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***“CRITICAL DIRECTIONS IN COMPARATIVE
FAMILY LAW: GENEALOGIES AND
CONTEMPORARY STUDIES OF
FAMILY LAW EXCEPTIONALISM”***

By

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JANET HALLEY & KERRY RITTICH*

**Critical Directions in Comparative Family Law:
Genealogies and Contemporary Studies of Family
Law Exceptionalism†**

INTRODUCTION TO THE SPECIAL ISSUE ON COMPARATIVE FAMILY LAW

This is an Introduction to a Special Issue of the American Journal of Comparative Law, edited by Janet Halley. The central theme of the Special Issue is “family law exceptionalism”: the myriad ways in which the family and its law are deemed, either descriptively or normatively, to be special. We argue that the nineteenth century emergence of Family Law as a distinct legal topic, influenced inter alia by Friedrich Carl von Savigny and carried around the world as part of the influence of German legal thought, was an intrinsic element of the rise of contract as the law of the market. Our comparative approach to this phenomenon in this volume is twofold. First, we think that colonial expansion brought with it the idea of the family/market, family-law/contract-law distinction, and that legal orders around the world emerged in which this distinction played some important role. This is the Genealogical Project, and it occupies essays collected here by Duncan Kennedy, Isabel Sierra Jaramillo, Philomila Tsoukala, and Lama Abu Odeh. Second, we suspend Family Law Exceptionalism in order to study the Economic Family. Historically and in the present context of globalized labor, we emphasize international, regional, and local law as transplanted, intersecting or nested background rule systems in which households form and provide social security, consume, and produce material and other goods. Tsoukala, Abu Odeh, Hila Shamir, Chantal Thomas, and Kerry Rittich provide

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essays exemplifying this research. The Special Issue begins with an essay by Fernanda Nicola mapping the comparative family law tradition and situating this volume on its critical branch.

INTRODUCTION

The central theme of this Special Issue is “family law exceptionalism” (FLE). We start with the observation that family and family law are often treated as occupying a unique and autonomous domain—as exceptional—and for a wide variety of reasons: they are unique because (unlike the market) they house intimate, private, emotional, and vulnerable relationships; they are unique because they preserve (against modernity and/or the global or foreign) the traditional, the national, the indigenous; they are unique because (as against the secular) they derive from sacred command. Sometimes family law is maintained as exceptional merely descriptively: the law curriculum, for instance, implicitly claims that family law is an autonomous domain of legal regulation with a distinctive set of rules, norms, and practices that sets it apart from other regulatory domains. But FLE is also packed with many normative projects: family law itself is saturated with claims that family law (or marriage, or “the family”) *should* be different because of the unique, special, crucial, affective, altruistic, social-ordering, and/or sacred nature of the relationships that it houses. Together, the descriptive and normative claims of FLE produce a vast range of disciplinary effects, running from the curriculum, the code, and case law to our understandings of sexuality, our habits of domestic architecture, and our modes of delivering social security.

Thus we take it as axiomatic that the “special” character of the family and its law in domestic legal systems and in the interactions between states, both in the past and today, is pregnant with ideological and material significances. Our goal in collecting the Articles presented here has been to articulate methods and produce work that makes the *comparison of those significances* possible.

FLE is both real and a fantasy, and this Special Issue is committed both to studying its emergence as well as global diffusion as a real fact about many legal orders and to dissolving it so that its ideological effects can be suspended and examined. It seems equally important to identify FLE where it is operative *and* to bring back together the elements of the world that it sets in opposition. The questions asked here include these: How is FLE deployed and to what effects? What regulatory possibilities, intellectual inquiries, and disciplinary effects does FLE produce and facilitate? What ones does it obscure or even block? What questions do and what questions do not get asked? In what ways does FLE discipline the ways in which we think about the family? The family as economic, the family as modern, the family as

secular: do we know as much about how to understand these modes of family and family law as we do about the family as altruistic, traditional, and/or sacred? How might we understand family law differently if we understood it as a crucial site of neo-liberal governance? Or as a form of commodified self governance? How might we teach it differently if we embedded it in legal domains—such as social security systems and contracts—from which it is typically divided or extruded?

This Introduction is a description of the methods, theoretical constructs, and provisional findings about the nature of FLE displayed in the essays collected here. The Introduction has two parts. Part I spells out the methods we have devised for de-exceptionalizing the family from the market, and shows how these methods suggest new approaches to comparative family law. The basic premise here is that, while the liberal legal order's market is patently and shamelessly distributive, market/family ideology masks the distributive functions of the household much as it masks those same functions in the market. Like most family law scholarship, work in Comparative Family Law is chronically complicit with this backgrounding, with the result that it persistently avoids noticing the ways in which large comparative projects, like efforts to codify local or customary law or to transplant legal rules or even entire legal systems, reallocate material resources and rearrange ideological investments and thereby produce concrete distributional outcomes.¹ Such work also risks underplaying the *constitutive* role of liberal legal reforms. Rather than merely transport, diffuse or consolidate legal norms, such reforms may have a deep impact on the lived family in ways that remake its structure, character, and preoccupations. We think we have one—not the only, but a good—method for avoiding these pitfalls. Part II turns the method of Part I on a large historical problem: the emergence of FLE—indeed, the emergence of *family law*—in colonial settings and in the West along with the rise of global capitalism. An urgent comparative project opens up here: can we re-understand the place of sex, sexuality, gender, reproduction, and the family not as peripheral but as central to the making of the modern global legal order and, indeed, of the global political economy itself?

I. FROM THE FAMILY TO THE HOUSEHOLD: COMPARATIVE LAW AND THE ECONOMIC FAMILY

Family law did not always exist; rather, it was invented.² This genealogical stance toward the idea of “family law” is one of the fea-

1. We thus continue the critique set forth in Duncan Kennedy, *Ideology in Comparative Law*, in CAMBRIDGE COMPANION TO COMPARATIVE LAW (forthcoming 2010).

2. Wolfram Müller-Freienfels, *The Emergence of Droit De Famille and Familienrecht in Continental Europe and the Introduction of Family Law in England*,

tures that distinguish the critical project set forth in this volume from much canonical comparative family law, which accepts the family as a transhistorical, natural human form.³ This predicate stabilizes the object of comparison in ways that disguise its legal, social, and ideological production. Instead, for us, it is axiomatic that, wherever “the family” and its law do gain distinct categorical status in the social and legal order, that distinctiveness is not only a reflection of reality but a constitutive and productive basis for it. We hypothesize that “the family” and its law are full of ideological and political meaning and do concrete distributional work not only by virtue of specific rules but also by the sheer force of their categorical existence.

