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FRAMING EFFECTS, RHETORICAL DEVICES, AND HIGH-STAKES LITIGATION: A CAUTIONARY TALE

MARCUS MOORE[†]

OVERVIEW

A. INTRODUCTION

This article provides an original exploration of an important, and likely not infrequent, problem. Terms are sometimes used in political debate for their framing effect or as rhetorical devices crafted to exert non-rational influence. *Where this usage is imported into adjudication without appreciating* that the imported terminological usage was externally shaped to exert framing or rhetorical effects, there is a significantly heightened risk of adjudication falling short in its aspiration to reasoned decision making.

For example, in political debate, a term that is universally valued (e.g. "protection") may be chosen for use as a label for a position on one side. Terminology may also be employed which selectively emphasizes the upside of a political position (e.g. "benefit"), obscuring its downside. Terms may be used in a sloganistic way (e.g. "freedom"), lacking the linguistic context necessary to discern a specific meaning, hence inviting various listeners to each assume a meaning they value, though it will conflict with different meanings assumed by others.

Within the scholarly discourse on framing analysis—widely studied in social and cognitive sciences but thus far largely ignored by legal scholarship—these terminological uses represent *frames*

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employed in order to exert non-rational influence.[1] Also, from the alternate perspective of law and literature's study of rhetoric, these frames can be cross-identified as the type of rhetorical devices known as tropes.[2]

Where the use of frames/tropes arises in an external discourse that is then imported into litigation, the result is especial danger for adjudication, as a form of social ordering distinguished by its characteristic burden of reasoned decision making and justification.[3] The danger is not simply manipulating judges. After all, framing and rhetorical devices are common strategies of legal advocacy. Judges are on guard for this as it is routinely part of adjudication, is devised by an interested party, and will be flagged and countered by the opposing party.[4]

But where terms are used in these ways in discourses external to law, the fact they were deployed in the external discourse as frames or tropes is not always appreciated by judges. Particularly where the terms typify the external discourse, courts may feel it appropriate to import them. If the use of the terms as frames or tropes is unrecognized, no adjustment to the terms or other account will be made for the sake of the legal reasoning process, for example, to instead select terms for that purpose that accurately and precisely describe what the frames or tropes were used in reference to. Especially in cases where the terms themselves are familiar to courts (and only the externally-crafted *usage* for effect as frames or tropes is unappreciated by the court), there is a danger of the legal reasoning process operating on the assumption of the terms being used with an ordinary expository meaning. There then results significant risk of confounding legal reasoning and frustrating larger legal analyses in the adjudication of a case.

This problem of externally-crafted frames/tropes being carried into adjudication where they then confound adjudication's effort

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1 Discussed in §II-A, *below*.

2 Per §II-B, *below*.

3 Explained in §I-A, *below*.

4 See §II-F, *below*.

to meet its burden of reason is demonstrated here through a penetrating examination of the judgment of the Supreme Court of Canada in the high-profile case *Eric v Lola*.[5] A major case, it addressed whether provisions of Québec's civil code spelling out spousal economic obligations in the event of separation infringed the constitutional right to equality in excluding from their scope of application unmarried couples. The case had broad social implications, as the affected group represented a huge percentage of Québec couples. It was also legally significant as the decision could affect economic rights of unmarried spouses across Canada. The media lavished attention on the case, with its sensationalist plotline of a local billionaire, a foreign-born fashion model, and a high-stakes suit for a $50 million lump sum and $56,000 in monthly support payments.[6]

Despite a lengthy judgment, including four separate opinions, the Court's reasons were criticized by observers on both sides of the case's public controversy.[7] The deficiencies in the reasons offer an excellent illustration of the problems above: the judgment imported from political debate uses of the terms "choice", "autonomy", "protection", and "benefit" in ways that constituted frames or tropes. Incorporated into legal reasoning without attention to this fact, the usage led to several confusions. Among these were: failing to distinguish the choice of one spouse and the "choice" of the couple in situations where the couple disagree; overlooking substantial segments of the claimant group for whom the legislation was not a "protection"; and conflating the scheme at issue with a different category of law (and hence a different set of applicable precedents) properly known in law as "benefit" legislation. These and other notable confusions which resulted

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5 *Québec (Attorney-General) v A*, 2013 SCC 5 [*Lola*], widely known as *Eric v Lola* (see §I-C).

6 See e.g. Martin Patriquin, "A Billionaire, the Law, his Brazilian Ex" (19 February 2009), online: *Macleans* <macleans.ca/news/canada/a-billionaire-the-law-his-brazilian-ex/>.

7 See e.g. Robert Leckey, "Developments in Family Law: The 2012–2013 Term" (2014) 64 Sup Ct L Rev 241 at 242; Robert Leckey, "Strange Bedfellows" (2014) 64:5 UTLJ 641 at 668; Alain Roy, "Affaire Éric c Lola: Une fin aux allures de commencement" (2013) 1 CP du N 259 at 264.

from the judgment's unguarded importation of terminological uses that served as frames or tropes in political debate hindered, in turn, larger legal analyses called for by the case, including the central question of discrimination. The judgment's serious deficiencies are a cautionary tale about the risks of inattention to where terminological usage imported into adjudication from an external discourse comprises frames or tropes—valued in the political realm for their non-rational influence, but hazardous to the legal reasoning process.[8]

B. Breakdown of the Paper

A roadmap of this article's discussion of the ideas above may be useful. The article proceeds in four main parts. Part I provides context for the argument which follows. I note adjudication's burden of reasoned decisions (§A). I then acknowledge the ways that political discourse regularly enters adjudication and the attendant risk discussed here of political frames or tropes confounding legal reasoning (§B). Next I outline how the *Lola* case can illustrate this problem and show the significance of these risks (§C). Further, I pinpoint the focus of this article's consideration of the case, which leaves aside other important dimensions that have been addressed elsewhere.

Part II examines the nature of the problem at issue here, the risk of incautiously importing into adjudication external uses of terminology as devices of non-rational influence. I first show how such use of terms has been widely studied across social and cognitive sciences—but thus far rarely in legal scholarship—through the lens of "frame analysis" (§A). I then observe how these frames can be cross-identified with an alternate conceptualization of them within law and literature scholarship as the rhetorical devices known as tropes (§B). Next, I note that frames and tropes are common within legal terminology itself but explain why native terminology does not pose the same risk to legal reasoning (§C). The special difficulties presented by

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8 See Jean-Pierre Dupuy & Gunther Teubner, *Paradoxes of Self-reference in the Humanities, Law, and the Social Sciences* (Saratoga: Anma Libri, 1990).

external devices are explained as reflecting the self-referentiality of social systems (§D-i) and, alternatively, within law and literature study, as a matter of the culture-specificity of language (§D-ii). I acknowledge how in adjudication, litigators routinely construct frames and tropes as part of their argumentative strategies; however, this is familiar and recognized by judges, and balanced in net effect by the adversary legal process (§E). This is not true for frames or tropes imported from political speech—absent special attention to the risk. I show how such usage of terms was carried into the *Lola* case, concretely manifesting the theoretical points from this part of the paper (§F).

Part III sets the scene regarding the prominence and importance of the *Lola* case (§A) and offers an overview of its long and fractious judgment, to aid Part IV's detailed demonstration of the case's confusions and analytical deficiencies.

Part IV then shows how the risks from Part II materialized in the case: it reveals the confusion and distortion caused by incorporating from political speech key terms devised there as frames or tropes. I then trace through how this led in turn to problems in larger legal analyses that were needed in order to evaluate the case's discrimination claim. One section looks at confusion around the imported sloganistic use of the terms "choice" and "autonomy" and the defects this caused in the case analysis (§A). The other section scrutinizes how the imported use of "protection" and "benefit" as labels for the impugned legislation served to legally mischaracterize it—of note because of the key role played by legislative characterizations in assessing the constitutionality of the scheme.

A short conclusion wraps up the discussion, including preliminary thoughts on how to guard against such problems in future cases.

I. CONTEXT

Per the roadmap above, this part of the paper provides context for the main argument which follows in Part II. I start by calling to mind adjudication's distinctive burden of reasoned decisions.

A. ADJUDICATION'S BURDEN OF RATIONALITY

Contrasting different modes of social ordering, the great legal philosopher Lon Fuller observed that one "distinguishing characteristic of adjudication lies in" its reliance on "proofs and reasoned arguments".[9] Comparing adjudication to elections, another mode of social ordering, Fuller acknowledged that a "political speech may take the form of a reasoned appeal to the electorate; to be sure, it often takes other forms, but the same thing may be said of speeches in court."[10] Thus, Fuller acknowledged that lawyers often use non-rational forms of influence in arguing cases.[11] Nonetheless, the way the resulting "decision . . . is *institutionally defined and assured*" differentiated adjudication from elections as modes of social ordering: in adjudication, both the decision-making process itself and public justification of decisions *formally assign* a central role to reason, unlike in elections.[12] The value of impartiality, which helped underpin adjudication's justifiability as an undemocratic source of social ordering, flowed from and depended on reasoning as the "institutionally defined and assured" decision-making process.[13]

Contemporary sociologist of law Gunther Teubner explains the point this way: adjudication's "promise [is] to supply convincing reasons for its decisions, to produce a legitimate basis of rational argumentation that people accept as just."[14] It can never actually attain this promise, as non-rational elements (assumptions, contingent authorities, judicial fiat, etc.) also play a part, but it is always compelled to try to do so.[15]

As those familiar with the practice of adjudication understand: it is not *exclusively* an exercise in logic; however, the inevitability of non-rational factors does not mean that non-rational attempts to

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9 Lon L Fuller, "The Forms and Limits of Adjudication", ed by Kenneth I Winston (1978) 92:2 Harv L Rev 353 at 364.

10 See *ibid* at 366.

11 Discussed in §II-E.

12 See Fuller, *supra* note 9 at 366 [emphasis added].

13 See *ibid*.

14 Gunther Teubner, "Self-subversive Justice: Contingency or Transcendence Formula of Law?" (2009) 72:1 Mod L Rev 1 at 13.

15 See *ibid* at 13–14.

influence are welcome—judges try hard to guard against them.[16] Moreover, it is one thing for non-rational factors to influence a decision; it is another thing for those elements to actually undermine the endeavour of rendering rational decisions by confounding the legal reasoning process and frustrating case-specific analyses that rely on it—the problem at issue in this article. In short, reason plays an indispensable role and is a feature which helps define and distinguish adjudication from other forms of social ordering. As Fuller summarizes:

> Adjudication is, then, a device which gives formal and institutional expression to the influence of reasoned argument in human affairs. As such it assumes a burden of rationality not borne by any other form of social ordering. A decision which is the product of reasoned argument must be prepared itself to meet the test of reason. We demand of an adjudicative decision a kind of rationality we do not expect of the results of contract or of voting.[17]

B. Political Discourse's Potential Confounding Influence on the Adjudicative Process

Meeting this "test", "demand", and "expectation" is not always easy. "Hard cases",[18] deficiencies in the record, and the pressures on overburdened courts are but a few of the challenges familiar and endemic to the system.[19] In this article, I want to explore a different challenge to adjudication's aspiration to the quality of reasoning that Fuller described—a challenge which arises from *outside* the legal system.

On a regular basis, the terms of political debate enter the legal system through various portals. The most obvious gateway is via legislation and regulation, where politics becomes law and political discourses that push and pull on the political branches of

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16 See *ibid*; §II-E.

17 See Fuller, *supra* note 9 at 366–67.

18 See Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) at ch 4.

19 See *R v Zora*, 2020 SCC 14 at para 6.

government can find their way into the content of those laws. A related route is when judges, in the role of *la bouche de la loi*,[20] interpret legislative instruments: they look for clues as to a law's meaning or purpose by delving into policy debates of legislative bodies or policy pronouncements of government officials;[21] such speech is responsive to political audiences. Another important channel is via judicial consultation of academic commentary which discusses social issues the law regulates or that call for regulation, so that the scholarship involves both legal discourse and broader discourses about legal policy, including political perspectives. Similarly, the work of law commissions, sometimes reviewed by courts where relevant, carries the marks of commission projects' political terms of reference and of external consultations. Policy discourse also enters adjudication when interest groups intervene, representing particular political viewpoints, using language geared in part to the constituencies they represent. Party advocates might also use terms from political debate in their submissions, either from drawing on the sources already mentioned or as a deliberate litigation strategy.[22] The appeals process in a given dispute, and the legal system's use of case precedents from similar disputes, also allows political terms which have entered one case to spread to others. These describe some of the ways in which the terms of political debate regularly enter the adjudicative process.[23]

Whatever their port of entry, such terms pose a challenge for adjudication in delivering "a decision which is the product of reasoned argument".[24] *This is not because the terms are political per se*: as discussed, adjudication regularly deals with matters of political controversy and political points may be made in the form

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20 See Montesquieu, *De l'esprit des lois*, 2nd ed (1758), Livre XI ch 6.

21 See Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014).

22 See §II-E, *below*.

23 Like other people, judges may hold their own political views and outside of court live in environments of political expression. However, the discussion here is confined to political *discourse*'s entry *into the adjudicative process*.

24 *Supra* note 17.

of reasoned arguments. The challenge arises rather from the fact that, as Fuller noted, although political persuasion "may take the form of a reasoned appeal . . . it often takes other forms" than reasoned argument.[25] Courts are wary of being influenced by unreasoned appeals and, generally, strive to protect the rationally justified character of adjudicative decisions.

The alternative means by which political expression may seek to influence are manifold. The various means of doing so cannot all be tackled here. Among them, the means this article concerns itself more specifically with, is political speech's *employ of terms in ways that, in the choice of term and the particular usage of the term, represent means of non-rational influence.* These are valuable in the political arena. But *when imported into adjudication without being recognized as having been crafted for such use*, *they risk distorting the legal reasoning process*.

It should be added that, although it might be tantalizing to explore lawyers and judges' intentionally "emotive and deceitful" adoption of such use of terms in adjudication,[26] this article is confined rather to where their incorporation by legal actors has the *unintended* effect of *confusing legal reasoning and detracting from the quality of legal analysis.*

That concern addressed in this article is not merely of theoretical import: an adjudicative decision which does not itself "meet the test of reason" is deficient in justification, and hence tends to reduce public confidence.[27] Moreover, the guidance that decisions are supposed to offer future cases as precedents may be compromised—or worse, the flawed reasoning and conclusions themselves may spread to later cases and so undermine broader

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25 Fuller, *supra* note 9 at 366.

