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# Articles

# What is Family Law?: A Genealogy Part II

**Janet Halley***

## INTRODUCTION

This Article offers a genealogy of domestic relations law (later renamed family law). It comes in two Parts. Part I is an account of how it emerged as a distinct field in American law in the latter half of the nineteenth century.[1] This Part, Part II, is an account of its successive transformations

* Royall Professor of Law, Harvard Law School. Thanks to Amy J. Cohen, Glenn Cohen, Lisa Kelly, Duncan Kennedy, Frank Sander, Mark Tushnet, and Philomila Tsoukala for help with many aspects of the research. Thanks to David Worthington, Janet Katz, and the staff of Harvard Law Library Special Collections team for help with rare materials; and special thanks to FRIDA for making the research on all other fronts possible. Kristi Jobson was a wonderful research assistant. Thanks also to the Up Against Family Law Exceptionalism conference for the context of this work, to the Harvard Law School Faculty Workshop for excellent questions, to the HLS Family Law Lunch for help with the ideas, and to my Family Law students over the years for tolerating a lot of curricular experimentation as I tried to harvest the lessons of this investigation for them, and to distill the lessons I learned from them for this investigation. All errors of fact and judgment are mine alone.

1. Janet Halley, *What is Family Law?: A Genealogy: Part I*, 23 YALE J.L. & HUMAN. 1 (2011) [hereinafter Halley, *What is Family Law?: Part I*].



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over the course of the twentieth century. I argue that domestic relations/family law did not always exist; rather, it was invented, and the ideological implications of that act of creation remain embedded in the field today. The central idea which, I argue, recurrently characterizes the field is that the family and its law are the opposites of the market and its law. Born in the middle of the nineteenth century as the notorious status/contract distinction, it has shown amazing powers of resilience, surviving three highly intentional and collectively organized attacks and gathering to itself new ideological and practical implications as the presuppositions about law that permeate legal consciousness have changed and changed again over time.

The idea that the family and its law are the opposites of the market and its law is just one form of family law exceptionalism (FLE).[2] But it is a crucial one: it travelled the globe in the middle of the nineteenth century, originating in the thought of the immensely influential jurist Friedrich Carl von Savigny and diffusing, along with capitalism and colonialism, all around the world. [3] It became a fit vessel for the ideologies of *laissez faire* and the separate spheres when they emerged. All of this was a product of classical legal thought (CLT), which, as Duncan Kennedy shows in an article from which this one draws its basic historical template,[4] venerated contract as the legal space in which to maximize space for the will of the parties, and venerated family law as its opposite, the space for the untrammeled will of the state imposing ascriptive statuses saturated with duty. Savigny also taught that contract law was universal, while family law gave voice to the spirit of the people, which was inevitably local. This formulation became an apt explanation for the development of a transnational body of law governing commerce and a

2. For a fuller statement of the vast range of meanings that have accumulated around the idea that the family and its law are exceptional, see J. Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753 (2010) [hereinafter Halley & Rittich, *Critical Directions*].

3. For an account of Savigny's family law/contract law distinction and his influence, see Duncan Kennedy, *Savigny's Family/Patrimony Distinction and Its Place in the Global Genealogy of Classical Legal Thought*, 56 AM. J. COMP. L. 811 (2010) [hereinafter Kennedy, *Savigny's Distinction*]. Kennedy construes FRIEDRICH CARL VON SAVIGNY, SYSTEM OF THE MODERN ROMAN LAW (Hyperion Press 1979) (William Holloway trans., 1867). *See also* Halley & Rittich, *Critical Directions*, *supra* note 2, at 757-58, 771-75.

4. Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (David Trubek & Alvaro Santos eds. 2006) [herinafter Kennedy, *Three Globalizations*]. The same basic periodization receives different explanations in Ugo Mattei, *Why the Wind Changed: Intellectual Leadership in Western Law*, 42 AM. J. COMP. L. 195 (1994).

complementary deference to national difference with respect to the family and was widely deployed in colonial as well as postcolonial nationalist projects.[5]

Kennedy dates CLT as a global phenomenon to the period from 1850 to 1914. It has never entirely disappeared; instead, its ideas broke up from the systematic, conceptualist, abstract armature which CLT eventually built for imagining all of law, becoming fragments which survived into two large subsequent forms of legal consciousness which succeeded it. My argument in this Part of this Article is that FLE in its form as the status/contract, family/contract, family/market distinction is one such durable fragment.

The two subsequent forms of legal consciousness which Kennedy identifies as spreading throughout the world in globalizations of legal thought spanning the twentieth century are, first, "the social," emerging by 1900 and losing its grip on legal minds by 1968[6]; and second, the era of conflicting considerations, which I will dub concon, emerging after World War II and persisting today.[7] Here is how Kennedy introduces these two successive but also overlapping brainwaves:

> Between 1900 and 1968, what globalized was The Social, . . . a way of thinking without an essence, but with, as an important trait, preoccupation with rethinking law as a purposive activity, as a regulatory mechanism that could and should facilitate the evolution of social life in accordance with ever greater perceived social interdependence at every level, from the family to the world of nations. . . .
>
> Between 1945 and 2000, one trend was to think about legal technique, in the aftermath of the critiques of CLT and the social, as the pragmatic balancing of conflicting considerations in administering the system created by the social jurists. At the same time, there was a seemingly contrary trend to envisage law as the guarantor of human and property rights and of intergovernmental order through the gradual extension of the rule of law, understood as judicial supremacy.[8]

Whereas the social emanated originally from Europe, and was received eagerly by Americans still hungry to receive intellectual influence from

5. *See* Halley & Rittich, *Critical Directions*, *supra* note 2, at 771-75.
6. Kennedy, *Three Globalizations*, *supra* note 4, at 21, 37-62.
7. *Id.* at 21, 63-71.
8. *Id.* at 22.

abroad, Kennedy's concon consciousness is a largely American export, and indeed in this Part we will see American legal elites gaining confidence in their own powers to reconstruct all of law in the interwar period, during the rise of the social. Today, American legal influence is everywhere, carrying not only the pragmatic balancing impulse but also a neoformalist "identity/rights complex" putting faith in rights as enforced by judges. Both of these elements of concon will play an important part in our story here:

> Public law neoformalism strongly resembles the practices of late nineteenth-century U.S. courts, which took the CLT construction of private law and applied it to the U.S. Constitution. After WWII, liberal civil libertarians who had strongly criticized the conservative public law neoformalism of the earlier period took up the same practice through the Warren Court. Policy analysis and balancing were post-Realist U.S. developments, and the advocates of balancing were already debating public law neoformalists in the early 1950s.
>
> The identity/rights complex, as a template for thinking about a vast range of legal issues, seems foreshadowed in the United States by the post-WWII alliance of elite WASPS, Jews, and blacks in the construction of the category of ethnicity, linking the evils of the Holocaust to those of racism in the United States as illegal discrimination. U.S. second-wave feminism is responsible for the abstraction and generalization of the category by transforming it into "identity." And it is familiar since de Toqueville that Unitedstateseans tend toward juristocracy.[9]

At three points, twice during the social and once in the explosive birth of concon identity politics, vanguard groups took direct aim at FLE. The first attacks came from social jurists: Roscoe Pound and the Columbia Law School faculty pursuing radical reform of their curriculum in the 1920's. They sought to reconnect domestic relations/family law not only with the market but with the vast array of regulatory orders, inside and outside the state, that condition its lifeways. That effort failed, only to be taken up again in the waning days of the social era by a group I will call the professionalizers. They produced an important casebook that fully delivers upon the most innovative ideas of the Columbia reformers, with some distinctive mid-1960's changes. But this erasure of FLE was not to last for long. The third group was feminists attacking the private/public

9. *Id.* at 67-68.

distinction, and within that the family/market and family/state distinctions, as a crucial tool for male dominance throughout the legal order. Their law reform efforts were partially successful, though their commitment to women's interests *uber alles* meant that they could not track the wide-open inquiry into the distributive role of the family that the Columbia reformers had envisioned. By the time gay-rights advocates stepped into their shoes as the vanguard identity-political critic of family law rules, the status/contract, family/market distinction had reasserted its sway: marriage as status was decidedly *back*, both for the proponents and the opponents of gay marriage. This Part thus tells how FLE came under attack three times, but each time resituated itself in the ever-evolving legal order. We have it still today, in a way that sediments fragments of CLT, the social, and concon in a conception of family law that is strongly dedicated to the status/contract distinction.

This Part has five sections, each focusing on legal interventions that I have selected for close examination because they were highly symptomatic of the brainwaves reshaping legal consciousness generally, and domestic relations/family law in particular, in successive periods of twentieth-century American legal life. I first tell how, between 1870 and 1940, the authors and publishers of legal treatises and, later on, casebooks struggled to operationalize the classical mandate to divide contract from status, the law of the market from the law of domestic relations (Section I). I then tell how the social emerged as an all-out attack on the resulting classical legal order. My example will be articles published in the 1910s by a young Roscoe Pound, setting out an agenda for a new, sociological jurisprudence that completely changed the focus of domestic relations law. Pound turned against CLT's conceptualist emphasis on abstract doctrine to a method which Fernanda Nicola helpfully names "social-purpose functionalism"[10]: the job of the jurist was to identify correctly the social functions served by law, compare the rules that subserve those functions, and with cool hauteur, from position of high epistemic control, chose the right rule. Pound was also profoundly hostile to CLT's preference for individualism and saw FLE, correctly, as a warrant for it: he was the first to attack FLE as an ideologically and socially malign support for *laissez faire* (Section II).

The idea of a de-exceptionalized family law, ranging across all the

10. Fernanda Nicola, *Family Law Exceptionalism in Comparative Law*, 58 AM. J. COMP. L. 777, 793-95 (2010).

topics of law that have things to say about family life, seems to have been born not in the academy but in practice, in the Family Court movement of the social era. They struggled to free themselves of the constraints of domestic relations law (husband and wife, parent and child), so that they could reach all the bodies of law that attended to families in trouble. They sought to become less adversarial and more administrative, and to work with other administrative agencies, to unite expertise with expertise. These ideas emerged inside the Columbia Law School's curricular reform project in the 1920's and early 1930's, and the desire for a new topic – family law shorn of FLE – now burned. Initially mandated to pursue Pound's social-purpose functionalism and to mechanize ways of discerning the best rule in the three great domains of public law, commercial law and domestic relations law, the Columbia curricular reform turned so strongly to sociological data and the infinitely diverse social consequences of legal regulation that it soon undermined the epistemic control that is so characteristic of Pound's sociological jurisprudence idea. They discovered that Is and Ought were not nearly so seamlessly inter-implicated as Pound had promised: in the course of this disenchantment – originally experienced as profoundly exciting and liberating – they became genuinely legal realist. My exemplar of these shifts to what I will call real realism will be the intervention of Karl Llewellyn into the Columbia reform projects. Inspired by real realism and following the example of the Family Court movement, the Columbia family law team quickly discerned that FLE stood in the way of understanding the economic functions of family law, which they identified as a key topic. FLE also blocked understanding the role of law in the administrative mode so crucial to proponents of the social. So they attacked FLE head on – and then overwhelmed themselves with the sheer difficulty of the research program they had set out for themselves. As they lost confidence in their agenda, FLE visibly flowed back into the casebook tradition, in a dispirited and dispiriting process conducted by one of the original Columbia realists. Section III thus tells of the rise and fall of the legal realist assault on FLE.

After World War II, the American workforce was flooded with the energy of young returning troops; America was suddenly an undeniable world power; and the social era entered its last phase. The impulse for FLE once again emerged from practice and travelled from there to the academy. The family law bar, family courts, and administrators of social agencies woke up to the urgency of the social problems they were

entrusted with and organized to promote family law as a profession in full engagement with other professions handling urgent social problems. In 1965 two casebooks specifically devoted to the family – one of them to family *law* – burst on the scene and put a final end to domestic relations as a viable curricular or professional idea. One of these, *Cases and Materials in Family Law* by Caleb Foote, Robert J. Levy and Frank Sander, implemented the Columbia family law committee's innovative vision with amazing fidelity. Social policy and interdisciplinary professionalism now required that the law governing families, no matter where in the legal order CLT had parked it, needed to be included. I tell the story of the last great assault of the social era in Part IV.

And finally, Section V focuses on rise of feminism as the carrier of a concon consciousness profoundly hostile to the formulations of the professionalizers. A massive conference dedicated to work out feminist approaches to every course in the legal curriculum held at NYU in 1972 and Judith Areen's *Cases and Materials on Family Law* first published in 1978, are my examples of the emergence of equality, identity politics, constitutionalization, the culture wars – the neoformalist strand of the concon era – combined paradoxically with a general sense that making legal decisions was a never-resolved process of managing conflicting considerations. Once again, a massive assault on FLE – widely designated the feminist critique of the private/public distinction but turning at many points on a critique of the family/market distinction – rolled onto the legal field and substantially transformed both the boundaries and the contents of family law. But as feminist law reform institutionalized itself, FLE reemerged in new terms: the family became a distinctly feminized conceptual and social space, and feminist presuppositions began to do what the market/family distinction had long done, to obscure the distributive consequences of legal interventions.

The Conclusion points to a contemporary return to marriage-as-status in the wake of the same-sex marriage debates and asks what a fully distributive analysis of the field would look like today.

## I. FROM THE CLASSICAL TO THE SOCIAL: DIVIDING DOMESTIC RELATIONS FROM THE LAW OF WORK, 1870-1940

Classical legal thought was a genuinely classicizing effort: perhaps its most central characteristic was the yearning to secure a vision of law as a *system.* The status/contract, family/market, family law/contract law distinction was one of the crucial architectural structures of this emerging

system. It drove the treatise writers, and later the casebook composers, to divide Blackstone's now-ridiculed "*private* oeconomical relations"[11] – husband and wife, parent and child, master and servant, guardian and ward – so that the domestic relations were housed separately from those involving the state and the market. The most important of these shifts required that master and servant be constructed as radically distinct from the paradigmatic status relationships, marriage and parentage. This took work. I tell the story of that work in this Section.

In the first American Domestic Relations treatise, published in 1870, James Schouler imagined the core of his topic as "the law of the family" and distinguished it sharply from the law of the market in decisively Savignian terms:

> To an unusual extent, therefore, is the law of family above and independent of the individual. Society provides the home; public policy fashions the system: and it remains for each one of us to place himself under rules which are, and must be, arbitrary.
>
> So is the law of family universal in its adaptation. It deals directly with the individual. Its provisions are for man and woman; not for corporations or business firms.[12]

Given that fundamental distinction, Schouler worried that a treatise on domestic relations might not be the right place in the emerging classical system for the law governing servants not working "in families":

> Apprentices are, without much violation of principle, included under this head; they are generally bound out during minority and brought up in families. Clerks are not so readily confined within the circle of domestic relations as formerly; and the same is to be said of factors, bailiffs, and stewards. The *employés* of a corporation are frequently designated as servants; so are laborers generally. But it cannot be denied that master and servant is rather a repulsive title, and fast losing favor in this republican country; . . . and that in sounding its legal depths one often loses sight of his landmarks, and finds himself drifting out into the more general subject of principal and agent.[13]

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11. I WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 410 (photo. reprint 1979) (1765).

12. JAMES SCHOULER, A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS EMBRACING HUSBAND AND WIFE, PARENT AND CHILD, GUARDIAN AND WARD, INFANCY, AND MASTER AND SERVANT 7, 9 (Boston, Little, Brown & Co. 1870) [hereinafter SCHOULER, DOMESTIC RELATIONS (1st ed.)].

13. *Id.* at 7-8.

For Blackstone, the term "domestic" had unproblematically included master and servant and corporations; for Schouler, it increasingly carried its modern sense, limited to the relations inhabiting the *home*.

I have credited Schouler with introducing the novel legal idea that a treatise should draw its boundaries not around a conceptual but around a *social* space: the "circle of domestic relations" that he imagines is the ideologically "separate sphere" of the home. But his report of contemporary developments is acutely anachronistic, suggesting that his powers of social observation were severely limited by his classicizing attitude. Robert Steinfeld has conclusively shown that American judges in the free states had declared apprenticeship unfree and legally invalid by the 1850's, and that the terms master and servant had become repulsive, at least to northern servants, in the wake not of the civil war but of the American Revolution.[14] Schouler has the glimmer of an idea that a legal category should track a social one, but the driving impulse behind his desire to neaten up the boundaries between husband and wife and parent and child on one hand and master and servant on the other is the classical yearning for system. The "principle" he follows is the Savignian family/contract distinction.

Just about the time Schouler was fretting over the categorical mistake built into the "domestic relations," the Scottish author of his chief source—Lord Patrick Fraser's 1846 treatise *A Treatise of the Law of Scotland, as Applicable to the Personal and Domestic Relations, Comprising Husband and Wife, Parent and Child, Guardian and Ward Master and Servant and Master and Apprentice*[15]—was having the same worry. Scottish treatises were at this time crucial sources for architects of the classical legal order in America, in part because they provided an English-language vehicle for civil-law influence so deeply desired by American jurists, and partly because the Union of Scotland and England produced a lot of law that Americans, trying to figure out how to run a federal system, could ransack for legal concepts and rules. Indeed, the very status/contract distinction that was driving master and servant out of the domestic relations came directly from Scottish sources.[16] Twenty

14. ROBERT J. STEINFELD, THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350-1870, 126-27, 178 (1991).

15. PATRICK FRASER, A TREATISE OF THE LAW OF SCOTLAND, AS APPLICABLE TO THE PERSONAL AND DOMESTIC RELATIONS, COMPRISING HUSBAND AND WIFE, PARENT AND CHILD, GUARDIAN AND WARD MASTER AND SERVANT AND MASTER AND APPRENTICE (1st ed., Edinburgh, T. & T. Clark 1846).

16. *See* Halley, *What is Family Law?: Part I*, *supra* note 1, at 20-33.

years after publishing his *Treatise* on domestic relations, Fraser perceived that parent and child and guardian and ward were similar enough to each other and distinct enough from their usual company that they warranted separate classification; in 1866, he published a treatise devoted just to them.[17] And in 1872 he published a treatise devoted solely to master and servant and master and apprentice,[18] including these disparaging comments on his own 1846 *Domestic Relations* treatise: "[t]he subjects embraced in that work had no necessary connection with each other, and I have therefore thought that the practical utility of the several treatises would be increased, were they now, on the occasion of a second edition, published separately."[19] Following the logic, then, of a family/market distinction, that left him with a simpler topic on the domestic relations side: in 1882 he published a *Treatise on Husband and Wife According to the Law of Scotland.*[20]

This swift and decisive division of master and servant from husband and wife and parent and child, is decisively *not* what we see in the American domestic relations treatises. Schouler led the way, acknowledging the new-found incoherence of Blackstone's "*private* oeconomical relations," disparaging the inclusion of master and servant with the "law of family[,]"[21] but going ahead anyway to establish Domestic Relations as a taxonomically impure field. Following Schouler's lead, the domain was beset by taxonomic vagaries, keeping an increasingly archaic fealty to Blackstone's topics and wandering down a dead end of the "law of persons"; we will study these developments in a moment. The last edition of *Domestic Relations* that Schouler authored himself appeared in 1905, and it remained loyal to its original, admittedly misshapen taxonomy. It was not until 1921 – after the enormous shock to legal culture administered by World War I and after the sociological jurisprudes had launched their attack on classical legal thought – that a

17. PATRICK FRASER, A TREATISE ON THE LAW OF SCOTLAND RELATIVE TO PARENT AND CHILD AND GUARDIAN AND WARD (Hugh Cowan ed., 2d ed., Edinburgh, T. & T. Clark 1866). Notwithstanding the information on the title page, this book is a substantial novelty, not merely a second edition of Fraser's *Domestic Relations*.

18. Only the second edition is available to me: PATRICK FRASER, TREATISE ON THE LAW OF SCOTLAND RELATIVE TO MASTER AND SERVANT, AND MASTER AND APPRENTICE (2d ed., Edinburgh, T. & T. Clark 1872) [hereinafter FRASER, TREATISE ON THE LAW OF SCOTLAND RELATIVE TO MASTER AND SERVANT].

19. *Id.* at v.

20. PATRICK FRASER, A TREATISE ON THE LAW OF HUSBAND AND WIFE (Boston, Little, Brown & Co. 1882).

21. SCHOULER, DOMESTIC RELATIONS (1st ed.), *supra* note 12, at 9.

new editor, Arthur W. Blakemore, took over Schouler's *Domestic Relations* treatise and finally dropped master and servant. This new, realist handbook concentrated entirely on the "law of family."[22] Blakemore specifically cited the transformations wrought by "the Great War" as his motive for completely overhauling the contents of Schouler's treatise.[23] Blakemore's book belongs not in this Section but in the next, with the ferment in law brought on by the anticlassical sociological jurisprudes. For the Americans, the classical impulse to divest domestic relations of master and servant was a driving force, but the sheer inertia enjoyed by Blackstone's legal relations baffled the classicals who attempted the excision. It wasn't until the era of the social was well under way that Americans managed a division that had been so easy for the Scottish classicist Fraser.

Meanwhile, the rise of industrialization and the emergence of labor conflict received two distinct responses in the classical treatises. First, as John Nockleby shows, the classical treatises of contract, property and tort classified the relations of master and servant as fully governed by the law of contract (even if they had to borrow rules from the domestic relations to frame union activity as wrongful conduct).[24] And even during the heyday of classical legal thought, the law of master and servant evolved rapidly in response to a pressing need amongst practicing lawyers for books dealing with the rise of labor conflict. As early as 1840 we find a Scottish treatise devoted solely to master and servant and master and apprentice.[25] In 1852—the same year that Joel Prentiss Bishop introduced marriage-as-status-not-contract into the nascent classical order in his treatise on *Marriage and Divorce*[26] – Charles Manley Smith published *A*

22. JAMES SCHOULER & ARTHUR W. BLAKEMORE, A TREATISE ON THE LAW OF MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS, at vii, 1, 3, 4 (6th ed. 1921). Schouler had died in 1920. *Historical News*, 25 AM. HIST. REV. 756 (1920). We see here a practice of consigning valuable treatise brands to subsequent editors when the original authors had stopped work on them because of death, old age, illness, the press of other responsibilities, and the like. Our first instance of this was the extremely long vitality of Chancellor Kent's *Commentaries on American Law*. See the last edition of Kent's *Commentaries*, JAMES KENT, COMMENTARIES ON AMERICAN LAW (John M. Gould ed., 14th ed., Boston, Little, Brown & Co. 1896), discussed in Halley, *What is Family Law?: Part I*, *supra* note 1, at 88-89. In this case – a treatise handed off from a classicizer to a realist – the pentimento is dramatic. *See also infra* note 35, for similar example.

23. SCHOULER & BLAKEMORE, *supra* note 22, at Preface to the 6th ed.

24. *See* John Nockleby, *Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort*, 93 HARV. L. REV. 1510 (1980).

25. THOMAS BAIRD OF PERTH, A TREATISE ON THE LAW OF SCOTLAND RELATIVE TO MASTER AND SERVANT AND MASTER AND APPRENTICE (Edinburgh, Thomas Clark 1840).

26. JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE, AND EVIDENCE IN MATRIMONIAL SUITS 105 (1st ed., Boston, Little, Brown, & Co. 1852)]. For a

*Treatise on the Law of Master and Servant, including therein Masters and Workmen in Every Description of Trade and Occupation.* This book was published in London and in Philadelphia; the English edition went through seven editions and the American edition two.[27] Additional American treatises concentrating solely on master and servant appeared in 1877 and 1886.[28] W.F. Baily's treatise devoted to the master's liability for injuries to servants, first published in 1897, was substantially overhauled in 1912, going from two volumes to three in the process;[29] and C.B. Labatt expanded his treatise on master and servant from two volumes in 1904 to *eight* in 1913.[30]

What to call this new field? Schouler had been quite unsure. He noted that, "[i]n these days, we dislike to call any man master."[31] And the problem was not just nomenclatural; it was taxonomic. What, he wondered, was the right general term for apprentices, clerks, bailiffs, stewards, and *employés* of a corporation?[32] Were they "laborers generally"?[33] Or perhaps the correct general title was "principal and agent"?[34] When Fraser's treatise *Master and Servant, and Master and Apprentice* reappeared in 1882, edited by William Campbell, it bore a more modern title, adding the terms "employer and workman," but retaining the obsolete relation of master and apprentice.[35]

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discussion, see Halley, *What is Family Law?: Part I*, *supra* note 1, at 33-48.

27. CHARLES MANLEY SMITH, A TREATISE ON THE LAW OF MASTER AND SERVANT, INCLUDING THEREIN MASTERS AND WORKMEN IN EVERY DESCRIPTION OF TRADE AND OCCUPATION, WITH AN APPENDIX OF STATUTES (London, S. Sweet 1852; Philadelphia, T. & J.W. Johnson 1852). London printings were issued in 1860, 1870, 1885, 1902, 1906, and 1922; the second American edition appeared in 1866.

28. H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT. COVERING THE RELATION, DUTIES AND LIABILITIES OF EMPLOYERS AND EMPLOYEES (Albany, N.Y., John D. Parsons, Jr. 1886) [hereinafter WOOD, MASTER AND SERVANT (1st ed.)]; H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT. COVERING THE RELATION, DUTIES AND LIABILITIES OF EMPLOYERS AND EMPLOYEES (Albany, N.Y., John D. Parsons, Jr. 1877).

29. W.F. BAILEY, THE LAW OF THE MASTER'S LIABILITY FOR INJURIES TO SERVANT (St. Paul, Minn., West Pub'g Co. 1894); W.F. BAILEY, A TREATISE ON THE LAW OF PERSONAL INJURIES: INCLUDING EMPLOYER'S LIABILITY, MASTER AND SERVANT AND THE WORKMEN'S COMPENSATION ACT (2d ed. 1912).

30. C.B. LABATT, COMMENTARIES ON THE LAW OF MASTER AND SERVANT: INCLUDING THE MODERN LAWS ON WORKMEN'S COMPENSATION, ARBITRATION, EMPLOYERS' LIABILITY, ETC., ETC. (Rochester, N.Y., The Lawyers Cooperative Pub'g Co. 1913); C.B. LABATT, COMMENTARIES ON THE LAW OF MASTER AND SERVANT (1904).

31. SCHOULER, DOMESTIC RELATIONS (1st ed.), *supra* note 12, at 7.

32. *Id.* at 7-8.

33. *Id.*

34. *Id.*

35. PATRICK FRASER, TREATISE ON MASTER AND SERVANT, EMPLOYER AND WORKMAN, AND MASTER AND APPRENTICE, ACCORDING TO THE LAW OF SCOTLAND (William Campbell ed.,

A major impediment to efforts to find a handy title for the modern version of master and servant was the emergence of large bodies of social legislation and administrative law governing relations in the workplace. These explicitly contradicted the classical ideology that master and servant was destined to contract, and thus to the will theory. Fraser noted the rise of statute law, bewailed the confusion created by overlapping legislation, and offered his treatise as an attempt to produce consistency: "The Factory Acts, the main object of which is to protect the interests of women and children, amount to no less than fourteen in number, presenting a mass of almost inextricable confusion . . . which must be puzzling in deed to the young persons and females whose interests they were intended to guard."[36] Baily's and Labatt's revised titles acknowledged the predominance of legislation over common law and the rise of social conflict in the field: Bailey offered *A Treatise on the Law of Personal Injuries: Including Employer's Liability, Master and Servant and the Workmen's Compensation Act,* while Labatt's advertised *Commentaries on the Law of Master and Servant: Including the Modern Laws on Workmen's Compensation, Arbitration, Employers' Liability, etc., etc.* Even a cursory survey of this bookshelf shows the rising complexity of the field as statutory and administrative innovations rose to meet the social crisis attending the transformation of the common law master into the capitalist and the servant into organized labor. Kennedy points out, "After a brief flirtation with the judge . . ., the hero figures of the social current became, in principal, the legislators who drafted the multiplicity of special laws that constituted the new order, along with the administrator who produced and enforced the detailed regulations that put legislative regimes into effect."[37] We see that shift in Baily's and Labatt's structural overhaul of master and servant. They opened the floodgates of the social and reconstructed the ancient topic by an open-eyed recognition of social legislation. Domestic relations, meanwhile, sailed placidly on, adding chapters about Married Women's Property Acts but manifesting

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Edinburgh, T. & T. Clark 1882). By the time this volume appeared, Fraser was a vigorous 65 years old and a Lord of Session. OXFORD DICTIONARY OF NATIONAL BIOGRAPHY ONLINE, http://www.oxforddnb.com.ezp-prod1.hul.harvard.edu/view/article/10119?docPos=2 (last visited Aug. 3, 2011). Presumably he delegated the editorial role to Campbell because he was fully occupied by his judicial duties.

36. FRASER, TREATISE ON THE LAW OF SCOTLAND RELATIVE TO MASTER AND SERVANT, *supra* note 18, at vi.

37. Kennedy, *Three Globalizations*, *supra* note 4, at 43.

no felt need to reframe or rename the field because of them.[38]

What was the fate of Schouler's idea that the field might best be designated the law of "laborers generally"? It seems plausible that this term, focusing entirely on one side of the relation, was understood by the inventors of the field to be too partisan. Several entrants proposed instead to follow the old "relations" format, by replacing master and servant with employer and employee.[39] One of these, decidedly not a product of the academic legal elite, offered itself not as a legalists' learned book but as a handbook for the masses:

> In offering this work to the public the author has endeavored to give information which is often an object of earnest inquiry among the masses of the people; but the real motives that prompted the undertaking is to clear away the distrust in courts, and to point out why so many decisions were against labor in the past, and to direct the attention of the masses to bring the law to bear on all matters concerning them as the solution of the present evils. . . .
>
> . . .
>
> . . . Should the work tend to direct the thoughts of the industrial and commercial world to apply the law, instead of force, to govern their relations, thereby lessening the present overhanging evils, the author will consider it of the highest personal compensation, and to the end of bettering the condition of the toiling masses with whom he has ever been identified the book is respectfully submitted.[40]

J.H. Murphy's politics were typical of social progressives. He deplored the Pullman strikes as injurious to capital, workers and consumers alike and implored all sides to put strikes behind them. In a chapter titled "The

38. Shouler thought the Married Women's Property Acts established an unfair bias in favor of wives, SCHOULER, DOMESTIC RELATIONS (1st ed.), *supra* note 12, at 17-20, and refered to them only when necessary in the text, e.g., *id.* at 247-48. Blakemore, revising Schouler's *Domestic Relations* treatise in 1921, was perhaps even more disgusted by the changes these Acts introduced, SCHOULER & BLAKEMORE, *supra* note 22, at 309-10, but felt obliged to give them a chapter of their own, *id.* at 307-32 (Chapter XVI, *Married Women's Acts*).

39. *See* J.H. MURPHY, APPLY THE LAW: A TREATISE ON THE APPLICATION OF LAW AS THE MEANS OF SETTLING DISPUTES BETWEEN EMPLOYER AND EMPLOYED, AND OTHER MATTERS OF DAILY IMPORTANCE TO THE MASSES 7-8 (Terre Haute, Ind., Moore & Langain 1891); WOOD, MASTER AND SERVANT (1st ed.), *supra* note 28, at Title Page; *see also* IRVING BROWNE, ELEMENTS OF THE LAW OF DOMESTIC RELATIONS AND OF EMPLOYER AND EMPLOYED (2d ed., Boston, Boston Book Co. 1909); IRVING BROWNE, ELEMENTS OF THE LAW OF DOMESTIC RELATIONS AND OF EMPLOYER AND EMPLOYED (Boston, Soule & Bugbee 1883) (a student trot compressing Schouler and Wood).

40. MURPHY, *supra* note 39, at 7-8. Murphy included a short chapter on marriage. *Id.* at 133-37.

Remedy," he proposed the establishment of labor courts devoted to the neutral and fair administration of the law.[41] As Kennedy indicates, the social occupied a large political range between communism and pure *laissez faire*; across the spectrum it was an ideology of social and industrial harmony, not of confrontation and class war.[42] Murphy fits right in, on the left end of the spectrum.

Murphy's preferred name for the field, employer and employee, did not take hold, perhaps because it gave a scent of his progressive egalitarianism. (Our current course Employment Law has origins not in the rise of the social but in the Post-World-War II era, the age of rights.) The nomenclatural question was not settled until 1922, the year after Schouler's *Domestic Relations* treatise appeared under new editorship and for the first time bereft of master and servant. The social reformers' new name for the field was Labor Law, announced by Francis Bowes Sayre in his 1922 work, *A Selection of Cases and Other Authorities on Labor Law*.[43] Inside the covers we find another transformation: Sayres displaced contract and gave pride of place to combination.[44] A thoroughly modern topic had been born, and a new form of the status/contract distinction: domestic relations law/labor law.

The divorce of master and servant from domestic relations was swift but one-sided: the former declared independence long before the latter took note of the rift between them. As Maine had predicted, contract progressed and status lagged. The remainder of this section describes the long, shambling wanderings that carried Blackstone's "*private* oeconomical relations" into modernity, that is, to take shape as domestic relations housing only husband and wife and parent and child.

Almost incredibly, Tapping Reeve's *Law of Baron and Femme* was republished in 1846, 1862, and 1867, long after Reeve's own death in 1823.[45] In 1888, a new editor renamed it *The Law of Husband and Wife*

41. *Id.* at 152-57.

42. Kennedy, *Three Globalizations*, *supra* note 4, at 39, 42, 44.

43. FRANCES BOWES SAYRE, A SELECTION OF CASES AND OTHER AUTHORITIES ON LABOR LAW (1922).

44. *Id.* at *passim*.

45. TAPPING REEVE, THE LAW OF BARON AND FEMME, OF PARENT AND CHILD, GUARDIAN AND WARD, MASTER AND SERVANT, AND OF THE POWERS OF A COURT OF CHANCERY, WITH AN ESSAY ON THE TERMS HEIR, HEIRS AND HEIRS OF THE BODY (Amasa J. Parker & Charles Baldwin eds., 3d ed. [sic], Albany, N.Y., William Gould 1867); TAPPING REEVE, THE LAW OF BARON AND FEMME, OF PARENT AND CHILD, GUARDIAN AND WARD, MASTER AND SERVANT, AND OF THE POWERS OF A COURT OF CHANCERY, WITH AN ESSAY ON THE TERMS HEIR, HEIRS AND HEIRS OF THE BODY (Amasa J. Parker & Charles Baldwin eds., 3d ed., Albany, N.Y., William Gould 1862); TAPPING REEVE, THE LAW OF BARON AND FEMME, OF PARENT AND CHILD, GUARDIAN AND WARD, MASTER AND

and deleted Reeve's "Essay on the Terms Heir, Heirs and Heirs of the Body," but held on tight to an admittedly inadequate section on master and servant: "[T]he growth of modern industrialism, and of the vast combinations of capital and labor necessary to carry on the complex activity of the commercial life of today, have led to a corresponding development and extension of the legal principles governing the relations of Master and Servant. All these causes have led to the comparative disuse of Judge REEVE'S work, though it is still cited with respect by courts, and used by older practioners."[46] Meanwhile, Schouler's *Domestic Relations* went through at least five editions under his own pen between 1870 and 1905, always with master and servant on board. [47] Other books followed suit.[48]

Bolder protests against the inclusion of master and servant followed, though without effectively ousting the topic. In 1896 Walter C. Tiffany offered a *Handbook on the Law of Persons and Domestic Relations* which included the following topics: Husband and Wife; Parent and Child; Guardian and Ward; Infants, Persons Non Compotes Mentis, and Aliens; and Master and Servant.[49] (I will turn to this addition of "persons"

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SERVANT, AND OF THE POWERS OF A COURT OF CHANCERY, WITH AN ESSAY ON THE TERMS HEIR, HEIRS AND HEIRS OF THE BODY (Lucius E. Chittenden ed., 2d ed., Burlington, V.T., Chauncey Goodrich 1846; N.Y., Banks, Gould & Co. 1846). For the date of Reeve's death, see Rev. Dr. Beecher, *Hon. Tapping Reeve. From a Funeral Sermon*, VT. CHRON., Mar. 9, 1827, at 48 col. E; *Tapping Reeve*, AM. NATIONAL BIOGRAPHY ONLINE, http://www.anb.org/articles/11/11-00724.html?a=1&f=%22tapping%20reeve%22&d=10&ss=0&q=1 (last visited Aug. 3, 2011).

46. TAPPING REEVE & JAMES W. EATON, JR., THE LAW OF HUSBAND AND WIFE, OF PARENT AND CHILD, GUARDIAN AND WARD, MASTER AND SERVANT iii (4th ed. [sic], William Gould, Jr., & Co. 1888). This is actually the fifth edition.

47. Schouler's treatise went through five editions in his lifetime. Throughout he maintained his original categorical scheme and reprinted his objections to it. See, for instance, JAMES SCHOULER, A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS EMBRACING HUSBAND AND WIFE, PARENT AND CHILD, GUARDIAN AND WARD, INFANCY, AND MASTER AND SERVANT 3-21 (2d ed., Boston, Little, Brown & Co. 1874), which moves the First Edition's introduction virtually verbatim to a new introductory chapter, and JAMES SCHOULER, A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS EMBRACING HUSBAND AND WIFE, PARENT AND CHILD, GUARDIAN AND WARD, INFANCY, AND MASTER AND SERVANT 8-14 (3d ed., Boston, Little, Brown & Co. 1882), which moves much of the categorical discussion to footnotes, with modifications, such as the observation that "'domestic relations' is now the well-sanctioned title of that law which embraces the topics specified by us at the outset[.]"

48. MARSHALL DAVIS EWELL & JAMES W. LA MURE, A MANUAL OF THE LAW OF DOMESTIC RELATIONS (Detroit, Collector Pub'g Co. 1896) (with successive editions); WILLIS E. MYERS, SYLLABUS OF THE HON. HENRY D. HARLAN'S LECTURES ON THE LAW OF DOMESTIC RELATIONS (Baltimore, King Brothers 1898); JAMES PAIGE, ILLUSTRATIVE CASES IN DOMESTIC RELATIONS: WITH ANALYSIS AND CITATIONS (Philadelphia, T. & J.W. Jonson 1893). All three of these items retained guardian and ward and master and servant.

49. WALTER C. TIFFANY, HANDBOOK ON THE LAW OF PERSONS AND DOMESTIC RELATIONS, at iii (St. Paul, Minn., West Pub'g Co. 1896) [hereinafter TIFFANY, HANDBOOK].

shortly.) Tiffany didn't like the inclusion of master and servant one little bit. Like Schouler, he thought that the proper topic was domestic relations simpliciter, and introduced Master and Servant with an express statement that its classification with the domestic relations was an error:

> The relation of master and servant has from a very early period been classed with that of husband and wife, parent and child, and guardian and ward, as one of the domestic relations . . .. This classification is accurate enough when applied to slaves, apprentices, and domestic servants, but it is not accurate when applied to other servants, like clerks in stores and offices, laborers, employés of railroad companies, and many other employés who are subject to the law governing the relation of master and servant. Accuracy in classification, however, must, in this as in many other cases, yield to usage, and the law applicable to all kinds of servants will be considered.[50]

The second and third editions of Tiffany's *Law of Persons and Domestic Relations* appeared in 1909 and 1921; the second credited Roger W. Cooley as an editor, while the third declared him a co-author.[51] Tiffany and Cooley continued to object to their continued inclusion of master and servant. Meanwhile, possibly under the influence of Cooley increasingly shouldering the burden alone, the treatise added an almost laughably inadequate section on statutory regulation. I reproduce it in full because that is the only way to convey how little responsibility domestic relations took for the immense social, political and legal struggle which by then had become manifest in the freestanding master and servant treatises:

> STATUTORY REGULATION.
>
> 256. The state, by virtue of the police power, may make such regulations controlling the relation of master and servant as may be necessary to preserve the public health, safety, or general welfare.
>
> In many states statutes have been enacted regulating the relation of master and servant in matters pertaining to the employment of children and women, and the hours of labor, and intended to insure the public welfare and health and safety of employés. Such

50. *Id.* at 451-52.

51. WALTER C. TIFFANY & ROGER W. COOLEY, THE LAW OF PERSONS AND DOMESTIC RELATIONS (2d ed., St. Paul, Minn., West Pub'g Co. 1909) [hereinafter TIFFANY & COOLEY, DOMESTIC RELATIONS (2d ed.)]; WALTER C. TIFFANY & ROGER W. COOLEY, THE LAW OF PERSONS AND DOMESTIC RELATIONS (3d ed., St. Paul, Minn, West Pub'g Co. 1912) [hereinafter TIFFANY & COOLEY, DOMESTIC RELATIONS (3d ed.)].

> statutes are generally held to be valid exercises of the police power of the state, and unless open to some special objection are constitutional.[52]

One year after this pathetically depoliticized and entirely useless summary appeared, Labatt produced his eight-volume guide to master and servant. It is impossible to imagine any early twentieth century practitioner turning to a treatise on domestic relations for guidance on how to handle a working hours dispute or a labor injunction. Master and servant lived on as a "domestic relation," but under the cloud of a complete and express loss of faith.

Meanwhile, the idea that marriage is status, transformed into the idea that the *wife* occupies *a* status, that she was a deviant kind of legal person, led several publishing houses and treatise writers to add "the law of persons" to their domestic relations offerings. The American idea that certain people are persons arose not from the Roman law concept of *persones*, but from the home-grown insight that certain individuals were incapable of contract and needed special legal treatment.[53] If contract was the queen of all law, those who could not participate in it were problematic and needed special treatment. Theophilus Parsons' 1853 list of the "disabled persons"[54] included a very colorful cast of characters: infants; married women; bankrupts and insolvents; persons of insufficient mind to contract (which in turn included *non compotes mentis*, seamen, and persons under duress); aliens; slaves; and outlaws, persons attainted, and persons excommunicated.[55] (At no time did American legal minds entertain the French legal idea of "personal status law.") The idea of classifying the domestic relations with the law of (defective) persons produced a small shelf of treatises entitled *Persons and Domestic Relations* (or vice versa) between 1897 and 1927, and then died out, leaving the field to Domestic Relations simpliciter. This was never a robust legal idea; and there are indications that pressure from publishers rather than the working out of a legal logic lies behind this weak trend.

We have already seen Tiffany protesting his own inclusion of master

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52. TIFFANY & COOLEY, DOMESTIC RELATIONS (2d ed.), *supra* note 51, at 478 (citations omitted). The third edition added equally cursory acknowledgment that federal statutes and state Workmen's Compensation Acts existed. TIFFANY & COOLEY, DOMESTIC RELATIONS (3d ed.), *supra* note 51, at 573-74.

53. *See* Halley, *What is Family Law?: Part I*, *supra* note 1, at 17.

54. 1 THEOPHILUS PARSONS, THE LAW OF CONTRACTS 242 (photo. reprint 1980) (Boston, Little, Brown & Co. 1853) [hereinafter PARSONS, THE LAW OF CONTRACTS].

55. *Id.* at xix-xxii.

and servant in his 1896 *Handbook on the Law of Persons and Domestic Relations*. Nor did he like including the Infants, Persons Non Compotes Mentis and Aliens, his thinned out list of the classical persons.

His Preface states his own preference for a book limited to Husband and Wife, Parent and Child, Infants, and Guardian and Ward, indicating in the passive voice that "it has been thought advisable" to add Master and Servant, the insane and aliens. He thanked another writer, to whom he did not grant the dignity of co-authorship, for writing these unwelcome additions.[56] Tiffany thus offered a vastly contracted enumeration of disabled persons from the one contemplated by the classics; did so under protest; and even refused to write *or even credit the author of* the pages setting forth their law.

This is the first book in our survey published by West, and it exemplifies the rise of the law-book (soon to be the casebook) *series*. A new player, the publisher seeking to present the full array of marketable books, is on the stage. It seems likely that pressure from West was what overrode Tiffany's legal science, and that his term "usage" means something close to the expectations of the law-book consumer, probably a practitioner, teacher or student, rather than a judge. This is our first direct indication of a force that doubtless pervades our story without rising explicitly to the surface: the yearning for system that so preoccupied the classics was giving way to pragmatic decisions attuned to selling books to consumers in law practice and in legal education.

One detects more enthusiasm for linking domestic relations with the law of persons in Edwin Woodruff, who housed under this rubric Marriage, Divorce and Separation; Parent and Child; Insanity; Drunkenness; and Aliens.[57] But contraction of the defective persons continued when Woodruff's second and final editions, published in 1905 and 1920, drastically curtailed the space given over to them, suggesting that he (or his readers or publisher, or some combination of them) was losing faith in the idea that a law of persons existed and needed to be known.[58] More air was let out of the balloon by Albert M. Kales, who published *Cases on Persons and Domestic Relations* in 1911 as part of

56. TIFFANY, HANDBOOK, *supra* note 49, at iii.

57. EDWIN H. WOODRUFF, A SELECTION OF CASES ON DOMESTIC RELATIONS AND THE LAW OF PERSONS iii-xiv (N.Y., Baker, Voorhis & Co. 1897).

58. EDWIN H. WOODRUFF, A SELECTION OF CASES ON DOMESTIC RELATIONS AND THE LAW OF PERSONS v-xi (2d ed., New York, Baker, Voorhis & Co. 1905); EDWIN H. WOODRUFF, A SELECTION OF CASES ON THE LAW OF DOMESTIC RELATIONS AND OF PERSONS v-x (3d ed., New York, Baker, Voorhis & Co. 1920).