Life at home was once lived in a household—an explicitly economic unit housing both human reproduction and material production as well as a complex array of legal relationships. In early to mid nineteenth-century Anglo-America, for instance, slaves, indentured servants, and contract servants were as much a part of the household as husbands and wives. Food was not only cooked and eaten in the household, it was *grown* there; thread was spun and cloth woven there; the geographical space of the household was traversed constantly by persons having legally determined, hierarchically arranged relations.

Market modernization involved the breakup of these large semi-public spaces and the segregation of their functions into the notorious separate spheres. Productive work for pay moved out of the home, both in social life and in legal taxonomy. The law of master and servant—formerly adjunct to the law of husband and wife and the law of parent and child—gradually dissolved. Slavery and indentured servitude were abolished, and the legal relations governing employment,

28:1 J. FAM. HISTORY 31, 32 (2003). Müller-Freienfels notes that Roman law knew no category “family law” and Bruce W. Frier and Thomas A.J. McGinn, who nevertheless use the term, collect sources clearly indicating that the Roman legal concept “*familia*” described the power of the paterfamilias over designated familial relatives and seamlessly included large sectors of what modern Roman law described as property law. BRUCE W. FRIER & THOMAS A.J. MCGINN, A CASEBOOK ON ROMAN FAMILY LAW, at 18-19 (2004). Family law was interpellated into Roman Law as a nineteenth-century novelty, and indeed our claim is that, as a category, it was dependent on its separation from the law of property and contract—the law of obligations in civilian terms—which became, with the rise of capitalism, paradigmatic of the market. See Janet Halley, *What is Family Law*, YALE J. OF LAW & HUM. (forthcoming 2010).

3. See, e.g., Max Rheinstein, *The Family and the Law*, in INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, VOL. IV, PERSONS AND FAMILY 3 (1973) (“The family is what sociologists call a primary group. It is a social institution which simply exists. Its structure is determined pre-legally.”); Mary Ann Glendon, *Introduction: Family Law in an Age of Turbulence*, in INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, VOL. IV, PERSONS AND FAMILY 3 (2007) (“When we refer to ‘the family’ here, it is with the understanding that families have always existed in a variety of forms.”). The original pagination of Rheinstein’s “The Family and the Law” is by columns rather than pages and is not serial; we follow it precisely rather than attempt any correction.

even where they retained vestiges of the master servant relationship,⁴ were transmuted and reframed within the law of contract. Only the husband and wife and the parent and child remained in the newly private, intimate, and affective space of the home. Whereas the dominant gender in the household had been male, the dominant gender in the family was female: patriarchy found a way to establish a distinctive feminine domain by segregating it from and subordinating it to the masculine market. And ever so gradually, the German law term for the legal relationships founding and governing the family—*family law (Familienrecht)*—took hold.⁵

Duncan Kennedy's contribution to this volume is a close reading of a formative text in the development of FLE: Friedrich Carl von Savigny's *System of the Modern Roman Law*.⁶ Savigny was expressly concerned to set family law against the law of obligations, and, as Kennedy reveals, he made this distinction both profound and rich with signification. What we will call the Savignian pattern pitched paired opposites against each other:

Family Law	Contract Law
Family Law as the Domain of Status	Contract Law as the Domain of Will
Family Law as Universal in the Sense that it is Fundamental Everywhere	Contract Law as Particular in the Sense that Every Contract is Unique
Family Law as Particular in the Sense that Each Nation's Family Law Expresses the Spirit of the People	Contract Law as Universal in the Sense that it is the Same Everywhere

The Savignian pattern posits a conceptual dependency of the family and contract on each other; they are *mutually constitutive*. As Kennedy also shows, Savigny's taxonomy had a long life; through the immense global influence of the German historical school in the mid-nineteenth century, it continued to influence the development of legal thought long after the legal world for which he wrote it had disappeared. And when modern capitalism picked up and resignified the Savignian pattern, it generated a crucial ordering role for the family in the rise of the colonial system and of its modern sequels.

All these shifts produced *the family* in a new sense of the term. It was not the intergenerational authoritarian structure of premodern

4. ALAN FOX, HISTORY AND HERITAGE: THE SOCIAL ORIGINS OF THE BRITISH INDUSTRIAL RELATIONS SYSTEM, 14-15 (1985); see generally, SIMON DEAKIN & FRANK WILKINSON, THE LAW OF THE LABOUR MARKET: INDUSTRIALIZATION, EMPLOYMENT, AND LEGAL EVOLUTION (2005).

5. For a brief discussion, see Rheinstein, *supra* note 3, at 2.

6. Duncan Kennedy, *Savigny's Family/Patrimony Distinction and its Place in the Global Genealogy of Classical Legal Thought*, 58 AM. J. COMP. L. 811 (2010) (giving an analysis of FRIEDRICH CARL VON SAVIGNY, SYSTEM OF THE MODERN ROMAN LAW (William Holloway trans., Hyperion Press 1979) (1867)).

patriarchy that Savigny actually had in mind. Instead it was an adaptation of the Savignian pattern—the law of family versus the law of contract—to a world in which the former housed a nuclear affective unit and the latter housed the individualist ethos of freedom of contract. In this newly intensified dualism, FLE got a new set of meanings: if contract was individualistic, market-driven, affectively cold, and free, the family was altruistic, morality-driven, affectively warm, and dutiful.⁷ By the early twentieth century, moreover, the ideology of the “social”—exemplified in this collection by Isabel Sierra Jaramillo’s Latin American Family Law treatises⁸—bestowed its cultural and legal sensibility on this newly depopulated, newly intensified family. As Michel Foucault argues in *Security, Territory, Population*, the family shifted from being the basic element of a larger, strictly analogous governmental form, to being a *tool of society*.⁹ The family would do for members of society everything that the market could not: take care of them in their mutual dependency, provide them with a haven in a heartless world, and keep the hearthfire of moral and spiritual life burning.

To deconstruct FLE in this context is to put the family and the market, family law and contract, back into contiguity. Our term here is the *economic family*. Those two words are not just a topic; we intend them as an etymological undoing. οἶκος in Attic Greek—the etymological root of our word “economy”—referred to the household, understood to be a site of production (including the production of human beings), of welfare provision, and of consumption. But over the course of the nineteenth century, the English term “economic” lost its reference to the household and became proper to the market; simultaneously, “the family” shed its reference to the lineage and the household and became a term for the nuclear, affective family made up of a husband, a wife, and their children.¹⁰ When we designate our topic the *economic family* we are attempting to undo this fissure—to put the husband, the wife, and the child back into the context of the economically functioning household in which they live.