26 See Richard A Posner, *Cardozo: A Study in Reputation* (Chicago: University of Chicago Press, 1990) at 54.

27 See the text accompanying notes 13, 17. See also Beverley McLachlin, "Remarks of the Right Honourable Beverley McLachlin" (Address delivered at the Second International Conference on the Training of the Judiciary, Ottawa 1 November 2004), online: *SCC* <scc-csc.ca/judges-juges/spe-dis/bm-2004-11-01-eng.aspx>.

jurisprudence.[28] The prospect of that is greatest where case zero occurs in a high court whose authority binds a pyramid of courts below.

C. *ERIC V LOLA*: A CASE STUDY OF THE RISK OF POLITICAL FRAMES OR RHETORIC IMPAIRING LEGAL ANALYSIS

This article demonstrates the risk detailed in §B through a case study of the judgment of the Supreme Court of Canada in *Québec v A*.[29] A particularly high profile case, it may be recalled by non-lawyers for its extraordinary plotline: a billionaire, a Brazilian fashion model, and a suit for a $50 million lump sum and $56,000 monthly allowance.[30] A ban on publishing the parties' names led to the case becoming commonly known as *Eric v Lola*, which title will be retained here as it is the one most widely used and recognized in other legal commentaries as well as extra-legal discourse, to which this article responds.[31] At issue in the case was the important question of economic obligations among unmarried couples in Québec upon separation.[32] The social impact would be significant in that such couples represented—and hence the Court's decision in the case applied to—more than a third of the province's couples.[33] The ruling would also potentially have ramifications in other Canadian provinces for unmarried spouses left out of some laws on division of property.[34]

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[28] The point holds true even where a case is not a binding precedent but of persuasive authority. On the status of precedent in Québec case law, see e.g. Pierre J Dalphond, "Le style civiliste et le juge: le Juge Québécois ne serait-il-pas le prototype du juge civiliste de l'avenir?" in Nicholas Kasirer, ed, *Le droit civil, avant tout un style?* (Montréal: CRDPCQ, 2003) 81 at 91.

[29] See *Lola*, *supra* note 5.

[30] See Patriquin, *supra* note 6.

[31] See e.g. Québec, Comité consultatif sur le droit de la famille, *Pour un droit de la famille adapté aux nouvelles réalités conjugales et familiales*, ed by Alain Roy, (Québec: Ministère de la Justice du Québec, 2015) at 1.

[32] See Robert Leckey, "Sameness and Change Respecting Unmarried Couples" *STEP Inside* 12:2 (May 2013) 5 at 5.

[33] See *Lola*, *supra* note 5 at para 125.

[34] See Leckey, *supra* note 32 at 5.

Policy discussion around the issues at stake was infused with the terminology of political debate on these issues: the use of "autonomy" or "choice" as slogans, and the use of "protection" and "benefit" as labels, served to cast the associated positions in an appealing light.[35] The terms also selectively emphasized certain aspects of the matters in dispute, obscuring others, in ways that supported corresponding views on the policy question at issue.[36] Such uses of terms embody potent forms of non-rational influence, which may be viewed as instances of what modern social science studies call "framing effects" or else what literature studies and philosophical works refer to as rhetorical devices.[37]

Within academic discussions that overtly involve policy debate alongside legal discourse, one naturally expects such terminological usage to be preserved. Yet, its non-rational influence is muted because listeners are also speakers within a network affiliated with the social context in which the policy issues came to be disputed by those means. Hence, members are familiar with and resistant to this influence. Transposed into adjudication however, terminological usage which originated in the political realm, where it operated as a frame or rhetorical device, carries risks of confusing the legal reasoning process and of distorting legal analyses. As will be discussed, such usage of terms amplifies the existing risk of a miscommunication resulting from encounters between the political and adjudicative spheres—conceptualized by social system theorists as a problem of self-referentiality and by law and literature theorists as one of the culture-specificity of language.[38] The risk is highest in cases requiring especially complex or subtle legal analysis, which necessitates in turn the most clear and accurate use of terms. In this respect, *Eric v Lola* was the most challenging of cases: It was firstly a claim under the constitutional right to equality, which the Supreme Court had described as "the *Charter*'s most conceptually

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35 See §II-F, *below*.

36 See *ibid*. Namely, what economic obligations unmarried spouses should owe one another.

37 See §II-A, II-B, *below*.

38 See §II-D, *below*.

difficult provision", one that constitutes a "challenge for the judiciary in interpreting and applying".[39] Beyond that, the case brought particular complications, including conflicting interests within the asserted claimant group and a discrimination claim against private laws operating between citizens.[40] Already facing those formidable challenges, I will show how the confusing and distorting effect of frames or rhetorical devices, originating in political discourse and then carried into adjudication as key terms upon which the legal reasoning process would have to be exercised, made it all but impossible to "meet the test of reason."[41] That this was so for a court of such international renown as the Supreme Court of Canada attests to the significance of the threat to adjudicative ideals posed by the external and non-rational forms of influence discussed in this article.

D. Other Issues Raised by the Case Left to Discussions Elsewhere

This article scrutinizes the *Lola* judgment in detail from the specific perspective of the aspired reasoned character of adjudicative decisions, and the risk of its frustration due to the factors noted above. While this important case raises other prime questions, those are necessarily left to discussions elsewhere: This paper does not provide a commentary (express or implied) on the family policy issues underlying the case, which have expanded via the work of the Comité consultatif sur le droit de la famille,[42] and are presently the subject of an important reform project in progress by the Québec government; also not addressed, but the subject of other published commentaries, are the significant

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39 *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 2, 170 DLR (4th) 1 [*Law*].

40 See §IV-B, *below*.

41 Argued in §IV, *below*.

42 Letter from Alain Roy to Bertrand St-Arnaud, *Rapport préliminaire du Comité consultatif sur le droit de la famille* (2013), online (pdf): *Ministère de la justice* <justice.gouv.qc.ca/fileadmin/user_upload/contenu/documents/Fr__francais_/centredoc/rapports/couple-famille/rapp_prelim_CCDF.pdf>.

women's rights issues raised by this case.[43] Left aside as well, but the subject of discussion elsewhere are difficulties related to the troubled analytical framework governing equality claims under section 15(1) of the *Canadian Charter of Rights and Freedoms*.[44]

II. EXTERNAL NON-RATIONAL FORMS OF INFLUENCE & THEIR RISKS FOR ADJUDICATION

Per the roadmap provided earlier, I now investigate the *nature* of the problem the paper addresses of the risks of importing into adjudication usages of terminology that were crafted for the sake of their non-rational influence within an external discourse, without courts appreciating or attending to the usages being shaped to induce such effects. This problem is first conceptualized through analysis of framing effects (§A) and then via the study of rhetorical devices (§B). While frames and rhetorical devices exist in legal terminology and advocacy (see §C and §E below), particular risks are present where they penetrate adjudication coming from an external discourse. This is comprehended first in terms of the self-referentiality of social systems (§D-i) and then of the cultural-specificity of language (§D-ii). It is then explained how

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43 See Justice Québec, "Family law reform" (June 2022), online: *Ministère de la justice* <justice.gouv.qc.ca/en/issues/family/>. See e.g. Natasha Bakht, "A v B and Attorney General of Quebec (Eric v Lola) - The Implications for Cohabiting Couples Outside Quebec" (2013) 28:2 Can J Fam L 261 (for family policy implications of the case outside Québec); Angela Campbell, "Supreme Court's common-law decision may be good for women" (25 January 2013) , online: *The Globe and Mail* <theglobeandmail.com/opinion/supreme-courts-common-law-decision-may-be-good-for-women/article7864692/>; Natasha Mukhtar, "A Feminist Critique of Quebec v. A.: Evaluating the Supreme Court's Divided Opinion on Section 15 and Common Law Support Obligations" (2017) 30:1 Can J Fam L 129 (for case comments on the subject of women's rights).

44 See *Canadian Charter of Rights and Freedoms*, s 15(1), Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. See also Robert Leckey, "Strange Bedfellows" (2014) 64:5 UTLJ 641; Jennifer Koshan & Jonnette Watson Hamilton, "The Continual Reinvention of Section 15 of the Charter" (2013) 64 UNBLJ 19; Carissima Mathen, "The Upside of Dissent in Equality Jurisprudence" (2013) 63 SCLR (2d) 111 (for comments related to the equality claim aspect).

these theoretical observations can be illuminated by looking at how they manifested in the *Lola* case (§F).

A. FRAMING EFFECTS

One perspective from which to approach the issue discussed in this article is that of "frame analysis". Recent decades have seen the emergence of frame analysis in a number of social science and cognitive science disciplines as a way to understand the influence of elements of speech other than reasoned argument.[45] Among the many fields in which methods of framing and their effects are studied are political science, sociology, psychology, anthropology, linguistics, communications, media studies, and marketing.[46] As defined in the *Oxford Handbook of Political Communication*, "framing effects refer to behavioral or attitudinal outcomes that are not due to differences in *what* is being communicated, but rather to variations in *how* a given piece of information is being presented (or framed) in public discourse."[47] Framing is about shaping or packaging the substance of a message with a view to inducing some desired effect on the part of the message recipient. One way to do this is to "select some aspects of a perceived reality and make them more salient in a communicating text, in such a way as to promote a particular problem definition, causal

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45 See Roberto Franzosi & Stefania Vicari, "What's in a Text?: Answers from Frame Analysis and Rhetoric for Measuring Meaning Systems and Argumentative Structures" (2018) 36:4 Rhetorica 393 at 393. See also Steve Rathje, "The power of framing: It's not what you say, it's how you say it" (20 July 2017), online: *The Guardian* <theguardian.com/science/head-quarters/2017/jul/20/the-power-of-framing-its-not-what-you-say-its-how-you-say-it>.

46 See James N Druckman, "The Implications of Framing Effects for Citizen Competence" (2001) 23:3 Political Behavior 225 at 226; Donald Kochan, "The Takings Keepings Clause: An Analysis of Framing Effects from Labeling Constitutional Rights" (2018) 45:4 Fla St UL Rev 1021 at 1072; Franzosi & Vicari, *supra* note 45 at 393.

47 Dietram Scheufele & Shanto Iyengar, "The State of Framing Research: A Call for New Directions" in Kate Kenski & Kathleen Jamieson, eds, *The Oxford Handbook of Political Communication* (New York: Oxford University Press, 2014) 619 at 619. [emphasis in original]

interpretation, moral evaluation, and/or treatment recommendation".[48] Presentation styles, images, phrases, and words can be consciously leveraged as frames to influence reactions to information.[49]

Looking specifically at terms, a mere word—used as a framing label—can have a significant framing effect. As Donald Kochan notes, "a label manipulates participants' 'subjective construal' of the situation".[50] The selection of the label influences how the audience interprets the underlying subject matter or context, and reacts to it. As a "characterization" of that to which the label refers, or a "certain aspect" of it, the label "activat[es] a mental model of a situation, or frame, that seems to match the concrete situation at hand and that subsequently defines this situation."[51] The label may "cue" comparable situations, or cause the listener to "infer" that the scenario at hand matches the label.[52] As such, labels and other "frames in communication often play an important role in shaping frames in thought."[53] Where selected for that purpose, they represent powerful non-rational forms of influence, used in political speech to "mobilize/persuade audiences".[54]

B. RHETORICAL DEVICES

An alternate perspective by which to understand such forms of influence is as rhetorical devices. Non-rational modes of influence

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48 Robert M Entman, "Framing: Toward Clarification of a Fractured Paradigm" (1993) 43:4 Journal of Communication 51 at 52. [emphasis removed]

49 See Druckman, *supra* note 46 at 227.

50 Kochan, *supra* note 46 at 1075, citing Kimmo Eriksson & Pontus Strimling, "Spontaneous Associations and Label Framing have Similar Effects in the Public Goods Game" (2014) 9:5 Judgment & Decision Making 360 at 360.

51 Kochan, *supra* note 46 at 1075, citing Eriksson & Strimling, *supra* note 50 at 360, citing Clemens Kroneberg, Meir Yaish & Volker Stocké, "Norms and Rationality in Electoral Participation and in the Rescue of Jews in WWII" (2010) 22:1 Rationality & Soc 3 at 7. See also Druckman, *supra* note 46 at 230.

52 Kochan, *supra* note 46 at 1075.

53 See Druckman, *supra* note 46 at 228.

54 See Franzosi & Vicari, *supra* note 45 at 402, n 50.

that can be understood as frames can alternatively be conceptualized as rhetorical devices.[55] The rhetorical lens is more common in literary studies and philosophical work; as far back as Plato's *Gorgias,* the "study of persuasion has been the realm of rhetoric".[56] Hence, long before the rise of empiricism and the emergence of modern psychology as a scientific discipline, rhetoricians systematically studied the art of persuasion through the lens of rhetoric. Lawyers too have noted that "human behavior is sometimes a function of expressive considerations."[57] These alternate ways of conceptualizing the phenomenon mirror law's duality as both a (social) science and a craft.[58] The rhetorical perspective corresponds to studying communication from the perspective of a craft. As James Boyd White explains, rhetorical knowledge is not "scientific" by nature, but "practical", embodying "the sense that one knows how to do things with language and with others."[59]

Under a broad meaning, rhetoric includes reasoned argument—"*logos*" per the taxonomy in Aristotle's *Rhetoric*.[60] However, it is commonly used in legal circles with a narrower meaning—indeed one that stands in contradistinction to persuasion through reasoning.[61] In the latter sense, which is the one invoked by the discussion in this article, rhetoric has been defined as "stylistic devices used to persuade readers or listeners to believe or to do something."[62] Through aspects of it that reflect a

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55 See *ibid* at 410.

56 *Ibid* at 402.

