian Charter of Rights and Freedoms*, s. 15(1).
- *Federal Child Support Guidelines*, SOR/97-175, ss. 15 to 20.
- *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) [am. 1997, c. 1], ss. 8(2), 9(2), 15, 15.2, 17, 21(1), (5).
- *Divorce Act*, R.S.C. 1970, c. D-8, s. 11, 17(2).

Ontario :

- *Family Law Act*, R.S.O. 1990, c.F.3, part 1, preamble, ss. 1(1), definition "spouse", 5, 29, definition "same-sex partner", 33(4), 33(9), 52-54, 56(4).

British Columbia:

- *Family Relations Act*, R.S.B.C. 1979, c. 121, ss. 1(1), definition "spouse", 56, 58, 59, 61, 65, 68, 89.

Nova Scotia:

- *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, preamble, ss. 2(g), definition "spouse", 3(1), definition "matrimonial home", 5(1), 6(1), 11(1)(a), 12, 13, 23, 29.
- *Maintenance Enforcement Act*, S.N.S. 1994-95, c. 6 s. 2(e)
- *Human Rights Act*, R.S.N.S. 1989, c. 214 Law Reform (2000) Act, S.N.S. 2000, c. 29.
- *Vital Statistics Act*, R.S.N.S. 1989, c. 494.

Alberta:

- *Domestic Relations Act*, R.S.A. 2000, c. D-14 s. 1(2)(b), definition "spouse"

Manitoba:

- Common-Law Partners' Property and Related Amendments Act, S.M. 2002, c. 48 (not yet proclaimed)
- *Family Maintenance Act*, R.S.M. 1987, c. F20 (C.C.S.M., c. F20) ss. 1, definition "spouse", 4(3), 14(1).

New Brunswick:

- *Marital Property Act*, S.N.B 1980, c. M-1.1, s. 41.

Newfoundland and Labrador:

- *Family Law Act*, R.S.N.L. 1990, ch. F-2, s. 66(4).
- *Family Law Act*, R.S.N. 1990, c. F-2 s. 35(c), definition "spouse"

Saskatchewan:

- *Family Property Act*, S.S. 1997, c. F-6.3, s. 24(2).
- *Family Maintenance Act*, 1997, S.S. 1997, c. F-6.2 s. 2, definition "spouse".

Prince Edward Island:

- *Family Law Act*, S.P.E.I. 1995, ch. 12, ss. s. 29(1)(b), definition "spouse", 55(4).

Yukon:

- *Family Property and Support Act*, R.S.Y. 1986, c. 63 s. 1, definition "spouse".

Northwest Territories:

- *Family Law Act*, S.N.W.T. 1997, c. 18 s. 1(1), definition "spouse"

Critical Readings:

- *A c. B.*, 2009 QCCS 3210
- *Moge v. Moge*, [1992] 3 S.C.R. 813 (summary)
- *Miglin v. Miglin*, [2003] 1 S.C.R. 303 (summary)
- *Hartshorne v. Hartshorne* [2004] 1 S.C.R. 550 (summary)
- Gary S. Becker, *A Treatise on the Family*, (Harvard University Press: Cambridge, 1993), chapter 2. (excerpts)
- Michael J. Trebilcock & Rosemin Keshvani, "The Role of Private Ordering in Family Law: A Law and Economics Perspective" (1991) 41:4 *The University of Toronto Law Journal* 533
- Frances Wooley, "Control over Money in Marriage", in Shoshana A. Grossbard-Shechtman, eds., *Marriage and the Economy: Theory and Evidence from Advanced Industrial Societies*, (Cambridge, UK ; New York, NY : Cambridge University Press, 2003), chapter 5 (excerpts)

9. Citizens in Conflict: The Jewish Get in Family Law Matters (Canada, France and Israel)

The Jewish *Get* is a written document authorized by the husband and delivered to his wife, stating that all marital bonds between them have been severed. Under rabbinical law, a wife is not considered divorced and cannot remarry until the *Get* has been obtained upon the husband's assertion to the rabbinical court that it is being sought of his own free will. If the husband refuses to give the *Get*, the wife is without religious recourse, and will officially remain his wife in the eyes of rabbinical law. She will be referred to as an *Agunah* or “chained wife”. Moreover, rabbinical law considers any child born of a subsequent civil marriage as illegitimate. For an observant Jewish woman living in Western states, the complex relationship between the religious and the secular spheres presents an impossible dichotomous space: under Canadian or French law, she is free to divorce her husband regardless of his consent, whereas under rabbinical law, she remains married to him unless he accepts to divorce her. This means that while she can remarry under civil law, she is prevented from remarrying in accordance with her religion.