Canonical works in comparative family law pervasively note the historical transformation of the household to the nuclear family in the move to modern industrialist social orders. Max Rheinstein, for example, introduced the monumental *International Encyclopedia of Comparative Law* volume on *Persons and the Family* by listing the

7. A classic theoretical resource for the study of the family/market distinction as an ideological artifact is Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

8. Isabel Jaramillo, *The Social Approach in Family Law: The Treatise Tradition in Latin America*, 58 AM. J. COMP. L. 843 (2010).

9. MICHEL FOUCAULT, *SECURITY, TERRITORY, POPULATION*, LECTURES AT THE COLLEGE DE FRANCE, 1977-1978, 203-05 (2004).

10. See Halley, *supra* note 2.

broader set of household relations of which it was originally a part and, in so doing, brought the historic economic function of the household to light.¹¹ But we think that the story of supercession—the idea that the economic character of the family disappeared with the transition to its nuclear, bourgeois, affective form—is an ideological effect that can and should be resisted. We seek a return, therefore, to the idea that our object of study is the *household*.

Working from a definition of the modern household developed by neo-Marxist World Systems theorists Immanuel Wallerstein and Joan Smith¹²—one that is almost uncannily similar to the definition proposed for World Bank policymakers in the Bank's *Engendering Development* report¹³—we consider a “household” to be a human association bounded through social negotiation and aimed at securing human reproduction, including reproduction from day to day of its members as well as the production of new human beings. In liberal economic orders, it is an important source of social security. In modern capitalism, it is a crucial site of consumption. It may be either larger or smaller than the legally recognized family, may include non-family members, and may be made up by people with no recognized family relationship to each other. All household members may live in the same residence or they may not. Households pool income and labor resources in that they allocate work responsibilities and income streams among household members. But they need not actually commit all their labor to the household or merge all their assets; as the *Engendering Development* report notes, household members may maintain separate property.¹⁴ Wallerstein and Smith helpfully add that households may collect income for internal allocation not merely as wages, but through market sales of goods or services, rent, transfer (gifts, for instance), and subsistence, which they define not as labor-for-survival but as the much broader category of self-help labor.¹⁵ Their claim that every member contributes income makes sense if you see a child earning money for his own use by providing services to neighbors as a household's sale of services, and a child cleaning up his own room (at last!) as producing subsistence income for the household. Wallerstein and Smith usefully see a wage earner's income as pooled, moreover, even if that household member spends some of it reproducing him- or herself.

11. Rheinstein, *supra* note 3, at 1-2.

12. Immanuel Wallerstein & Joan Smith, *Households as an Institution of the World-Economy*, in *CREATING AND TRANSFORMING HOUSEHOLDS: THE CONSTRAINTS OF THE WORLD ECONOMY*, at 3, 7, 11, 13 (Immanuel Wallerstein & Joan Smith eds., 1992).

13. WORLD BANK, *ENGENDERING DEVELOPMENT: THROUGH GENDER EQUALITY IN RIGHTS, RESOURCES, AND VOICE* 150-51 (2001).

14. *Id.*

15. Wallerstein & Smith, *Households as an Institution of the World-Economy*, *supra* note 12, at 7.

Any one person may be a member of more than one household. The polygamous husband and the live-in nanny can be examples, but so can the child living in a university dormitory where students form some sort of collective life involving economic dependency but return home for vacations. Defining the outer boundary of a household is ultimately arbitrary—does it include the grandfather who occasionally makes spontaneous gifts to his adult child for the support of his grandchildren, or the employer who provides health insurance for a working spouse/parent and his legal family, for instance? For us, the household is a heuristic category, not a natural kind.

Above all, the household is economic both in the sense that it has an internal economy that can be studied, and in the sense that it is continuous with the market economy—including the informal economy, as Chantal Thomas's contribution to this Special Issue suggests¹⁶—in which it is inextricably embedded and with which it engages in myriad dynamic transactions.

Critical methodological insights for unpacking both the internal household economy and its relation to the market can be drawn from scholarship that models family relations and the household as zones of negotiation, zones in which conflicts of interest are just as likely as altruism, merger, and selfless cooperation.¹⁷ Here, we are particularly interested in the role played by legal rules in structuring the bargaining that takes place between the parties as well as creating incentives for, and even coercing, participation in market activity.¹⁸

Our warrant for this move is Lewis Kornhauser and Robert Mnookin's classic article "Bargaining in the Shadow of the Law."¹⁹ Kornhauser and Mnookin put their frame around the divorcing couple and asked how the rules governing *litigated* divorce influence the far more common phenomenon, the *settled* divorce. The answer lay for them in theories of bargaining: conflicting and converging interests, risk appetites and aversions, bargaining strategies, the foreseeability of litigation outcomes, and the like—all of these sub in for rule application as the way to understand how the legal rules influence actual settlements. So, the next move is to lift that frame and to put it down to enclose the ongoing marriage. Expand the legal

16. Chantal Thomas, *The Economic Family in a Global Context: A Case Study of Migrant Domestic Workers in Egypt*, 58 AM. J. COMP. L. 987 (2010).

17. Bina Agarwal, 'Bargaining' and Gender Relations: Within and Beyond the Household, 3 FEMINIST ECONOMICS 1(1997); Amartya K. Sen, *Gender and Cooperative Conflicts*, in PERSISTENT INEQUALITIES: WOMEN AND WORLD DEVELOPMENT 123 (Irene Tinker ed., 1990).

18. Olsen, *supra* note 7; Mary Joe Frug, A Postmodern Feminist Legal Manifesto (An Unfinished Draft), 105 HARV. L. REV. 1045 (1991-92); KERRY RITTICH, *The Gender of Restructuring*, in RECHARACTERIZING RESTRUCTURING: LAW, GENDER AND DISTRIBUTION IN MARKET REFORM, 173 (2002); Philomila Tsoukala, *Gary Becker, Legal Feminism, and the Costs of Moralizing Care*, 16 COLUM. J. GENDER & L. 357 (2007).

19. Lewis Kornhauser & Robert Mnookin, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 954 (1979).

rules to include not only those governing breakup but those that would apply if one or both parties decided that divorce was too costly and that they should block the split-up and keep the marriage going. For modeling purposes at least, the bargaining endowments that family members derive from the legal rules (and many other sources as well) affect large outcomes—marriage or divorce; deciding how much to invest in the education of children; tolerating domestic violence or deciding to escape it—and small ones, like who will take out the garbage.