57 Cass Sunstein, "On the Expressive Function of Law" (1996) 144:5 U Pa L Rev 2021 at 2027.

58 See Hanoch Dagan, "The Real Legacy of American Legal Realism" (2018) 38:1 OJLS 123 at 141–42.

59 James Boyd White, "Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life" (1985) 52:3 U Chi L Rev 684 at 695.

60 Franzosi & Vicari, *supra* note 45 at 403.

61 See White, *supra* note 59 at 687–88.

62 See Richard Posner, *Law and Literature*, 3rd ed (Cambridge: Harvard University Press, 2009) at 331. See also Zhongdang Pan & Gerald Kosicki,

"pre-rational function," used to trigger a certain mental model of the situation on the part of the reader or listener, language can be leveraged to that end.[63]

There is an immense range of rhetorical devices ranging, for example, from oxymoron to hyperbole.[64] However, the mere choice of words to refer to a given object allows great scope for rhetorical influence: "Certain words and phrases are useful for the purpose of releasing pent-up emotions, or putting babies to sleep, or inducing certain emotions and attitudes in a political or a judicial audience."[65] Words may be selected so as to make desired "conclusions sound more reasonable, less controversial, and more appealing".[66] Words may be employed that imply a particular "priority of values and policy".[67] Words may be used inaccurately but suggestively, and as "myths may impress the imagination and memory where more exact discourse would leave minds cold."[68] As Roberto Franzosi and Stefania Vicari explain, in the nomenclature of rhetoric, the use of a word in such ways is as a trope.[69] Because "language shapes thought", tropes are potent forms of non-rational influence: "the choice of words can therefore have political and social consequences".[70]

"Framing Analysis: An Approach to News Discourse" (1993) 10:1 Political Communication 55 at 61.

63 See Felix Cohen, "Transcendental Nonsense and the Functional Approach" (1935) 35:6 Colum L Rev 809 at 812; text to note 50.

64 See generally Franzosi & Vicari, *supra* note 44.

65 See Cohen, *supra* note 63 at 812.

66 Brian Bix, "Law and Language: How Words Mislead Us" (2010) 1 Jurisprudence 25 at 38.

67 Kochan, *supra* note 46 at 1083.

68 Cohen, *supra* note 63 at 812.

69 Franzosi & Vicari, *supra* note 45 at 409.

70 Richard Posner, *Law and Literature: A Misunderstood Relation* (Cambridge: Harvard University Press, 1988) at 311, cited in Robert Hillman, "'Instinct with an Obligation' and the 'Normative Ambiguity of Rhetorical Power'" (1995) 56:3 Ohio St LJ 775 at 811, n 188.

C. Use of Frames or Tropes Within Legal Terminology Itself

Manipulation of language to achieve some desired effect is, of course, not peculiar to discourses external to law. Within the law's own internal discourse, usage of words with the properties described in the preceding sections as frames or tropes has long been recognized.[71] As Brian Bix summarizes, the law is full of "dubious labels", "linguistic inventions and conventions" that could distort legal reasoning.[72] Sometimes it is due to invented concepts becoming reified along with what the relevant language suggests. For example, the anthropomorphic construct of the corporation as a legal person may cause a court to approach whether the corporation may be sued in a given jurisdiction by asking where the corporate person is.[73] In other cases, it is due to the law adopting words that have expressive significance as legal terms. This might be the case, for instance, with calling certain provisions in a constitution "human rights," or terming a particular provision the "takings clause" rather than the "keepings clause".[74]In these cases, the words selected and used as the relevant legal term communicate things that alternative possible labels would not.

Yet, in either of the sorts of scenarios just mentioned, the usage comprises internally-recognized terms of legal discourse whose meaning and context is fully understood within the legal system. This mutes the risk of their non-rational content influencing the course of adjudication. Indeed, borrowing from ordinary language and modifying the meaning of words for use as legal terms of art is necessary to constitute a legal discourse, or as White puts it, a "proper language of justice in our culture."[75]

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71 See e.g. Oliver Wendell Holmes, "The Path of the Law" (1897) 10:8 Harv L Rev 457.

72 Bix, *supra* note 66 at 25.

73 See Cohen, *supra* note 63 at 809–12.

74 See Kochan, *supra* note 46.

75 White, *supra* note 59 at 690.

D. Distinct Difficulties Where Embedded in External Discourse

In contrast to frames or tropes resident within legal terminology itself, terms used in such ways in external discourses present a different challenge for adjudication.

i. Self-Referentiality of Social Systems

One perspective from which to understand the additional challenge that arises where the frame or trope is born in an external discourse is a social scientific perspective. Systems theory breaks down society into functionally-differentiated spheres—the legal system, the political system, etc.—which come to develop their own self-referential ways of understanding phenomena.[76] This includes each system's interrelation with the other systems that make up its external environment. The legal system may therefore comprehend words coming from political speech with a meaning rooted in the legal system, rather than with their meaning in the political system in which they were spoken.[77] Indeed, Niklas Luhmann and Gunther Teubner argue that "social" systems' very nature is that they are systems of communication and therefore that "[l]aw exists only as communication," differentiated from political communication.[78] Law is highly responsive to outside influences, including political influences, where these enter and "irritate" the legal system into responding. But crucially, the law has to construe (or reconstruct) the meaning of the relevant phenomenon from the external environment, such as political speech, in a way that makes sense of it within its own system.

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[76] See Max Miller, "Intersystemic Discourse and Co-ordinated Dissent: A Critique to Luhmann 's Concept of Ecological Communication" (1994) 11:2 Theory, Culture and Society 101 at 104.

[77] See Gunther Teubner, "Introduction to Autopoietic Law", in Gunther Teubner, ed, *Autopoietic Law: A New Approach to Law and Society* (De Gruyter, 1988) 1 at 3.

[78] Niklas Luhmann, "The Unity of the Legal System" in Gunther Teubner, ed, *Autopoietic Law: A New Approach to Law and Society* (Berlin: De Gruyter, 1988) 12 at 17; Teubner, *supra* note 77 at 3.

Where political communication does not take the form of reasoned argument, and where indeed it does not use words in an expository way, but rather as framing labels, the risk is all the greater that problems in the legal system's understanding will result.

ii. Culture-Specificity of Language

The other way in which the challenges of terminological usage from external discourse can be understood is again through law as a craft of language. White describes rhetoric—not in the narrow sense mostly used in this article, but in the broad sense—as "the central art by which community and culture are established".[79] Rhetoric in that sense, similar to communication in Luhmann's systems, "always starts in a particular culture and among particular people . . . . speaking a particular language."[80] And as with the social systems, "there are real and important differences among cultures [so] that each person is to a substantial degree the product of his or her own culture."[81] The law is no exception. "Law is in this sense always culture-specific", so that "the lawyer . . . must always start by speaking the language of his or her audience".[82] White adds that, when a person speaks, they construct a character or "what the Greeks called an *ethos*—for oneself, for one's audience, and for those one talks about, and in addition one proposes a relation among the characters one defines. One creates . . . a community of people, talking to and about each other."[83] This too evokes Teubner's emphasis on the generative and self-reproducing character of social systems,[84] although what White perceives seems to be less permanent and more permeable. Rooted not in science but in art, which bonds culture and community,[85] White's account is also more localized than that of

[79] White, *supra* note 59 at 684.
[80] *Ibid* at 695.
[81] See *ibid*.
[82] See *ibid* at 688–89.
[83] *Ibid* at 690.
[84] See Teubner, *supra* note 77.
[85] See White, *supra* note 59.

the social systems. But it is an account that likewise sees problems of communication as prone to occur if speech from one culture or language community is simply inserted into another. As White describes, the "heart" of the challenge for "the law is the process of translation by which it must work, from ordinary language to legal language and back again."[86]

Speech taken from a *different* culture-specific community such as politics thus presents a special challenge, particularly where the political speech takes the form of tropes which change the ordinary meaning of language.

E. Intentional Construction of Frames or Rhetorical Devices by Advocates in Court

It may be countered that the construction of potentially novel frames and rhetorical devices by advocates in court is an everyday practice, and thus in realistic terms if not Fuller's aspirational ones is as much a part of adjudication as reason. Some such as Kurt Saunders have emphasized, for example, the "rhetorical, practical, and culturally constructed nature and function of legal argument."[87] Others like Lawrence Solan have observed "the ways in which lawyers attempt to make choices to direct a case's vocabulary in a direction beneficial to the lawyer's client", for instance selecting between "undocumented worker" or "illegal alien" in an immigration case, or between "victim" and "complainant" in a sexual assault case.[88] As Fuller's counterpart from the rival Realist school Karl Llewellyn put it:

> [T]he first art is the framing of the issue so that if your framing is accepted the case comes out your way. Got that? Second, you have to capture the issue, because your opponent will be framing an issue very differently. You have got to so frame yours that it . . . "captures the field" . . . . And third, you have to build a technique of

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86 *Ibid* at 692.

87 Kurt Saunders, "Law as Rhetoric, Rhetoric as Argument" (1994) 44:4 J Leg Education 566 at 567.

88 See Lawrence Solan, "Patterns in Language and Law" (2017) 6 Intl J Language L 46 at 63.

> phrasing of your issue which not only will help you capture the Court but which will stick your capture into the Court's head ….[89]

Although legal advocates use frames and rhetorical devices, the prospect of court decisions failing to live up to being "the product of reasoned argument" on account of this is a risk that differs in degree and kind from that which is the subject of this paper.[90] The use of frames and rhetorical devices by advocates is a risk that judges are well-attuned to, precisely because it is present in almost every case. The judge is doubly attuned to the risk where the judge, as is often the case, is a former advocate who is practiced and accomplished in the same techniques that other advocates now seek to sway the judge with. In my experience as a legal adviser in the Supreme Court of Canada, judges are very much on guard for these strategies and their potential influence. This risk is also balanced by the adversary process, as exemplified by the competing vocabularies referenced above, employed by opposing sides in the same immigration case or sexual assault case. At all events, this risk is part of the system, along with structures and practices that serve to mitigate it.

In contrast to this, by definition the risk at issue in this article is one (a) whose origin is foreign to the legal system in the senses discussed above in §D; (b) that does not stem from the deliberate act of an interested party to the proceedings; (c) that arises rather as terminological usage typical in the (external) literature associated with some social sphere that the dispute affects; (d) but the terminology misleadingly seems familiar in also being used in legal discourse, with only the usage different; and (e) the different usage not duly appreciated by the court. In my experience, the risk is far greater in such circumstances: The court is not on guard for this. On the contrary, it is trained to defer to external terminological usage where that usage is typical (for example, in expert witness testimony or judicial review of administrative decision making). It will further have a false sense of security

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89 Karl Llewellyn, "A Lecture on Appellate Advocacy" (1962) 29:4 U Chi L Rev 627 at 630.

90 See the text accompanying note 17; Fuller, *supra* note 9 at 366–67.

where the terms are also used in legal language—unless it is aware of the different use and external strategy of influence—but the familiarity of the terms themselves helps disguise that.

F. Incorporation of External Frames or Tropes into Adjudication with Unintended Confounding Effects for Legal Analysis

The ensuing sections of this article provide an illustration of the problem discussed above. They show how the risk of external frames or tropes being imported into adjudication and confounding legal analysis was present—and materialized—in the case of *Eric v Lola*. A high profile and high stakes dispute, it attracted significant attention in the social policy sphere. Policy discussion of the issues at stake was infused with the terminology of political battles over these issues, in which slogans like "autonomy" or "choice" and labels like "protection" and "benefit" served as frames and tropes exercising non-rational influence. Their influence, as such, is valuable. Benefit expresses value, while freedom and protection are qualities universally valued. The mere use of them exerts its own direct appeal, independent of any reasoned argument on behalf of that which the terms are used in reference to. Moreover, the terms (and their usage) skew perception of what they are used in reference to, by selectively emphasizing certain aspects and correspondingly obscuring other aspects.

Take, for starters, "choice", "autonomy", and associated terms. To refer to the "choice" of *couples* obscures whether the choice was a consensus between the individual spouses or the result of a legal default position in a scenario where the spouses disagreed. Moreover, usage of these terms in a sloganistic way without consistently including the necessary specifics or context amplifies the apparent value of what is referred to by casting it very broadly. For instance, "liberty" is conceived of as a foundation of the entire political system. Such usage of the terms also expands support for what it refers to through its ambiguity, which invites different listeners (as with a word like "reform" used as an electoral slogan) to each assume a more particular intended meaning they agree with, but which differs from and may even conflict with the

particular meanings assumed by others. For example, the support of this or that person for a government policy based on citizens' choice of marital status might differ depending on whether the choice would include an existing intimate relationship or exclude it as an independent choice. It might also differ depending on when and how the choice must be made.

Turning to "protection" and "benefit", the use of these terms as a label for legislation which only has that effect for one spouse within a couple, while necessarily having an opposite effect on the other spouse, puts a singularly positive "spin" on the legislation. It obscures half of the picture, and thus produces a distorted impression of it. In addition, given that these same words serve as legal terms of art that describe a particular type of law, their use in debate over legal policy as a label for a different type of law—even if the ordinary meaning of those words describe part of the law's effect—is prone to mislead.[91]

The usage of the above terms for purposes of their political value as non-rational forms of influence was evident in many of the materials surrounding the *Lola* case. This included legislative debates in Québec around the provisions at issue,[92] and in other provinces which were looked at for comparative purposes,[93] as well as government consultations with political interest group representatives.[94] It was reflected in commentaries that were considered from law reform commissions, within the class of projects dealing with social policy reform as opposed to technical legal reform.[95] In cited academic discussion that sought to combine legal analysis with family policy debate, such terminological usage naturally was preserved. As Angela Campbell describes, "the themes of individual choice and autonomy have

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91 See §IV-B, *below*.

92 See *Lola*, *supra* note 5 at paras 108–09 (focused on choice and autonomy).

93 See e.g. Nicholas Bala, "Controversy Over Couples in Canada: The Evolution of Marriage and Other Adult Interdependent Relationships" (2003) 29:1 Queen's LJ 41 at 110 (discussing the responsiveness of politicians to calls for protection in different situations).

94 See *Lola*, *supra* note 5 at paras 107–08.

95 See *ibid* at paras 296–97, 307, 313.

been central to discussions on this topic. Even feminist constituencies have invoked these ideas in pressuring the government not to reform the law to extend married spouses' mutual duties to unmarried couples."[96] The same could be said, but for the opposite policy position, of the themes of "protection" and "benefits". Indeed, policy debate was often cast as a contest between, or question of how to balance, contrasting ideals invoked by these terms: "Conjugality in Private Law: How to Reconcile 'Autonomy' and 'Protection'?";[97] "Freedom of Choice and Legal Protection of Unmarried Spouses upon Separation: Difficult Juggling Act";[98] "a balance . . . hard to keep between protection of family members' equality and respect for their liberty";[99] "ensuring a better balance between liberty and equality."[100]

In such discussions, positions taken in favour of a given policy option were frequently phrased in similar terms: "the principle of respect for autonomy should prevail";[101] "protective legislation should also exist . . . for unmarried spouses to protect the vulnerable spouse in this partnership-type";[102] "unlike in other Canadian provinces, disadvantaged unmarried spouses enjoy no legislative protection";[103] "the time has perhaps come to re-

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96 Campbell, *supra* note 43.