West Publishing Company's new American Casebook Series.[59] Kales acknowledged two sources: Woodruff and Jeremiah Smith's 1899 *Cases on Selected Topics in the Law of Persons*[60] (an offering suggesting further debilitation of the impulse for system) and proceeded without comment to eliminate all of Woodruff's disabled persons from the text itself.[61] He presented the list which Smith had deemed merely "selected"[62] as complete: Parent and Child, Infants, and Husband and Wife. By the time William Edward McCurdy published his 1927 casebook on *The Law of Persons and Domestic Relations*, the impulse to classify marriage with the disabled persons was dead.[63] McCurdy divided his book into three topics, making no excuse for what he was leaving out: Marriage, Separation and Divorce; Husband and Wife, Married Women; and Parent and Child, Guardian and Ward, and Infants. Moreover, though McCurdy included Guardian and Ward in the title of his Part III, he radically demoted the topic: it disappeared from the Table of Contents without comment and, in the text, he referred to it in scattered notes and almost offhand references.[64] In the second edition he finished the excision: Part III of the casebook was re-titled "Parent and Child. Infants."[65] The modern domestic relations law-book had finally been born.

In 1927 McCurdy was in the vanguard; Schouler's vision – now almost 50 years old – of a legal topic centered on the social space of the home was finally realized. Still, McCurdy retained *The Law of Persons* in his title through three further editions, deleting it only in his last 1964 edition.[66] The casebook was in print for about 40 years, a very long run.

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59. ALBERT M. KALES, CASES ON PERSONS AND DOMESTIC RELATIONS SELECTED FROM THE DECISIONS OF ENGLISH AND AMERICAN COURTS xii-xvi (St. Paul, Minn., West Pub'g Co. 1911) [hereinafter KALES, PERSONS AND DOMESTIC RELATIONS].

60. JEREMIAH SMITH, CASES ON SELECTED TOPICS IN THE LAW OF PERSONS (Cambridge, Mass., Harvard Law Review Pub'g Assoc. 1899) [hereinafter SMITH, LAW OF PERSONS].

61. KALES, PERSONS AND DOMESTIC RELATIONS, *supra* note 59, at xii.

62. SMITH, LAW OF PERSONS, *supra* note 60, at v-ix.

63. WILLIAM EDWARD MCCURDY, CASES ON THE LAW OF PERSONS AND DOMESTIC RELATIONS (1927) [hereinafter MCCURDY, DOMESTIC RELATIONS (1st ed.)]. For the table of contents, see *id.* at ix-x.

64. The index refers to cases and notes on child custody, *id.* at 877-881, the infant's property, *id.* at 894-99, 907-09 n.3, and to extremely abbreviated footnote references about infants' contracts, *id.* at 1050 n.1, on tort actions for the seduction of a child, *id.* at 1186 n.2, and on the child's tort action against a guardian for injuries to his person, *id.* at 1203 n.3. For the index entry, see *id.* at 1216-17. Guardian and ward had ceased being a topic and was reborn as fragmentary scraps of law within *other* topics.

65. WILLIAM EDWARD MCCURDY, CASES ON THE LAW OF PERSONS AND DOMESTIC RELATIONS xii (2d ed. 1933) [hereinafter MCCURDY, DOMESTIC RELATIONS (2d ed.)]

66. WILLIAM EDWARD MCCURDY, CASES ON THE LAW OF PERSONS AND DOMESTIC RELATIONS

As we will see, by 1964 his whole approach, from title to contents, had become reactionary.

Thus the idea of a law-book housing the Blackstonian "*private* oeconomical relations" died out very slowly indeed.[67] When it did, McCurdy's casebook became modal. But compared with what had happened to master and servant, it represented very little change, achieved very late. Domestic relations had become a temporally "slow" field.

The rise of master and servant as a separate topic, and its swift embrace of social legislation, implied a complete rejection of the classical legal idea that the work relation was governed by contract law, and that contract law was preeminently the home of the will theory, the exclusive domain of the will of the parties. This happened quickly in the law-of-work treatises – though not of course so quickly in the classicizing treatises on contract, tort and property and very slowly indeed at the Supreme Court. And we see a corresponding loss of faith in contract's complementary opposite, status, as the domestic relations treatises and casebooks wanly attempted and gradually failed to yoke a law of persons to the domestic relations.

What we are seeing here is the reconstruction of the classical status/contract distinction in the new parole of the social. What made domestic relations law exceptional was, at first, its crisp preservation of the will of the state against the will of the parties,[68] but an increasingly distinct feature of the field was becoming its tendency to *lag*. Master and servant modernized rapidly; by the end of the 19th century it had assumed its social form and was lacking only its social name, labor law. Meanwhile domestic relations law went through a desultory, almost aimless series of minor revisions. In this process, it became acceptable to produce domestic relations books that their own authors denounced as wrong; the field was becoming not only *retardataire* but demoralized. Domestic relations didn't dock *as* domestic relations law in the revised legal order until 1927. By that time, the pervasive understanding of the

(3d ed. 1939); WILLIAM EDWARD MCCURDY, CASES ON THE LAW OF PERSONS AND DOMESTIC RELATIONS (4th ed. 1952); WILLIAM EDWARD MCCURDY, DOMESTIC RELATIONS (1964).

67. The last treatise that I can find using the Blackstonian list in its title is WILLIAM PINDER EVERSLEY, EVERSLEY'S LAW OF THE DOMESTIC RELATIONS: HUSBAND AND WIFE, PARENT AND CHILD, GUARDIAN AND WARD, INFANTS, MASTER AND SERVANT (Alexander Cairnes ed., 5th ed., London, Sweet & Maxwell 1937). Schouler's posthumous editor had by that time abandoned it, classifying instead the law of ongoing marriages, of parent and child, of infancy, of guardian and ward, and of divorce and separation. SCHOULER & BLAKEMORE, *supra* note 22, at vii-xxx.

68. This was always ideological. *See* Halley, *What is Family Law?: Part I*, *supra* note 1, at 48-54.

legal order corresponded with "the social." Maine's prediction that contract would progress and status would lag[69] came true, though in terms he could not possibly have predicted.

## II. THE RISE OF THE SOCIAL: POUND

In the early years of the 20th century, a massive new brainwave sped through the heads of American legal elites: the rise of the idea that law derives not from abstract principles but from the human project of using it to address social needs. Roscoe Pound was in the vanguard of this movement and established himself quickly as one of its most vocal and prolific proponents.[70] In 1916, the same year that he became Dean of Harvard Law School,[71] Pound fired the opening salvo against the classical contents of Domestic Relations in an article entitled "Individual Interests in the Domestic Relations."[72] The article states an ambitious new program for sociological jurisprudence about the domestic relations. The field was finally going to be shaken up.

First, note that Pound paid no credit to the idea that the domestic relations included master and servant. His article is a compact synthesis of four interests that constitute the field and justify legal rules in common law, civil law, Roman law and the Married Women's Property Acts:

> There are four types of interest in the domestic relations which the law is called upon to secure. These are (1) interests of parents, demands which the individual may make growing out of the parental relation; (2) interests of children, demands which the individual may make growing out of the filial relation; (3) interests of husbands, demands which the individual husband may make growing out of the marital relation; and (4) interests of wives, demands which the individual wife may make growing out of the marital relation.[73]

Delving down deeper, Pound counted up three legally recognized interests

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69. HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS 168-69 (Frederick Pollock ed., London, John Murray 1912) (1861). For a discussion, see Halley, *What is Family Law?: Part I*, *supra* note 1, at 71-74.

70. *Roscoe Pound*, AM. NAT'L BIOGRAPHY ONLINE, http://www.anb.org.ezp-prod1.hul.harvard.edu/articles/11/11-00699.html?a=1&n=roscoe%20pound&d=10&ss=0&q=1 (last visited July 8, 2011).

71. *Id.*

72. Roscoe Pound, *The Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177 (1916) [hereinafter POUND, INDIVIDUAL INTERESTS].

73. *Id.* at 181.

in the parent against the child; three interests in the child against the parent; four interests in the husband with respect to his wife against the world; four interests in the husband against the wife; four interests of the wife with respect to her husband against the world; and two interests in the wife against the husband.[74] For each of these, Pound assesses the strength of the interest, identifies the rules that serve it, and adjudges the rules either adequate or still in need of improvement.

But Pound's title is misleading: the crux of his argument is that individual interests in the domestic relations must, and inexorably do, give way to social interests. The very first lines of the article state this credo: "It is important to distinguish the individual interests in domestic relations from the social interest in the family and marriage as social institutions. This social interest must play an important part in determining what individual interests in such are to be secured, how far they are to be secured and how they are to be secured."[75] The article maps out, rule by rule, the many ways in which the individual interests of husband and wife, of parent and child – protected as rights but constantly implying correlative duties – were required to give way not only to countervailing individual interests but, increasingly, to social interests. Joseph's Story's idea that marriage is an institution of society, and Schouler's that domestic relations as a topic should map the social home – both of which had pretty much lain on the table unused by anyone until now—were suddenly ready for an efflorescence.

Pound rationalized all the specific rights of husband against wife, wife against husband, parent against child, child against parents as *individual interests* which, whenever needed, quietly give way to an overarching *social interest* both in the family and in its dependent members. For example, modern law restricts parental right in order to enforce the parental duty to care for children in their neediness and to secure the social interest in the child as a member of society:

> Under more primitive social conditions the group interests of the family or kindred largely dictated the legal delimitation of parental and filial interests. In modern times the individual interests of the child came to be given greater weight. Today certain social interests are chiefly regarded. These are on the one hand a social interest in the maintenance of the family as a social institution and on the other a social interest in the protection of dependent

74. *Id.* at 181-2, 185-6, 188, 190-93, 193, 195.
75. *Id.* at 177.

> persons, in securing to all individuals a moral and social life and in the rearing and training of sound and well-bred citizens for the future. The parent's claim to the custody of the child and to control over its bringing up has come to be greatly limited in order to secure these interests.[76]

Except for the complacency with which Pound predicted that social interests inexorably put precisely the right limits on individual ones, this is almost verbatim the prescription for the family that we see in one of Pound's most admired German jurists, Rudolf von Ihering.[77] What Pound admired in Ihering was precisely the ideas that law had purpose – that its purpose was not the exaltation of the individual and his will but the well-being of society – that legal rules both did and should evolve to constrain individual will and serve social welfare – and that an entirely new jurisprudence was needed to capture the immense transformation in law studies and law making that was founded on these ideas.[78] The great modernist revolution in American legal thought of the opening decades of the twentieth century, advancing sociological jurisprudence and legal-science-based social-purpose functionalism[79] against the deductive style and the formal classicism of classical legal thought, shook up the house of Domestic Relations just as it was doing for all the abutting legal topics.

Still, there was an important difference between Ihering and Pound. Ihering expressed anxiety that not nearly enough was being done to protect children from malign parents: the solution – public homes – would require a "mighty transformation" that might take "perhaps thousands of years."[80] Pound's "Domestic Relations" article was far more complacent, almost giving off a "whatever is, is right"[81] vibe. For all that, in his early years, Pound rightly assumed the mantle of the Young Turk leading the

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76. *Id.* at 182.

77. RUDOLF VON IHERING, LAW AS A MEANS TO AN END (Isaac Husik trans., Boston, The Boston Book Co. 1913) [hereinafter IHERING, LAW AS A MEANS]. This prescription is particularly evident in Chapter 8, § 13, "The Pressure of the Law upon the Individual." *Id.* at 381-409. Pound read German, and so could have read Ihering's *Law as a Means to an End* in any of the several German-language versions published before 1913. The first of these was RUDOLPH VON JHERING, DER ZWECK IM RECHT (Leipzig, Breitkoph & Härtel 1877-1883).

78. Pound was on the Editorial Committee of the Association of American Law Schools that sponsored the 1913 English translation of *Law as a Means to an End.* IHERING, LAW AS A MEANS, *supra* note 77, at frontispiece. For Pound's high estimate of Ihering and his reasons for it, see Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 610 (1908); and Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence II*, 25 HARV. L. REV. 140, 140-47 (1911).

79. Nicola, *supra* note 10, at 793-95.

80. IHERING, LAW AS A MEANS, *supra* note 77, at 385.

81. "One truth is clear, 'Whatever IS, is RIGHT.'" Alexander Pope, *An Essay on Man*, l.294, *in* THE POEMS OF ALEXANDER POPE 501, 515 (John Butt ed., 1973).

charge against the Old Guards of conceptual jurisprudence, he displayed at the same time the profound political conservatism which was to transform him in later years into a political reactionary and to set up his investment in his conflict with the legal realists.

The next year, 1917, Pound situated his vision of the domestic relations in an all-out attack on individualism as a principle for legal development. In Part II of "The End of Law as Developed in Juristic Thought," he took the genealogy of individualism back to Immanuel Kant, traced it through Freidrich Carl von Savigny and Henry Sumner Maine, labeled it "individualism," and denounced its march across the late-nineteenth-century Anglo-American legal field. [82] He concluded that it "coincided . . . with the dominance of the idea of *laissez faire* in economics"[83] and was pregnant with baleful ideological, social, and moral import:

> Thus the conception of the end of law as an unshackling of individual energy, as an insuring of the maximum of individual free self-assertion, gave rise to a conception of the function of law as a purely negative one of removing or preventing obstacles to such individual self-assertion, not a positive one of directly furthering social progress.[84]

The real villain of Pound's story was less Kant than Maine: his "teaching was so completely in accord with . . . individualism . . . that it soon got entire possession of the field."[85] And where Maine went wrong, his initial first mistaken step, was to adopt as his model the Roman law seen "from the standpoint of Savigny."[86] This body of social thought, and all its moral and legal ideas, were alien to the common law. Cut out the foreign growth and the healthy, indigenously *social* emphasis of Anglo-American law – indeed, its healthy feudal emphasis on reciprocal relations saturated with social duty – could flourish in modern form.

This legal purification required the excision of the "Romanist system" in order to eradicate its central "conception of a legal transaction" giving effect to the "will of the actor[.]"[87] Pound objected to the preeminent

82. Roscoe Pound, *The End of Law as Developed in Juristic Thought*, 30 HARV. L. REV. 201, 203-10 (1917) [hereinafter Pound, *The End of Law*]. Pound traced the spread of individualist thinking from the English utilitarians (*e.g.*, Bentham), *id.* at 206-08, to historical jurists (*e.g.*, Maine), *id.* at 209-11, to the positivists (*e.g.*, Spencer), *id.* at 222-23, to the social-individualists (*e.g.*, Lasalle), *id.* at 224.

83. *Id.* at 203.

84. *Id.*

85. *Id.* at 210.

86. *Id.* at 221.

87. *Id.*

place given in the Romanist system to the law of obligations, elided into the law of contract.[88] "In our law, by contrast, the central idea is rather relation."[89] The antagonism between Romanist law and the common law spans the legal field from one end to the other:

> The Romanist speaks of the contract of *societas*. He develops all his doctrines from the will of the parties who engaged in the legal transaction of forming the partnership. We speak, instead, of the partnership relation and of the powers and rights and duties which the law attaches to that relation. Again, the Romanist speaks of a letting and hiring of land and of the consequences which are willed by entering into that contract. We speak of the law of landlord and tenant and of the warranties which that relation implies, the duties it involves, and the incidents attached thereto. The Romanist speaks of a *locatio operarum*, a letting of services and of the effects which the parties have willed thereby. We speak of the relation of master and servant and of the duty to furnish safe appliances and the assumption of risk which are imposed upon the respective parties thereto. . .. The double titles of our digests, such as principal and surety, or vendor and purchaser, where the Romanist would use the one word, suretyship or sale, tell the same story.[90]

And Pound understood that *Family Law* was a Romanist idea alien to the common law: "The Romanist speaks of family law. We speak of the law of domestic relations."[91]

This is the first instance in my genealogy when any American jurist gives a reason why the Americans never picked up the German law term family law for their own law. To be sure, they had been willing to use it to designate the primitive, exotic practices of dubiously civilized others. Not long after Schouler published his *Domestic Relations* treatise, Family Law first appeared as a legal topic in English, and *all* the early uses virtually scream "primitive law – foreign law – the law of colonies – the law of the East." Thus we find a chapter on "Anglo-Saxon Family Law"; *The Family Law of the Chinese*; a chapter on Family Law in *An Outline of Chinese Civil Law; A Treatise on the Basic Hindu Law* including a chapter on Family Law; and a provisional treaty setting forth the *Personal Status and Family Law Jurisdiction of American Nationals in Persia and of Persian*

88. *Id.* at 211 n.34.
89. *Id.* at 212.
90. *Id.* at 212-13.
91. *Id.* at 213.

*Nationals in the United States of America.* [92] But never Anglo-American family law. Before Pound's intervention, this setting-aside can easily be explained by the fact that domestic relations had been the preferred term of practitioners since at least the 1830's: there was an agreed-upon term in place for what we had in America.

But Pound's reasons ran far deeper. He wrote in the midst of World War I; in 1917, the year Pound published "The End of Law," America entered that bloody conflict against Germany and its allies. And he was simply exploding with the energy of the social, deeply hostile to the ideological orientation of the classical era. His anti-Germanism, anti-individualism and anti-classicism merged; together they expressed, for him, a civilizational conflict.

Wait a minute, you might object: when the Savignian Romanist speaks of family law, he *affirms* a legal domain in which "regulation, paternalism, community and informality"[93] are both venerated and preserved! Why not welcome that element of the Savignian idea, and leave the rest? But Pound got the deconstructive point of Savigny's system: family law sacralized community, reciprocity, paternalism, and so on *by segregating them from contract.* Family law exceptionalism (FLE) was not a saving remnant from but a warrant for the will theory. Adopting the Romanist idea of family law, he warned, would bring the paired, opposite, equally Romanist idea of contract in its wake. As indeed it had done – though it was now housed under Pound's favored term Domestic Relations.[94]

For Pound, then, the domestic relations were not exceptional. They

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92. ROBERT THOMAS BRYAN, AN OUTLINE OF CHINESE CIVIL LAW (Shanghai, The Commercial Press 1925); KASHI PRASAD JAYASWAL, MANU AND YÂJÑAVAKJYA: A COMPARISON AND CONTRAST: A TREATISE ON THE BASIC HINDU LAW (Calcutta, Butterworth 1930); J.L. LAUGHLIN ET AL., ESSAYS IN ANGLO-SAXON LAW (Boston, Little, Brown & Co. 1876); PAUL GEORGE VON MÖLLENDORFF, THE FAMILY LAW OF THE CHINESE (Shanghai, Kelley & Walsh 1896); and PERSONAL STATUS AND FAMILY LAW JURISDICTION OF AMERICAN NATIONALS IN PERSIA AND OF PERSIAN NATIONALS IN THE UNITED STATES OF AMERICA, PROVISIONAL AGREEMENT OF THE UNITED STATES OF AMERICAN [SIC] AND PERSON, EFFECTED BY EXCHANGE OF NOTES SIGNED JULY 11, 1928 (Washington, D.C., U.S. Gov't Print Office 1931). The Savignian idea that family law is distinctively *national* law, unlike contract law which is (or ought to be) universal, thus came to American law libraries through legal anthropology about primitive law and through handbooks on the residual law of colonized people. Pound doesn't allude to this development, but it may have contributed to the general loyalty to Domestic Relations as the title for the field which forms the default position from which my story in this Part begins.

93. DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT 185 (1975).

94. Pound took note of this terminological shift: "If it be said that this is a relatively recent phrase in our books, it may be pointed out that the title 'baron and feme' goes a long way back, and, as contrasted with "law of persons," has the true common law ring." Pound, *The End of Law*, *supra* note 82, at 213 n.39.

were no different from the relations of landlord and tenant, master and servant, mortgagor and mortgagee; no different from the duty (the *relation*) that is the basis of tort liability, from fiduciary duties, from the infusion of common law with equity.[95] To be sure, the underlying relation is different in each case, but it's relation all the way down. Of all the figures in our genealogy, Pound is surely closest to Theophilus Parsons: they share the focus on relation and are antagonistic to the market/family division of the world that begins, in our story, with Story.[96] To be sure, Pound objected to Parsons' emphasis on contract,[97] not noticing, apparently, that Parsons actually thought that implied contracts – not the will of the parties – "form the web and woof of actual life."[98] As we will see, this refusal of FLE was immediately and enthusiastically taken up by the first program for legal realist reform of the law school curriculum.

But before we turn the page forward, one more important point about Pound. He was an unabashed neofeudalist.[99] The great continental affinity of the common law was not with Romanist law but with *German* law – German law as Pound supposed it to exist before the early modern revival of Roman law. Maine had overlooked an immense resource of primitive law that did not need to be superseded by contract and that lay at hand, ready to help proponents of the social in their efforts to order modern life.

Compare, for instance, the Roman *patria potestas,* the power of the head of the household, with the corresponding Germanic institution of the *mundium.* The Roman institution is quite one-sided. The *paterfamilias* is legally supreme within the household. He has rights. But whatever duties he may owe are owed without the household, not within. On the other hand the Germanic institution is conceived of as a relation of protection and subjection. But the subjection is not because of a right of the house-father. It is a subjection because of the relation and for the purposes of the protection which the relation involves. Also the right of the house-father grows out of the right of the relation and is a right against the world to exercise his duty of protection.[100]

It all sounds very retro now, because we now assume that modernization means equality, and that a man's defense of male

95. *Id.* at 213-16.
96. *See* Halley, *What is Family Law?: Part I, supra* note 1, at 12-20.
97. Pound, *The End of Law, supra* note 82, at 218, n.56.
98. PARSONS, THE LAW OF CONTRACTS, *supra* note 54, at 4.
99. *See also* Roscoe Pound, *The New Feudal System*, 19 KY. L.J. 1 (1930).
100. Pound, *The End of Law, supra* note 82, at 217 (citation omitted).

superiority is almost *per se* in bad faith. But that set of ideas didn't become canonical in family law until the last chapter of our story, in the rise of identity politics as a central organizing discourse in the field, and of the equality of the spouses as a central organizing legal principle. The modernizing impulse that Pound brought to the domestic relations came with an intuition that it was no different from any other area of law: it was social, and so was the law of business.

## III. INSTITUTIONALIZING THE SOCIAL: THE LEGAL REALISTS AND THE CURRICULUM

The stage finally shifts from Harvard Law School to Columbia Law School, where the faculty undertook an immense curricular reform project in 1926. Happily, the story of this undertaking has been painstakingly told in an article by Brainerd Currie,[101] and I will rely heavily on his research in the primary documents.

The stimulus for change came when new courses in Industrial Relations, Illegal Combinations, and legal economics were offered at Columbia in 1922-23. The first two of these will not surprise a reader of Section I of this Part: the rise of labor conflict was our first indication of the rise of the social in classical-era treatises. According the Currie, these new courses grabbed the faculty's attention for framing their topics around social situations rather than doctrinal categories, for transgressing the boundaries between the topics of the established curriculum in assembling the law they taught, and for integrating "nonlegal materials" in order to make the leap from law to society.[102] The third, taught by Robert Hale, dared law to become as scientific as economics. Currie observed that these courses, with their "challenge to the accepted taxonomy of the law and their disturbing impact on the unity and the proportions of the curriculum, . . . [were] directly responsible for the extensive studies [of the curriculum as a whole] which the faculty undertook four years later."[103]

The result was a full-scale effort to reform the entire curriculum. This

101. Brainerd Currie, *The Materials of Law Study, Part III, Nonlegal Materials in the Law School: Beginnings of the Modern Integration Movement*, 8 J. LEGAL EDUC. 1 (1955) [hereinafter Currie, *Materials*]. I have also relied on Annaline Loubser, Nonlegal Materials in Legal Education with Special Reference to Family Law (unpublished seminar paper, Harvard Law School) (May 1961) (on file with Harvard Law Library).