In balancing competing rights and values such as freedom of religion, gender equality and autonomous choice in marriage and divorce, the Supreme Court of Canada in ***Bruker v. Marcovitz*** was willing to attach civil consequences to the husband's refusal to provide a *Get* and thus recognized that the inability to remarry within one's religion represents a serious compensable injury. Similarly in France, the Cour de cassation (***Chambre civile 2, 15 juin 1988, no. 86-15476***) and the European Commission of Human Rights (***D. c. France***) held that the refusal to provide the *Get* is a delictual fault and French courts have routinely awarded substantial damages to the wife. In your opinion, does the fact that the *Get* has a religious aspect make it non-justiciable? Will the judicial recognition of harm by the secular court address gender disparities in the religious sphere or will it further separate both spheres? Do you agree with **Benoît Moore's** and **Louise Langevin's** critiques of the decision? In 1995, Israel adopted *The Rabbinical Courts (Enforcement of Divorce Decrees) Law*, which permits rabbinical courts to issue various restraining orders against recalcitrant husbands, including the right to leave the country, to hold a driving license, to hold a passport, and even incarceration for a specified period of time. In reading **Ruth Halperin-Kaddari's** article, try to envision what are the strategies used by Jewish women to navigate between the religious and secular spheres in Canada and Israel. How do they differ? Is the use of criminal sanctions an appropriate means to counter religious gender imbalance? What could be the unintended consequences for Jewish women?

Positive Law:

- *Canadian Charter of Rights and Freedoms*, s. 2.
- *Canadian Multiculturalism Act*, R.S.C. 1985, c. 24 (4th Supp.).
- *Charter of human rights and freedoms*, R.S.Q., c. C-12, ss. 3, 9.1.
- *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), ss. 15.1, 15.2, 16, 21.1.
- *Civil Code of Québec*, S.Q. 1991, c. 64, ss. 1371, 1372, 1385, 1373, 1378, 1385, 1410, 1412, 1413, 1607, 1618, 1619.

- *Act respecting the implementation of the reform of the Civil Code*, S.Q. 1992, c. 57, s. 9.
- *Foundations of Law Act*, 1980, 5740-1980, 34 L.S.I. 181 (1979-80), s. 1.

Critical Readings:

- *Bruker v. Marcovitz*, [2007] 3 S.C.R. 607. (excerpts)
- Cour de cassation, *Chambre civile 2*, 15 juin 1988, no. 86-15476
- *D. c. France*, application No. 10180/82, 6 décembre 1983, D.R. 35, 199-202
- Benoît Moore, “À la volonté de Dieu ou des contractants? Commentaire sur l’affaire *Marcovitz c. Bruker*” (2009) 43 R.J.T. 219 (excerpts)
- Louise Langevin « L’affaire *Bruker c. Marcovitz* : variations sur un thème », (2008) 49 *C. de D.* 655 (excerpts)
- Halperin-Kaddari, Ruth (2005) "Agunah Journal Addendum - Solutions to the Agunah Problem: Barriers and Backlash", JOFA Journal. Online. Available HTTP: <<http://www.jofa.org/pdf/jofa2005summeradd.pdf>>

10. Citizens in Conflict II: The Islamic Divorce and Private International Law (Canada and Europe)

In the era of globalization, the family is increasingly politicized. This session is devoted to the relationship between domestic and international legal orders in family law matters. More specifically, it will ask whether international private law rules function to relegate the family as a site of identity formation. In exploring the migration of Islamic divorce in Canada and Europe, it will investigate into the relationship between citizenship and distributive outcomes at the time of divorce. In “Moroccan Women in Europe: Bargaining for Autonomy”, **Marie-Claire Foblets** presents the enactment of the new Moroccan family code (*Moudawana*), which has significantly changed the status of women in Morocco and has also had an impact on the lives of numerous Moroccan women living in Europe. Is the flexibility offered by private international law rules attached to citizenship a positive strategy to ensure women’s emancipation?