97 See Dominique Goubau, "La conjugalité en droit privé: comment concilier 'autonomie' et 'protection'?" in Brigitte Lefebvre & Pierre-Claude Lafond, eds, *L'union civile: nouveaux modèles de conjugalité et de parentalité au 21e siècle* (Cowansville, QC: Yvon Blais, 2003) at 153 (author translation).

98 See Louise Langevin, "Liberté de choix et protection juridique des conjoints de fait en cas de rupture: difficile exercice de jonglerie" (2009) 54:4 McGill LJ 697 (author translation).

99 See Benoît Moore, "Culture et droit de la famille : de l'institution à l'autonomie individuelle" (2009) 54:2 McGill LJ 257 at 272 (author translation).

100 See Alain Roy, "Le contrat de mariage en droit québécois: un destin marqué du sceau du paradoxe" (2006) 51:4 McGill LJ 665 at 665 (author translation).

101 See Goubau, *supra* note 97 at 162 [translated by author]).

102 See Moore, "Culture et droit de la famille", *supra* note 99 at 269 [translated by author].

103 See Langevin, "Liberté de choix et protection juridique", *supra* note 98 at 697 [translated by author].

evaluate the relevance of this uniform approach and consider . . . other models more respectful of spouses' freedom of choice".[104] These are but a small number of examples from a few of the works cited in the case.

That said, precisely because these debates are located in literature associated with the social sphere that the policy questions stem from, participants in these debates at a minimum appreciate the terms' use as frames or tropes, and most likely have thus developed resistance to their influence.

In *Lola*, the case record incorporated this terminological usage which, as mentioned, was widespread externally. For example, the overview portion of the parties' factums, which play such an important role in the "framing" and "phrasing of [the] issue," as Llewellyn put it, located and articulated the case in these terms.

Lola's factum, for instance, began by observing that "Québec's is the only legislature that grants no protection to these spouses upon breakdown of their relationship" whereas the "CCQ grants married spouses a panoply of protections".[105] Repeatedly in these opening lines, the provisions at issue were characterized as "statutory protections for couples' benefit" and the provisions' corresponding effect on couples as "the benefit of . . . protective measures".[106] The protections were to address the fact that spouses are "vulnerable . . . in the event of dissolution of their relationship".[107] The political framing and rhetoric of the opposing position was also incorporated, but countered as merely "supposed", a "theory", ultimately a "myth": in justifying the legislation, it has always been the case that "the Québec legislature . . . invokes purported respect for the theory of free will . . . rather the myth" of free will.[108]

Likewise, incorporating the political use of terms summarized earlier, Eric's factum described the issue raised by the case as

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[104] See Roy, "Sceau du paradoxe", *supra* note 100 at 691 [translated by author].

[105] *Lola*, *supra* note 5 (Factum of Lola at paras 1–2 [FoL]) [translated by author].

[106] *Ibid* (FoL at paras 5, 7–9) [translated by author].

[107] *Ibid* (FoL at para 6) [translated by author].

[108] *Ibid* (FoL at paras 4, 7, 10) [translated by author].

being "people's right . . . to make fundamental choices about their marriage life, and the legality of a decision . . . to respect those choices."[109] The impugned provisions of the CCQ "respect fundamental dignity and autonomy, . . . individual liberty . . . [and] preserve freedom . . . . The Québec legislature respects freedom of choice."[110] The opposing position was seeking "to override people's choices".[111] The framing/rhetoric of the contrary policy view again was accepted—"protection of unmarried spouses in need following a breakdown should prevail over individual freedom of choice"—but cast as exceeding what it might justify.[112] In a similar vein, the factum of the Attorney-General of Québec cast its position in the language of choice and autonomy used by politicians in the legislative debates.[113] And it challenged the opposition's use of the terms protection or benefit, characterizing the legislation instead as "reciprocal rights and obligations"; it also noted that "the impugned provisions of the CCQ bear on the effects marriage has on spouses towards one another, not on benefits they can claim from a third party."[114]

The terminological usage at issue was incorporated not only into the parties' submissions, but also into the record of the lower courts, from which the case arrived at the Supreme Court on appeal.[115]

Hence, political speech using the above terms as frames or tropes entered the adjudicative process of the Supreme Court of Canada in *Eric v Lola* through all the portals identified in §I-B, and to use Llewellyn's expression, "captured the court."[116] As implied by the aforementioned findings of systems' theorists and of law

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109 *Ibid* (Factum of Eric at para 1[FoE]) [translated by author].

110 *Ibid* (FoE at paras 3, 6) [translated by author].

111 *Ibid* (FoE at para 4) [translated by author].

112 *Ibid* (FoE at para 7) [translated by author].

113 *Ibid* (Factum of Attorney-General of Québec at paras 7–8 [FoAG]) [translated by author].

114 *Ibid* (FoAG at paras 1, 4) [translated by author].

115 *Droit de la famille — 091768*, [2009] QCCS 3210 (CanLII) [*Lola Trial*]; *Droit de la famille — 102866*, [2010] QCCA 1978 (CanLII) [*Lola Appeal*].

116 See Karl Llewellyn, *supra* note 89 at 630.

and literature theorists, the court was not well-placed (compared to residents of the political or family policy spheres) to appreciate that familiar legal terms were being used not in ways typical of legal discourse but as politically-devised frames or tropes.[117] Incorporating this terminological usage into the legal reasoning process thus invited confusion and consequent flaws in larger legal analyses crucial to whether the decision and justification could be said to "meet the test of reason."[118]

Part IV will trace precisely how this manifests in the case, but in order to support a detailed dissection, I first set the scene and overview the judgment.

III. THE CASE: ERIC V LOLA

Per the roadmap of the article, this section sets the scene for the *Lola* case, and offers a helpful guide to its lengthy and fractured judgment which will be scrutinized in the ensuing Part IV.

A. SETTING THE SCENE

Much attention from legal observers surrounded this major case, as well as from the wider public as the case attracted sensationalist media coverage.[119] Legally, the question was whether provisions of Québec's civil code addressing spousal economic obligations upon separation infringed Canada's constitutional right to equality[120] in being limited to couples united by marriage or by Québec's civil union.[121] Was the basis of these obligations conjugal cohabitation, or registration of a union?

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117 See §II D, *above*.

118 See the text accompanying note 17; Fuller, *supra* note 9 at 366–67.

119 See e.g. Patriquin, *supra* note 6; CTV Montreal, "High stakes Lola palimony case hits top court" (18 January 2012), online: *CTVNews* <montreal.ctvnews.ca/high-stakes-lola-palimony-case-hits-top-court-1.755719>; Lili Boisvert, "A bizarre case could force Canadians to be married against their will" (3 June 2012), online: *National Post* <nationalpost.com/opinion/lili-boisvert-a-bizarre-case-could-force-canadians-to-be-married-against-their-will>.

120 See *Charter*, *supra* note 44, s 15(1).

121 The relevant economic obligations of Québec's civil union (*Civil Code of Québec* (LRQ, c C-1991) at art 521.1.) mirrored those of marriage [*CCQ*].

Or could it vary based on the legislation in force in different provinces? The case carried important social implications as well. From a demographic standpoint, 37.8% of Québec couples were living as the '*de facto*' spouses left out of these provisions; and nationwide, the figure had reached 20%.[122]

Canada's high court lavished attention on the case, as evident by the judgment's book-length.[123] Yet despite this, the Court's legal analysis was criticized by scholars on both sides of the case's policy controversy.[124] This article, as noted, focuses on the judgment's analytical difficulties traceable to the confounding effect of incorporating into the case reasoning externally devised non-rational usages of terminology, without appreciating or accounting for their identity or influence as such.

B. OVERVIEW OF THE JUDGMENT

Table 1 (below) offers an overview of the judicial opinions and conclusions on key legal issues.

Table 1: *Overview of Judicial Opinions and Conclusions*

	LeBel J. (Fish, Rothstein and Moldaver JJ. concurring)	Abella J.	Deschamps J. (Cromwell and Karakatsanis JJ. concurring)	McLachlin C.J.
	Judgment	Dissenting in Result	Dissenting in Part in Result	Concurringin Result
	282 Paragraphs	99 Paragraphs	28 Paragraphs	41 Paragraphs
Should the default position for de facto spouses, absent a consensual choice, be obligations or no obligations?	No obligations	All Obligations	Some Obligations	Up to Québec legislature to decide

[122] *Lola*, *supra* note 5 at para 125.

[123] *Lola*, *supra* note 5. The judgment was 70,000 words long.

[124] Leckey, "Developments", *supra* note 7; Leckey, "Bedfellows", *supra* note 7; Roy, "Affaire Éric c Lola", *supra* note 7.

	LeBel J. (Fish, Rothstein and Moldaver JJ. concurring)	Abella J.	Deschamps J. (Cromwell and Karakatsanis JJ. concurring)	McLachlin C.J.
Should the default status of de facto spouses, absent a consensual choice, be obligations or no obligations?	Opt-In	Opt-Out	Opt-Out	Up to Québec legislature to decide
Where should the role of "choice" be considered?	As to whethera right was infringed (under the right)	As to whetherthe infringement was justified (under s.1)	As to whetherthe infringement was justified (under s.1)	As to whether the infringement was justified (under s.1)
Did the legislation discriminate against the claimant group, contrary to s.15(1) of the Charter?	No	Yes	Yes	Yes
Was the infringement of s.15(1) justified as a reasonable limit under s.1?	Question does not arise	Unjustified	Support provisions unjustified; family property provisions justified	Justified
What is the constitutional status of the legislation?	Legislation is constitutional	Legislation is unconstitutional	Legislation is unconstitutional	Legislation is constitutional

The table is intended to assist the reader in situating the detailed discussions to follow in Part IV. The substantive structure of the judgment may otherwise be arduous to work out, with four separate opinions and a complex array of diverging conclusions on the major legal questions involved. Such fractured judgments are generally seen as an undesirable outcome of appellate adjudication, for as Robert Leckey explains, "too many concurring and dissenting judgments undermine the law's authority."[125] They

[125] Robert Leckey, "Chosen Discrimination" (2002) 18:2 Sup Ct L R 445 at 447, n 9.

also contribute to the *Lola* judgment's imposing length, which again reduces its accessibility.[126]

As evident from the table's indication of the length of each opinion, the primary opinions are those of LeBel J (together with three other justices) upholding the legislation and of Abella J finding it unconstitutional. The other opinions rely in part on these ones, agreeing or distinguishing themselves from the primary opinions on selected points. The ensuing discussion here of the case reflects this allocation of roles among the various opinions.

IV. THE CONFOUNDING EFFECT OF FRAMES OR TROPES FROM POLITICAL DISCOURSE INCORPORATED AS KEY TERMS IN THE JUDGMENT

Per the initial roadmap, this part of the paper examines how the risks from Part II materialized in *Lola* as confusion and distortion caused by frames or tropes from political speech being incorporated as key terms in the legal reasoning process. This in turn caused deficiencies in larger legal analyses required by the case. Section A below focuses on imported sloganistic use of *choice* and *autonomy*, and Section B on imported legislative labels of *protection* and *benefit*.

A. "CHOICE," "CONSENT", "AUTONOMY" AND "FREEDOM"

i. IMPORTANCE IN THE JUDGMENT

As previewed earlier (§II-F), one set of terms that played an important role were *choice*, *consent, autonomy*, and *freedom*. One sign of these terms' importance to the decision is their near–constant invocation. The judgment is replete with references to them. For instance, the term *choice* including derivatives and synonyms,[127] is found 272 times in the text. Similarly, *consent*,

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[126] See note 123.

[127] Including derivatives of *choose* and *opt*.

counting derivatives and synonyms,[128] appears 305 times. All four judicial opinions make frequent reference to these. However, their role is most decisive in the two that together produce the outcome—the principal judgment of LeBel J (Fish, Rothstein, and Moldaver JJ concurring), and the tie-breaking opinion of McLachlin CJ. As Leckey notes, the "notions of choice and autonomy lie at the heart of the reasons rejecting [Lola's] claims."[129] The importance of the terms *choice* and *autonomy* in the judgment mirrors the case record which reflects the terms' prominence in external policy debates and their utility in that sphere as frames or tropes, as discussed.[130] The powerful role these terms played in the judgment is symbolized by the LeBel camp's conclusion, following a detailed legislative history, that the "premise of Québec family law [is] the exercise of autonomy of the will."[131]

ii. IMPRECISE AND INCONSISTENT USE

With the case reasoning revolving around these terms, the need to use them precisely was crucial. However, too often the judgment reproduced the sloganistic usage of political debate: commonly found are phrases like "the issue of choice,"[132] and "the freedom … of spouses",[133] with linguistic context missing. Such usage is valuable in the political arena, where (per §II-F), omitting the particulars amplifies the interest seemingly at stake in the associated policy position by casting it broadly. But imported into adjudication of a complex legal case, this vagueness impairs the difficult and subtle analysis required of the court.

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128 Including derivatives of "consent", "agree," the exercise of "autonomy," and the exercise of "freedom."

129 Leckey, "Developments", *supra* note 7 at 254.

130 See §II-F, *above*.

131 *Lola*, *supra* note 5 at para 270. The Deschamps camp similarly observes "the "autonomist" trend…has predominated for the last 50 years or so": *ibid* at para 387. See also paras 442 (per McLachlin CJ), 358 (per Abella J).

132 *Lola*, *supra* note 5 at para 343 per Abella J.

133 *Ibid* at para 267 per LeBel J.