102. Currie, *Materials*, *supra* note 101, at 3.

103. *Id.* at 3-4.

campaign involved a vast outpouring of faculty energy. The goals were to make each course fully responsive to pressing social problems, to integrate social science knowledge so that lawyers could join with other professions generating knowledge of society in the expert solution of those problems, and, in the process, and withal that, nevertheless to reconstruct a coherent curriculum in which students would not encounter duplicative training. Currie again: "At some point early in this four-year period, the idea was developed that the solution to the problem was to reorganize the *entire course of study* along functional lines. . . . [This] accounts for the paradox that inclusion of nonlegal materials in the course of study was actually advocated as a simplification device . . . . As long as the law school clings to the doctrinal classifications as the basis of instruction, duplication is inevitable; but duplication can be eliminated if functional classifications are consistently substituted for them throughout the curriculum."[104]

The ultimate goal was to shift all teaching to social-purpose functionalism. As Dean Oliphant charged the faculty,

> All rules of law, both statutory and customary, should be judged by legislators and courts by their effects upon the human relations which they regulate or promote, and should be approved or changed accordingly. It is not enough to consider them merely as ideas; how, as such, they came about; and how they fit into some body of abstract doctrine. In order to judge rules of law by their effect it is necessary:
>
> 1. To discover what human relation is actually being affected by the operation of a given rule of law and
>
> To marshal the contemporary data of the other social sciences concerning that human relation and consciously to weigh such data in passing upon the rule in question.[105]

Currie's story begins with the rising excitement with which the faculty divided into committees dedicated to this ambitious collective goal.

One of these committees was Family and Familial Property.[106] Dean Oliphant's charge to this group:

> 1. The primary object is to uncover those areas of the law now

104. *Id.* at 8.

105. *Id.* at 28-29 (quoting Professor Herman Oliphant, Memorandum Concerning a Proposed Study of Familial Law, *cited in* Currie, *Materials*, supra note 101, as Document No. 28, at 125B [hereinafter *Oliphant Memorandum*]).

106. Currie, *Materials*, *supra* note 101, at 22.

> affecting the family without our being aware of the fact and reclassify this material in a way more significant for a study of these rules as social forces actually shaping human relations and conduct. Present classification tends merely to facilitate the study of these rules of law as concepts, as parts of a history of legal thought or as parts of a body of abstract doctrine.
>
> 2. The secondary objective is to disclose to students of law the major bodies of pertinent knowledge as to the family in the other social sciences and to consider methods of using such knowledge in judging rules of law.[107]

The Columbia enterprise thus aimed for a quadruple transformation of the field: it was now defined by the family, not marriage; all the law that "affect[s]" the family – not just marriage and divorce, and not just the reciprocal relations of husband and wife, parent and child – was to be included; rules of law were not given but were to be *judged* on a functional paradigm (the purpose of teaching was to identify the social function of legal rules and to discover the best rule for each function); and the social function of legal rules was to be revealed through social science "knowledge."

If any of this were achieved, the classical edifice would lie in ruins and an entirely new, entirely different, but equally coherent structure would take its place. For all its antagonism to classical legal thought, the Columbia curricular reform was neoclassical at its core. What would emerge would be a new system. The tolerance for curricular fragmentation which is now so high as to be unremarkable was then completely unknown.

Three documents mark the progress that the Columbia team made in transforming Domestic Relations: the Committee's report; a 762-page report entitled *A Research in Family Law*, privately published by Committee members Albert C. Jacobs and Robert C. Angell as the culmination of research pursued on a $25,000 grant from the Rockefeller Foundation, which I will call the Jacobs/Angell Report;[108] and the first casebook resulting from this work, Jacobs's 1933 *Cases and Other Materials on Domestic Relations*.[109] What did the progression from the first of these statements to the third do to fulfill Oliphant's charge?

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107. *Id.* at 29 (quoting *Oliphant Memorandum, supra* note 105, at 125c).

108. ALBERT C. JACOBS & ROBERT C. ANGELL, A RESEARCH IN FAMILY LAW 4 (1930). The full name of the granting foundation was the Laura Spellman Rockefeller Memorial Foundation. *Id.*

109. ALBERT C. JACOBS, CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS (1933) [hereinafter JACOBS, DOMESTIC RELATIONS (1st ed.)].

First, Columbia reformers were eager to replace Domestic Relations with the Family and Family Law. Ironically, when Pound's impulse to sociological jurisprudence bore its first fruit, his nomenclatural campaign for Domestic Relations was simply swept aside; his idea that Family Law signified Romanism and the will theory had dissolved without a trace. The same thing happened at Yale, where Dean Hutchins boasted that in 1928-29 the faculty had "abandoned the old course in domestic relations because it seemed a waste of time to give such poor instruction in so vital a subject." Hutchins reported that a team of four faculty members was working to "build up a new course" – which Hutchins called "family law" – "that should have some relation to what is going on in the world."[110] To this first wave of social functionalist reformers, Family Law clearly signified the social family and the exciting transformation of legal studies into a new social science, while Domestic Relations became the "technical doctrine of the law"[111] and threatened to lay the dead hand of the intellectual past on their lively work. Pound's high-theory neofeudalism had no takers.[112] Like Pound, the reformers burned to "make it new." But for them, Family Law was the new.

What could these gentlemen have meant by "family law"? I offer two sources for an etymology here: the account of the field which Jacobs and Angell extracted from sociology and anthropology of the family and which Jacobs redacted as Chapter I of his 1933 casebook; and the family *courts* movement which had begun simultaneously with the rise of the social. They follow a track so identical, to a destination so identical, that it is hard to credit the idea of their complete autonomy. Somehow, I don't know how, they were connected.

The Jacobs/Angell Report observed that the term family is a conceptual

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110. *School of Law, Report of Robert Maynard Hutchins, Dean, in* YALE UNIVERSITY, THE SCHOOL OF LAW, REPORTS OF THE DEAN AND OF THE LIBRARIAN, JULY 1, 1928-JUNE 30, 1929, at 5, 6 (1929).

111. Harlan F.Stone, *The Future of Legal Education*, 10 A.B.A. J. 233, 234 (1924), *quoted in* Currie, *Materials*, *supra* note 101, at 11.

112. The Columbia committee quoted with approval the lament of Ernest W. Burgess in his introduction to Ernest R. Mowrer's book *Family Disorganization*: "Our ignorance of the life of the present-day family is none the less colossal because of the vast and increasing literature upon sex and marriage and the family. For much of this literature deals with family life of other societies than our own, the best of it with marriage and the family among preliterate peoples, and the remainder of it with the large patriarchal family, the type of familial organization of the ancient Israelites, Romans and Greeks . . . ." Currie, *Materials*, *supra* note 101, at 29 n.113. (quoting Document 42 at 320, quoting Ernest W. Burgess, Foreward, *in* ERNEST R. MOWRER, FAMILY DISORGANIZATION vii (1927)). Apparently even knowing about the past could get in the way of learning about the present. We see here an early symptom of the anti-intellectualism that would entrench itself in law schools in the name of sociological investigation.

abstraction embracing social arrangements that differ vastly over time and across society. Though the contemporary European and American family classically consists of a husband and wife, their offspring, and perhaps collaterals and ascendants "associated together," there was nothing necessary about the nuclear unit:

> Professor Ernest W. Burgess has defined the family as "a unity of interacting persons with a conception of their roles in it supported by, if not derived from, the community." This definition clearly shows the generalized character of the concept with which we were to deal. . . . [P]erhaps a higher degree of specific content would be obtained if we regarded the family in modern European and American society as consisting of man and woman associated together for a period of some, but varying, duration, together with the offspring of this union, and in many instances collaterals and ascendants of one or both of the major characters. It would continue to be a "family" after the death or departure of the collaterals, ascendants, descendants or even one of the major characters, if the remainder of the group continued to function as a social unit. It is to be noticed that so far no reference has been made of the necessity for a marriage ceremony in the creation of a "family". It is possible to create a "family" by the relationship between man and woman where there is no marriage. Even further variations may occur in the constituent units of the group. Several adult children may set up a household and live together for an indefinite period of time; a man, having no family, may adopt a child or children, and the group may function as a family. It is apparent also that variations may occur in significant environmental factors. A "family" connotes a very different set of relationships in a remote agricultural community of the middle west, in an industrial community as Pittsburgh, and in an apartment house in New York City.[113]

The shift from domestic relations to family law was thus a shift from the purely legal forms of familial relation to the actual social forms, however diverse and however innocent of legal recognition. Schouler's idea of limiting the field to those relations that actually inhabited the home has broken through his indifference to sociological and historical reality: the Columbia reformers were ready to make the leap from the law in the books to the law in action.

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113. JACOBS & ANGELL, *supra* note 108, at 9-10. Jacobs reproduces most of this passage in the opening pages of his 1933 casebook. JACOBS, DOMESTIC RELATIONS (1st ed.), *supra* note 109, at 1-2.

The 1933 Jacobs casebook went on to ask whether the "blood tie" and the "sex tie"[114] were essential elements of family. Jacobs was not sure:

> Suppose *X* and *Y,* first cousins, set up a household with an aunt, *Z;* would this constitute a family? *X, Y* and *Z,* adult men not related, set up a household; does this constitute a family?[115]

He did not answer this very queer question. It thus appears that "family" is a social rather than a legal concept, highly variable in practice, characterized by cohabitation and perhaps by the ties of blood and sex. We have broken completely with Schouler's husband and wife, parent and child. As long as the Columbia reformers' influence held sway, Domestic Relations referred to the law governing these *legally recognized* family relations; if one was to study the family and its law, one must go much much further.

Jacobs observed that the feudal family so beloved of Pound is a historical anachronism: the modern family has undergone "shrinkage."[116] The "most important" function that has departed the household is "family industry."[117] The rise of the market for labor and of modern industrial relations has contracted the family: the family in both cases, formerly large, now small. But that doesn't mean that the family is a purely affective social space: "about the only functions left are the bearing and early care of the young, affection between spouses and as to children, and *as a property holding and disposing unit.*"[118] Even if it is no longer the primary site of productive labor, the family remains important as a *distributional* social institution.

Finally, Jacobs posits that the *law* of this family extends way beyond the old common law rules of husband and wife, parent and child: "Beginning with a closely-knit body of common law dealing with the family, this all has been changed by interpretation and statute to meet existing conditions."[119] Family law was finally poised to undergo the change that master and servant underwent in the late nineteenth century: catching up with the statutes is one of the things it means to develop a social idea of law. Account must be taken of the "Married Women's Acts, the Child Labor Laws, the Compulsory Education Laws, the freer divorce

114. JACOBS, DOMESTIC RELATIONS (1st ed.), *supra* note 109, at 2.
115. *Id.* at 6.
116. *Id.*
117. *Id.*
118. *Id.* (emphasis added).
119. *Id.*

laws, and many others."[120] Large state-based bureaucracies – public schools, agencies overseeing the welfare of children – are family law too.

I think it is almost certain that Jacobs and Angell were taking their cue from the very recent rise of family *courts.* As with so much else in the American legal world of the social era, we can trace the family court movement back to Pound. In "The Administration of Justice in the Modern City," published in 1913, he argued that the rise of city life required a turn from individualist to collectivist consciousness in law and that this had procedural implications: the time was nigh for a turn from adjudication to administration. Pound himself then saw that the social-purpose-functionalist vision could not contain the complexities facing administration: managing the modern city required tools "to apply and enforce law in a community where furnishing a guide to the individual conscience is not enough, where it is often of more importance to enforce rules vigorously but intelligently than to insure that the rules are the best possible[.]"[121] As we will see, Pound bequeathed this insight to his mentee Karl N. Llewellyn, and they were to come to a painful parting of the ways over it.

When it came to the family, Pound's solidaristic goal was "to administer justice in relations of family life, where conditions of crowded urban life and economic pressure threaten the security of the social institutions of marriage and the family."[122] As Amy J. Cohen concludes, this was precisely the motive that animated the progressive reformers setting up family courts:

> To supporters, family courts embodied the progressive and utterly public assumption of duties and obligations that were previously administered through the private family group. Through informal conciliatory procedures, the *state* could demand that the family behave in solidaristic, virtuous, and altruistic ways.[123]

Cohen recounts how domestic relations courts emerged in the 1910's and were soon renamed family courts to signify the consolidation of a whole array of legal instruments addressing "'the security of the home': for example, "nonsupport or abandonment of wives or children, paternity, divorce, child custody, adoption, guardianship, neglect and abuse of

120. *Id.*

121. Roscoe Pound, *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302, 310-11 (1913).

122. *Id.* at 311.

123. Amy J. Cohen, *The Family, The Market, and ADR*, 2011 J. DISP. RESOL. 91, 102.

children, and matters formerly handled in juvenile court."[124] The name change endowed the moniker "family law" with rich meanings: whereas the law of domestic relations remained the common law rules of husband and wife and of parent and child, *all* legal domains and institutions centering on the social home or one of its wayward members were, collectively, the law of the family, *family law*. Administrative law and criminal law were just as important to the work of family courts as the law of husband and wife and of parent and child.

This reframing family law de-exceptionalized it. *Any* body of law, *any* element of the emerging social bureaucracy, *any* social policy that managed the lives of actual families – married or unmarried, legitimate or not – was within the purview of this new family law. A key point: the family law of the poor would now come in for serious, sustained attention. The distributive effects – the economic consequences – of legal rules and practices affecting families would come into view. A genuinely distributive emphasis could emerge in the field. FLE was dead: the distributive market and the distributive family could be articulated over that erased boundary.

The Columbia reformers were in a game of deep catch-up with the sociologists and the social reformers out there in the field. A huge body of sociology on the contemporary family was emerging: how to embrace it? Family courts already existed: what was their law? The family law committee's first task was to send a questionnaire circulated to the whole faculty "seeking out every phase of the law which might bear upon the family[.]"[125] The Columbia reformers thought that the law of the lived family had been hacked into a thousand pieces and distributed carelessly throughout the law curriculum; the Committee, as John Milton would have said, "imitating the careful search that Isis made for the mangled body of Osiris, went up and down gathering up limb by limb still as they could find them."[126]

To Pound, the domestic relations were homologous with all the relations of society; the solicitude, duty, and dependency that various

124. *Id.* at 100 (quoting REGINALD HEBER SMITH, JUSTICE AND THE POOR: A STUDY OF THE PRESENT DENIAL OF JUSTICE TO THE POOR AND OF THE AGENCIES MAKING MORE EQUAL THEIR POSITION BEFORE THE LAW 73 (1924)).

125. Currie, *Materials*, *supra* note 101, at 30.

126. John Milton, *Areopagitica; A Speech of Mr. John Milton for the Liberty of Unlicenc'd Printing, to the Parlament of England*, *in* JOHN MILTON: COMPLETE POEMS AND MAJOR PROSE 717, 742 (Merrit Y. Hughes ed., 1957). Milton likened Isis's painful search to the slow gathering of fragmented truth that is the fate of humankind after the ascent of Christ.

members of society bore towards each other seamlessly pervaded life; no market/family distinction was welcome. But that very distinction seemed fundamental to the Columbia team: the "[b]road areas of life most markedly affected by, and affecting, law are those: (i) of business relations, (ii) familial relations, and (iii) communal political relations."[127] To the Columbia reformers, the family was a distinct social form, fundamentally different from the social forms of business relations and the political system. It was one of the three great social systems, and it needed its own place in the law curriculum. That much of the classical order, they retained. But they thought that the law of the family was idiotically distributed throughout the curriculum; when the work of gathering it back in was done, the field would bestow a new, intensified coherence and distinctiveness on the law that was proper to the family.

This shift from the domestic relations to the social family radically demoted marriage in favor of any social arrangements that, in fact, constituted family life. As we have seen, in theory at least, Jacobs and Angell were ready for almost anything society could throw at them.

Having deliberated at how to encompass this vastly expanded topic, the Jacobs/Angell group proposed two Outlines, one addressed to the sociological object of study and the other constituting a plan for a series of actual courses – an express admission that the research agenda and the teaching plan would have to diverge:

| The Fact Situation Outline | The Curricular Outline |
|---|---|
| I. Single Individuals with reference to Possible Future Family Founding | I. Family Organization and Disorganization |
| II. Non-Marriage Families | II. The Biological Relations of the Family |
| III. At Marriage | III. Personality Delevoment [sic] and Family Solidarity |
| IV. The Husband and Wife in the Organized Family | IV. The Economic Relations of the Family |
| V. The Child in the Organized Family | V. The Family and Other Institutions[128] |
| VI. The Organized Family as a Whole | |
| VII. Family Disorganization[129] | |

127. JACOBS & ANGELL, *supra* note 108, at 4 (quoting FACULTY OF LAW OF COLUMBIA UNIVERSITY, SUMMARY OF STUDIES IN LEGAL EDUCATION (1926)) (citation omitted). Jacobs and Angell note that they have disposed of "familial" in favor of "family." *Id.* at 4 n.3.

128. *Id.* at 21.

129. *Id.* at 12. Like Pound, Jacobs and Angell had no use for master and servant as an element of their reconstituted field. They noted that they had omitted even from the broad research agenda the "domestic servant problem. This field has not been explored by the staff in its investigations, important as are the problems arising therefrom." *Id.* at 12 n.15.

The Curricular Outline proposed not just five separate subheadings, but five separate courses. The first – the core course – was basically the law of marriage and divorce; Jacobs and Angell admitted that it was "a non-functional course[.]"[130] (It, in turn, became the template for the first casebook to emerge from the Family Law effort of the Columbia curricular reform, Jacobs's 1933 *Cases and Other Materials on Domestic Relations*, on which more anon.) The second course was a real innovation: it housed the public health, population management, and social control problems posed by human sexuality and reproduction. This was a course in what Michel Foucault would later designate biopower.[131] The third was a hodgepodge of issues dealing with the family as a site for "training its members in future family life"; the planners hoped that it could ultimately be merged into the core course. The Economic Relations of the Family was also a complete novelty. And the fifth course, The Family and Other Institutions, was also a complete innovation: it would address the relationships between family life and religious institutions, industry, education, the state, and the community.[132]

We have noted that the Columbia reform project respected FLE to the extent that it deemed public law, the law of commerce and the law of family to be the three basic domains of law. But *within* Family Law, the Committee discarded FLE almost completely. In Blackstone's preclassical division, the "*private* oeconomical relations" – including master and servant, husband and wife, parent and child, and guardian and ward, and corporations – sat side by side; they were all private, and they were all "oeconomical." The classicals, pushing their contract/status, market/family distinction, broke up this smooth unity. The word "economic," which originally signified *only* the management of the household, gradually came to signify *only* nonfamilial market activity, while the term "family" lost its reference to the master/servant relation and came to signify *only* the husband, his wife and their children. This shift was of course ideological: marriage and the family continued all the while to serve functions that fit the modern sense of "economic"; but the effect of FLE was to make these functions invisible, to subject them to what Eve Kosofsky Sedgwick would call "the speech act of a silence."[133]

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130. *Id.* at 21.

131. MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, VOLUME I, AN INTRODUCTION 135-150 (Robert Hurley trans., 1978).

132. JACOBS & ANGELL, *supra* note 108, at 27.

133. EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 3 (1990).

Jacobs and Angell's course on "The Economic Relations of the Family" would have gone a long way to erasing the contract/status, market/family distinction, to unpinning FLE, and to enabling a distributive assessment of the law governing the family. Pound had begun the work of undoing FLE; the Columbia reformers aspired to complete it.

The courses examining the relationships between the lived family and the administrative state and between the lived family and governance institutions outside the state were equally new, and shattered FLE along another line, that separating the private family from public institutions and public law. The rise of Family Courts during the Progressive era would be explicitly brought into the curriculum; with it would have come the law of poor families, vast tracts of administrative law, and serious attention to the social uptake of legal rules. Here, the Columbia reformers far outpaced Pound, making a full embrace of the social institutions that governed family life an intrinsic part of the field and committing themselves to a realist assessment that significantly departed from Pound's residual formalism.

So that was the agenda as of 1930. A lot happened in legal theory before 1933, when Jacobs published the casebook which he intended to encapsulate the Columbia program for family law, and we need to take it into account as it provided the polemical context in which Jacobs labored.

In late 1930 or early 1931, Pound published his attack on what he saw as malign developments in sociological jurisprudence, "The Call for a Realist Jurisprudence."[134] In direct and polemical response, Llewellyn promptly published his manifesto, "Some Realism about Realism – Responding to Dean Pound,"[135] decisively breaking with his mentor and severing what I will call "real realism" from sociological jurisprudence. There were now two forms of the social in American legal thought, one for the jurisprudes committed to social-purpose functionalism; the other committed to "realism" and ecstatically open to complex and even paradoxical relationships between law and its social effects. The next year Llewellyn published a major paper on family law in the *Columbia Law Review,* titled "Behind the Law of Divorce: Part I."[136] Llewellyn had been

134. Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1930-31).

135. Karl N. Llewellyn, *Some Realism about Realism – Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931). For an excellent account of the intense intergenerational relationship between Pound and Llewellyn, see William Fisher, *Karl Llewellyn*, *in* DAVID KENNEDY & WILLIAM W. FISHER III, THE CANON OF AMERICAN LEGAL THOUGHT 133, 133-38 (2006).

136. K.N. Llewellyn, *Behind the Law of Divorce*, 32 COLUM. L. REV. 1281 (1932) [hereinafter Llewellyn, *Behind the Law of Divorce*].

a member of the Columbia faculty since 1924[137]; he was on the curriculum committees on Finance and Credit and on Methodology.[138] He was acutely aware of the Columbia family law project,[139] and Jacobs would have been equally aware of the rift in legal theory between Pound, suddenly repositioned as the Old Guard, and Llewellyn, one of the new Young Turks. While composing his casebook Jacobs must have asked himself constantly: am I fulfilling Oliphant's social-purpose functionalist charge and Pound's mandate for domestic relations and sociological jurisprudence, or am I tracking real realism as Llewellyn mapped it? As we have already seen, he hewed strongly in the real realist direction. Llewellyn's divorce paper was thus an important intervention into the Columbia scene; Jacobs's path forward had to be around or through it. What novelties did it introduce?

Llewellyn's express aim in "Behind the Law of Divorce" was to figure out what the rise in the number of jurisdictions allowing for ever-easier divorce, and the rise in the incidence of divorce, might produce in the form of social effects. This was no abstract inquiry for Llewellyn: in 1930 the first of his three marriages had ended in divorce; this was the first of his two divorces.[140] It was not a matter of comparing available rules, identifying their unilateral social consequences, and selecting the good rule/consequence pairs: both law and society were inexorably and dynamically changing, and Llewellyn thought that his first job was simply to produce an adequate description of where they were going:

> The paradoxes are familiar. Society moulds and makes the individual; but individuals are and mould society. Law is a going whole we are born into; but law is a changing something we help remodel. Law decides cases; but cases make law. Law deflects society; but society is reflected in the law. How can such propositions, patently all true, all so commonplace that we do not think them through, exist together? How and where do the gears of the seemingly inconsistent insights mesh? The problem before us is description. It is to see, in action, to follow in their interaction, the divergent branches of the paradox; to see them in action as a

137. *Karl Nickerson Llewellyn*, AMERICAN NATIONAL BIOGRAPHY ONLINE, http://www.anb.org.ezpprod1.hul.harvard.edu/articles/11/1100533.html?a=1&f=Karl%20Llewellyn&g=m&n=Karl%20Llewellyn&ia=-at&ib=-bib&d=10&ss=0&q=1 (last visited Aug. 5, 2011).