The move we just made—from the law of divorce proper to the *background rules* that give divorce negotiations much of their meaning—is borrowed from another classic, Robert Hale’s “Coercion and Distribution in a Supposedly Noncoercive State.”²⁰ Very early in our work, we adopted Hale’s article as canonical, and reimagined it. For Hale, “freedom of contract” was in the foreground and was claimed by *laissez faire* economists to fully explain the laborer’s wage, but Hale argued that the background rules of property provided the not-hidden-but-ignored nexus of bargaining endowments in which the property owner and the propertyless man actually formed or failed to form a labor contract. The agreed upon wage, if there was an agreement, was subtly, pervasively coerced on both sides (though differently) by the law of property. For us, the foreground rules of family law (marriage, divorce, the parent/child relationship) were of course important for studying how families and households would come to important distributive decisions; but we knew that these rules had been artificially segregated from other rules, lying in the background, that could, and often did, play an equally important distributive role in particular settings. We devised a terminology to capture our sense that a series of legal backgrounds would, in various contexts, command the family law scholar’s attention: Family Law 1, 2, 3, and 4.

Family Law 1—FL1—is what you will find in a modern family law code, course, bar exam, or casebook. It comprises marriage and its alternatives: divorce, parental status, and parental rights and duties; in some countries it includes inheritance and in others, for interesting reasons, it does not. But if you wanted to understand how law contributes to the ways in which actual family and household life is lead by actual people, you would never stop there. You would immediately look for the explicit family-targeted provisions peppered throughout substantive legal regimes that seem to have no primary commitment to maintaining the distinctiveness of the family—regimes ranging from tax law to immigration law to bankruptcy law. We can call that Family Law 2, or FL2. In the still-deeper back-

20. Robert Hale, *Coercion and Distribution in a Supposedly Noncoercive State*, 38 *POLITICAL SCIENCE QUARTERLY* 470 (1923).

ground would then be Family Law 3—FL3—the myriad legal regimes that contribute structurally but silently to the ways in which family life is lived and the household structured, sometimes intentionally, sometimes in ways we could describe as functionally rational, sometimes in the mode of disparate impact or sheer accident or even perversely. For simple examples of FL3, imagine occupancy limits in landlord/tenant law that give more or less protection to incumbents; employment rules that permit dismissal on the part of the employer “at will” or, by contrast, require employers to give notice to employees who are dismissed without cause; rules that exclude household employees from the protective legislation governing workplaces or that craft special regimes governing such employees. Finally, we take it as given that any probing legal analysis of the family or household, and certainly one that attempts to track the effects of legal rules on the bargaining endowments of different household members, needs to attend to a wide range of informal norms, as they may substantially alter the impact of FL1, 2, and 3 and, in some cases, effectively “govern” the household. While their status as *law* is a live question for us—as it has been for comparatists and legal anthropologists at various times²¹—we have no doubt that these norms belong somewhere on the map and, at least for some purposes, we think of them as Family Law 4 (FL4).

To exemplify briefly: family law casebooks typically make no mention of the welfare regime *as* family law (it’s not FL1); nevertheless welfare law often turns directly on the statuses of husband, wife, parent, and child (FL2). Meanwhile, the neoliberal/neoconservative turn in welfare law—a development widely endorsed, indeed promoted, by international financial and economic institutions,²² exemplified in the United States by the replacement of Aid to Families with Dependent Children (AFDC)²³ with the much more restrictive and disciplinary Temporary Assistance to Needy Families (TANF),²⁴ and even visible in the increasingly popular “conditional”

21. See, e.g., Rheinstein, *supra* note 3, at 6.

22. Organisation for Economic Cooperation and Development, *OECD Jobs Study – Evidence and Explanations. Part I: Labour Market Trends and Underlying Forces of Change; Part II: The Adjustment Potential of the Labour Market* (1994).

23. Social Security Act of 1935, tit. IV, ch. 531, §§ 401–406, 49 Stat. 620, 627 (repealed and replaced by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105, 2110 (codified at 42 U.S.C. §§ 601–617 (2006))).

24. Temporary Aid to Needy Families (TANF) is part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, tit. I, Pub.L. 104-193, §§ 101–116, 110 Stat. 2105, 2110–13 (1996) (codified at 42 U.S.C. §§ 601–617 (2006)). A key element of TANF is a lifetime limit of five years or sixty months on the amount of time that a family with an adult can receive federally funded assistance. 42 U.S.C. §§ 601-617 (2006).

cash transfers to families in developing countries²⁵—creates pervasive incentives to seek economic security through employment or interfamilial dependency but in any event *not* through social transfers provided by the state.

It is important here to acknowledge that significant parts of the legal order in which family life is worked out are designed and enforced by non-state entities. For instance, employers produce many family-related rules. Some of these are mandated by the state (e.g., rules allocating pension proceeds to surviving and divorced spouses); but others are either negotiated with workers' representatives, adopted voluntarily, or maintained under the force of widespread custom. Examples of the latter in the United States today would include "work/life balance" policies and dependent-care entitlements that exceed statutory minima. At some point these regulatory elements stop looking like law, but it is helpful, we think, to consider whether they constitute part of FL3 or even FL4 before dismissing them from scholarly attention.

Finally, we find it useful to recall the general points, derived from Wesley Hohfeld, that legal rules establish "jural relations," and that the absence of a right (a "no-right") distributes bargaining power just as decisively as the presence of one.²⁶

There is a lot of FL2—and FL3 and FL4 are theoretically limitless. Here are some examples of FL2 from Anglo-American law:

Contract Law	Infant's incapacity to contract Spousal duty to pay third-party suppliers of necessities
Property Law	Alienability (or not) of personal or joint property to non-family members Inalienability of real property via tenancy by the entirety
Employment/Labor Law	Right/no-right to paid or unpaid dependent-care leave
Pension Law	Survivors' entitlements
Welfare law	Welfare entitlements and social transfers that depend on total household income versus individual income
Tax law	Joint filing and all its related rules Inheritance tax
Citizenship and Immigration Law	Lex soli/jus sanguinis Family reunification rights/no-rights of citizens and legal immigrants

25. Maxine Molyneux, *Mothers at the Service of the New Poverty Agenda: Progresal Oportunidades, Mexico's Conditional Transfer Programme*, 40 SOC. POL. & ADMIN. 425 (2006); Childhood Poverty Research and Policy Centre, *Child Poverty and Cash Transfers, CHIP Report No. 4*. (2004).

26. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Legal Reasoning*, 23 YALE L.J. 28 (1913).

Seeing these rules *as Family Law* goes a considerable way toward undoing the field's exceptionalization as a categorical matter (though of course many FL2 rules exert specific exceptionalizing counterpressures). Seeing them as elements of the *law of the household* goes still further in that direction. The impulse behind the studies collected here was to go as far in this direction as we could while still doing systematically framed studies.