A related problem was these terms' usage in the judgment with various conflicting meanings, with the meaning in the particular instance unspecified and often unclear. In the political sphere such ambiguity is valuable, as it invites each listener to assume a meaning that they support, though it will conflict with meanings assumed by others.[134] But in adjudication, such ambiguity creates confusion, which hampers legal reasoning. Here, freedom and autonomy were used with various subjects in contemplation, but without always making clear who the subject was. For example, the reasoning is plagued by failing to consistently distinguish the freedom of the *couple* (as a unit), from the freedom of the *spouses* (as individuals),[135] from the freedom (or lackthereof) of the *"vulnerable/dependent" spouse*.[136] Similarly, the term *choice* is used with respect to varying intended objects, without it always being clear which object is contemplated. For instance, the reasoning is impaired by it being unclear when a given use refers to choosing the *regime of economic obligations* at issue,[137] choosing *to marry*,[138] or choosing *a particular spouse together with* one or the other of the preceding two choices.[139] These are but a few examples of the ambiguity surrounding the usage of these terms in the case.

This imprecision and inconsistency in the terms' use detracts from the coherence of the opinions and hinders communication between the various opinions in the overall judgment.[140] On the latter point for example, at para 375 Abella J states: "the choice to formally marry is a mutual decision. One member of a couple can decide to refuse to marry or enter a civil union and thereby . . . preserves his or her autonomy at the expense of the other." Abella J

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134 See §II-F, *above*.

135 *Lola*, *supra* note 5 at para 267 per LeBel J.

136 *Ibid* at para 376.

137 *Ibid* at para 445.

138 *Ibid* at para 219.

139 *Ibid* at para 428.

140 Even before the opinions in a case are written, such confusion may amplify perceived disagreement, contributing to the presumed need for more opinions. Whether this was the case in *Lola* can only be speculated.

is here describing only whether to register a conjugal union as a mutual choice, while suggesting that *de facto* status is not a mutual choice, at least where one spouse wishes to marry and the other refuses. LeBel J fails to acknowledge this distinction in replying that "Abella J is mistaken in saying that the choice of a form of conjugal relationship, especially that of marriage, is necessarily a mutual one . . . . para 375."[141] The rejoinder is also incoherent with LeBel J's own immediately preceding statement that "[i]n this context…the existence of a set of rights and obligations depends on mutual consent in one of a variety of forms."[142] The incoherence can be resolved by presuming that LeBel's reply to Abella meant to say that she was mistaken in concluding that the choice of a form of conjugal relationship is *not* necessarily a mutual one. If that is correct, the confounding effect of the imprecise usage of the incorporated key terms surely bears much of the responsibility for a typographical error not being caught which wholly inverted the meaning of LeBel's reply to Abella. It may be that the words "especially that of marriage" were added upon it being caught that the statement otherwise clearly mischaracterized the opinion of Abella J, but without realizing that the root of this was the LeBel opinion's misstatement of its own view due to a typographical error. Even still, the reply fails, as mentioned, to acknowledge the distinction made by Abella J, and thus crucially, to expressly state its disagreement with that distinction, which follows from LeBel J's preceding statement that the obligations arise by mutual consent, and subsequent statement that "a decision to continue living with a spouse who refuses to marry has the same value as that of a spouse who gives in to insistent demands to marry."[143] The example just summarized is significant as that debate is at the heart of the disagreement among these two principal opinions in the case, and upon which the other two opinions rely. If LeBel J had been able to precisely state Abella J's view, and express at that juncture his contrary view that one way or another *de facto*

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141 *Lola*, *supra* note 5 at para 259.

142 *Ibid*.

143 *Ibid* at para 260.

spouses' status is by what the law must treat as mutual consent, the judgment as a whole could likely have been more concise and cogently reasoned.

Besides the issues above, even when key terms such as *choice* and *consent* imported from policy debates are used in the judgment with the specifics needed to distinguish distinct meanings, it is frequently unexplained and inevident why the analysis oscillates between the differing meanings as it does when it does. In many cases, it appears that the various meanings are unconsciously being used interchangeably despite their inconsistency.

Thus, the sloganistic use of these terms, politically valued for framing effect or rhetorical impact, when incorporated into the adjudicative forum, became a source of confusion and abstruseness. The sections below show how this contributed in turn to larger-scale flaws in legal analyses requiring clearly-specified use of these terms—including the central question of discrimination.

iii. Judgment's Account of Relevance to Discrimination

I now address the relevance of the judgment's prominent discussions around choice, consent, autonomy or freedom (surrounded by confusion, as described) to the key question of: whether the legislation discriminated by prescribing its economic obligations for married spouses but not *de facto* spouses?

The justices who found no discrimination reasoned that the provisions were not discriminatory because they were applicable to anyone—to be accessed through the *choice* to marry.[144]

The justices who concluded that the provisions were discriminatory relied on the precedent in *Miron v Trudel,*[145] where the Supreme Court had observed that an unmarried spouse might *not* be "in practice . . . *free to choose*" to marry, and accepted that the legislation in that case, which applied only to married spouses, drew an arbitrary distinction with functionally equivalent

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144 See *ibid* at para 275.

145 *Miron v Trudel*, [1995] 2 SCR 418, 124 DLR (4th) 693 [*Miron*].

unmarried spouses, thus discriminating against the latter. In *Lola,* the opinions of Abella J, Deschamps J and McLachlin CJ approved[146] of *Miron*'s statement that*:*

> In theory, the individual is free to choose whether to marry or not to marry. In practice, however, the reality may be otherwise. The sanction of the union by the state through civil marriage cannot always be obtained. The law; the reluctance of one's partner to marry; financial, religious or social constraints—these factors and others commonly function to prevent partners who otherwise operate as a family unit from formally marrying. In short, marital status often lies beyond the individual's effective control.[147]

The question then arises: but an unmarried couple could *opt* to have the same obligations apply to them as applied to married couples under the legislation in *Lola* . . . did the obligations' inapplicability to them not result, then, from their *choice* not to do so, rather than from legislative exclusion?[148] As the reasoning went, having to "opt-in" placed on unmarried couples a differential burden to take "positive action"[149] as compared to married couples for whom the regime was mandatory and non-excludable.[150] And precedent in the case *Lavoie v Canada*[151] held that discrimination is not negated by the fact a person could have *chosen to* take action that would *avoid* the discriminatory effect:

> The fact that a person could avoid discrimination by modifying his or her behaviour does not negate the discriminatory effect. If it were otherwise, an employer who denied women employment in his factory on the ground that he did not wish to establish female changing facilities could contend that the real cause of the discriminatory effect is the woman's "choice" not to use men's changing facilities. The very act of forcing some people to make such a choice violates human dignity, and is therefore inherently

146 *Lola*, *supra* note 5 at paras 287, 396, 423.

147 *Miron*, *supra* note 145 at para 153.

148 *Lola*, *supra* note 5 at para 263.

149 *Ibid* at para 366.

150 *Ibid* at para 358.

151 2002 SCC 23.

> discriminatory. The law of discrimination thus far has not required applicants to demonstrate that they could not have avoided the discriminatory effect in order to establish a denial of equality under s.15(1).[152]

This describes the judgment's account of the relevance of choice to discrimination. I now show the significant problems with it.

iv. Problems with this Account

a. What is the Choice of a Couple Who Disagree?

The first problem with this account is how to determine the choice of a couple who disagree.

1. The Choice to Continue Living with a Partner Whose Choice Trumps One's Own?

As noted above, LeBel J and three fellow justices concluded there was no discrimination because the obligations were applicable to anyone, to be accessed through the choice to marry. Frequently, the LeBel opinion preserved the imported sloganistic usage of the terms (e.g. "couples who had not expressed their consent"[153]) as if the choice of a *couple* is always self-evident. This usage was echoed in the other opinions (e.g. "choice by the couple";[154] "choice and autonomy for couples"[155]). If both spouses agree, the choice of the couple is easily identified. The problem is—and it is the reason Eric and Lola ended up in court—what if they disagree?

With the sloganistic usage of choice, the LeBel opinion despite relying so much on what a couple chooses, did not realize its need to make clearer the basis upon which it assesses that. The basis can be distilled from the clouded statements quoted earlier:[156] If a *de facto* spouse who wishes to marry, but whose partner refuses,

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[152] *Ibid* at para 5.

[153] *Lola*, *supra* note 5 at para 215. For a rare exception, see para 257.

[154] *Ibid* at para 307 per Abella J.

[155] *Ibid* at para 442 per McLachlin CJ.

[156] See *supra* notes 141–143 and accompanying text.

chooses to continue living with the partner, *the spouse thereby acquiesces to the choice of the partner*. This resolves the disagreement, making the choice of the couple evident. Since access to the obligations depends on the choice to marry, the choice to continue living with a partner who refuses to marry is also a choice not to avail of the obligations.

Had that reasoning been clearer, evident also would have been a need to justify *why* the choice not to marry should trump the choice to marry with respect to accessing the obligations, so that choosing to continue living with a spouse who refuses to marry could be treated as acquiescence to the unavailability of the obligations. Of course the legislation required couples to marry in order to access the obligations. But the question then is whether the legislation discriminates in making a choice not to marry trump a choice to marry with respect to accessing the obligations. Next, I deal with the legislator's predicament in such situations.

2. A Default Choice?

The choice of a couple in situations where spouses disagree may be resolved through the use of "default rules."[157] A default position is assigned, changeable only by *consensus* of both spouses. The LeBel group seems to take for granted that the default position should be no obligations, but it is evident from the first row of Table 1[158] how controversial this question is. As LeBel J sees it, individuals start off not subject to the regime, a situation only changed by the choice to marry, which "radically alters each spouse's patrimonial rights."[159] The LeBel camp seems less to defer to this as Québec's policy than to suggest its inevitability, casting cohabitation not as a possible independent basis for spousal obligations but as an insufficiently explicit indication of a couple's choice to have such obligations *imposed* on them.[160] Conversely, for Abella J the default position should be that the

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157 See Richard Thaler & Cass Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (London: Penguin Press, 2009) at 225.

158 See §III-B, *above*.

159 *Lola*, *supra* note 5 at para 253.

160 *Ibid* at para 254.

protection of the obligations applies to cohabiting spouses, absent a consensus to exclude them.[161] Deschamps J and two fellow justices, would have the default for cohabiting spouses be some obligation of support, but no obligation in respect of the other economic interests at issue.[162] Only McLachlin CJC recognizes the intractability of the problem: that even using default rules to resolve the choice of a couple who disagree, a default must itself be chosen, knowing that the default will necessarily favour one spouse and disfavour the other. Accordingly, her view seems to be that either default would be reasonable—and justifiable under section 1 of the *Charter*—the choice therefore resting with the legislature. One wonders whether this perspective, most evident in the last paragraph of her reasons,[163] might have facilitated dialogue between the camps on either side, and diminished the extent to which those opinions talk past one another, had it been more explicit from the start.

The judgment's focus on couples' choice reflects the way the claim was structured—comparing the legislative treatment of unmarried couples and married couples on grounds of marital status, as successfully argued in *Miron*.[164] But in the *Lola* case context of a dispute rooted in couples' disagreement, the imported sloganistic use of *choice* encouraged a confounding focus on the choice of couples, distracting from the real substantive question of whether the Québec *legislature's choice of default rule* infringed the right to equality. That it would prima facie discriminate in a context of spouses who disagree follows from the above-noted recognition by McLachlin CJC that, in all events, the default rule would support one spouse's autonomy at the expense of the other's. The outcome of the claim then depends on whether the infringement is justified under section 1 of the Charter. This puts the focus on the aim *chosen* by the legislator, discussed next.

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161 *Ibid* at para 376.

162 *Ibid* at para 408.

163 *Ibid* at para 449.

164 See §IV-B-iii, *below*, for further discussion.

3. The Choice of Legislative Object

At the time of *Lola*, legislative purpose was central to the justification inquiry under section 1, including at the decisive *minimal impairment* step—asking whether a right was impaired as little as reasonably possible in pursuing the legislative object.[165] The choice most important to the outcome of the claim in *Lola* was therefore neither the choice of the couple, nor the choice of default rule itself, but *the choice of legislative object* in relation to which a chosen default rule might or might not be justifiable as a minimal impairment.

With construction of the legislative purpose thus being so pivotal to the outcome in *Lola*, it should have been the subject of rigorous analysis. However, looking at the principal opinions: LeBel J's discussion of it conflated purpose with content and effects;[166] meanwhile, Abella J canvassed many sources, but this included several of questionable authority and unknown weight (e.g. law commission reports and cases from outside jurisdictions figured prominently).[167] Not surprisingly, the result was disparate conclusions among the various opinions: LeBel J and McLachlin CJC saw the object as couples' autonomy to choose the spousal obligations regime they prefer.[168] Abella J ambiguously accepted this on one hand, but also argued extensively to the contrary that the objective was to protect vulnerable spouses.[169] Deschamps J construed the aim of some of the provisions as autonomist and some as protective.[170] The superficial analysis of the legislative purpose is significant, as the 5:4 outcome rested on a subtle distinction: McLachlin CJC rejected suggestions by Abella and

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165 See *R v Oakes*, [1986] 1 SCR 103 at para 70, [1986] SCJ No 7; *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at paras 54–55, .

166 *Lola*, *supra* note 5. LeBel J having found no discrimination, LeBel J did not consider s 1. However, it was also necessary to construe the purpose as to whether the legislative purpose was itself discriminatory).

167 *Ibid*, Abella J, dissenting.

168 *Ibid* at paras 254–57, LeBel J; *ibid* at paras 413, 435–36, 442, McLachlin CJC.

169 *Ibid* at para 358; see e.g. paras 283–84, 294ff.

170 *Ibid* at paras 386–92.

Deschamps JJ of other possible default rules the legislature could have chosen that might impair the right to equality less, because these would distort the legislative aim of not merely providing couples some autonomy but of maximizing their autonomy.[171]

As the discussion in this and the preceding two subsections explains, the judgment's confusion around the relevance of *choice* led to an unhelpful focus on the choice of couples who disagree,[172] rather than the more pivotal choices of a default rule and of a legislative object which might or might not justify it. Much of the judgment's lengthy and sprawling discussion of choice was therefore peripheral to choice's real relevance to discrimination and justification.

b. Is Miron Reducible to Lack of Choice Over Marital Status?