138. Currie, *Materials*, *supra* note 101, at 22, 23 n.83.

139. Llewellyn repeatedly pointed to the Jacobs/Angell Report as a contribution to real realism. Llewellyn, *Behind the Law of Divorce*, *supra* note 136, at 1287 n.10, 1305 n.60; Llewellyn, *supra* note 135, at 1245 n.59, 1262 n.1 [sic].

140. Fisher, *supra* note 135, at 138.

going whole.[141]

The immense buoyancy of social life occupies the first part of Llewellyn's investigation. He denied that marriage itself is a primarily legal institution: divorce may be subject to a judicial monopoly, but social forces and social norms play a far greater role in the conduct of ongoing marriages than legal rules.[142] He identified four general social purposes of marriage-sex; group-perpetuation; economic aspects; and personal effects – and each of them he subdivided into a complex mesh of completely inconsistent functions. Thus Llewellyn shouldered aside Pound's neat discrimination of the four legal relations which family law protects, and completely rejects the clinical abstraction with which Pound subdivided them into neatly mirroring interests in and against each other.

One example will have to suffice. The first function of marriage is the "powerful social pressure"[143] that channels sex into permanent pair-bonding:

> The ordering of sex relations: there is but one *recognized* road in. And whole-hog or none, with permanent relationships. A world divided into those who are *res sacrae,* and those who can be acquired—but acquired *only* as permanencies. Limited possibilities of acquisition: *one* man, *one* wife; unambiguous marking of the *res sacrae:* a plain thirdfinger band; in some circles, a diamond still will serve.[144]

Immediately Llewellyn turned to the paradoxical way in which the rule produces and shapes the social space in which it can be flouted:

> This does not . . . eliminate extra-marital sex. Prostitutes, happenstances, girl-friends, poachers, are still present. But the tabu-system simplifies the problem . . .: by isolating a single issue, and specializing the means to its solution. Instead of all the services of marriage coming up for thought at once, *extra-*marital sex desire can specialize on sex.[145]

This is the kind of thought-maneuver that Pound would never have made: the ideas that informality sits adjacent to formality, that permission begins when prohibition runs out, that "is" can be so completely the opposite of "ought," are key elements of real realism that break up the smooth surface

141. Llewellyn, *Behind the Law of Divorce, supra* note 136, at 1283.
142. *Id.* at 1282.
143. *Id.* at 1298.
144. *Id.* at 1297-98.
145. *Id.* at 1298.

of the world according to social-purpose functionalism. But Llewellyn didn't stop even with this arresting insight; he forged on, to notice that people involved in extra-marital sex often import some, but not all, of the functions of marriage:

> Even such specialization meets its troubles. There is the illegitimate child. There is abortion (but, for all that one can gather, vastly less frequent outside than inside the tabued walls). There may be much admixture of the permanency and comforting that goes with marriage. But property matters in the large sense, and matters of inheritance, typically also the problems attending the production or consumption unit, are removed.[146]

Law has come into the account, in the form of the property rules of marriage, specifically inheritance. And it is the basic idea of enforceable exclusive property rights that secures the importance of legal marriage. Like enforceable exclusive property rights in land, they secure "the Peace":

> Factual possession is, for any man or group which lacks a private army, a reflection, a product, of the Peace. So, too, of marriage. Assault, kidnapping, raiding for women, poisoning or knifing of unwanted mates (one's own or another's) are *not* the order of the day. On these points there can be no question of the value of the lawmen and their ways to marriage as a social institution.[147]

And even where there is no question that the property rules within marriage will be enforced, they can condition the interactions of husbands and wives in ways that reinforce social hierarchies. Turning "to the extent to which the *law* of property in marriage affects the behavior of the partners in a joint household[,]" Llewellyn anticipates Lewis Kornhauser and Robert Mnookin's key insight that husbands and wives bargain with one another "in the shadow of the law"[148]:

> Not as greatly, one may indeed suspect, as group-ways and -norms outside the law; the turning over of the unopened pay envelope has as little to do with legal rules as the despotic purse-power not infrequent with him whose every asset stands in his wife's name. Still, in such major policy decisions as mortgaging or selling the

146. *Id.* (citation omitted).

147. *Id.* at 1300 (citation omitted).

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

> house, as in current allocation of income between the partners, informal observation shows the sense of legal power repeatedly to enter in, often to tip the balance. Feet do get put down, and it is the law which provides the footing.[149]

I have radically pared down Llewellyn's description of the sex-channeling function of marriage. Even so, I hope I have conveyed the sense of scintillation that his account produces, as effect and counter-effect jostle one another aside in a scramble for attention.

Several methodological trends are visible in Llewellyn's intervention, and they all differentiate real realism from the sociological jurisprudence in which the Columbia reforms were first imagined. First, the social world as envisioned by Llewellyn was so diverse and complex – the latitude that each marital pair has to deviate from any supposed norm so great – that Llewellyn refused to acknowledge the existence of "society":

> [T]oo much is thought and written as if we had a pattern of ways that made up marriage. To generalize existent ways into such a pattern, or even into a fixed number of typical patterns, is to lose sight precisely of that *rôle* of individual action which we are seeking to explore. . . . In part, our solutions border on fresh creation : a thousand individual compromises. We – you and I, he and she, Joneses and Smiths. And not "society."[150]

It is at the level of "you and I, he and she, Joneses and Smiths" that the consequences of divorce law will appear. The idea that there is such a thing as "marriage" is just wrong: "Our society shows not *a* marriage institution, but a goodly number of such, overlapping, contradictory, both in needs and in effects."[151] And if the goal is to describe them functionally, well, once again one faces a Sisyphean labor: "In marriage the functions seem to have no end."[152]

Nor was the law/society dynamic rational; instead, it was riven through with contradictions, paradoxes and surprises.

> The tentative conclusion: society, law-in-action, legal doctrine, all of necessity sown with contradiction and divergent tensions; the older basic structure and ideology (touchingly over-simplified even as to the conditions which it mirrored) bedevilled with a kaleidoscopic miscellany of new patchings— and of more ancient

149. Llewellyn, *Behind the Law of Divorce*, *supra* note 136, at 1305 (citation omitted).
150. *Id.* at 1285 (citation omitted).
151. *Id.* at 1287.
152. *Id.* at 1288.

> hold-overs imbedded. Barocque, Rococo, Empire, even particles of modernistic, bristling like cloves upon the ancient Gothic.[153]

Even at the level of a single operative legal rule, paradox reigned, cutting purpose and effect off from one another and even pitting them against one another. Recognizing common-law marriage, for instance, though intended "to relieve hard cases may be working to produce more hard cases than it relieves."[154] Law envisioned as functional might be not merely ineffective but *perversely* productive.

Llewellyn mocked the idea that social science empiricism could rescue legal studies from complexity and paradox. He rebelled outright against Oliphant's mandate to bring legal science into line with social science. Though a voracious consumer of social science, Llewellyn attacked the ideas that social science was a superior, more objective form of knowledge to which students of law had to defer. It was not even an interdisciplinary partnership: law was better. In 1930-31, at a Brookings Institution seminar dedicated to the question "Whither Social Science?", Llewellyn participated as the only representative of legal studies.[155] He refused to kowtow to the empiricists, who were having their own crisis about whether society could be systematically known. Instead, he delivered a patronizing lecture on all the ways in which social science was failing to benefit from the insights of legal real realism. And in "Behind the Law of Divorce," he repeatedly complained about the state of the empirical evidence: "[t]he figures we have" on the role of pair marriage in preventing what we now call sexually transmitted diseases, for instance, "give no adequate light on this. We trust neither their completeness nor their accuracy nor their typicality."[156] The social sciences were methodologically adrift; they could be neither a model nor a source. He declared himself jaded by his "[s]ample drillings into the available data": these almost never interfered with the plausibility of "personal

153. *Id.* at 1287.

154. *Id.* at 1301 n.52.

155. Llewellyn, *Legal Tradition and Social Science Method – A Realist's Critique, in* BROOKINGS INSTITUTION, COMMITTEE ON TRAINING, ESSAYS ON RESEARCH IN THE SOCIAL SCIENCES: PAPERS PRESENTED IN A GENERAL SEMINAR CONDUCTED BY THE COMMITTEE ON TRAINING OF THE BROOKINGS INSTITUTION, 1930-31, at 89 (1931) [hereinafter BROOKINGS ESSAYS]. The Training Committee commenced its collection of essays by the seminar participants with an introduction entitled "Whither the Social Sciences?", BROOKINGS ESSAYS, *supra*, at 3, and the first essay included in the anthology expressed alarm that social science might never attain the legitimacy enjoyed by physics. W.F.G. Swann, "What is Science," in BROOKINGS ESSAYS, *supra*, at 11-23.

156. Llewellyn, *Behind the Law of Divorce, supra* note 136, at 1289 n.14.

observation and prior reading—i.e., . . . so-called insight."[157] By enshrining the producer of objective truth, Oliphant delegitmated the only really honest course of serious inquiry: drilling down, working hard, sorting out with perpetual skepticism what might be going on in the world, and then guessing. Sometimes social science would prove you right; extremely rarely it would insist on a change of view. But even "[t]hat of course affords no proof even of the views checked up, still less of the others. It does justify their submission."[158] In short, "Nothing in the paper purports to have any guaranty more trustworthy than common sense and personal observation."[159] Oliphant's idea that there could *be* legal science asked legal inquirers to set themselves up as emperors with no clothes; Llewellyn preferred to go, simply or complexly depending on your appetite for epistemology, bare. To him, that *was* legal science, and should be the measure of social science as well.

From Llewellyn's perspective Pound's image of law as its judicially enforced rules was just as abstract and conceptual as anything CLT produced. Instead, real realism required a vastly expanded definition of law itself:

> What will in this paper hereafter be meant by "law" . . .. is in first instance and especially all that the lawmen *do,* as such. And in second instance, what one may reasonably anticipate that they will do. And in third instance, the rules laid down for their doing. Fourthly, the ideology about their doing prevalent among them (following precedent, *e.g.*). Lastly, the ideology of other folk about the law comes into the discussion. Where necessary, some one or more of the several phases will be singled out for emphasis or contrast with another. And the question now recurs, have *any* of the phases any effects on other people, in regard to marriage?[160]

Real realism about marriage and divorce required a hard-nosed and skeptical inquiry into whether and how law – figured not only as the rules laid down by judges, not only as predictions about what the judges will in probability do, but as what *all* the lawmen might do, what ideologies about that drive them, and what ideologies about all of that motivate users of the legal system – produces effects in the real world.

For all that the Peace seems overall better than the state of nature,

157. *Id.* at 1281, n.*.
158. *Id.*
159. *Id.*
160. *Id.* at 1297.

Llewellyn repeatedly insisted that "[c]osts which go here unnoted are bitterly high."[161] This was a large methodological point, and it again divides sociological jurisprudence from real realism. Whereas for Pound, conflicts between individual and social interests were passively resolved as the more functional arrangement silently emerged, for Llewellyn the legal order was *distributive*, and it distributed not only benefits but costs: "One thing is clear: the prices paid for values need computation, as well as the values gained. And the phenomena of modern marriage are best seen by setting the two against each other."[162] For example, he observed that

> "Pair marriage forces a large fraction of the population to celibacy, and it is they who are the excluded who suffer by the arrangement. This bears chiefly on women. . . . Very little serious attention is paid to this offset to the advantages." . . . [T]to some future generation our condemnation of unmarried women to childlessness will seem as wildly cruel as witchcraft persecution seems to our contemporaries.[163]

Reversing this distribution, so that unmarried women could enjoy legitimate procreation, would of course redistribute: new benefits with new costs, new costs with new benefits.

Llewellyn flatly denied one of the key premises of the Columbia curricular reform effort, a premise which I have described as neoclassical: that a new system just as orderly as the classical legal order could be built by cleanly distinguishing the social functions of law and segregating them into their proper topics and ultimately their proper courses. This idea vastly underestimated the complexity envisioned by real realist functionalist thinking:

> Such are the functions of the social institution, in our civilization. Little about the set-up is inevitable. . .. In no point is the institution adequate in performance, nor is it always the major factor in such performance as obtains. Any one of the functions could be, at some time or place has been, is now in part, served powerfully in

161. *Id.* at 1295.

162. *Id.* at 1294 n.35.

163. *Id.* Llewellyn quoted from WILLIAM GRAHAM SUMNER, FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES AND MORALS 373 (1907). Sumner was a prolific sociologist and economist and a key figure in the conservative flank of the American social; he died in 1910. *William Graham Sumner*, AMERICAN NATIONAL BIOGRAPHY ONLINE, http://www.anb.org.ezpprod1.hul.harvard.edu/articles/14/1400611.html?a=1&g=m&n=william%20graham%20sumner&ia=-at&ib=-bib&d=10&ss=0&q=1 (last visited July 13, 2011).

> other ways. Few indeed are the cases in which marriage alone is halfway adequate to any of them. Compare, *e.g.,* the part played today by written records, specialization of labor, the schools, and breaking men into jobs, in carrying forward the existing culture of the western world, nation, community, and industry. But would one for that deny vitality to the work, in any of these phases, which marriage does?[164]

This is a somewhat complex taxonomic point. Not only does marriage largely fail to fulfill its proper functions; other institutions and social forces are necessary to the production of its intended effects, and many of its functions can be served by other elements of the social and legal order. Elements of the legal order that seem quite off-sides of marriage and divorce – administration, education, and labor markets – couldn't produce their effects without marriage.

Llewellyn has completely unravelled the neoclassical premise of the Columbia reformers' functional vision. With it, he has again erased FLE. The idea that marriage is meaningfully described as status-not-contract struck him as empty lexical twiddling: he alluded to the idea as a somewhat ridiculous judicial rationalization in the opening of his essay and never returned to it.[165] He devoted far more attention to debunking the family/market distinction. The ideology of the market and of marital monogamy was not so much a complex of mistaken social purposes as a confusing mesh of hopelessly contradictory rationalizations:

> Here one can add the ofcourseness of the glorification of the Captain of Industry who has the skill to manage great quantities of things and people "to the common good." And whose powers we should not bring to fruition if we did not give him-or leave him-"incentive to provide for his offspring." Meantime, we seek to keep him from unfolding, by limiting the pressure of responsibility and pride to the offspring of a single woman; we do what we can, too, to keep his unique talents from chances of perpetuation by combination with any chromosomes save those of the woman he happens to have married. The interesting thing is that the two approaches are both, for our dominant ideology, obvious. And

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164. Llewellyn, *Behind the Law of Divorce*, *supra* note 136, at 1295-96 (citation omitted).

165. "So the law-books tell us of marriage as a 'contract' (by which is meant in first instance a contracting) and marriage as a 'status'; indeed in the latter aspect jurisdictional difficulties have led courts into talking of marriage as a '*res*.' Yet though they talk of legal doctrine, lawyers like other folk find the social reality coloring discussion and thought at every point." *Id.* at 1282. With no more ceremony than that, Llewellyn tosses aside the distinction that had helped give shape to the classical legal order. *See* Halley, *What is Family Law?: Part I*, *supra* note 1, at 33-48.

> both may, of course, be wise, though seemingly inconsistent; society is not mathematics. But the rationalizations current seem to need considerable re-working.[166]

Here is a highly counterintuitive passage: it has, to me anyway, the earmarks of a chiasmatic critique. Our ideology produces the "ofcourseness" of the ideas that the Captain of Industry must be untrammeled at work so that he can provide for his offspring, but that he must be channeled by marriage into producing offspring with one and only one woman. This is a scrim of rationalizations; tear it away and the justifications for *laissez faire and* for marriage as status fall away, and we are radically free to alter the rules on either side of the now-dissolved family/market divide. Or again: among the economic functions of marriage, Llewellyn noted that it provides a career for infants and children, along with "some support, too, for her who does the caring, which make[s] her support in decent measure independent of continuing sex charm. Old age insurance, of a sort. The wife who is used up is not simply to be fired – even under most ruthless individualistic capitalism."[167] Llewellyn seamlessly assimilates the husband's common law duty of support to social insurance: if we can have the one, why not the other? The question is simply unintelligible if one maintains any grip on FLE; it seems inevitable if one lets it go.

The Columbia curricular reform project became a crossroads forcing social purpose functionalism and real realism into real-time conflict. As we have seen, Jacobs and Angell's new courses promised to give curricular form to a fundamental restructuring of domestic relations. I think it's safe to say that they pushed the field strongly in the direction of real realism. For instance, the turn to administration: Pound's 1913 insight that social purpose functionalism would be outrun by administration would later come to haunt him in the form of the real realists and their insistence that legal method accommodate the complexity of the law/society dynamic. The scope, procedures and institutional attitude of the family courts invented by the social progressives could not be described in the vocabulary of Pound's social purpose functionalism: you would need real realism even to notice them.

But this impulse also caused the committee considerable anguish, as they did not yet see how the family-related elements of the law of

166. Llewellyn, *Behind the Law of Divorce*, *supra* note 136, at 1298 n.38.

167. *Id.* at 1290 (citation omitted).

Property or of Trusts and Estates could migrate to Family Law without causing gaps and/or duplication that would tear the new curriculum to pieces. And the turn to empirical sociology opened a floodgate to social information so voluminous that Pound's and Oliphant's complacent social-purpose functionalism broke to pieces: the shock of the real. As the Committee and its members reeled, and though the Committee devoted huge efforts to taming this ambitious agenda so that it could be fitted into teachable materials, the template of the old Domestic Relations reasserted itself, holding this time large fragments of the social. FLE reemerged – not in its classical form, but in the new *parole* of sociological jurisprudence. The remainder of my account is the story of the continual reassertion of FLE in ever-new, ever-old terms.

From the beginning the Columbia researchers realized that the state of sociological knowledge about the family was a problem. Currie quoted this passage from a working document in the Committee's files:

> [T]he approach to familial law is at least two or three decades behind the present state of wisdom as to business law, and . . . the painful efforts of the pioneers in that field during the last thirty years must be duplicated in the field of familial law before a report on this topic can approximate the definiteness and excellence now obtainable in the fields of business organization and marketing.[168]

Jacobs and Angell reported that their working group, after a year of struggle with the project, was "in entire accord"[169] with the dismal prediction of the original Columbia committee:

> It is probable that the . . . [functional, sociological] approach would be practicable if the seminar were being held in 1947 instead of 1927, but it is the judgment of the committee that the present state of knowledge as to familial organization and the interaction of law therewith is so imperfect that an organization upon this approach would involve the pyramiding of guesses to such an extent as to be highly undesirable.[170]

Note that while, for Maine, the law of status progressed by not changing while the law of contract sped forward to modernity; and while for Schouler and Tiffany the contents of domestic relations could not keep up with the demands of an emerging classical legal order; for the Columbia

168. Currie, *Materials*, *supra* note 101, at 29-30 (quoting Document No. 42 at 320).

169. JACOBS & ANGELL, *supra* note 108, at 20.

170. *Id.* (quoting report of the Committee on "The Family and Familial Property," Doc. XLII, at 8-9).

reformers it was *knowledge about* the family and marriage that lagged. The sense of being "behind" seems like a permanent part of the field now, but clearly it has its own conditions of intelligibility.

The first edition of Jacobs's casebook marks the challenges of putting the Committee's recommendations and the Jacobs/Angell report into effect. Jacobs signaled his long-run willingness to make compromises with Domestic Relations early on. In 1930, he and Angell had referred to Domestic Relations courses as the "Old-Type Courses"[171]; three years later he titled his own casebook *Cases and Other Materials on Domestic Relations*. His introduction reassured the anxious teacher that "[w]herever possible an attempt has been made to continue the main portions of the material covered in the older courses on Domestic Relations."[172] Old-type, conceptualist, dogmatic teaching was entrenched among teachers of Domestic Relations; like Schouler and Tiffany before him, Jacobs felt the pressure to produce a marketable law-book. The tolerances of the buying public – the law professors out there teaching the field; students exerting their immemorial drag on pedagogy – reasserted themselves as conservative constraints on the field.

The actual casebook shows, however, that at first Jacobs tried hard to pour new wine into this old bottle. The basic structure is familiar (marriage, relations during marriage, divorce), but introductory sections and long, densely type-set footnotes present historical and sociological materials which sometimes press the case material up towards the top margin.[173] To be sure, marriage has returned to its prideful place as the central, indeed, *only* real legal topic. Family Organization does not refer to single people or unmarried families but to the formation of a marriage contract and of a marriage[174]; not until 1965 did a casebook emerge that broke the constraints limiting the field to legal marriage. More in line with the original aspirations, Jacobs's Part II, Relations among Members of an Organized Family, is divided into Solidarity between husband and wife, between parent and child; and Economic Relations of husband and wife, of parent and child.[175] This carries out, at least in part, a major innovation of the Columbia curriculum committee which Jacobs had co-chaired. Pound's idea that one must focus on the relative claims of the social and

171. *Id.* at 28.
172. JACOBS, DOMESTIC RELATIONS (1st ed.), *supra* note 109, at vii.
173. See, for instance, *id.* at 34-38.
174. *Id.* at xiii.
175. *Id.* at xiv.

the individual interests of the family was now central to the way the ongoing marriage was taught. And Blackstone's oeconomical relations are *back*, now indicating something new: *domestic economics*. Finally, Part III, Family Disorganization, includes not only divorce but a series of *de facto* dissolutions wrought by informal separation (desertion, separation), and by other legal institutions (incarceration for insanity and for crime).[176] It's a remarkably careful selection from the immense array of topics Jacobs and Angell had proposed three years earlier; it is in many ways the breath of fresh air the Columbia curricular reform had sought; but its bones are those of a Domestic Relations treatise à la Schouler and McCurdy.

Jacobs took direct aim at the idea that marriage was status-not-contract. The first case in his chapter on "Marriage" is the 1888 Supreme Court decision that adopted this idea into the constitutional order, *Maynard v. Hill*.[177] In so doing it brought into positive legal doctrine a key structural division of the classical legal order, introduced originally in 1852 by Joel Prentiss Bishop.[178] Here are the basic facts underlying *Maynard v. Hill*. David Maynard left his wife Lydia in Ohio and departed for Seattle. There, he obtained a divorce from cronies in the Oregon Territory legislature without notice to her and apparently without cause. After both of them had died, her children asserted dower rights in land he had owned during the marriage, thus raising the question whether the divorce was good. They argued that the divorce violated the Contracts Clause of the U.S. Constitution, which stipulates that the states may not impair the obligation of contracts.[179] When the case finally made it to the U.S. Supreme Court, it thus raised the question: was marriage a species of contract? Preclassical treatise writers and judges had said yes. Bishop had said no; it was the opposite of contract. The Court now agreed:

> [W]hile marriage is often termed by text writers and in decisions of courts as a civil contract, generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization, it is something more

176. *Id.* at xv.