In ***M.H.D. v. E.A.***, a 1991 Québec Court of Appeal decision, the wife filed for divorce in Montréal and claimed the enforcement of deferred Mahr (a form of dowry). In applying Syrian law to the marriage contract according to private international law rules, the appellate Court concluded that the wife had to waive Mahr because she embarked on an Islamic form of divorce (*Khul*) which dissolves the husband’s duty to pay the deferred Mahr. Furthermore, the principles established by Syrian Islamic law in general and *Khul* divorce in particular did not, according to the court, violate any provision of the *Canadian Charter*. Do you agree with this decision? If the *Divorce Act* gives the opportunity to both spouses to initiate divorce proceedings, do you think that punishing a female spouse on the basis that she exercises her rights according to the *Act* is a violation of gender equality? In ***Vladi v. Vladi***, a 1987 decision from Nova Scotia, the Court refused to enforce Mahr on the basis of “substantial justice”. Justice Burchell considered that Mahr was attached to Iranian Islamic family law, and that under such a legal regime women could not benefit from the principle of equal

sharing: “In Iran, a wife in the position of Mrs. Vladi would be entitled to minimal support and a nominal award in relation to a so-called "mahr" or "morning-gift". Otherwise she would have no direct claim against assets standing in the name of her husband (...) To put it simply, I will not give effect to Iranian matrimonial law because it is archaic and repugnant to ideas of substantial justice in this province”. Having found Iranian law inapplicable, Mrs. Vladi was entitled to an equal division of matrimonial assets (a generous amount of \$246 500). In the narrow issue of the enforcement of Mahr, the same Muslim woman will get different outcomes (i.e. be better or worse off economically), depending on the position adopted by the judge. Given that actual decisions on the enforceability of Mahr by courts in Canada produce disparities in economic outcomes, and confirm (both implicitly and explicitly) their connection to underlying ideological positions, what does this entail for Muslim women?

Positive Law:

- *Civil Code of Quebec*, S.Q. 1991, c. 64, ss. 3083, 3084, 3088-3096, 3122-3124, 3141-3147.

Critical Readings:

- Marie-Claire Foblets, “Moroccan Women in Europe: Bargaining for Autonomy” (2007) 64:4 *Washington and Lee Law Review* 1385 (excerpts)
- *M.H.D. v. E.A.*, Droit de la famille – 1466, 23 septembre 1991, No 500-09-001296-896
- *Vladi v. Vladi*, 1987 CarswellNS 72

11. Thinking about Families in the Context of Immigration (Canada and Europe)

This session will provide an opportunity to critically examine the field of immigration law as a form of family law, in the specific legal contexts of Canada and Europe. We will try to assess what is at stake in talking about family law and immigration law as an overlapping legal field. How is family law used to delineate national insiders from foreign outsiders? Why does immigration law use marital relations as a key organizing feature? How is the institution of marriage differently shaped by immigration rules and regulations? In his briefing paper to the European Parliament, **Sergio Carrera** provides a comparative analysis of EU strategies and priorities in the specific areas of labour migration, family reunification and immigration and traces the latest developments regarding the admission of third country nationals for the purposes of employment, family reunification and education. What is the relationship between illegal global markets, welfare gains (for the non-immigrant) and family vulnerability (for the immigrant)? How is the paradoxical description of the public sphere as “open markets, closed borders” reflected in the private sphere of immigrants’ lives? In their report, **Langevin** and **Belleau** explore the Canadian immigration regulatory regime with regard to the specific example of mail-order brides and seek to articulate women’s inequality under

such regime. What are the distributive consequences of trade liberalization on families? Are the disparities between the poor “sending” and rich “receiving” countries replicated in the bride-groom dynamics? How does capitalism function to conceal unequal relations of power and mask mail-order brides’ transactions as expression of freedom and equality? Could it be that mail-order brides, in *some* contexts, enjoy significant bargaining power in particular gender dynamics?