I now deal with a second problem in the judgment's account of the relevance of choice to discrimination: the assumption that the *Miron* precedent turned solely on lack of choice over marital status. As noted earlier,[173] the justices who found discrimination relied on the principle from *Miron* that it was discriminatory for a benefit available to spouses to be conditioned on marital status, which might lie outside a person's choice.[174]

However, in *Miron*, the benefit was from a third party: an insurance benefit.[175] Also, in *Miron*, although the couple disagreed on whether to marry, they agreed on wishing to access the benefit conditioned on marriage; indeed, the spouse was not a defendant but a co-plaintiff.[176] From the perspective of the ultimate substantive issue of the benefit, the distinction based on marital status was thus arbitrary.

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171 *Ibid* at paras 442–47.

172 See generally Danielle Pinard, "Au-delà de la distinction du fait et du droit en matière constitutionnelle: les postulats nécessaires" (2014) 48 RJTUM 1 (for an evidential perspective, concerned with approaching this as a question of fact).

173 See §IV-A-iii, *above*.

174 See e.g. *Lola*, *supra* note 5 at para 396.

175 *Miron*, *supra* note 145 at para CI.

176 *Ibid*.

In these respects, the context in *Lola* was critically different: The benefit of the provisions for one spouse was at a corresponding detriment to the partner, and the couple disagreed not only on whether to marry, but also on the substantive issue of subscribing to the provisions. A couple could opt for the obligations without marrying.[177] A spouse's choice not to marry was therefore not arbitrary with respect to the substantive question of that spouse's choice to subscribe to the obligations, but a reasonable proxy for it (subject to the noted issue of a differential burden of positive action to so opt).[178]

In that context, it was puzzling to treat the *Miron* precedent as applicable, as did the opinions which found discrimination in *Lola*. One could extend *Miron*, but as discussed above,[179] doing so might not alleviate the problem giving rise to the finding of discrimination—namely legislation which is based on the choice of a couple, notwithstanding that the couple may disagree. Flipping the default position of the legislation would recreate the same problem of making one spouse's choice determinative, and the other's irrelevant, as the choice of the couple. It is not readily apparent how a law based on the choice of a couple could, practically speaking, be devised that would not discriminate in that way.

Should such legislation therefore be prohibited? This would likely not have been welcomed by the claimant in *Lola*. Her request was to extend the scope of the provisions to include her, and "consequently" for the defendant to be ordered liable to pay benefits to her under them.[180] But the Supreme Court had said of

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177 See *Lola*, *supra* note 5 at para 263.

178 See §IV-A-iii, *above*.

179 See §IV-A-iv-a-1, *above*.

180 See *Lola Trial*, *supra* note 115(specifically, to order: "the defendant to make monthly support payments to her, for herself, in the net amount of $56,000, as well as a lump sum, payable in cash, in the amount of $50,000,000"; "the partition of the value of the family patrimony"; "the partition of the value of the legal matrimonial regime of the partnership of acquests"; and to "[reserve] the applicant's right to seek a compensatory allowance" at para 25).

Miron that it was "one of those exceptional cases where retroactively 'reading up' a statute may be justified."[181] And in *Miron*, the consent of the party responsible for providing the benefit was never a condition of access to it: it was the result of a standard contract term mandated by the *Insurance Act*.[182] Thus, extending the benefit to the claimant retroactively did not necessarily override the autonomy of the insurer, as even if it knew in advance that it would be liable for a claim, likely this could not have been avoided.

By contrast, in *Lola*, retroactively reading up the statute to include the claimant in order to alleviate the discriminatory effect of the legislation treating the defendant's choice as that of the couple would not only recreate the same problem in reverse, as mentioned, but also fail to give the defendant notice of the law at the time he chose to cohabit, as what the claimant's request would render the new trigger of liability. In *Nova Scotia v Walsh*, the Supreme Court had said "[t]he problem with that proposition. . . is that it eliminates an individual's freedom to decide whether to make such a commitment in the first place."[183] For the foregoing reasons, it is difficult to see how the *Lola* case context could be among the exceptional cases contemplated in *Miron* where retroactively reading up provisions might be justified.

The problem of subjecting a person to choice-conditioned liability for a set of choices they made (cohabitation, but not marriage), which at the time made, constituted liability-avoiding choices by retroactively making them liability-attaching choices could be alleviated by reading up the provisions only prospectively. But what if that caused adverse relationship consequences for couples who had been willing to agree to cohabit but not to subscribe to the state regime—potentially affecting many people, given the proportion of unmarried couples in Québec?[184] It is difficult to see the Court finding that appropriate

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181 *Miron*, *supra* note 145 at para 180.

182 *Ibid* at para 181.

183 2002 SCC 83 at para 57 [*Walsh*].

184 See text accompanying note 122.

as a judicial remedy, rather than leaving it to society's democratically-elected representatives to select as a constitutional cure. Also it would not aid the claimant in *Lola*, who was no longer cohabiting with the defendant.[185] Nor would a declaration of invalidity supply her helpful relief; and meanwhile it would disrupt the legal foundation which the province's married couples were reliant on.

As a result, one is left to wonder what remedy would have been constitutionally appropriate and at the same time able to provide the benefits the claimant filed the claim in the hope of obtaining. The discussion in this section suggests that it was problematic to apply the *Miron* principle in the *Lola* case context, as did the justices who found that the legislation discriminated; and even more problematic to assume that the remedy of retroactively extending the reach of the legislation, granted in *Miron* as "one of those exceptional cases where . . . [that] might be justified,"[186] would be appropriate in the *Lola* context where it would invert choice-conditioned legal consequences of past choices of the defendant**.** Absent that remedy, the claimant's interest in the case is not reached. Yet, surprisingly, it is on the basis of that assumed remedy that the claim was litigated for 11 years and that the discussion proceeds in all four opinions rendered by the Supreme Court.

In this way, the confusion caused by the incorporated sloganistic usage of *choice* led to the judgment's preoccupation with potential lack of choice over marital status, overlooking the relevance of other choices such as the obligations themselves, a conjugal relationship, and cohabitation, and whether/when those choices should be taken as included versus distinct. Such factors underpinned the principle and remedy in *Miron,* making these unsuitable to transplant to the very different factual and legal context of *Lola*.

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185 *Ibid* at para 5.

186 *Miron*, *supra* note 145 at para 190.

c. At What Time Does Choice Matter?

A further problem with the judgment's account of the relevance of *choice* to discrimination is that confusion produced by the term's sloganistic use caused the opinions to largely overlook the question of the *time* at which a choice is made, and the possibility of choices changing over time.

If legislation discriminates because a spouse's marital status might be beyond their choice, does that have to have always been the case? And if not, at what times would it count or not whether the spouse *was* able to make a choice that would determine their marital status—or indeed a choice enabling access to the obligations directly?

Perhaps the clearest way to demonstrate why the opinions' omission to grapple with this issue is problematic is to consider the closely-related question of at what time the choice would matter in the inverted scenario that Abella J argued would cure the discrimination: flipping the law's default position from unmarried spouses having to opt-in to instead having to opt-out.[187] Abella J considered that this would extend the benefit of the legislation to the claimant.[188] However, it is uncertain that it would. For instance, the record suggests the claimant first expressed to the defendant a desire to marry after she gave birth to the defendant's child in 1996, whereas they began cohabiting in January 1995.[189] They chose to cohabit in order "to find out whether their relationship, until then episodic, could evolve and become something stable",[190] but there were problems and by July they broke up. It was in seeing each other abroad that the child born in 1996 was conceived.[191] On these facts, it seems at least plausible that at the time they began cohabiting, they would have mutually agreed to opt-out of the marital regime, and that the claimant's wishes later changed as a result of becoming pregnant at a time when they

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187 *Ibid* at paras 360, 374, 379.

188 *Ibid* at para 375.

189 *Lola Trial*, *supra* note 115 at paras 11–13.

190 *Ibid* at para 10

191 *Ibid* at paras 10–12.

were not cohabiting. By contrast, years later at the time the claimant ended the relationship and filed her claim, they had cohabited for 7 years and had three children together.[192] This sequence illustrates how, for couples generally, the choice a spouse would make regarding the obligations might change over time. Legislation might delay the choice,[193] however the problem remains: if, earlier in a relationship of cohabitation, with the future for each spouse and the relationship unknown, a spouse chose to opt-out, does that choice govern the provisions' availability years later, even if the spouse's choice changes?

What if it changes due to factors "beyond the [spouse's] effective control,"[194] and becomes dictated by those factors as in *Miron*, although that had not been the case when the spouse indicated a choice previously?[195] This after all, is presented as the grounds for finding that the legislation is discriminatory, and a previous choice by the spouse at a different time in different circumstances would seem to fit easily into the sort of factors mentioned in *Miron* that could cause marital status to be beyond a spouse's control at the point of wishing to claim a spousal benefit.[196]

Or what if there develops dependence due for instance to childcare obligations, or vulnerability due for instance to acquired disability? Justice Abella seems keenly aware of how such potential life circumstances can impact a relationship and a spouse's need for *protection*.[197] However, it is unexplained whether and how factors such as these bear on the timing of the

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192 *Ibid* at paras 19–21.

193 See e.g. *M v H*, [1999] 2 SCR 3, [1999] SCJ No 23 (SCC) [*M v H*] (the Ontario regime for unmarried spouses kicked in after three years; on the other hand are jurisdictions that permit opt-outs even for married couples but only at the pre-nuptial phase).

194 *Miron, supra* note 145 at para 153.

195 Or vice versa: the original choice was the one dictated by factors outside the spouse's effective control.

196 *Miron*, *supra* note 145 at para 153.

197 See e.g. *Lola*, *supra* note 5 at paras 284, 349, 378.

choice referred to, that would be effective for purposes of whether the obligations apply.

In short, here again the imported sloganistic usage of *choice* sowed confusion in the judgment, with larger consequences: in this case through it being unclear what timing is determinative for choices made, or unable to be made due to being outside a spouse's effective control with respect to accessing the obligations. This again impaired the judgment's account of the relevance of choice to discrimination.

v. A Disappointing Analysis of Choice

Before the claim in *Lola* was filed,[198] and a decade before the final judgment in the matter, Leckey observed that "equality cases require a sophisticated analysis of choice."[199] As the preceding discussion shows, several dimensions of that were lacking in this case. Confusion resulting from the imprecise and inconsistent use of "choice" and associated key terms contributed to that.[200] This confusion was in turn a by-product of unintentional reproduction of the terms' sloganistic usage in political debate as framing effects or rhetorical tropes exerting non-rational influence in amplifying the relevant autonomy interest.[201]

B. Protection and Benefits

I now turn to a second overarching problem: the confusion caused by importing from politics the use of *protection* and *benefits* as rhetorical/framing labels for the legislation at issue.

i. Importance in the Judgment

Besides *choice* and related terms discussed in section A above, another set of key terms from *Lola* employed in a way that reflected their usage in political debate were those involved in

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198 *Lola Trial*, *supra* note 115 at para 21.

199 Leckey, "Chosen Discrimination", *supra* note 125 at 448.

200 See §IV-A-ii, *above*.

201 See §II-F, *above*.

characterizing the legislation, for example as a *protection* or a *benefit*. In the policy sphere, these terms are valuable as labels for legislation: words like *protection* and *benefit* suggest its desirability, without specifying or evaluating its operation or effects.[202] But in adjudication, where legislative characterizations have technical implications, the same usage may confound legal analyses. In this case, as will be detailed below, the singularly positive *spin* that these terms put on the legislation had a misleading effect on the legal reasoning in the judgment, and obscured contrasting simultaneous effects of the legislation, as well as its differential impact on different members of the group alleged to be disadvantaged by exclusion from it.

The confusing effect of incorporating political usage of such terms as frames or tropes had especially significant consequences in *Lola*; a complex equality claim. Equality claims rely on legislative characterization in assessing an alleged discriminatory purpose or effect. As part of that assessment, legislative characterization further influences the comparisons made and precedents looked to in judging possible discrimination. If there is a finding of prima facie discrimination, the way the legislation has been characterized is again influential via the role of legislative purpose and effects in answering whether a law is saved under section 1 of the *Charter* as proportionate. In all these aspects of an equality claim like *Lola*, labels incorporated from politics which are technically inaccurate or misleading, and hence mischaracterize the legislation, confound the goal of cogent legal analysis.

ii. PROTECTION AND RISK

One of the key words used most prominently in characterizing the legislation in *Lola* was *protection*, as evident from the frequency of the term's use, shown in Table 2 below.[203]

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[202] See *ibid*.

[203] *Lola, supra* note 5 (the table, meant only to convey the overall frequency of the term in the judgment, and proportionally greater frequency in the dissenting opinions, lists all [including unrelated] uses of the term, to avoid potential dispute over which uses characterize the legislation. On my reading,

Table 2: *Frequency of "protection" in Lola opinions*

	LeBel J. (Fish, Rothstein and MoldaverJJ. concurring)	Abella J.	Deschamps J. (Cromwell and Karakatsanis JJ. concurring)	McLachlin C.J.	Total
	Judgment	Dissenting in Result	Dissenting in Part in Result	Concurring in Result	All Opinions
	282 Paragraphs	99 Paragraphs	28 Paragraphs	41 Paragraphs	449 Paragraphs
"Protection" (and its derivatives)	25	65	28	21	139

The term is used most often in the dissenting opinions of Justices Abella and (proportionally to its length) Deschamps. Abella J's consistent reliance on the term, including six times in the first three paragraphs, mirrors its usage in policy debate.[204] Spousal support, division of property, use of the family home and household effects, she says, are meant to protect "the economically dependent—and therefore vulnerable—spouse [who] is faced with the same disadvantages when the union is dissolved."[205] Deschamps J likewise reproduces the policy debate in speaking of "protection",[206] "protective measures",[207] and a "protected form of union."[208] She too uses the term in the sense of "social protections"[209] there for "protecting . . . spouses . . . in need".[210] At

LeBel J's only reference to "protection" as a legislative characterization is to respond to that usage by Abella J at para 257).

[204] See Part II-F, *above*.

[205] See *Lola*, *supra* note 5 at para 284.

[206] *Ibid* at para 383.

[207] *Ibid* at para 382.

[208] *Ibid* at para 404.