Many changes in the basic tools for studying Family Law ensue. For one thing, Anglo-American FL1 begins to look like a collection of the legal issues about the formation and dissolution of formal family relationships; the legal issues affecting the ongoing life of family relationships are almost all housed in other courses! This exclusion is stunning, when you think about it. It is entirely complicit with that element of Anglo-American law that is so persistently puzzling to civilians accustomed to thinking of the family as primarily a *social* institution: the doctrine of marital privacy. The contemporary legal taxonomy of the family is the famous *McGuire v. McGuire* case²⁷ writ large. It is as though, once formed, family relationships were *free*. It is the methodological assumption of much of the work collected here that they are, instead, pervasively regulated, directly and indirectly. Admitting FL2 and FL3 to the canon of relevant rules makes this apparent.

Second, the rules of FL2 and FL3 arise in legal fields that are widely understood to be about the distribution of economic risks and material goods. Of course we find duties of support and separate/joint property rules for the intact marriage in FL1, but, in U.S. law, as *McGuire* counsels, they are unenforceable in FL1 until there is a divorce, and then an entirely separate body of law—property division and alimony at the time of divorce—applies! (It is only in *another course*—Trusts and Estates—that separate/joint property rules still do any real work.) Thus cut off of any basis in property law, FL1 becomes the course about the dual crises of relationship-formation and relationship-dissolution; the law seemingly looks away from distributional transfers within the relationship and between its members and the rest of the world. Putting Family Law 1, 2, and 3 “back together”—undoing the establishment of family law exceptionalism—invites a distributional analysis of ongoing family life in the household.

The next step is to situate the family and the household in the world of market exchange and government provision that surrounds

27. *McGuire v. McGuire*, 59 N.W.2d 336 (1953). *McGuire* is the classic casebook case exemplifying the doctrine of marital privacy for American students. In it, the court held that Lydia McGuire could not get a court order mandating her husband to provide her with more than subsistence support as long as the marital relation between them was legally intact. To get such an order, she would have to move out and sue for a divorce *a mensa e thoro* or an outright dissolution.

them. This calls upon us to keep in mind that FLE, as it became consolidated in the late nineteenth century, is a *liberal* idea. We see it almost everywhere today, but that is in part because of the political and economic liberalization from Europe to East Asia, and the globalization of market ideas and practices generally. Other economic and social systems have existed, some of them very recently, and yet more are doubtless still being born. Comparison with the past, studies of the transition to liberal market orders, and speculation about future possibilities all give the lie to the apparent naturalness of what we are doing now. Above all, they highlight the significance of decisions about market design, economic regulation, and the social state for families and households—and point us in the direction of FL2 and FL3 and their intersection with FL4.

As Kerry Rittich makes clear, the family is currently both a tool and an object of development policy.²⁸ Growing interest in the effects of both gender norms and household behavior and decision-making on the quality and intensity of labor and production in the market have converged to ensure that the family now appears as an explicit part of the reform agenda of the big international financial institutions. But it turns out that a wide range of *other* development policies and regulatory initiatives—property rights reforms that aim to increase productivity and growth, such as land titling initiatives; efforts to formalize and regulate labor markets to conform with norms of “good governance,” for example—are transforming the family, household economic activities, and the allocation of resources and power among family members. Thus, families and households are caught up in complex global processes in which both states and large non-state actors vie for economic leverage and control of national and transnational legal systems. Reconnecting FL1 to FL2, FL3, and FL4 renders the modern family visible as part of the law of work, part of poverty law, and reveals its intimate connection to wider transformations in the social state and the global market.²⁹ Noticing these reciprocal processes of family/market interaction and formation not only recasts the agenda for family law. As Rittich suggests, legal reforms both provoke and manage the flows of resources across a household/ market continuum. Considering the myriad ways that family members might, and in fact do, respond should enable us to assess the effects, and hence the desirability, of the development agenda itself.

It is possible to study this conjuncture at the level of policy and ideology, as Rittich does, and to trace the effects of policy decisions

28. Kerry Rittich, *Black Sites: Locating the Family and Family Law in Development*, 58 AM. J. COMP. L. 1023 (2010).

29. Kerry Rittich, *Families on the Edge: Governing Home and Work in a Globalized Economy* 88 N.C. L. REV. 1527 (2010).

and legal regimes at the level of the household. When the members of a marriage-centered household decide, for instance, whether only one or both of its adult members will work for a wage, they are making a decision that indistinguishably engages the family *and* the market. Make/buy decisions of the kinds that Ronald Coase attribute to the firm³⁰ are made constantly in households and can be understood as bargains made simultaneously within the household and between it and other entities, all in the shadow of FL1, 2, 3, *and* 4. Is the provision of family meals a subsistence activity, something performed on an unpaid basis, or are meals purchased through the market, either by hiring domestic help or by simply eating out? Are children educated at home or at private schools? Is infertility a condition to be endured, or are there options—think assisted reproduction or transnational adoption, for example—that subject decisions about family creation to the logic of supply and demand on the market? As these examples reveal, household decisions on these questions may be far from purely “local” in their effects; instead, they increasingly involve economic actors across national boundaries. Government provision matters as well: whether the welfare state relevant to a particular household is robust or residual, the precise kinds of family-related transfers the state makes, the precise kinds of family-related transfers it requires non-state entities to make—all of these elements of welfare-related FL2 enter into the bargaining that goes on within households and between them and their worlds—the more so if they are poor, but only the more so. *All* households depend on various forms of social security, whether government provided or provided by “private” insurers, hospitals, educational institutions, and so on, under various levels of government mandate. A shift to a distributional analysis of family law—encompassing FL1, FL2, and FL3—would then enable us to ask: what do the rules do to distribute the burdens and the benefits of production, the servitudes and the securities of dependency, the labor and satisfactions of consumption?³¹

It is entirely possible to produce distributional analyses of family/household life within the parameters of a single national or state family law system, but the methodological moves presented here were largely driven by the contributors’ experience that they urgently needed a more distributive approach to *comparative* family law questions. From our perspective, “comparison by columns” as Fernanda Nicola describes it here³²—isolating FL1 rules and comparing them from two or several states—merely replicates inside an artificially

30. Ronald Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937).

31. We could also ask how intimacy, altruism, moral life, affect, and duty organize life in the marketplace. While that would be a distinct project, it is one that is likely to shed crucial light on the operation of FLE.