177. *Id.* at 128-35 (excerpting Maynard v. Hill, 125 U.S. 190 (1888)). For a discussion of the place of this case in the emergence of the status/contract distinction in U.S. law, see Halley, *What is Family Law?: A Genealogy, Part I, supra* note 1, at 48-54.

178. For a discussion, see Halley, *What is Family Law?: A Genalogy, Part I, supra* note 1, at 33-48.

179. The Contracts Clause stipulates that "No state shall . . . pass any . . . law . . . impairing the Obligation of Contracts." U.S. CONST. art. I, § 10, cl. 1.

> than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relationship between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its public character the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.[180]

Two years later the Court would put the cherry on top, designating marriage "status."[181] The construction of status and contract as mutually constitutive opposites was a key structural element of the classical legal order, ideologically conforming it with *laissez faire* and the separate spheres. In *Maynard v. Hill,* the Supreme Court made it official.

What is this case doing in Jacobs casebook, you might ask! The short answer: it is there to be mocked. He almost crowded the decision itself off the page with an extended footnote detailing the major epochs in the history of marriage that bear no correspondence with Supreme Court's imagery: in Roman law marriage was entirely subject to the private prerogative of the patriarch; in early Christian doctrine it was merely tolerated as a regulatory framework for those too weak for the spiritual life; Luther and the Catholic Church then fought over whether it was a sacrament or a creature of "social agencies"; the Puritan idea that it was purely civil was transposed to the United States via Massachusetts Bay Colony.[182] He follows the case with three excerpts from sociologists of marriage who denied primacy to marriage: "We may truly say that marriage is rooted in the family rather than the family in marriage," said Edward Westermark.[183] And this from William Grant Sumner, the same sociologist that Llewellyn quoted in "Behind the Law of Divorce" lamenting the childless fate of unmarried women: "Although we speak of marriage as an institution, it is only an imperfect one. It has no structure. The family is the institution, and it was antecedent to marriage. Marriage has always been an elastic and variable usage, as it now is."[184] Jacobs has

180. Maynard v. Hill, 125 U.S. at 210-11.
181. United States v. Grimley, 137 U.S. 147, 151 (1890).
182. JACOBS, DOMESTIC RELATIONS (1st ed.), *supra* note 109, at 128-30 n.1.
183. *Id.* at 138 (quoting EDWARD WESTERMARCK, MARRIAGE 8 (1929)).
184. *Id.* at 135 (quoting SUMNER, FOLKWAYS, *supra* note 163, at 348-49).

revealed the status/contract distinction to be an artifact of legal thought, one which students of society outright rejected. To teach this part of the Jacobs casebook well, one would have to have an appetite for casting doubt on the grand dogmas of CLT.

Over the five editions of Jacobs's casebook, the Columbia committee's radical intervention in the field not only lost its edge; it eventually came to occupy the "conservative" position. Jacobs's subsequent editions, juxtaposed with book reviews of his efforts, tell the story of his gradual relinquishment of the Columbia reform agenda.

Right from the start, the book reviews make manifest an intense politics over whether the pedagogy of domestic relations should progress or not, and if so how far. They manifest three contesting positions in the politics of curricular reform: the *ancien regime* both accepting and resisting change; progressives celebrating it; and social functionalist hardliners willing to punish one of their own for not going far enough.

The old guard sounded a wistful, defeated note. Chester G. Vernier admitted he might be "confessing his age in doubting the wisdom of such a radical departure from the style of the older and simpler casebooks" and graciously cited his own casebook and statutory handbook (thus quietly impeaching his own objectivity). He worried that the sheer volume of materials in Jacobs's casebook would swamp the teacher's creativity and overwhelm the student's capacity.[185] But Vernier seemed to feel that complaints were too late, that a new day was dawning, and that the future belonged to the new generation: "The day of the simple casebook seems to be gone. The 'new deal' in this field calls for cases and materials."[186]

The progressives celebrated a break with the past in legal pedagogy. One reviewer exulted: "A revolution is precipitated by Jacobs in the organization and approach to the subject of Domestic Relations. . . . In every sense this is a modern case book for modern needs."[187] Roy Moreland compared McCurdy's *Cases on Domestic Relations*, his example of the "orthodox" path, with Jacobs, "an unusual and at times amazing casebook. The emphasis is sociological rather than legal. Much non-legal material has been included. All the social sciences are kept in

185. Chester G. Vernier, Book Review, 47 HARV. L. REV. 732, 732-33 (1934) [hereinafter Vernier, Book Review] (reviewing JACOBS, DOMESTIC RELATIONS (1st ed.), *supra* note 109). Vernier's star footnote drew attention to his CASES ON MARRIAGE AND DIVORCE (1912) and his AMERICAN FAMILY LAWS (Vol. I, 1931; Vol. II, 1932).

186. Vernier, Book Review, *supra* note 185, at 732. Note Vernier's association of the Jacobs casebook with the structural reforms being wrought by progressives in public law.

187. Book Note, 11 CHI-KENT L. REV. 319, 319 (1932-33).

mind all the time. . . . The reviewer has chosen Mr. Jacobs' casebook for use this year. It is interesting to experiment. And sometimes progress lies in that direction."[188] The line between orthodoxy and progress has been redrawn, and McCurdy's brief day as the vanguard was over.

Meanwhile, those who sought a rigorous and thorough integration of legal studies with sociology went into print scolding, even spanking, Jacobs for making a compromise favoring the status quo. One was none other than Robert Cooley Angell, who indicated that he had, four years past, worked with Jacobs on the Columbia curricular project and admitted he was biased both for and against his former partner's book.[189] The review itself can hardly be described as favorable. Jacobs, he observed, faced a dilemma between the conflicting demands brought by "run-of-the-mine" law students who were not used to the challenge of interdisciplinary materials, and those brought by real social scientists whose work could be effectively taught to law students only in an advanced seminar.[190] Regrettably, Jacobs opted to "steer a middle course."[191] But there was a more adventurous third way which Jacobs should have taken: "My criticism, then, comes to this: the materials dealing with life situations might have taken more the form of a framework for the legal materials instead of being juxtaposed, as it were, on the same level."[192] The Domestic Relations armature had stifled Jacobs's book in its cradle.

To Donald Slesinger, the Jacobs casebook was not merely disappointing but positively rearguard. It was built on a "specious sociological framework."[193] I quote at length from Shlesinger's review because it will, I hope, give my readers – no matter whom they identify with in this fracas – the opportunity to feel some of the rage, defensiveness, shame and sheer confusion that so often besiege the parties to an interdisciplinary romance gone sour:

[T]here is not the much needed fresh attack on family law and

188. Roy Moreland, Book Review, 22 KY. L.J. 460, 460 (1934) (reviewing MCCURDY, DOMESTIC RELATIONS (1st ed.), *supra* note 63, and JACOBS, DOMESTIC RELATIONS (1st ed.), *supra* note 109).

189. Robert Cooley Angell, Book Review, 33 COLUM. L. REV. 1086, 1086 (1933) (reviewing JACOBS, DOMESTIC RELATIONS (1st ed.), *supra* note 109).

190. *Id.* at 1087-88.

191. *Id.*

192. *Id.* at 1088.

193. Donald Slesinger, Book Review, 1 U. CHI. L. REV. 659, 659 (1934) (reviewing JACOBS, DOMESTIC RELATIONS (1st ed.), *supra* note 109).

> family relations. He apparently tried to build on the revered older courses. A genuine contribution will not be made until someone starts his compilation not by asking "what can be added to what we have to make it a little bit more"; but "what background is essential for a practicing lawyer or research worker in this important field?"
>
> The non-legal material, mainly sociological, is uneven, and badly co-ordinated with the cases. Much of what is presented is common-sense and historical interpretation with relatively few concrete data. . . . . [The introductory non-legal materials] give[] the legal student an entirely erroneous idea of the way a social science expert in family relations attacks his problem. [Instead, the presentation of sociological conclusions] is likely to make the tough minded legal student a little contemptuous of the tender minded sociologist. That Mr. Jacobs shows some of this entirely unjustifiable contempt is evident from the type of social questions he asks at the conclusion of various sections. . . .. The sociologist called to mind by these question is a genial judge in a study mulling over the opinions of earlier social scientists, or figuring out answers on a purely common sense basis. The law student is given no hint of the arduous process of rational analysis, the search for relevant data, and the complicated statistical techniques that enter into the solution of any of the . . . problems.[194]

The early unity of the Columbia vision had clearly broken up by now. Domestic Relations represented the old, the formalist, the conceptual – in short, the classical; Family Law represented the new, the social, the functionalist and the realist. But could Family Law so depicted be achieved?

According to Currie, who surveyed the Columbia reform effort not only in family law but in "Business Units,"[195] property, crime and criminology, marketing, finance and credit, labor, risk and risk-bearing, and "miscellaneous matters,"[196] some fields were relatively successful in integrating social science "knowledge"; others less so; and still others, notably "risk and risk-bearing," self-destructed as the reformers realized that social science and law classified their topics in incommensurate ways. And though Currie credited the explosion of social-purpose functionalism with an outburst of new thought about law, he determined

194. *Id.* at 659-60.
195. Currie, *Materials*, *supra* note 101, at 23-28.
196. *Id.* at 38-64.

in the end that the Columbia curricular reform could not be counted as a success. We have already seen in our small sliver of the story some of the problems which Currie detected in the overall enterprise. His account makes for depressing reading: repeatedly the faculty discovered reasons why the curriculum could not be a taxonomic expression of legal science; the curriculum that resulted was far more fragmentary and incoherent than what had preceded it; tensions arose between the lawyers and the social scientists, and between professional education and social-science research; interdisciplinary turf wars broke out. As participants began to feel that the enterprise was foundering, personal conflicts set in, taking pot-shots at social science became imaginable, and money ran out.[197]

In 1939, Jacobs produced a second edition of his *Cases and Other Materials on Domestic Relations* that responded to the critics in detail, not only in matters of format, but in structure and content.[198] Gone is the original first chapter quoting at length from the Jacobs/Angell Report and collecting sociological approaches to the family. Gone are the lengthy footnotes with social science detail. Sections begin with cases and end with notes summarizing statutes and more cases.[199] The Questions to which Slesinger had taken such strong objection: deleted. The effort to link domestic relations law with social science knowledge was now compressed into a "Select Bibliography on Domestic Relations," a revised version of the list that headed up the first edition.[200] This time it didn't even make it into the Table of Contents.[201] As before, Jacobs divided this bibliography into "Non-Legal Material" and "Legal Material" and introduced it with a proviso warning that the following pages present "[o]nly a few of the leading books": "For an exhaustive collection of material on the family, see Jacobs and Angell, *A Research in Family Law* (1930)[.]"[202] As before he concluded the headnote, "Further citations will be given in the notes throughout the book,"[203] but now those notes were almost all missing. In the first edition this booklist was a genuine

197. *Id.* at 64-71.

198. ALBERT C. JACOBS, CASES AND MATERIALS ON DOMESTIC RELATIONS (2d ed., Chicago, Foundation Press 1939) [herinafter JACOBS, DOMESTIC RELATIONS (2d ed.)].

199. *See, e.g., id.* at 15-47.

200. *Id.* at xix-xxiii. For the original version, see JACOBS, DOMESTIC RELATIONS (1st ed.), *supra* note 109, at xvii-xx.

201. JACOBS, DOMESTIC RELATIONS (2d. ed.), *supra* note 198, at xv-xvii.

202. JACOBS, DOMESTIC RELATIONS (1st ed.), *supra* note 109, at xvii; JACOBS, DOMESTIC RELATIONS (2d ed.), *supra* note 198, at xix.

203. JACOBS, DOMESTIC RELATIONS (1st ed.), *supra* note 109, at xvii; JACOBS, DOMESTIC RELATIONS (2d ed.), *supra* note 198, at xix.

apparatus for the many quotations from the works listed that appeared in the footnotes and notes; in the second edition it substitutes for them. A telling detail: in revising the list, Jacobs vastly upgraded his estimate of Vernier's *American Family Laws*. In 1933 it was "a very useful reference work": in 1939 it was "[t]he most useful work of its kind in existence[,]" "[e]xtremely valuable[.]"[204] Whereas the first edition included a "Note on Domestic Relations or Family Courts" which argued for "the desired goal of bringing all family adjustment problems together in one court of exclusive jurisdiction[,]" the second edition omits it and is silent on the Family Court movement.[205] To sum up: whereas Jacobs's first edition had been an attempt to fit the Jacobs/Angell agenda into the casebook format, the second edition abandoned that effort. Looking back, one notices that the road has forked, and that one is now on another path, a path leading *back* to the classical field of domestic relations.

It wasn't just Jacobs's lack of a fighting faith in the Jacobs/Angell vision, the conservatism of teachers ordering casebooks and students' demands for digestible syllabi that were at work here. Once again novelties in the world of adjudication heralded a substantive ideological shift. At the same time that Angell was returning domestic relations law to its classical parking place, FLE was dividing the legal sensibility of the family courts from that of commercial arbitration: the status/contract distinction was reemerging as a key determinant. Cohen tells how family courts adopted antiadversarial and informal procedures: one proponent indicated that the family court "should be looked upon as a social agency rather than as an agency to enforce criminal law or decide technical controversies between litigants."[206] Surprisingly, this informality was understood by its creators to be for-the-family-not-the-market. Though Pound had originally envisioned administration spanning the market and the family,[207] once again expressing his hostility to FLE, by the time family courts emerged, they reasserted the family/market dichotomy:

> One of the judges who sits in the Domestic Relations Court has said that if the letter of the law were followed, it would be a purely financial court. . . . Fortunately the judges do not hold too rigidly

204. JACOBS, DOMESTIC RELATIONS (1st ed.), *supra* note 109, at xx; JACOBS, DOMESTIC RELATIONS (2d ed.), *supra* note 198, at xxiii.

205. JACOBS, DOMESTIC RELATIONS (1st ed.), *supra* note 109, at 782-84; JACOBS, DOMESTIC RELATIONS (2d ed.), *supra* note 198, at 299-505.

206. F. R. Aumann, *Domestic Relations Courts in Ohio*, 15 J. AM. JUDICATURE SOC'Y 89, 92 (1931-32) (quoted in Cohen, *supra* note 123, at 101-2).

207. Cohen, *supra* note 123, at 99.

> to the letter of the law and some very excellent social work is done in this court, and plans for the enlargement of its powers are already underway.[208]

Cohen brilliantly exposes the divergent logics that drove the emergence of two opposed precursors of ADR during the social era: family courts for the home and arbitration for the market; solidarity and fluid mechanisms of legal regulation for the former; individualism and rule-bound contract for the latter.[209] She shows that the new form taken by status – intense micropoweristic oversight and management, through multiple layers of social bureaucracy, into and over the family lives of the poor, the mentally ill, children, orphans, juvenile offenders and all the other disabled persons – was not simply progressive; it also carried a strong social control agenda.[210] Meanwhile, aficionados of *laissez faire* and individualism invented commercial arbitration to restore freedom of the will to the man of commerce and to protect him from the progressives' efforts to regulate markets. FLE was back.

To accommodate it, Jacobs completely revised his presentation of *Maynard v. Hill.* The case is, once again, the first up in the section on "The Nature of Marriage" that commences the chapter on "Marriage." But Jacobs deleted both his long footnote about the varied history of marriage and all the sociological excerpts that followed the case in the first edition.[211] He then promoted a classicizing quotation from Vernier from the footnotes to the notes, where it basks in the sun as his only substantive, non-case-based commentary on this key case:

> Marriage clearly differs from an ordinary contract in that (1) it cannot be rescinded or its fundamental terms changed by agreement; (2) it results in a status; (3) it merges the legal identity of the parties at common law; and (4) it is not a contract within the Fourteenth Amendment, United States Constitution, forbidding legislation impairing the obligation of contract; (5) the tests of capacity differ from those applied to ordinary contracts.[212]

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208. Mary E. Paddon, *The Inferior Criminal Courts of New York City*, 11 J. AM. INST. CRIM. L. & CRIMINOLOGY 8, 14 (1920) (quoted in Cohen, *supra* note 123, at 102).

209. Cohen, *supra* note 123, at 100-09.

210. *Id.* at 100-03. For a rich account of the domestic relations court in Chicago, documenting the claim that it was newly "punitive, coercive, and therapeutic," see MICHAEL WILLRICH, CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO 128 (2003).

211. JACOBS, DOMESTIC RELATIONS (2d ed.), *supra* note 198, at 59-63.

212. *Id.* at 63 (quoting CHESTER G. VERNIER, AMERICAN FAMILY LAWS OF THE FORTY-EIGHT STATES, ALASKA, THE DISTRICT OF COLUMBIA AND HAWAII (TO JAN. 1, 1931), vol. 1, at 51 (1931)). This quotation had appeared in JACOBS, DOMESTIC RELATIONS (1st ed.), *supra* note 109, at 132 n.2.

Marriage as status-not-contract – almost exactly as Joel Prentiss Bishop had mortared it into the foundation of the CLT – was back.[213] Currents of curricular change carried the law of the market down streams of influence flowing out of the Columbia curricular reform project and the legal sensibility of real realism; domestic relations, like the cheese, stood alone.

In preparing this genealogy I have often wondered why a socially-oriented field named family law did not emerge in the wake of the rise, early in the social era, of family courts and why, despite the firm consensus that the family courts had jurisdiction vastly broader than the law of domestic relations, we leave end this chapter of our story still clinging to "domestic relations" as CLT had framed it. The answer lies in this second edition of Jacobs's casebook. It effectively cut domestic relations off from the real, and in doing so cut it off from the legal profession. It would not be until 1950's that these concessions to CLT were, once again, frontally contested.

Most of the reviews of Jacobs's second edition are placid reading. Robert R. Willard mocked the first round of reviews for complaining that the first edition "contained too much non-legal material, too little, and not the right kind" as a Papa Bear, Mama Bear, Baby Bear side show, and praising all Jacobs's changes, sometimes precisely because they could be ignored.[214] For Ernst H. Schopflocher, the early reviews were too conflictual by half: the conflict between *cases* and *cases and materials* was just a matter of "one's preference[.]"[215] Laurence M. Jones recommended that teachers adopt both Vernier's *American Family Laws and* Jacobs's *Domestic Relations*.[216] And T. Munford Boyd poured scorn on "the so-called social sciences"; according to him, Jacobs's second edition had been so dramatically watered down the original plan that one could teach it whichever side of the great divide one stood on, and that was a good thing.[217] The sense that something big was changing and that the Jacobs casebook represented transformation was waning. Instead, Jacobs mediated the conflicts between the conservatives and the

213. Halley, *What is Family Law?: A Genalogy, Part I,* supra note 1, at 33-48.

214. Robert R. Willard, Book Review, 27 CAL. L. REV. 631, 632 (1938-39) (reviewing JACOBS, DOMESTIC RELATIONS (2d ed.), *supra* note 198).

215. Ernst H. Schopflocher, Book Review, 40 COLUM. L. REV. 1126, 1126 (1940) (reviewing JACOBS, DOMESTIC RELATIONS (2d ed.), *supra* note 198).

216. Laurence M. Jones, Book Review, 34 ILL. L. REV. 377, 378 (1939) (reviewing JACOBS, DOMESTIC RELATIONS (2d ed.), *supra* note 198).

217. T. Munford Boyd, Book Review, 26 VA. L. REV. 238, 239, 240 (1939) (reviewing JACOBS, DOMESTIC RELATIONS (2d ed.), *supra* note 198).

hardliners, stilled the sense that a 'revolution" was underway, and was rewarded by a grateful readership willing to do mediating labor in its turn. The Jacobs casebook was fading into the light of common day. And then World War II intervened, changing everything.

## IV: THE FAMILY IN TROUBLE: THE POSTWAR STRUGGLE FOR FAMILY LAW

During the War, Pound looked with dismay at the state of legal science. Society as of 1943 was in an "era[] of transition," and the "absolute validity" and "authority" of law in general was in crisis: indeed "all the institutions of social control today" were shaken, and "[n]othing in the way of law reform will achieve all we seek."[218] He now looked back with nostalgia at the very certainties of the classical era which he himself had helped to dismantle:

> A traditional ideal of the end of law is the ultimate measure of choice of starting points for legal reasoning, of interpretation, and of application of standards. In the last century throughout the world jurists and lawyers accepted a received ideal to which they found it possible to come from any of many different philosophical starting points. [219]

That ideal had been the will theory, the idea of law as system, deduction, and all the other guiding principles of the classical era. As we have seen, these had been the object of Pound's attack in "The Ends of Law." But it turned out that life without them was disorienting: "Today that ideal has been largely given up, and nothing has yet arisen and established itself to take its place."[220] "Every branch of the law is disturbed[.]"[221]

A particular crisis was shaking up what Pound was now willing to call family law. The inability of the states to agree on a uniform law of divorce, and the increase in forum shopping for divorce and of collusive divorce, were demoralizing judges. Sometimes they seemed to think it was better to go along with a husband and wife collusively seeking a divorce on fabricated evidence of fault than to force a victim of marital cruelty back into the arms of her tormenter. Meanwhile, religious and other social institutions that used to aid law in maintaining social control

218. Roscoe Pound, *Foreword [to] a Symposium in the Law of Divorce*, 28 IOWA L. REV. 179, 181 (1943) [hereinafter Pound, *Foreword*].

219. *Id.* at 180.

220. *Id.*

221. *Id.*

were losing their grip on society. Overall, Pound saw in the rise of divorce a weakening of marriage as a social institution. This whole pattern of changes was producing "outstanding scandals of our administration of justice[.]"[222]

Nor would it be easy to address this crisis. Legal thought itself was in a state of disorientation. It was no longer a matter of smoothly and almost inevitably ascertaining when the social interest should prevail over individual ones, as Pound had thought in 1913. The challenge now was to *balance conflicting considerations:*

> The task of the legal order, the task of adjusting relations and ordering conduct, involves reconciling or balancing conflicting and overlapping desires and demands. It is a task of social engineering. . . . But all balancing of contradictories is hard. Some philosophers of the time give the matter up. A leader of current juristic thought tells us that the law is confronted by an insoluble contradiction; an irreducible antinomy. . . . We are told that the[] objectives of the legal order cannot be reduced to one and that all we do is to issue certain threats of employing the force of politically organized society . . .. I am not willing to give up the central problem of the science of law in this fashion. . . . [In torts the challenges] arise from the difficulty of reaching an adjustment between the social interest in the individual life and the social interest in the general security. In divorce law we have to reach an even more difficult balance between the social interest in the individual life and the social interest in the security of social institutions.[223]

The era of conflicting considerations – of concon – had begun. Nor did Pound think it would produce resolution soon: divorce was a legislative not judicial domain, and "It is no one's business to draft divorce legislation such as is demanded by the conditions of the time. Probably no one is competent to do so without research which it is no one's business to carry on."[224] Pound's 1943 essay can serve here as the last, dispirited

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222. *Id.*

223. *Id.* at 182-83. We do not need to look for the legal devil described in this paragraph: he is a made-up boogey. The anti-real-realists in the legal academy – Pound included – had been attacking the real realists for "nihilism" since the 1930s. For a bibliography, see Pierre Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEX. L. REV. 1195, 1195-96, 1196 nn.1, 2, 3 (1989). For an account of the charge of nihilism during the era of the social and again during the concon era, see Duncan Kennedy & Marie Claire Belleau, *La Place de René Demogue dans la Généalogie de la Pensée Juridique Contemporaine,* 56 REVUE INTERDISCIPLINAIRE D'ÉTUDES JURIDIQUES 163, 198-211 (2006).