[209] *Ibid* at para 385.

times, she appears to agree with Abella J that this applies to all the provisions at issue.[211] However, she also argues that the provisions are not a single package, and reflect rather a "variety of objectives being pursued and means that have been adopted".[212] In these instances, Justice Deschamps distinguishes support as the measure addressing "needs of the vulnerable spouse."[213] Either way, where the particular meaning of *protection* is specified, it is evident that Abella and Deschamps JJ incorporate its use in policy debate as protection against economic dislocation and the vulnerability of dependent spouses upon separation.[214]

In providing economically vulnerable spouses protection against economic dislocation in case of separation, measures of spousal support (and for Abella J the other provisions at issue) expose the partner spouse to a correlative risk of economic liability in that event. The protection afforded by the legislation is therefore only half of its effect and applies to only half of a couple, while the other half of its effect for the other half of the couple is rather the creation of a risk. To characterize such legislation as a *protection* is an incomplete and thus inaccurate account. Needless to say, the dissenting justices understand this as a general legal matter, and did not use the term *protection* with an intent to mislead. However, by incorporating that label from the policy debates, where it served as a frame or trope exerting non-rational influence,[215] the result was relying as a key term in adjudication on a label which mischaracterizes the legislation. Relying on those terms to characterize the legislation risked distorting larger legal analyses in which the legislative characterization is an important factor. In that regard, it is notable that the two opinions that relied on that label are also those that found the legislation to be

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210 *Ibid* at para 386.

211 *Ibid* at para 382.

212 *Ibid* at paras 382–83, 392.

213 *Ibid* at para 392.

214 See *ibid* at paras 284, 291, 296–97, 305, 309, 349, 356, 358, 360, 365, 372, 376, 378–79, 383, 392, 396, 399, 401–02, 404.

215 See §II-F, *above*.

discriminatory and unjustifiable (disproportionate). Indeed, the Deschamps group's proposed disposition regarding the various disputed provisions precisely tracks which measures (support) the opinion relied on that characterization for and which it did not. Terms which describe more accurately, the mixed character of the legislation were available were it not for the *protection* label—which dominated policy debate of the issue—winding up incorporated into the legal reasoning. A more value-neutral term—the LeBel J opinion just used the term *regime* for instance—might have reduced the risk of a value-laden term like *protection* potentially influencing core analyses of the equality claim.[216]

A second problem with the *Lola* dissents' incorporation of *protection* as a key term was that it led them to rely on the Supreme Court's decision in *M v H*[217] as an applicable precedent in finding a violation of the right to equality.[218] *M v H* was a case concerning legislation providing for spousal support for unmarried spouses in Ontario that discriminated in excluding same-sex couples.[219] Under the *M v H* legislation,[220] the criteria for support were that a couple "cohabited . . . in a conjugal relationship: (a) continuously for a period of not less than three years, or (b) in a relationship of some permanence, if they are the natural or adoptive parents of a child."[221] The law in *M v H* was thus applicable based on cohabitation, and provided for a means of social protection against economic dislocation upon separation, funded by the couple itself. Couples who either did not want protection against that risk, or protection by that means, could opt-out.[222] The purpose of this law could be said to be protective,

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[216] See generally *Lola, supra* note 5, Deschamps J, dissenting in part.

[217] *Supra* note 193.

[218] See *Lola*, *supra* note 5 at paras 315, 353, 364–67, Abella J*; Ibid* at para 395, Deschamps J.

[219] See *M v H*, *supra* note 193 at para 69.

[220] See *Family Law Act*, RSO 1990, c F.3.

[221] See *ibid*, s 29.

[222] *M v H*, *supra* note 193 at para 69.

in that way against that risk, in that it (presumptively) applied based on social facts measuring the relationship. This scheme matches the account by Abella J and (regarding support) by Deschamps J of the legislation in *Lola* as a *protection*: protecting vulnerable spouses against economic dislocation in the event of separation.[223]

However, the legislation in *Lola* had crucial differences from that in *M v H*. Preoccupation with the "protection" aspect, selectively emphasized by that label incorporated from policy debate and relied on in characterizing the legislation, led to those differences being overlooked. Hence, the provisions of the *Civil Code of Québec* at issue in *Lola* were inaccurately perceived as synonymous in nature with the Ontario provision in *M v H*.[224] This failed to appreciate the different basis upon which social protection of vulnerable spouses in case of separation was available under Québec law, and how the provisions at issue in *Lola* were designed in a way that served to protect against a related countervailing risk.

For starters, interspousal protection from economic dislocation in case of separation could only be obtained by a couple opting-in to it: either directly or by registering a conjugal union with the state. In that sense, although Abella J could say that the "protections are not contractual by nature", it was not improper of LeBel J to describe them as contractual in origin, considering that access to them was only by mutual consent, in one of the prescribed forms.[225] Abella J counters that this cannot be the case, as the terms of the supposed contract have been decided by the state "either presumptively or mandatorily".[226] However, that is typical of a civilian legal system's approach to contracts of common types,[227] including in Québec, with its civilian private law.[228] Apart from on support, Deschamps J acknowledges a

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223 *Lola*, *supra* note 5 at paras 382, 383, 404.

224 Text to note 218. As mentioned, for Deschamps J, this was limited to support.

225 *Lola*, *supra* note 5 at para 283

226 *Ibid*. See also expanded argument at paras 307–09.

227 *CCQ*, *supra* note 121, Title Two - Nominate Contracts.

228 See *Quebec Act* (UK), 14 Geo III, c 83, reprinted in RSC 1985, App II, No 2.

different basis than the Ontarian *M v H* legislation, noting that "[s]everal [measures] can easily be linked to the autonomist movement," and others' "purpose is to ensure autonomy and fairness for couples who have been able to, or wanted to, accumulate property."[229] Abella J, in the proportionality analysis near the end of her opinion, herself accepts "preserving freedom of choice", rather than the social protection of vulnerable spouses, as the objective of Québec's legislation.[230] This might have been seen as necessary at that stage in that, if it were maintained that the purpose was social protection of vulnerable spouses upon separation, it would follow at the next step of proportionality analysis that the Québec regime's consent requirement was rationally unconnected to the law's purpose—a controversial conclusion, to be sure.[231] Abella J's avoidance of that conclusion highlights again the crucial difference in basis between the legislative provisions at issue in *Lola* versus in *M v H*, where the criteria for support (lengthy cohabitation, relationship of some permanence, coparents of a child) are easily and directly connected to a purpose of social protection upon separation.

Relatedly, it is notable that the legislation in *Lola* required that couples execute a legal formality (registration of their conjugal union, conclusion of a cohabitation agreement, etc.) before the provisions would apply to them. This distinguishes them from the *M v H* law, whose application as mentioned, depended on social facts measuring the relationship. Characterizing both laws as "protections" against the economic dislocation of vulnerable spouses in case of separation makes the Québec legislation's formal requirement seem like a technicality inappropriately permitted to defeat its purpose. This makes it appear constitutionally defective, as Justice Abella describes, by denying *de facto* couples "access to fundamental legal protections simply because their spousal relationship lacks the formality", as in *M v H* it was clear one should "look at the content of the relationship's

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229 *Lola*, *supra* note 5 at paras 391–92.

230 *Ibid* at para 358.

231 See *R v Oakes*, *supra* note 165 at para 70.

social package, not at how it is wrapped."[232] However, as Québec law did not provide that protection based on the social "content" of relationships, but on a contractual basis as discussed above, the required formality is not formality for its own sake that pointlessly restricts protection to a narrower set of relationships than intended. To the contrary, consistent with the protection's non-application except by virtue of mutual consent, the formal requirement reflects care being taken to impose the obligations on couples only if they deliberately take a step whose formality signals that it carries important legal consequences. As the Minister of Justice explained, most of the input was that the state should "respect the desire of unmarried couples to distinguish their choice of lifestyle from marriage. We therefore considered it appropriate not to interfere with this freely chosen lifestyle; there is no need to institutionalize or regulate it."[233] McLachlin CJ further summarized: "The legislator sought to accommodate the social rejection of the traditional control by the state and the Church over intimate relationships."[234] This included not institutionalizing or regulating socioeconomic protections.[235] Such protection would be left to couples to opt for, if desired.[236]

These legislative arrangements therefore evince a concern to let unmarried couples live together free from—among other control or regulation—economic liability between them in the event of separation (unless they formally communicated their desire to be included in this, as mentioned). Québec's legislation thus operated to protect couples—within a broader intent to protect them from institutionalized regulation of their intimate relationship—against a risk related to and countervailing that of economic disadvantage upon the breakdown of a relationship, namely the risk of corresponding liability. As LeBel J describes, the provisions at issue in *Lola* enabled couples to "avoid entering into

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232 See *Lola*, *supra* note 5 at para 285.

233 *Ibid* at para 108 (translation by Lebel J).

234 See *ibid* at para 436.

235 See *ibid* at para 112.

236 See *ibid* at para 114.

[the legislated marriage] regime and consequently assuming such obligations as that of support or the partition of the family patrimony."[237] Those liabilities were significant. Their application "radically alters each spouse's patrimonial rights".[238] If it was a legitimate legislative objective to avoid the state dictating the terms of conjugal relationships, including imposing the liabilities contained in the provisions at issue—as all of the opinions in the case accepted it was[239]—then the legislation should be recognized as providing protection against that risk. This further distinguishes it from the scheme in *M v H*. Reflecting the term's usage in policy debate, however, the judgment reproduced language of "protection" or "legal protection" standing alone,[240] or in contrast to LeBel J's recognition of a contractual element to the Québec regime.[241] Such language distorted perception of the legislation by implying that economic dislocation of vulnerable spouses in case of separation was the only relevant risk it might protect against. This obscured protections against countervailing risks that the scheme was clearly designed in contemplation of.[242]

With this in sight, the nature of the legislation in *Lola* no longer appears synonymous with that in *M v H*. Rather, the schemes protect against opposing risks in contrasting ways. The law in *M v H* gives cohabiting spouses economic protection at a corresponding risk of economic liability to one another, subject to the ability to opt out if they wish to avoid imposition of that liability and decide their social protections independently of the state's conception of conjugal relationships. Conversely, the legislation in *Lola* protects cohabiting spouses from spousal liability at the risk of economic vulnerability beyond protections

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237 *Ibid* at para 261.

238 *Ibid* at para 253.

239 *Ibid at* paras 267 (LeBel J); 358 (Abella J); 394, 400 (Deschamps J); 435–37 (McLachlin CJ).

240 *Ibid* at paras 285, 289, 307–09, 316, 335, 340, 357–58, 373–77, 385, 405–07.

241 *Ibid* at para 283.

242 See the text to notes 233–238.

they have by other means,[243] subject to the ability to opt in if they do want protection against this on the same terms as state-registered unions. Instead of being a constitutionally defective version of Ontario's *M v H* law, Québec's legislation in *Lola* emerges as applying opposite presumptions and positive obligations on couples, reflecting a contrasting policy choice of how to address multiple countervailing risks.

For these reasons, the express reliance of the dissenting opinions in *Lola* on the *M v H* precedent[244] seems misplaced. Of concern more generally is the possible influence of the inaccurate use of the key term "protection", in the ways just discussed, on the ultimate conclusions regarding discrimination and its possible justification. The risk of the label's nonrational effect is perhaps enhanced in this context by the fact the term "protection" does not appear in the thirty-five impugned provisions of the *CCQ*, but the phrase "equal protection . . . of the law" is found in the heading and text of the right to equality that the dissents concluded was breached.[245] It is echoed too in the seminal Supreme Court precedent interpreting that right, which said "among those subject to a law, there must be accorded . . . an equality of benefit and protection".[246]

The foregoing discussion showed some potential impacts on larger legal assessments in *Lola* of mischaracterizing the legislation as an economic "protection", due to reproducing the term's use in political debate as a framing label meant to conjure a desirable one-dimensional image of it.

iii. "Benefits" and Burdens

Closely-related to the term "protection," another key term used to characterize the legislation in *Lola* was "benefit." The way this

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243 For example, via unjust enrichment claims, custom cohabitation agreements, and social insurance: *Lola*, *supra* note 5 at paras 365, 397.

244 See the text to note 218.

245 See text to note 44.

246 See *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at para 165, 56 DLR (4th) 1.

term was used in the judgment was likewise imported from political debate, where it served as a rhetorical or framing label for the legislation in overtly communicating value and putting a singularly salutary "spin" on its impact.[247] This usage too had a confounding influence on the reasoning in the case.

In legal usage, benefit legislation refers to social law, one of the types of legislation found within family law. Under social laws, the state provides benefits to families.[248] An example of legislation of this type is the Canada Child Benefit, a monthly payment from the federal government to aid families with the cost of raising children.[249] From the perspective of families, such provisions are "benefit" legislation in that their principal impact for the family is to provide a benefit. In legislation of this social law type, differential treatment between married and unmarried couples is readily perceived as discriminatory. As Dominique Goubau notes:

> In public and social law, recognition of conjugality outside of marriage . . . is now an accepted fact . . . . Accepting that an unmarried couple can, for example, enjoy just the same as married people the benefits of a public pension . . . is really about recognizing that individuals' private choices have nothing to do with their status in society.[250]

In *Lola*, all three opinions that used the term "benefit" to characterize the legislation concluded that it was discriminatory.[251] Yet, the case did not concern legislation of the social law type: It did not consist of the state providing a benefit, but rather spelled out socioeconomic incidents of marriage as a particular relationship recognized by the state. Although these prescriptions might operate to the socioeconomic benefit of a spouse, such benefit would arise as a corresponding burden on the partner spouse.[252] Legislative provisions operating in this way are

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247 See Part II-F, *above*.

248 See Leckey, "Developments", *supra* note 7 at 242.

249 *Income Tax Act*, RSC, 1985, c 1 (5th Supp), ss 122.6–122.64.

250 Goubau, *supra* note 97 at 156 [translated by author].

251 *Lola*, *supra* note 5 at paras 333, 373, 384–85, 390, 395, 423.