32. See also Günter Frankenberg, *Critical Comparisons: Rethinking Comparative Law*, 26 *HARV. INT’L L.J.* 457 (1985).

horizontal frame the isolation of the family from the market, of the family from the household, and of FL1 from FL2 and 3.³³ Nor were we moved to try to fix this problem by adopting social-purpose functionalism: the same deficiencies would result. The positive sociology comparative practice described in Nicola's paper is much closer to our own, but with the important distinction that we start not inside the law and its social purposes but *inside the household and its dauntingly contradictory assemblage of social purposes*—for that is what the bargaining model reveals. The Comparative Family Law pursued here, then, starts from the perspective of the users of the legal system, identifies the bodies of law that endow him, her, or them with vulnerabilities and advantages, and then examines the interoperation of those legal rule systems in *action*.

This last move ensures that the resulting analysis will implicate the political conflicts that exist among family and household members, and that, in turn, means that the ideologies of the family that are so hotly contested in political life will also be of direct relevance. Lama Abu-Odeh's contribution to this collection is an example of what we mean here: given the high value of unmarried women's virginity that she finds in Arab culture, and given crime of honor/crime of passion defenses of various scope for men who kill female relatives whom they understood to have defied that value, men and women bargain about sex and marriage, in the shadow of the law, across a wide range of political positions that are encoded in the ways they perform their sexualities.³⁴ The confluence and conflicts of interests among men and women are myriad, evolving, and—inasmuch as the very life of sexy unmarried virgin women is at stake—highly anxious. Or consider Hila Shamir's study of the ways in which the United States and Israel partially subsidize in-home dependent care: those who do this low-wage work and those who pay for it are all women, but their interests are hardly fully congruent; instead, we see them as located in a certain political tension.³⁵

We are now coming close to the core of what we mean by an adequate approach to Comparative Family Law. In a globalized world, in which everyday decisions of households everywhere rest on a nexus of FL1, 2, 3, and 4 rules lodged not only in local but in far-flung national and also in international law, a distributively focused Comparative Family Law would look to the interactions among these rules in the lives of their users. Several examples from this collection of essays may help indicate what we intend to suggest here as a new, critical

33. Fernanda Nicola, *Family Law Exceptionalism in Comparative Law*, 58 AM. J. COMP. L. 777 (2010).

34. Lama Abu Odeh, *Crimes of Honor and the Construction of Gender in Arab Societies*, 58 AM. J. COMP. L. 911 (2010).

35. Hila Shamir, *The State of Care: Rethinking the Distributive Effects of Familial Care Policies in Liberal Welfare States*, 58 AM. J. COMP. L. 953 (2010).

path forward. As Shamir indicates, comparing the ways in which the United States and Israel provide government-funded subsidies for the in-home care of needy family members (children, the aging) requires the bargaining-model approach to show how the negotiations over the intrahousehold division of labor might actually play out; the effects will be different in low-, middle-, and high-income families; and the availability of migrant workers to supply the subsidized care decisively changes the game by drastically lowering its cost. This in turn has immense effects on the supplier of paid care work, who after all is a member of the household too.³⁶ His or her situation cannot be understood, then, without reference to the legality of his in-migration and the strength of his or her ties to a state and a family of origin. Several national legal systems provide the background rules, then, of the Israeli or American family that hires a nanny.

Chantal Thomas's essay is almost continuous with Shamir's in framing a vast range of background rules that determine the working conditions of refugees in Cairo seeking domestic work in Cairene homes.³⁷ Unlike Shamir's comparative legal study, Thomas's work focuses primarily on the global context created by intersecting *international* legal regimes as those regimes are implemented domestically, in this case in Egypt. She demonstrates the impact of international law as it interacts with deep-structural dynamics in the global economy affecting the developmental state, such as informal labor sectors and South-South migration. The household, in Thomas's account, becomes one unit in a shifting transnational landscape whose governance is defined by legal, social, and economic variables. A project of critical-realist comparison emerges here—a method for comparing the interaction for specific populations of intersecting legal orders, domestic, “foreign,” and international.

Recent years have seen the emergence of Global and International Family Law treatises, periodicals and casebooks³⁸; the need for family law lawyers who can navigate treaty law, private international law, and human rights law is newly acute. Regional international accords have more and more to say about the family. But this international or global family is not well understood, and we propose that the top-down approach through human rights to a family life will miss the distributive consequences that become visible if we conceptualize the *household* as the relevant institution, and note its already-given international character. Consider the nanny. We

36. *Id.*

37. Thomas, *supra* note 16.

38. BARBARA STARK, *INTERNATIONAL FAMILY LAW: AN INTRODUCTION* (2005); WINSTON ANDERSON, *PRIVATE INTERNATIONAL FAMILY LAW* (2005); D. MARIANNE BLAIR & MERLE H. WEINER, *FAMILY LAW IN THE WORLD COMMUNITY: CASES, MATERIALS, AND PROBLEMS IN COMPARATIVE AND INTERNATIONAL FAMILY LAW* (2003); *INTERNATIONAL FAMILY LAW* (1998-).

think of the nanny—whether she lives in or out; whether her responsibilities extend beyond child care or not—to be the paradigmatic figure of a certain kind of comparison. If she lives in, she exemplifies, almost personifies, a merger of family and market. But even if she does not, she represents a confounding of the make/buy alternative: a new household intimacy is formed, but on market terms; production and welfare provision move into the home, but in an arms' length transaction. She is a member, then, of two households—one relatively rich, one relatively poor—at the same time as she is, in fact and in law, “not one of the family.”³⁹ These two households and their law constitute the background legal rules of the nanny's existence. They therefore also constitute the background rules of her *employer's* existence. Hire or become a nanny—join up with a family law system that can be adequately studied only through comparison.

Moreover, two crucial facts come into the project with the nanny: migrant labor and informal labor markets. Both of them reset the comparative frame yet again. Migrant labor implicates both employer and worker in multiple legal orders at once (they can be compared); informal labor markets lie “below” formal ones (and they can be compared). Thomas's essay can exemplify both moves. Once again, the nanny is a paradigm figure, for she is highly likely to be a migrant. If she enters the country of her employment illegally or overstays her visa, she enters the world of legally unrecognized work. But even where her presence is legal, the ideological and practical barriers to regulating the private sphere almost always ensure that her labor is *de facto* part of the informal economy. The implications for critical comparative family law are at least two. First, as we have noted, the nanny is a member not of one but of two households; if those households are centered in different countries, they operate under significantly different but conjointly operative bodies of law. As Shamir clearly shows, the distributive consequences of the domestic national legal rules of FL1 and FL2 for the bargaining situation of household members in both countries change dramatically when cross-border domestic labor enters the picture. And second, the informality of migrant labor mirrors the informality of many household relationships: they are vastly important to how people live, but they are not described or even captured in the code or the casebook. A thorough account of distributive consequences—if such were possible—would thus require comparisons between formal labor and its informal counterpart, between formal marriage and informal household alliances of a myriad kinds. Tsoukala's contribution to this volume makes manifest the stakes of our shift to distributive conse-