As you read *Otti v. Canada*, *Ali v. Canada* and *Gure v. Canada*, try to think of the causes and effects of prohibiting polygamous relationships under Canadian immigration and criminal law. If polygamy continues to be a prohibited form of marriage, how is the bargaining power of polygamous wives reduced by the current legal arrangements? Should there be limited recognition of polygamy to protect the property rights of women already involved in a second, third or forth marriage? Does the growing symbolic and institutional power of the international feminist movement, especially in criminal law matters, affect our national conception of polygamy? In “Bountiful Voices”, **Angela Campbell** presents a counter-narrative to the popular image of the polygamous wife as weak, oppressed and lacking agency. Does criminalization actually contribute to the harms associated with polygamy (vulnerability, exploitation, etc)? In your opinion, what is the constitutional validity of s. 293 of the *Criminal Code* under section 2 and 7 of the *Canadian Charter*? Can the prohibition be justified under s. 1 of the *Charter*?

Positive Law:

- *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss.12-14. Art. 19 (1) Art. 77 Art. 9(3),
- *Immigration Regulations*, 1978 DORS/78-172, (1978) 112 Gaz. Can. II. 757. ss. 2(1), 6 (2), 6 (3.2), 8 (1).
- *Criminal Code*, R.S.C., 1985, c. C-46, s. 293

Critical Readings:

- Sergio Carrera, “Legal Migration Law and Policy Trends in a Selection of EU Member States”, Briefing Paper, Policy Department C, Citizens Rights and Constitutional Affairs, European Parliament,
- Louise Langevin & Marie-Claire Belleau, « Le trafic des femmes au Canada : une analyse critique du cadre juridique de l’embauche d’aides familiales immigrantes résidentes et de la pratique des promesses par correspondance » (excerpts) : Chapter II (introduction), sections 3.5, 3.6 and 4.4.
- *Otti v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1031 (CanLII)
- *Ali v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8816 (F.C.)
- *Gure v. Canada (Citizenship and Immigration)*, 2002 CanLII 47141 (I.R.B.)
- Angela Campbell, “Bountiful Voices” 47:2 *Osgoode Hall Law Journal* (2009) (excerpts)

12. The Criminalization of Family Relations (Canada and the United States)

In this last session, we will continue our dialogue on family law's discursive encounter with other legal domains by investigating the particular field of criminal law in Canada and the United States. A central theme that we will explore during this last meeting is the effect on individuals of the criminalization of family behaviours. How are the feminist discourses on the (positive) uses of criminal law influencing our conception of the family? What is the role that morality plays in shaping the identities of those involved in domestic violence, i.e. the protective State assisting the vulnerable woman vs the criminal spouse personified as the bad man? How are these images (re)producing women as victims and men as perpetrators? How do background legal structures and economic conditions at a macro level affect relationships and bargaining power between men and women at a micro level?

In *R. v. Lavallée*, a decision considered by many as a feminist victory, the Supreme Court of Canada adopted the “battered wife defence” as a valid criminal defence and acquitted Mrs Lavallée of second degree murder. Read this decision and compare its assumptions about power and structural subordination with **Foucault's** conception of power as diffuse in nature, circular in action, and generative of subjects already-always constituted as effects of power. Can Foucault's frame of reference be applied to the phenomenon of domestic violence? What does this reading entail? In “The Feminist War on Crime”, **Aya Gruber** explores the feminist criminal law reform in the United States as replicating a conservative agenda in which (victimized) women are perceived as pure objects whereas (violent) men are described as pure agents, with increased criminalization as an obvious goal. What could we gain from portraying men *and* women involved in domestic violence as complex actors constrained by conflicting realities and desires?

Positive Law:

- *Criminal Code*, R.S.C., 1985, c. C-46, ss. 34(2)(a), (b), 37, 293, 235, 718, 745(c), 745.2, 749.
- *Canadian Charter of Rights and Freedoms*, ss. 1, 7, 12, 15(1).

Critical Readings:

- *R. v. Lavallee*, [1990] 1 S.C.R. 852. (exerpts)
- Aya Gruber, “The Feminist War on Crime”, 92 *Iowa L. Rev.* 741 (2007) (excerpts)
- Michel Foucault, *The History of Sexuality, Volume One*, trans. Robert Hurley (Vintage Books 1978), at 92-114