252 Crystallizing the protection and risk discussed in §IV-A-ii above.

not social law, but private law. In private law, like treatment of married and unmarried spouses is more controversial: Per Goubau, "in the context of considering whether to extend to unmarried spouses certain rights traditionally reserved to married spouses . . . it is crucial to avoid confusing, as happens too often" like treatment under "social law" versus under "private law".[253] How fundamental the distinction between private law and public (including social) law is may be debated.[254] But the position of the spouses vis-à-vis the state and each other diverges in private law from what is typically referred to as benefit legislation: Indeed, private law is depicted as a "horizontal" relation between individuals, unlike the "vertical" public law relation between state and individual. Imported from political debate, where it was useful as a rhetorical or framing label for the law, directly expressing its value and putting a positive "spin" on its impact,[255] the term benefit had a confounding influence on the judgment: conflicting with the conventional legal meaning of "benefit" legislation, the term mischaracterized the type of law at issue in *Lola*. Terming it "benefit" legislation placed it in the same boat as the legislation in *Miron,* which was of the social law type, unlike the private law provisions in *Lola*. This contributed to perceiving *Miron* as a more salient precedent than it actually was.[256] Overestimating the relevance of the *Miron* precedent meant simultaneously underestimating the relevance of the *Walsh* precedent[257]—which *did* involve the same type of law as in *Lola*: private law benefiting and burdening the spouses in equal but opposite measure. Misconstruing the authority of these precedents held significance to the opinions' conclusions on discrimination, as discrimination was found to exist in *Miron*, and not in *Walsh*.[258]

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253 Goubau, *supra* note 97 at 156 [translated by author].

254 See Langevin, *supra* note 98 at 697.

255 See §II-F, *above*.

256 Discussed in §IV-A-iv-b, *above*.

257 *Walsh*, *supra* note 183 at para 57.

258 *Ibid* at para 65.

Reflecting its political use as a device of non-rational influence, the imported use of the term "benefit" in *Lola* also distorted the effects of the challenged legislation by selectively referencing only the benefit for one spouse, while obscuring the correlative burden on the other spouse. If a "veil of ignorance"[259] concealed which spouse within a couple would become dependent and thus the beneficiary, and which bear a corresponding burden upon separation, the legislation would at least be a double-edged sword. But the Deschamps camp, which relied most on the term "benefit,"[260] along with Abella J, saw the "economically dependent" spouse within a couple as identifiable.[261] Dependence did not arise randomly, nor (usually) suddenly.[262] The legislation's contrasting effects in providing a benefit to the dependent spouse while imposing a burden on the partner spouse could and should then have been differentiated in the key terms used to summarize its effects. Its contrasting effects should have been mirrored by balanced terms to describe the legislation and avoid an incomplete and inaccurate account. For instance, instead of the term "benefit", LeBel J employed language accurately describing the legislation's multiple, balanced effects of creating both "rights and obligations".[263] When it came to crucial assessments such as whether the legislation was discriminatory, the singularly positive spin that the term "benefit" placed on the legislative effects focused attention only on the detrimental aspect of excluding *de facto* couples from them. Discussed in such terms, the seemingly obvious conclusion is that the exclusion is discriminatory. The unintentionally incorporated non-rational influence of the term "benefit" with regard to whether there was discrimination was enhanced by that account of the law's effect precisely matching what the equality right professes to guarantee: "equal *benefit* of

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[259] See John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971) at 136–42.

[260] *Lola*, *supra* note 5 at para 358.

[261] *Lola*, *supra* note 5 at paras 284–85, 294, 349, 378, 393, 399.

[262] See e.g. *Lola*, *supra* note 5 paras 393, 403 (Deschamps J); 296–300, 356 (Abella J).

[263] *Ibid* at paras 257, 268.

the law".[264] With this background, the fact that the three opinions that imported the term "benefit" to characterize the legislation are the same ones that found it discriminatory invites question again as to whether the nonrational influence of this label incorporated from political debate affected conclusions on this central legal issue. Whether by causing misperception of the type of law at issue and the relevance of opposing precedents, or through an imbalanced portrait of the legislation's effects that seems to cry out discrimination, the nonrational influence of this imported usage of the term "benefit" on the opinions that relied on it as a key term in their legal analysis cannot be known. However, that prospect is itself a concern recognized by legal systems.[265]

As with other key terms incorporated into the judgment from politics, discussed earlier, the problematic usage of the term "benefit" in *Lola* had other potential confounding consequences. Notably, mischaracterizing the challenged provisions as "benefit" legislation may have altered how the discrimination claim was evaluated. Casting the legislation as a "benefit" concentrated attention on the exclusion, for reasons "beyond the individual's effective control",[266] of *de facto* spouses who wished to opt in to the legislation, but could not due to their partner's refusal. Absent from that focus, firstly, was the situation of their partners, for whom, as discussed, the provisions were not a benefit, but a burden—and a burden not chosen as by registered couples (directly or in choosing to register their union) but imposed. Also absent from that focus was the position of *de facto* couples who by consensus did not wish to be subject to the provisions, and whose "exclusion" thus realized rather than frustrated their autonomy. The unrepresentative focus on the position of the claimant,[267] in a claim made on behalf of a group which included the other cohorts just noted whose positions were opposite that of the claimant in

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[264] *Charter*, *supra* note 44, s 15(1) [emphasis added].

[265] See *R v Sussex Justices, Ex parte McCarthy*, [1924] 1 KB 256, [1923] EWHC KB 1 (KB Div).

[266] *Miron*, *supra* note 145 at para 153.

[267] See e.g., Leckey, "Strange Bedfellows", *supra* note 7 (on the claimant being unrepresentative in other ways).

one or more ways, was only possible because the imported term "benefit" pushed out of sight subgroups for whom the legislation represented things other than a benefit. Generally, it resulted in overlooking how issues like those in *Lola* are, as Leckey observes, more complex than being "only a matter of individual rights."[268] Describing the legislation as a "benefit" obscured the "heterogeneity" of unmarried spouses as a group—a factor which eight members of the Court had concurred in *Walsh* it would be "wrong to ignore".[269] Regarding the overall group, it had been recognized in *Walsh* as "indeed clear from the evidence that some cohabitants have specifically chosen not to marry and not to take on the obligations ascribed to persons who choose that status."[270] And regarding couples who disagreed on whether to marry, *Walsh* had considered that "[t]o impose the regime . . . upon a person *who chooses not to marry* and to do so retroactively, would be as likely to create injustice as to resolve it."[271] In *Lola*, if these considerations had not shrunk from view as a result of labeling the legislation a "benefit," similar problems would have been more apparent. For example, reading up the legislation to include *de facto* couples would permit the claimant's inclusion, but among couples who disagree, also sweep in partners contrary to their will, plus impose on couples who by consensus did not want to be included a positive obligation to opt out to avoid this, which *Lavoie* was held to say was discriminatory.[272] It would then have been realized, as discussed earlier, the intractability of the problem when approached on the basis of a distinction between married and unmarried spouses.[273] That is, the root of the problem—and source of potential discrimination—complained of in *Lola* did not lie in the legislative distinction between married and unmarried couples, but in its non-distinction between couples unmarried by agreement and those unmarried due to disagreement.

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[268] Leckey, "Chosen Discrimination", *supra* note 125 at 459, n 48.

[269] *Walsh*, *supra* note 183 at para 39.

[270] *Ibid* at para 40.

[271] *Ibid* at para 14 [emphasis in original].

[272] See §IV-A-iii, *above*.

[273] See §IV-A-iv-a, *above*.

In other words, as discussed earlier (§A-iv-a), a legislative default rule as to the choice of a couple is unproblematic for couples who agree, but in the case of couples who disagree, has the effect of treating one spouse's choice as that of the couple, and the other spouse's choice as immaterial**.** If spouses are equal, and if the legislation treats either choice as valid when made by a couple, then deeming the choice of one spouse in such circumstances to be that of the couple raises concern. Such a dilemma cannot be resolved by the legislation flipping the default rule to put disagreeing couples in the same position as a group whose marital status is homogeneously chosen (assuming spouses in registered unions were not married/registered against their will). Instead, it might require legislation which allows each *de facto* spouse to register their preference and takes both into account in some way. At the point of considering alternatives, Justice Deschamps seemed to recognize this, in suggesting instead of opt-in or opt-out schemes, a possible obligation on the parties to negotiate a fair resolution, which she notes "would respect the autonomy of the parties while preventing abuse**.**"[274] Whatever alternative might be suitable and practical, the point is that a response to the problem complained of by the claimant in *Lola* would need to be addressed to the legislation's non-distinction of unmarried spouses whose marital status was the result of disagreement from those for whom the status was a consensus choice.

The problems detailed in this section illustrate the confounding effect on legal analysis in *Lola* of importing into adjudication the legislation's characterization in political debate as a "benefit", where that label was valuable as a frame or trope.

CONCLUSION

The above reflections on the reasons of the Supreme Court of Canada in *Eric v Lola* revealed several frailties. These were present in a major case with important social consequences, also being a high-profile case with implications for public confidence. With the

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[274] *Lola*, *supra* note 5 at para 399.

judgment being a legal precedent of the highest level, the problems in its reasoning also have broader and lasting significance.

These deficiencies in the *Lola* judgment served to illustrate the claim argued in this article: that when devices crafted in the political arena as means of non-rational influence subsequently enter adjudication, there is a risk of the legal reasoning process being undermined. Where the external usage of the terms as frames/tropes is not appreciated and attended to by the court, that risk will materialize with potentially profound effects on the case reasoning, as it did in confounding so much of the critical legal analyses in *Lola*.

Considering adjudication's distinct "burden of rationality not borne by any other form of social ordering" (including politics), a result like this is poignant.[275] To be sure, the "test of reason" is not always easy for courts to meet.[276] And that challenge is greatest in difficult cases like *Lola*—a *Charter* equality claim, and one with additional intricacies such as internal divisions within the claimant group as well as alleged discrimination by provisions of private law. The especially complex and subtle legal analysis required to deal with these challenges was rendered all but impossible by the confusing and distorting effect of frames/tropes imported from political debate and relied on as key terms in the legal reasoning process. Sloganistic use of "choice" and "autonomy", as well as labels like "protection" and "benefit" that distort the nature of the legislation when relied on to characterize it, confounded the analysis of crucial legal questions in assessing the claim.

Frames and tropes are but a couple examples of framing effects and rhetorical devices, from a broad array of them used in political speech, that—if they enter adjudication unrecognized and unattended to—carry risks of compromising the effort of the adjudicative process to meet its distinct burden of reasoned decisions and justification.

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[275] Fuller, *supra* note 9 at 366.

[276] *Ibid* at 366–67.

What can be done to reduce these risks? Some suggestions have been made elsewhere about what could be done at the point at which such non-rational forms of influence are created. Bix, for instance, suggests a reprioritization of our objectives: "Persuasion is not the only objective, or even the highest objective. We need to be more transparent in our moral and policy arguments, even (or especially) where this makes us less likely to persuade."[277] Daniel Kahneman and Amos Tversky call for ethical reflection: They note that "deliberate manipulation of framing" or exploitation of rhetoric is a "commonly used" instrument of control, which makes the decision to resort to this "an ethically significant act."[278] Cass Sunstein recommends greater thoughtfulness about the unintended consequences of expressive devices, not just the particular influence on a particular audience which is intended: He suggests that thought be given beyond the intended audience and immediate purpose of a statement to the full range of its possible listeners and plausible consequences.[279]

But this article focused on a different stage: the point at which a frame or rhetorical device which is already commonly-used in one arena of communication risks being unintentionally reproduced in another, with deleterious consequences that no one seeks—unless this usage of the language is recognized and taken into account in the process it is being imported into. Here, that risk arose in the use in politics of frames/tropes, then imported from political speech into adjudication. And that is not an isolated risk, because adjudication is a place where political speech indeed regularly reverberates. What, then, can courts do to prevent non-rational forms of influence "hidden" in discourse imported from politics (or some other external context which bears on a legal dispute) from confounding the legal reasoning and justification process?

The recourses available may be limited. However, one preliminary thought would be whether a useful analogy could be drawn to the plight of a witness under cross-examination?

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277 *Bix*, *supra* note 66 at 37.

278 Amos Tversky & Daniel Kahneman, "The framing of decisions and the psychology of choice" (1981) 211:4481 Science 453 at 458.

279 See Sunstein, *supra* note 57 at 2045.

Opposing lawyers frame the facts of a case to serve their client, craft leading questions, and exert pressure on the witness to go along with their desired answer. To counter this, counsel for the witness must anticipate this and prepare the witness to tacitly ask themself before answering such questions: whether a frame is being employed?; and if so, they should respond in their own words, rather than in the terms put to them by the opposing lawyer. Courts might counsel themselves to employ similar caution when incorporating discussion taken from politics or related policy debate. They may not be able to answer whether language which is common in that external discourse is being used as a frame or rhetorical device. The problem of the self-referentiality of social systems or of the culture-specificity of language means that the judge may not fully appreciate the intended usage of terminology found in an external discourse—including potentially as frames or tropes. However, the native character of communication also means that courts should at least be able to recognize whether or not familiar terms which are also being used externally are being used in the same sense the legal system recognizes. In *Lola*, investigating this might have revealed, as one example, that the usage being made of the term "benefit" served to mischaracterize the type of legislation at issue.

Continuing with this preliminary reflection on whether courts could find help in guarding against the risks discussed in this article by drawing on techniques from legal cross-examination, I note that counsel will prepare a witness for cross-examination by advising them that if they are uncertain of the meaning of a question as phrased, and are unable to get it rephrased, they should restate the question in their own words when answering it: "if I correctly understand the meaning of the question as X, my answer is Y". Here again, I wonder whether courts, where similarly uncertain about the potential significance of the way an issue is framed in an external discourse, would be best to reframe the issue in their own language before proceeding with the difficult and subtle task of legally analyzing the issue. In *Lola*, this might for example have led to avoiding ambiguous use of the word "choice". In each instance where the imported sloganistic use of that term was unclear, it would instead have been specified whether what was being referenced was the choice: of the couple or one spouse;

via consensus only or also via the effect of legal default rules; inclusive of or independent of the choice to cohabit in a given existing relationship; made at what time; and required in what form. In turn, this would have made it much more feasible to provide a sound analysis of the larger legal assessments called for by the claim.

Whether in ways like these, or in other ways, greater attention to the risk of importing external terminological usage devised as frames or tropes into adjudication and thus undermining the reasoned character of adjudicative decisions is needed in order to avoid disappointing exercises of that important function such as occurred in the *Lola* case. With political speech regularly (and these days, seemingly increasingly) entering adjudication, the danger of the legal reasoning process being distorted by framing effects and rhetorical devices embedded in the imported political discourse cannot be ignored. Special attention to these risks will give adjudication a better chance in its essential aspiration to "meet the test of reason."[280]

[280] See text accompanying note 17; Fuller, *supra* note 9 at 366–67.