39. NOT ONE OF THE FAMILY (Abigail B. Bakan & Daiva Stasiulus eds., 1997).

quences.⁴⁰ Debates about family law harmonization within the European Union have accepted the Savignian pattern: family law is national, so either it cannot be harmonized because the relevant nations are the Member States, or it can and must be harmonized because the relevant nation is Europe. This way of framing the debate is fully complicit with FLE and its strong family/market distinction. And so, as Tsoukala reveals—devastatingly, in our view—it omits from consideration the consequences of harmonization for differently situated families and family members. If indeed easier divorce and attenuated alimony obligations are the better law—and surely on their face they seem to treat men and women more equally—and if they are adopted for Europe as a whole, they will have vastly different impacts on homemaker wives in countries with different levels of female labor market participation and different marital property rules. Big FL2 and 3 systems—at the very least, employment and government welfare provision—must be taken into account if we want to trace the bargains that will be struck between breadwinner husbands and homemaker wives under the supposedly “progressive” new rules. From this perspective, it seems starkly clear that the vulnerability of homemaker wives in Member States with weak welfare systems and weak labor force participation by women will be the price of the harmonizers’ progress. Perhaps it is right that they should pay this price. Tsoukala does not determine this hard normative question. But she does insist that it be asked.

Before closing this discussion of the Economic Family, we put explicitly on the table some misgivings we have about our own project. It is, writ large, an effort to de-exceptionalize the family; to recontextualize it in the market. We do this for descriptive purposes, because we detect a large *lacuna* in our ability to articulate the role that households play in economic orders. It is an open question, and one that can be decided only in particular contexts, whether undoing FLE will be socially beneficial for any human persons, groups, causes or ideas we might commit ourselves to. Clearly the World Bank has provisionally decided that deploying the family for market purposes is a good thing to do; while we feel the need to de-exceptionalize the household just to be able to study what the World Bank is doing, we also worry that it might be very important to be able to invoke FLE to resist such a move.⁴¹ And even on the descriptive register, we do not pretend that the Economic Family is the only way to go. The erotic family, the aesthetic family, eros and aesthetics detached from any reference to family—these are all important analytic projects, ones

40. Philomila Tsoukala, *Marrying Family Law to the Nation*, 58 AM. J. COMP. L. 873 (2010).

41. WORLD BANK, *ENGENDERING DEVELOPMENT*, *supra* note 13.

that simultaneously carry important political motives that we care about deeply.

II. GENEALOGIES OF THE FAMILY IN COLONIZATION, DECOLONIZATION, MODERNIZATION, AND DEVELOPMENT

If family law did not always exist—if, as we believe, it was invented—what role did its invention play in the process of modernization? We think that the production of FLE was a global process—as intrinsic to the rise of capitalism and the formation of empires as it was to the process of decolonization and the making of the modern global economy. This Special Issue offers some mosaic bits of this vast historical panorama. Like the Economic Family, the Genealogical Project is as much a research agenda in the process of articulation as a body of existing work.

Our authors suggest two headwaters for a genealogy of FLE, one in legal ideas, the other in colonialism. Indeed, we are prepared now to suggest that the emergence of FLE in India, Greece, Egypt, Kenya, Taiwan—always differently, at different times, with different legal and political inputs—marks the reception—implicit or explicit, wholesale or in fragments, sometimes the wholesale rejection—of German legal thought. Specifically it marks the travel of an idea of the German Historical School ramified throughout the world by its own intellectual authority and crystallized into world-traveling codes by the Pandectists.⁴²

The Savignian pattern not only insisted on a strong family law/contract law distinction; it made contract law and family law differentially *comparative*. In Savigny's family/contract dichotomy, the rules of contract law were universal (they should be the same everywhere), but the rules of family law were necessarily local (because they made manifest the spirit of the people). It was in the nature of contract law to *become the same everywhere* and in the nature of family law to *differ from place to place*.

This formulation bears an uncanny resemblance to what we see in actual colonial legal orders of the nineteenth century, as the European colonizer repeatedly imposed its own commercial law (and criminal, procedural, and other bodies of law adjunct to an ever-less mercantilist and ever-more capitalist colonial enterprise) and left the law of marriage, divorce, and parentage to persist under what then became local or "customary" law. Whether the resulting body of law was called Personal Status Law (a mark of French legal influence), or Family Law (a German legal idea), it was transformed—modernized—by being thus segregated and integrated as a new, distinct

42. For a short statement consistent with this idea, see Rheinstein, *supra* note 3, at 2.

legal domain. This move, which simultaneously made it traditional, was therefore highly paradoxical.

The standard narrative—in which local powers entered into the colonial relationship holding their ancient, usually religious, Family Law as their most sacred ground—seems again and again to be a little skewed; so often, the coherence of tradition comes *later*. This is very strongly the suggestion of Tsoukala telling the Greek story.⁴³ Tsoukala crucially ties the making of the Greek nation to the invention of a traditional Greece identified with a body of family law harbored by the Orthodox Church during the long Ottoman “occupation.” But her analysis also shows that the consolidation of the Greek state involved the abstraction of family law from a welter of customary and religious jurisdictions: it is a classic example of the invention of tradition.⁴⁴ This story and others which complement it, showing how much legal labor was needed to wrest the family into existence⁴⁵ differ, yet again, from the narrative set out in Abu Odeh’s classic “Modernizing Muslim Family Law: The Case of Egypt,” where indirect French and then English rule developed modern commercial, procedure and criminal codes, imposed mixed courts to ensure European law as the choice of law applying to European commercial activity—all the while leaving a residual body of Islamic rules of marriage, divorce, and parental rights to *become* “family law.”⁴⁶

Thus the project proposed by this collection is committed to tracing the ways in which legal influence and geopolitical power work together—and to do so wherever possible by paying equal attention to the legal life of “peripheral” legal orders as to “central” ones. Whether the reaction of local elites was to fight family law residualization as the defeat of traditional authority or to embrace it as the precious remnant of the traditional religious life of the people—whether the colonizer tended to leave the law of the family alone as beneath its notice or to identify primitive atrocities (usually perpetrated against women) within it and to legitimate colonial intervention by denouncing, regulating, and/or prohibiting them—FLE became a pivot upon which the legal operations of colonialism would turn.