224. Pound, *Foreword, supra* note 218, at 188.

whimper of the social-purpose functionalism that so profoundly animated the rise of the social. It also indicates that complacency about the family was over: divorce was produced by and was producing a series of social crises that no one knew how to solve.

After World War II, the campaign for the social family re-emerged, but it carried a new idea, situated in a completely transformed intellectual paradigm. Nineteen-fifty-one can be our inaugural date for the new project in the field. That year the Association of American Law Schools convened a Roundtable on Family Law at its annual meeting, held in Denver, in which the new battle lines were drawn.[225] The same forces mustered the next year at the AALS Annual Meeting in Chicago.[226] Two books, both published in 1952, represented the new formation. Fowler V. Harper's *Problems of the Family,*[227] collecting materials he taught at Yale Law School in a Family Law course, took its position as the new vanguard; the conservative position fell to Jacobs himself, publishing a third edition of his *Domestic Relations* with a new co-editor, Julius Goebel, Jr.[228]

Recall that the social-purpose functionalists had seen the family as a site of social integration and disintegration, and they sought to promote the former and manage the latter by selecting the optimal legal rules; recall also that the real realist trend in the Columbia curricular reform project envisioned family law as the totality of legal agencies that managed family disorganization. Both adopted the stance of the governor, first in the form of a judge, then in the form of a social regulator. By contrast, Harper's family was the social setting encountered by the practitioner exposed on a daily basis to familial calamity. An emerging crisis, produced by rising divorce rates and a surge in "children of broken families," lay claim to professional concern.[229] Harper's intended audience was young lawyers who would stand shoulder-to-shoulder with psychiatrists, sociologists (soon to morph into social workers), clergymen,

225. Robert Kingsley, Book Review, 5 J. LEGAL EDUC. 400, 400 (1952-53) (reviewing FOWLER V. HARPER, PROBLEMS OF THE FAMILY (1952) and ALBERT C. JACOBS AND JULIUS GOEBEL, JR., CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS (1952)).

226. The *Journal of Legal Education* published two papers which refer to the Chicago panel as their origin. *See* Kingsley, *supra* note 225, at 400; Kenneth Redden, *Domestic Relations – Stepchild of the Curriculum*, 6 J. LEGAL EDUC. 82, 82 n.* (1953-54).

227. FOWLER V. HARPER, PROBLEMS OF THE FAMILY (1952).

228. ALBERT C. JACOBS & JULIUS GOEBEL, CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS (3d ed. 1952).

229. HARPER, *supra* note 227, at iii.

and anthropologists "in order to deal with the family in trouble."[230] For those in the grip of this sensibility, the cool attitude of Jacobs's and Goebel's *Domestic Relations* casebook seemed utterly out of touch with reality – seemed, indeed, to be mere conceptualism. Paul Sayre excoriated Jacobs and Goebels for missing the sheer human grandeur of their topic:

> [M]y main difficulty is with something that no one else apparently thinks important, and which certainly is no defect in this casebook by all the accepted standards. I don't think any of them describe the animal so you would recognize him by their description. Do they think Domestic Relations a purely verbalistic and logical system of rules put together under (preferably) Aristotelian influence? If so, I disagree. . . . I think family relations are strikingly a dynamic matter with apparently an endless succession of the relations of parent and child, then husband and wife, and then parent and child again, in a kind of earthly immortality.
>
> Our students, for the most part, will go out and deal with actual children and husbands and wives. To serve them usefully they must dare to touch the dignity of life itself. Not to give students some training in the amazingly complex and enduring qualities of their labors means incredible failure.[231]

The sense of urgency, of crisis—the moral earnestness and indignation that Sayre brings to his attack on Jacobs and Goebels – are completely new. To be sure, the social-purpose functionalists had confronted "family disintegration" as a major social problem, but it was one that experts could deal with. From a high center, they would determine the social purposes, study their operation in society, and recommend the right rule. For all the intellectual excitement and ferment of the realist revolt, it harbored a deep cognitive composure. The postwar progressives jettisoned all of that. For them, the family in crisis demanded emotional attachment with real people having real problems. And it produced a sense of not-knowing that was unsettled, hectic, emotionally hot.

There were dissenters, moving into new positions on a new battlefield. Side by side with Sayers's review, the *Journal of Legal Education* published one by Robert Kingsley, who objected strongly to the idea that he should teach on the "integrated" method represented by Harper's casebook:

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230. *Id.*

231. Paul Sayre, Book Review, 62 YALE L.J. 307, 400 (1953) (reviewing FOWLER V. HARPER, PROBLEMS OF THE FAMILY (1952)).

> At this point I "beg off." I am a lawyer – not an anthropologist, nor a theologian, nor an economist nor an historian. What is more, I am a law teacher. I have spent a quarter of a century, slowly learning a little about how to teach *law* to law students. And the very heart and core of my pedagogy is that I teach *how* to use knowledge and not merely knowledge itself. The arts and skills of the teacher whose sole task is to transmit information to, and to imbed it in, the minds of a student body are not mine. By this, I deprecate neither my skills nor those of the teacher of data. But we are different. He cannot do my job well; I cannot do his![232]

Kingsley concluded by identifying himself as a pedagogic "conservative"; he could assign Jacobs's and Goebel's third edition because it was, by now, in contrast to Harper's Young-Turk entry, a "reasonably traditional" text.[233]

Both sides of the new domestic-relations/family-law divide had abandoned legal science; both sides saw their job as training lawyers to meet with practical problems in the real world. The conflict was over the relationship of legal professionals to the other professions attending in families in crisis. For Harper, the idea was "not . . . that lawyers must become psychiatrists, sociologists, and anthropologists in order to deal with the family in trouble" but that the lawyer "does need something of the clergyman in him, and perhaps also something of the psychiatrist and social scientist" to give substance to "his understanding of the source of much unhappiness."[234] Fully half of his materials, he claimed, come from anthropology, sociology, and psychiatry; he didn't offer his readers a legal case until page seventy-five.[235] In order to review the book, the *Yale Law Journal* understood that it was necessary to solicit contributions from a psychiatrist, a lawyer, a social worker, and a family-court judge.[236] This was the new progressive project. For the conservatives, the goal was equally professional but narrower: Jacobs and Goebel would enable them to teach lawyers to be lawyers, that is, to understand the legal problems of their troubled clients and to use law to solve them.

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232. Kingsley, *supra* note 225, at 401.

233. *Id.* at 401-02.

234. HARPER, *supra* note 227, at iii.

235. *Id.* at 1-75.

236. Jules V. Coleman, Book Review, 62 YALE L.J. 305 (1953) (reviewing FOWLER V. HARPER, PROBLEMS OF THE FAMILY (1952)); Sayre, *supra* note 231; Harleigh B. Trecher, Review, 62 YALE L.J. 309 (1953); Anna M. Kross, Review, 62 YALE L.J. 311 (1953). The notes indicate that these contributors were, respectively, a professor of psychiatry, a professor of law, the dean of a school of social work, and a family court judge. 62 YALE L. J. at 307 n.*, 309 n.*, 311 n.*, 312 n.*.

The neoclassical façade of the legal order envisioned by the social-purpose functionalists had broken up. They wanted legal science to be like the natural and social sciences; just as those sciences sought to discern universal law in their proper domains, legal science would identify an entire universe made up by the laws of social control. Their curriculum would transparently represent the universe known by this legal science. Observers have regretted that they undertook to "revamp the entire curriculum"[237] but that was central to their idea of a respectable knowledge project, and in adopting it they sought to replace the classical edifice with another structure equally shapely and complete. The real realists had enthusiastically accepted fragmentation, but they too wanted to explain *everything.* Postwar, we detect no trace of this encyclopedic ambition. If Pound had thought that domestic relations were of a piece with all social relations, and if the Columbia social-purpose functionalists had thought that the family was a distinct social entity that nevertheless could be governed through the use of the same intellectual paradigm that would work on every other social activity, the postwar family fell back into the complete exceptionalism which the classical order had crafted for it.

Given the robust ascendancy of the market in postwar American social life and in the career ambitions of law students, advocates of family law dedicated themselves to it as to a fighting faith. In 1952 Kenneth Redden recalled with sorrow and indignation his experience as a beginning law teacher at the University of Virginia:

> As the bottom man on the totem pole I was quite naturally given those courses which no one else wanted to teach. One of these was family law. Having absolutely no prior experience in the field, I was obviously the perfect one to teach it. I could approach the subject with an objective, unbiased, and impartial eye in all the unsullied freshness of youth.[238]

Redden "soon discovered" that family law was the "stepchild" – even the "ugly duckling" – of the curriculum.[239] But this was a dangerous error: "Although lawyers are properly concerned with prosperous business relations, sound financial relations, peaceful international relations, or conciliatory labor relations, what good are they if we have a failure in our

237. LAURA KALMAN, LEGAL REALISM AT YALE 73 (1986); *see also* Currie, *Materials*, *supra* note 101, at 71.

238. Redden, *supra* note 226, at 82.

239. *Id.* at 82, 84.

family relations?"[240] (Echoes of Pound and the Columbia reformers: all the relations constituted an ordered society, and all were coequal in importance.) Given the "alarming rise of juvenile delinquency and the tragic disintegration of the family unit," the stakes were no smaller than the "fall or decline of every great civilization."[241] In 1960 Dean Griswold of Harvard Law School worried in his annual report that law students' enthusiasm for the law of the market was resulting in a curriculum that demoted and verged on ignoring civil and human rights, international law, legal history, legal theory – and family law.[242] Something had to be done.

The push for a revitalized field, when it did come, arose not in the academy but among professional lawyers. In the late 1950's, bar associations started producing sections and publications dedicated to family law. The movement started in state bar associations,[243] and swiftly commandeered the energies of the American Bar Association. In 1960, the ABA started publishing *The Family Lawyer*, a bimonthly newsletter;[244] and proceedings of the ABA section on Family Law appeared annually from 1959 through 1963.[245] The urgency and excitement conveyed in these early publications can perhaps be captured in some characteristic greetings appearing in these series. The second issue of *The Family Lawyer* confessed that, "[i]n trying to include all accumulated news [since the first issue two months before], the type had to be reduced below the bifocal strength of some grandfathers' glasses. For this we apologize. By trial and error, we hope to have a creditable newsletter."[246] Section Chairman Sol Morton Isaac closed his Foreword to the *Proceedings* published that same year with this salute: "If you have a family – if you represent a family – if you judge a family – you are concerned with Family Law."[247] Institution building was an urgent

240. *Id.* at 82.

241. *Id.*

242. Erwin N. Griswold, *Law School*, *in* 58 OFFICIAL REGISTER OF HARV. UNIV. 405, 408-09 (1961) (special issue containing *Report of the President of Harvard College and Reports of Departments, 1959-1960*).

243. STATE BAR OF CAL. COMM. ON CONTINUING EDUC. OF THE BAR, FAMILY LAW FOR CAL. LAWYERS (Univ. of Cal. at Berkeley Extension 1956); INDIANA STATE BAR ASSOCIATION, THE EIGHTH ANNUAL ELEVENTH DISTRICT LEGAL INSTITUTE ANNUAL MIDWINTER MEETING OF THE INDIANA STATE BAR ASSOCIATION ON FAMILY LAW (John D. Cochran & Joseph G. Wood eds., Indianapolis, Bobbs Merrill Co. 1957).

244. 1:1 THE FAMILY LAWYER (April 1960).

245. AMERICAN BAR ASSOCIATION, SECTION OF FAMILY LAW, SUMMARY OF PROCEEDINGS (Chicago, American Bar Center 1959, 1960, 1961, 1962, 1963).

246. 1:2 THE FAMILY LAWYER 1 (June 1960).

247. AMERICAN BAR ASSOCIATION, SECTION OF FAMILY LAW, SUMMARY OF PROCEEDINGS 7

priority. The June 1960 issue of *The Family Lawyer* is packed with reports on state bar association meetings, tentative schedules for upcoming meetings, resolves to start law clinics and raise funds, case notes and offers of bibliographical assistance: it all "adds up to the fact that a genuine Research Center must be our number one project."[248] As part of the general ferment, Duke University had already established an Institute on Family Law and circulated a verbatim account of its proceedings in typescript.[249] The American Law Institute published a practice guide on Family Law,[250] and a whole array of Family Law journals and research reports appeared.[251] *Family Law* re-emerged, this time from the professional organizations. It was Family Law as opposed to Domestic Relations, a stodgy formalist encrustation of the law curriculum. It was Family Law because it was about real families and their real problems. It took about five more years before it pushed Domestic Relations off the curricular stage.

This transition was fraught with meaning for the participants, and anyone who was politically alive in the 1960s will recognize the urgency, the fervor, the sense that the center might not hold, that the chaos of social life might overwhelm law – the sheer contact with craziness – that attended the long-belated birth of Family Law as a topic in the standard law curriculum. The turning point from domestic relations to family law was interpreted contemporaneously in an anguished book review for the *Harvard Law Review* by Robert F. Drinan, S.J. He narrated the shift from domestic relations to family law as a shift from formalism to a professionalized social-realist attitude towards family crises like divorce and adoption.[252] We can see the shift in the very titles of his examples: Homer H. Clark's *Cases and Problems on Domestic Relations*, Joseph Goldstein and Jay Katz's *The Family and the Law*, and Caleb Foote,

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(Chicago, American Bar Center, 1960).

248. 1:2 THE FAMILY LAWYER 1 (June 1960).

249. PROCEEDINGS OF THE INSTITUTE OF FAMILY LAW APRIL 9, 10, 11, 1959, DUKE UNIVERSITY (John S. Bradway ed., 1959) (typescript).

250. C. CLINTON CLAD, FAMILY LAW (1958).

251. In addition to THE FAMILY LAWYER, *supra* notes 244 & 246, see, for instance, ILLINOIS STATE BAR ASSOCIATION SECTION ON FAMILY LAW, FAMILY LAW BULLETIN (Springfield, Ill., 1958); JOURNAL OF FAMILY LAW (University of Louisville School of Law 1961); A REVIEW OF FAMILY LAW RESEARCH AND SOME SUGGESTED AREAS OF FUTURE ACTIVITY (Chicago, American Bar Foundation 1961).

252. Robert F. Drinan, S.J., Book Review, 79 HARV. L. REV. 1727 (1966) (reviewing HOMER H. CLARK, CASES AND PROBLEMS ON DOMESTIC RELATIONS (1965); JOSEPH GOLDSTEIN AND JAY KATZ, THE FAMILY AND THE LAW (1965); CALEB FOOTE, ROBERT J. LEVY, AND FRANK E. A. SANDER, CASES AND MATERIALS ON FAMILY LAW (1965)).

Robert J. Levy and Frank E. A. Sander's *Cases and Materials on Family Law.*[253] This sequence takes us from domestic relations (Clark is the new Jacobs and Goebels), to the social and psychological family confronted by the law, to *family law* as a new discipline or field in legal studies.

The urgency of Father Drinan's review arose from his sense that no-fault divorce was exposing moral and spiritual problems for which "society" and "the law" had, as yet, no answers. Signing on to Justice Brandeis's bon mot, "A lawyer who has not studied economics and sociology is very apt to become a public enemy,"[254] Drinan ranked the three books by the extents to which they acknowledged the *profundity* of family problems and to which they *professionalized* them. Divorce, custody, difficult adoptions, the path of unwed motherhood: a client presenting these legal issues is "seeking the aid of a lawyer to alter the profoundest personal relationships of his life."[255] Clark's tutelage of the lawyer as "technician dealing almost exclusively with the legal aspects of the marriage relation" was simply not up to the task.[256] The interdisciplinary materials – from psychiatry particularly – presented in the Goldstein and Katz volume were more adequate at least in showing that "the legal aspects of any problem related to marriage, divorce, or custody are almost nonessential formalities in comparison with the profound moral and spiritual values which form the real basis of the legal concept of the union of husband and wife."[257] Their materials were "bewildering," but the resulting disorientation was, Drinan thought, an important wake-up call: "The ambivalence and sheer confusion" that the law manifests when it confronts the socially and psychologically *real* family are "portrayed in Goldstein-Katz in a way that is truly shattering."[258] In 1966 law professors *liked* to feel shattered.

But clearly Drinan thought that Foote, Levy, and Sander's casebook offered the only way out. Their casebook aimed for a *professional* response to the problem: it was "unprofessional" for lawyers to ignore the "nonlegal problems" suffered by their clients, and it was a professional

253. HOMER H. CLARK, CASES AND PROBLEMS ON DOMESTIC RELATIONS (1965); CALEB FOOTE, ROBERT J. LEVY & FRANK E. A. SANDER, CASES AND MATERIALS ON FAMILY LAW (1966) [hereinafter FOOTE, LEVY & SANDER, FAMILY LAW]; and JOSEPH GOLDSTEIN & JAY KATZ, THE FAMILY AND THE LAW (1965) [hereinafter GOLDTEIN & KATZ, THE FAMILY AND THE LAW].

254. Drinan, *supra* note 252, at 1727.

255. *Id.* at 1729.

256. *Id.* at 1728.

257. *Id.*

258. *Id.* at 1729.

obligation for them to have enough interdisciplinary training to be able to refer clients to "psychiatry, social work, and other relevant disciplines" for help with those problems.[259] With "expert nonlegal assistance" clients might even hope for "resolution" of those problems.[260]

Drinan also praised Foote/Levy/Sander for throwing a healthy dose of skepticism on the idea that these problems were a new set of formal or technical challenges: rather, the law attempts to make an "uneasy compromise of irreconcilable values[.]"[261] And when it can't, it faces the inescapable, dire question, "Which of the 'irreconcilable values' should the law endorse?"[262] Because it faced that question "in countless disquieting ways" the Foote, Levy, and Sander volume was, in Drinan's view, "the most important casebook in family law in the history of American legal education."[263]

What shifts in the legal ideology of this new domain can we detect in Drinan's review? Like all advocates for family law and detractors of domestic relations since the Columbia reforms, it was antiformal. Like Harper, it acknowledged the need for parallel professional engagement; like Harper, it focused attention on the sheer giddy depth of family affect. The novelty is the sense of social crisis, pitched in an awareness that most problems addressed by family law escape its reach. The legal obligations of husband to wife, the grounds for divorce, the causes of action for breach of marriage-related duties: these were quite beside the point for lawyers facing the social disruption and moral confusion of people whose lives were being lived off their grid.

The Foote/Levy/Sander casebook originated in 1956, in a National Institutes of Mental Health grant to support training for law students in the behavioral sciences.[264] It thus expresses in academic form the family law bar ferment that arose as the postwar generation tried to get a grip on its rapidly changing society. By 1960, Frank Sander was teaching "Family Law" to Harvard Law School students.[265] So far, the project sounds like the Columbia family law project rising like a Phoenix. But with a difference: in addition to framing policy questions in large social-science

259. *Id.*

260. *Id.*

261. *Id.* at 1730 (quoting FOOTE, LEVY & SANDER, FAMILY LAW, *supra* note 253, at 649).

262. *Id.* at 1730.

263. *Id.*

264. FOOTE, LEVY & SANDER, FAMILY LAW, *supra* note 253, at ix.

265. FRANK ERNEST ARNOLD SANDER, FAMILY LAW (1960-61) (mimeographed course materials available at Harvard Law Library, Hollis # 8438824).

contexts, Sander consistently propelled students into their coming role as lawyers. The materials add "Problems": "Miss Ida Idlehour has come to you with the following problem"; "As chairman of your state's law revision commission, you have been asked to consider both the constitutionality and the advisability, in public-policy terms, of the following statute."[266] And he included a special section devoted to the counseling role, in which the Columbia focus on the collaboration of legal science with social science morphs into an emphasis on lawyers' collaborations with psychiatrists, social workers, medical teams, school officials and the full panoply of professionals with any kind of role in managing the lives of actual people in actual families. He included a draft article by Howard R. Sacks advising, "[m]any lawyers seem unaware of the contribution that social agencies, marriage counselors, psychiatrists, and clinical psychologists can make in aiding a client."[267] Family law is now not only about policy analysis but also about the practice of law by actual lawyers, embedded in a complex web of professionals responsible for addressing all the complex aspects of a family crisis.

The next year Sander and Caleb Foote produced independent course materials, *Cases and Materials on Family Law*. This is the prototype of the 1965 Foote/Levy/Sander casebook, and a major innovation that strikes the eye reading both of them is how fully they incorporate the kinds of materials which, in the *longue durée* of the Jacobs casebook, never got out of the footnotes and short notes. The published casebook includes two actual trial records, including probation officer's reports and psychiatric assessments from independent psychiatrists and state hospitals, as well as transcripts of court proceedings, giving students a direct view of multiple institutions and professional roles convening to determine the future course of seriously troubled parties.[268] The editors have compiled long introductory sections summarizing social science data relevant to the cases; include complete statutes so that students can be asked to apply them to the cases; and excerpt social science articles as main readings, not notes.[269] The first chapter of the casebook, for instance, devotes fifty-six pages to policy analysis and thirty-one pages to lawyers' problem-solving

266. *Id.* at Assignment 1, 1, Assignment 3, 1.

267. *Id.*, n.p. (excerpting Howard R. Sacks, *Talking with Clients*, at 9 (mimeographed article)).

268. FOOTE, LEVY & SANDER, FAMILY LAW, *supra* note 253, at 417-40, 866-95.

269. For instance, in the chapter on "The Dysfunctional Family," we find an introduction crammed with social detail, *id.* at 394-400, a complete statute on the "neglected child", *id.* at 417-22, and a long excerpt from the social science literature, *id.* at 441-43 (quoting Eileen L. Younghusband, *The Dilemma of the Juvenile Court*, 33 SOC. SERV. REV. 10 (1959)).

options.[270] These sections, which represent more than half of the entire chapter, forgo cases altogether. The speculativeness that the Columbia committee feared and the market resistance that Jacobs had to contend with were no longer impediments; Foote, Levy and Sander confidently offered a richly social casebook.