In a separately published paper, one of us has traced a parallel genealogy of the emergence of Domestic Relations Law (and its very late replacement by Family Law) in the United States, and there is one point from that research that is worth mentioning here. The idea

43. Tsoukala, *supra* note 40.

44. For this term, see *THE INVENTION OF TRADITION* (Eric Hobsbawm & Terence Ranger eds., 1983).

45. Works in progress that complement Tsoukala’s account include Sylvia Kang’ara, *Western Legal Ideas in African Family Law* (on file with the authors) and Yun-Ru Chen, *Maneuvering Modernity: Family Law as a Battle Field in Colonial Taiwan* (on file with the authors).

46. Lama Abu Odeh, *Modernizing Muslim Family Law: The Case of Egypt*, 37 *VAND. J. TRANSNAT’L L.* 1043 (2004).

that marriage is status-and-not-contract, which jurists eagerly adopted in the 1850s to solve some peculiarly American legal problems, can be traced back to Scottish (that is, civilian) sources, and to a manual for the legal administration of the English empire.⁴⁷ That is to say, the imperial and colonial experiences produced the conceptual framework upon which American FLE would be built. We still need the papers on English law, French law, German law . . . and their relationships to the emergence of the Savignian pattern and FLE, but there is at least the hypothesis that transmission from the periphery to the center was just as important as transmission from the center to the periphery.

FLE played a role as well in the ideological war waged between colonizer and colonized: stigmatizing the antagonist's *family* was one way to consolidate national legitimacy, and this was true in the center and in the periphery. Thus Western legal minds have sometimes attached their universalizing ambitions to women's equality, affective marriage, and the nuclear family, and decried the subordination of women and the instrumentalisms of the patriarchal family that they saw in the populations they subjugated. International feminism continues this project. Nationalist, feminist, and cosmopolitan legal elites in the colonized world could find themselves in a bind: they now had Family Law in the form of tradition, and tradition as the marker of residual local legal authority; putting their nationalism, feminism, and/or cosmopolitanism into legal form—modernizing—would lay them open to charges that they were Westernizing. Work in progress by Sylvia Kang'ara provides a panoptic view of the myriad roles of Western legal ideas in African family law, from the era of direct rule to that of human rights and development, and offers a rich display of the many forms that this conflicted effort can take.⁴⁸ And Abu Odeh's contribution to this volume lucidly demonstrates how codification of crimes of honor, cut in with legal ideas derived from the French crime of passion, mediated between the Islamic and the Western at the level of micro-rules, always in politically significant ways.⁴⁹ (Note that both of these articles showcase how the hybridity of postcolonial legal systems makes it possible to do comparative work on the family law of a single nation state.) But our collaborator Yun-Ru Chen continually astonishes us with the paradoxes produced by the basic fact that FLE in East Asia—specifically, in her work, in the triple colonization of Taiwan in the nineteenth and early twentieth centuries—sometimes pivoted not on the *problem* but the *prestige* of westernness and modernity.⁵⁰ Shift-

47. Halley, *supra* note 2.

48. Kang'ara, *supra* note 45.

49. Abu-Odeh, *supra* note 34.

50. Chen, *supra* note 45.

ing from the politics of recognition—the typical vocabulary for evaluating the conflict between indigenous and imported law—to distributional consequences significantly changes the way we study this hybridity.⁵¹

Kennedy, Tsoukala, and Abu Odeh all show us how the forms in which the Savignian pattern, and/or FLE, survive to provide the vocabularies if not the structures of modernity. We think that the problem faced by Shamir, Thomas, and Rittich, as they attempt to expose the contemporary economic family to analysis, belongs in the context of these historical papers about the crisis of modernization as it pivoted on the family. Indeed, Tsoukala's ominous analysis of debates over EU accession of Turkey—turning as they do on the demonization of the Turkish national spirit through its supposedly alien family law—suggest that Turkey's failure may be performed in a precise reversal of Greece's success.

It is important to recall that the Savignian pattern contained a paradox: family law was both particular because it embodied the spirit of a nation's people, and universal because it was fundamental to all civilized existence. In Tsoukala's Greece, the former element of the pattern was the more salient; in Jaramillo's Latin American story, we see an especially clear example of the latter.⁵² Her Latin American treatise writers converged on the universal family of natural law: it is a "social fact," an "organic reality." In doing so they established the family and its law as the premier expression of the social: it was exceptional not by being segregated and marginal but by being fundamental and exemplary. But the ideological significance of this *sameness* was not the same everywhere. When, as Judith Surkis tells us, French colonial codifiers justified detaching family law from inheritance rules and thus from property law in Algeria (a project motivated by the colonists' need for clear title to land they had purchased from Muslim *waqf* holdings), they justified doing so on the basis of a sameness very different from that of Jaramillo's Latin American treatise writers. The Algerian family was nuclear, like the French family; it was not a lineage and was not an intergenerational property holder. According to one jurist involved in the 1887 reforms:

If one penetrates into indigenous territories, one recognizes that, whether under a tent, or the roof of a hut [gourbi] or house, there are only ever a small number of beings, gathered around the same fire, bound together by the most intimate ties: a husband, a wife, children, and more rarely,

51. For a specific argument that the politics of recognition are not the only relevant metric, but that the problems of distribution need careful study as well, see PASCALE FOURNIER, *ISLAMIC MARRIAGE IN WESTERN COURTS: LOST IN TRANSPLANTATION* (2010).

52. Tsoukala, *supra* note 40; Jaramillo, *supra* note 8.

sisters. Never two households. In this milieu, one does not find any outstandingly different characteristic between a peasant family in France and that of an Algerian fellah, aside from bigamy, from polygamy, which are exceptions.⁵³

What an odd, complex act of projective identification! Here, FLE serves as a mirror in which the colonizer beheld the colonized, and in which the colonized reflected itself back.

It cannot be an accident that the family emerged from the household during the long nineteenth century seemingly *everywhere*—but the bewildering variety of ways in which it did so still daunts us. Whether this shift took place through acts of colonial-legal violence, in moments of nation-making, or merely by being ignored in the hustle to make global commerce governable and profitable—it just kept happening.

53. Judith Surkis, *Civilization and the Civil Code: The Scandal of "Child Marriage" in French Algeria*, in SCANDALOUS SUBJECTS: INTIMACY AND INDECENCY IN FRANCE AND FRENCH ALGERIA (book MS), quoting "28 April 1887, Loi ayant pour objet de modifier et de compléter la loi du 26 juillet 1873, sur l'établissement et la conservation de la propriété en Algérie: Rapport à la chambre des députés fait au nom de la commission par M. Bourlier," in Estoublon and Lefébure, *Code de l'Algérie*, vol. 1 (1830-1895), 739.