These formal changes dramatically altered the substance of the topic. The first chapter, for instance, is not about marriage or "the family" but about "The Problem of Illegitimacy."[271] This full frontal recognition that sex and procreation happen outside the legally legitimate place for them is real realist; we first saw it in Llewellyn's "Behind the Law of Divorce." The focus is explicitly distributive. After reviewing cases deciding whether illegitimate children could inherit (at common law, the answer was no; a bastard is *filius nullius*),[272] the notes turn to the possibility of providing for their support through a federally funded social welfare program. There, students were asked whether this was a good idea on policy grounds, and how Congress could best trump common law definitions of "child."[273] The section on support for illegitimate children assumes that support must be found: who should shoulder this burden? The first source examined is the mother's filiation or paternity action against the alleged father, but we soon encounter the fact that "the bulk of paternity proceedings are forced to trial by the Welfare Department[.]"[274] The paternity action is at the nexus between the family and the state: it is where the public welfare system most visibly pushes its responsibility to provide subsistence back onto the family. Foote, Levy and Sander offer a swift but comprehensive treatment of the law governing public assistance and a description of the relationship between sources of private and public support for illegitimate children.[275] The sections on inheritance and filiation thus transgress the private/public distinction in order to make it clear that the family is a crucial private welfare system. The casebook comes directly to the distributive point: illegitimate children need support just as badly as legitimate ones do; who is going to provide it?

The casebook authors showcase Walter Gellhorn's condemnation of trying paternity actions as criminal litigation. Gellhorn vividly claims that

270. *Id.* at 77-159.

271. *Id.* at 3-169

272. *Id.* at 11-22.

273. *Id.* at 23 (Problem 2).

274. *Id.* at 63 (quoting WALTER GELLHORN, CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK CITY 180 (1954)).

275. *Id.* at 66-71.

adversarial procedure brings the worst out of everybody:

> The wretched chronicles that unfold before the Court are likely to thrill none but the depraved. They rarely bring joy in the telling either to the complainant or to the defendant. . . . [In cases] forced to trial by the Welfare Department . . . the mother is a reluctant participant, and in any event cases are not brought on for trial until the evidence has been responsibly reviewed by a highly competent law officer of the City of New York. In "private" litigation, on the contrary, the defendant may be the victim of a scheming woman who, by threatening to shout her accusations in a public forum, may exact a substantial settlement regardless of the merits.[276]

Lawyers, judges, venal mothers and frightened putative fathers all appear in a world minutely managed by the Welfare Department's social workers. (Note, incidentally, the absence of the victimized single mother and the deadbeat dad from this picture. Feminism will introduce them onto the family law stage in the next Section of this Part.) Policy errs when it compels professionals to solve the profound problems of family life in the rigid, adversarial forms of criminal court. This is an *administrative* problem and it should be addressed with administrative tools:

> Hearings in Family Court seem on the whole to be conducted in a more helpful spirit than are their counterparts in Special Sessions. . . . The holding of hearings in small courtrooms without the crowds that fill the seats of Special Sessions, conduces to a natural, relaxed, and unsensational presentation of the facts.[277]

Foote, Levy and Sander came out from behind the curtain to refute the counterclaim on behalf of Special Sessions, that women will be deterred from bringing fraudulent claims by the publicity of criminal proceedings. The ability to expose a "man of substance and standing" in public proceedings puts a weapon of "terror" in a woman's hands: "It may well be that the threat of exposure to a public airing . . . may be a means of furthering fraudulent claims, rather than discouraging them."[278] Like Llewellyn, Foote, Levy and Sander could see the perverse effects of law in action; but unlike him they expressed a calm confidence that professional minds can manage them wisely.

As we have seen, Family Courts were the first institutions to invent the

276. *Id.* at 62-63 (quoting GELLHORN, *supra* note 274, at 180).
277. *Id.* at 63 (quoting GELLHORN, *supra* note 274, at 183).
278. *Id.* at 63 n.40.

idea of modern family law and to dissolve FLE, but the Columbia reformers failed to figure out how to incorporate these courts, administrative law generally, and the expanded category of family law. The commitment of the domestic relations format to FLE was too strong, and Jacobs's casebook reverted to type. Foote, Levy and Sander had finally figured out how to frame family law as the full range of crucial distributive devices which had long been sought by proponents of the social and by the real realist strand within it.

Foote, Levy and Sander completely broke the Domestic Relations mold. They did know the Jacobs/Angell Report and relied on it, fittingly, for doctrines of marital property[279]; but they didn't cite it for the many ways they reproduce its field-design innovations. It seems, instead, that they *reinvented* many of the Jacobs/Angell Report's strategies for incorporating the social family. There is something almost structural in their revival of its key features. Once again we see the turn to law in society, the encounter there with the role of administrative agencies, the vastly different legal systems that address the legal life of poor and "disorganized" families from those that attend to the needs of the middle and upper classes. But there is a new affective tone. Foote and Sander have exposed us to the angst and horror that real family problems produce not only in the people who suffer them but in the professionals responsible for regulating them. It's not about getting the right rule: it's about being a self-disciplined professional who can look at human misery and modestly bring the meagre tools of law to bear, knowing that they can address but cannot cure the malaise. The costs run bitterly high, but lawyers must participate in the work of social distribution. Their only salvation is professionalism.

After 1966, family law rapidly replaced domestic relations as the favored title for the field. Family law is well established now, but it is a fairly recent invention.

## V. EQUALITY, IDENTITY POLITICS, CONSTITUTIONALIZATION AND CONFLICTING CONSIDERATIONS: AREEN

By the early 1970's, legal feminists had appeared on the scene, agitating for an overhaul of the law curriculum with the ultimate goal of changing the law and transforming society. Modeling themselves on the black civil rights movement of the past and setting the template for gay-

279. *Id.* at 319 n.33.

identity reformers to come, they saw themselves as having a social constituency. They spoke for a vibrant social movement and brought the brainwaves of identity politics and multiculturalism to law school. When I started teaching Family Law in 1990, this insurgency had dramatically changed family law not only by redrawing its borders but by transforming its contents. The feminists launched an assault on FLE that was as cogent, as intense, and as serious as the one waged by the social-purpose functionalists and real realists; and like them, they successfully reoriented the field. But as their efforts became institutionalized, FLE re-emerged.

In 1972, legal feminists staged a flagship conference on *The Law School Curriculum and the Legal Rights of Women.*[280] It was held at New York University Law School and sponsored by the American Association of Law Schools. Excitement was high: Eleanor Holmes Norton's keynote address indicated that attendance was so much more robust than anticipated that, even after the conference was moved to larger rooms, it was still oversubscribed. Once again we have all the signs of reforming ferment, but this time it has a more grassroots and even insurgent origin, a more indignant and even angry tone:

> Special tribute is due to the vanguard group who pried open the consciousness of the bar. Who were they? . . . As with so many issues during the past 15 years, the vanguard was students, in this case women law students. Unpracticed in the law and new to its

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280. AMERICAN ASS'N OF LAW SCHOOLS, A SYMPOSIUM ON THE LAW SCHOOL CURRICULUM AND THE LEGAL RIGHTS OF WOMEN (1972) (conference proceedings) [hereinafter NYU SYMPOSIUM]. This is a collection of mimeographed teaching plans for courses in the law school curriculum; each has its own pagination. It is quite rare: only 22 copies exist in American libraries. OCLC Accession Number, 4510893, in *FirstSearch*, ONLINE COMPUTER LIBRARY CENTER, INC. (last visited July 21, 2011).

The contents of the Harvard Law Library version of this collection are as follows (in the order of the collection): *Remarks of Eleanor Holmes Norton, Chairman, New York City Commission on Human Rights, at "the Law School Curriculum and The Legal Rights of Women," A Symposium Presented by The Association of American Law Schools and New York University School of Law on Friday, October 20 and Saturday, October 21, 1972* [hereinafter Norton, *Keynote*]; Ruth Bader Ginsburg, *Towards Elimination of Sex-Based Discrimination: Constitutional Aspects* [hereinafter Ginsburg, *Sex-Based Discrimination*]; Susan C. Ross, *Cases and Materials on Title VII of the 1964 Civil Rights Act for the AALS Panel on Labor Law*; Kenneth M. Davidson, *Women in Unions: The LMRA, the LMRDA and Associated Problems: Cases and Materials*; Davidson, *Cases and Materials on the Equal Pay Act of 1963*; Davidson, *Cases and Materials on Executive Order 11246*; Linda R. Singer, *Women in the Criminal Justice System* [hereinafter Singer, *Women in the Criminal Justice System*]; Barbara Allen Babcock, *Outline of the Discussion about Rape To be Presented at the AALS Symposium on the Law School Curriculum and the Legal Rights of Women*; Herma Hill Kay, Robert J. Levy, Cynthia Lou Attwood & Kathryn Gehrels, *Family Law Materials* [hereinafter Kay et al., *Family Law Materials*]; Anon., *Social Welfare Legislation*; Babette Barton, Grace Blumberg & Carlyn McCaffrey, *Tax Law Materials*; Leo Kanowitz, *The Law School Curriculum and The Legal Rights of Women: Property*; Judith T. Younger, *Community Property, Women and Curriculum* [sic].

> rigors and concepts, they forged ahead to uncover what only the unbiased eye could see: that the law was riddled with sexist distinctions; that the law encouraged diminished opportunity for girls and women; that the law ridiculed and punished people because they are women and not men.[281]

An immense samizdat collection of teaching materials issued from the conference. It is a self-published collection of course outlines and "cases and materials," typed out and mimeographed onto the recto side of 8 x 11 paper. It resembles nothing in this genealogy so much as the Jacobs/Angell report, but that was the communication of elite insiders with themselves; this is a how-to manual for the troops. Jacobs and Angell were deputized to reform the law school curriculum by the Dean; the NYU conference proceedings addressed themselves to a loose national alliance of individual teachers. Course by course, it put tools in the hands of readers eager to transform the curriculum by changing what was taught, starting now.

As I indicated in the Introduction, Duncan Kennedy's third globalization of legal thought embraced two contradictory trends. It maintained the social, but now without the rationalist assumption that social interests would eventually be correctly subserved by the emergence of legal rules that would optimally adjust them: they were now politicized as conflicting social interests, and the best that law could do would be to balance them in the least bad way that lawmakers could ascertain. Conflicting considerations – concon. But the third globalization also revived a classical idea of legal right: neoformalist rights, ideally constitutionalized and enforced by judges, would vindicate socially oppressed groups. The NYU feminists were strongly committed to the latter strand of concon thinking. Contributors to the conference were sanguine that the Equal Rights Amendment, very recently passed by the Senate, would be ratified. Law was both the problem and the solution. Ruth Bader Ginsburg contributed the first entry, an outline of women's historical legal inequality and an argument that the ERA – not the Fourteenth Amendment or legislation – would be needed to produce change.[282] The section on family law, composed by Herma Hill Kay, Robert Levy, Cynthia Lou Attwood and Kathryn Gehrels, looks to the same approach to emancipation: "These materials are intended to focus on sex discrimination, with special emphasis on discrimination against

281. Norton, *Keynote*, *in* NYU SYMPOSIUM, *supra* note 280, at 2.

282. Ruth Bader Ginsburg, *Sex-Based Discrimination*, *in* NYU SYMPOSIUM, *supra* note 280, at 2.

women. . . . It is submitted that women should support an approach to family law reform which seeks to insure that traditional family law policy be replaced by a policy of advancing the goal of equality inherent in the Equal Rights Amendment and the Woman's Movement generally."[283] Constitutional equality was the measure of everything. With only one exception,[284] all the other teaching materials in the collection hew to this emphasis on equal rights. Four key innovations come into our story with this move: 1. a focus on rights, 2. specifically rights to equality, 3. preferably based in the Constitution, 4. to be realized through adjudication. As Kennedy indicates in his diagnosis of the third globalization, for concon consciousness, the judge is the hero.

The NYU feminists took up family law as an existing domain, tacitly accepted its contours, and thus carried forward its existing exceptional location. But family law was by no means the only site that needed substantial legal and social reconstruction. Instead, it was located amidst a welter of legal domains that needed fixing. The collection included cases and materials and outlines on Title VII; Women in Unions (with Notes on Additional Strategies for Dissident Minorities); the Equal Pay Act of 1963; Executive Order 11246 (requiring nondiscrimination in employment by government contractors); Women in the Criminal Justice System; Rape; Family Law; Social Welfare Legislation; Tax Law; Property; and Community Property.[285] Family Law was a distinct domain; no effort was made to unpin its boundaries. But every course in the legal curriculum needed reform: family law was not special.

Unlike the early social-purpose functionalist reformers at Columbia, the NYU feminists had no faith in the idea of a correct systematic architecture for law; the legal system could be dealt with in its existing fragments. Indeed, the complete absence of an impulse to put the distinct contributions into a correct or even a coherent order signals acquiescence in the fragmented legal curriculum that had resulted when the Columbia reformers' effort to produce a systematic one flew to pieces.

For the early feminist reformers, however, there was a structure to the legal order. It was not expressed in the various topics of the law curriculum; rather it permeated them all. It was male domination and

283. Kay et al., *Family Law Materials*, *in* NYU SYMPOSIUM, *supra* note 280, at 2.

284. Linda Singer's materials on Women in the Criminal Justice System argued that the goal for feminists must not be equality of incarcerated women with incarcerated men but the depopulation of the entire prison system. Linda Singer, *Women in the Criminal Justice System*, *in* NYU SYMPOSIUM, *supra* note 280, at 43-44.

285. For a complete list of the *NYU Symposium* contents, see *supra* note 280.

female subordination. Separate spheres ideology and the market/family distinction – typically dubbed the private/public distinction – constituted *the* key structural feature of the legal system and made law indispensable to the maintenance of male domination. Norton asked the NYU feminists to "[t]hink how far along the country would be if the bar began to take the same professional responsibility for equal rights, justice for the poor, and criminal justice that it has historically taken for the country's tax and business policy, in [sic] behalf, of course, of its most prosperous clients."[286] And think they did: by the end of the decade, legal feminists had produced a sophisticated structural critique of the private/public distinction and its role in constructing, perpetuating and legitimating women's inequality.

In 1982, David Kairys published a handbook for critical legal studies, then in its heyday.[287] Kairys included two feminist essays, both of them centrally committed to unraveling the private/public distinction as a crucial step towards women's emancipation.[288] Nadine Taub and Elizabeth M. Schneider opened their essay with an attack on FLE:

> The Anglo-American legal tradition purports to value equality, by which it means, at a minimum, equal application of the law to all persons. Nevertheless, throughout this country's history, women have been denied the most basic rights of citizenship, allowed only limited participation in the marketplace, and otherwise denied access to power, dignity and respect. Women have instead been largely occupied with providing the personal and household services necessary to sustain family life.[289]

Women were legally and socially excluded from the two "public" spheres – governance and the market; positive law actively kept them out.[290] Thus constrained to the private sphere of the family, they were exposed there to the raw power of men: privacy meant an "[a]bsence of [l]aw" from the domestic sphere.[291] Taub and Schneider elaborated Norton's idea that men had provided themselves with protections in the marketplace that

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286. Norton, *Keynote*, *supra* note 280, at 1.

287. DAVID KAIRYS, THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (1982).

288. The two feminist essays were Nadine Taub & Elizabeth M. Schneider, *Perspectives on Women's Subordination and the Role of Law*, *in* KAIRYS, THE POLITICS OF LAW 117 [hereinafter Taub & Schneider, *Women's Subordination*]; and Diane Polan, *Toward a Theory of Law and Patriarchy*, *in* KAIRYS, *supra*, at 294.

289. Taub & Schneider, *Women's Subordination*, *supra* note 288, at 117.

290. *Id.* at 118-20.

291. *Id.* at 121.

they had denied to women in the home. The very distinction between the law of the market and the absence of law in the family subordinated women:

> Despite the fundamental similarity of conflicts in the private sphere to legally cognizable disputes in the public sphere, the law generally refuses to interfere in ongoing family relationships. For example, the essence of the marital relationship as a legal matter is the exchange of the man's obligation to support the women [*sic*] for her household and sexual services. Yet contract law, which purports to enforce promissory obligation between individuals, is not available during the marriage to enforce either the underlying support obligation or other agreements by the parties to a marriage to matters not involving property. A woman whose husband squanders or gives away assets during the marriage cannot even get an accounting. And while premarital property arrangements will be enforced on divorce, courts' enormous discretion in awarding support and distributing property makes it highly unlikely that these decisions will reflect the parties' conduct during the marriage in regard to either the underlying support obligation or other agreements. It is as if in regulating the beginning and end of a business partnership the law disregarded the events that transpired during the partnership and refused to enforce any agreements between the partners as to how they would behave.[292]

But it was not only contract and business law that was missing: tort and criminal law step back from the family and remit women to male domination in the private sphere that these legal evacuations create. Interspousal immunity, the marital rape exception, courts' refusal to hold men criminally liable for assaults in the home and to issue injunctions evicting them not only left women defenseless in the private sphere; they sent the message that women, their safety and their work in the home were meaningless.[293] A large law reform agenda was implied by this critique: tort law, criminal law, business associations law, and the remedies available in equity were packed with protective legal rules that men depended on in the public sphere; women should enjoy them at home. Eliminating FLE was an *equality* project.

Note that Taub and Schneider have flipped the status/contract distinction framed by CLT. They saw the market as public and saturated

292. *Id.* at 121.
293. *Id.* at 122-24.

with duty, and marriage as private and relegated to the husband's raw social power. Their solution: make the family more like the market. But in the rise of *laissez faire* and separate spheres ideology in the nineteenth century, American jurists had framed contract as the will of the parties and marriage as the will of the state; freedom of contract was paired with its opposite, marital status.[294] And as we have seen, this idea is extremely resilient; it seems to be embedded in our legal consciousness and to be capable of truly spooky returns from the grave. Sadly, that is precisely what happened in the wake of the legal feminists' assault on FLE. Indeed, the feminists themselves facilitated it. Her is how.

As Frances E. Olsen argued in an article published in 1983, Taub and Schneider vastly underestimated the complexity of the market/family distinction. Vis-à-vis the state, *both* the market and the family were understood to be private; and legal ideology was equally committed to the ideas that law governed both of them and that law had to leave them free.[295] Though these ideas were immensely productive in shaping law and society, they were, Olsen insisted, at root ideological.[296] Feminist arguments that emancipation could be sought by making the family more like the market ran the risk of intensifying rather than relieving the individualism and privacy of the domestic sphere; the opposite strategy, pursued by cultural feminists, of making the market more like the family might extend protections for caring behavior to the workplace but might also extend the reach of oppressive gender stereotypes from the family to the market, entrenching women in caring roles.[297] Olsen's argument brought the tools of critical legal studies – with its commitment to seeing the contradictory operation of legal rights which we can trace back, in this genealogy, to Llewellyn – to bear on the feminist attack on FLE. It is a brilliant chiasmatic critique of the false necessity of feminist rights-focused neoformalism.

The idea that legal feminism needed to take the shape of critical work within the CLS movement did not appeal to everyone, however. Not only did liberal feminists like Ginsberg feel just fine ignoring CLS; the more radical elements of legal feminism were undergoing a turn to the state and an embrace of concon rights neoformalism across the board. I will offer

294. Halley, *What is Family Law?: A Genealogy, Part I*, *supra* note 1, at 33-54, 86-95.

295. Frances E. Olsen, *The Family and the Market: A Study of Ideology and Law Reform*, 96 HARV. L. REV. 1497, 1497-1507 (1983).

296. *Id.* at 1508-28.

297. *Id.* at 1529-60.

just two examples of this trend, one from perhaps *the* leading producer of power feminism in legal studies, Catherine A. MacKinnon, and the other from perhaps *the* leading producer of cultural feminism in legal studies, Robin West.

In 1983, MacKinnon published a critique of rape law that deployed a core critical maneuver, one we have seen in this genealogy when Llewellyn noted that the concentration of legitimate sex in pair marriage, where it becomes tied to the almost infinite nonsexual functions of marriage, liberated "*extra*-marital sex" to "specialize on sex."[298] In Llewellyn's formulation, the formally recognized and legitimated element of the legal order implies a hidden, illegitimate element: enforcement of the legal rule inevitably runs out, and that makes space for precisely the human events it aimed to make impossible. MacKinnon ran this move in reverse, starting with the criminalization of rape and then remembering that it would run out, implicitly legitimating all the rapes that fell outside the scope of the prohibition. Criminalization was too risky, MacKinnon thought in 1983; the "state was male in the feminist sense"; and only a thoroughgoing critique of male domination in all its lived, legal and ideological ramifications could make law emancipatory for women.[299] But by 1989, when MacKinnon revised these very passages for publication in book form, she had concluded that "Rape with legal impunity makes women second-class citizens."[300] The turn to neoformalist rights thinking, to the state, and away from real realism and CLS.

Meanwhile, West helpfully recorded the social dimension of this division of intellectual forces, describing it as the "CLS-Fem Split" and siding decisively on the Fem side in it. Within the CLS Conference, West noted, tenured male law professors enjoyed a position of relative power over untenured female feminist law professors, who suffered a position of relative powerlessness.[301] Their own commitments to what West dubbed "deconstruction" (more accurately, perhaps, denaturalization) should by then have led the tenured male law professors to embrace the feminists'critique of their own sexist attitudes and practices, but a recent

298. Llewellyn, *Behind the Law of Divorce*, *supra* note 136, at 1298.

299. Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 644-45, 655-58 (1983).

300. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 182 (1989). For a discussion of this transition, see JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 46-48 (2006).

301. Robin West, *Deconstructing the CLS – Fem Split*, 2 WIS. WOMEN'S L.J. 85, 85 (1986).

article assessing the erotic politics of mentorship in the CLS Conference, written by none other than Duncan Kennedy,[302] made it clear to West that they had not done anything of the kind.[303] West concluded with a tripartite recommendation. The tenured male professors in CLS should change their ways through intense self-criticism. "Second, unless they do so, CLS is not a congenial atmosphere for feminist work, nor is it a healthy environment for women, and women should therefore get out." And third – presupposing that the tenured male law professors would not meet West's first demand – feminist law professors should relate to CLS not as members but as an external audience for their work.[304] The split was foreordained. Cut off from its critical base, radical legal feminism loosened its grip on Olsen's critique of FLE; instead, they began to lay the tracks for its return.

Well before Taub and Schneider published their feminist attack on FLE, Judith Areen's 1978 *Cases and Materials on Family Law* had worked out its implications for teachers of family law.[305] This book enabled feminist law professors to bring the NYU Conference's emphasis on women's equality directly into the family law classroom.

Symptomatically, Areen had no use for several important innovations from the 1960s. Foote, Levy and Sanders' emphasis on professionalism and interprofessional cooperation was gone; the idea of focusing sections of the casebook on social problems like illegitimacy had dissolved into thin air. Nonlegal materials were now introduced not to exemplify professional perspectives of non-lawyer experts but for the truth of the matter asserted therein or for the controversial positions they staked. The emphasis on expertise and professionalism was being replaced by a balancing consciousness and neoformalist rights thinking.

Areen, fully within the new concon *zeitgeist,* saw the rise of rights as basic to her topic, and saw rights as in tension, always in needing of balancing, with family privacy:

> [I]f there is a single theme that may serve to unify the materials that follow, it is the tension between the doctrine of family privacy and protection of the rights of individual family members. Critics

302. Duncan Kennedy, *Psycho-Social CLS: A Comment on the Cardozo Conference*, 6 CARDOZO L. REV. 1013 (1985).

303. West, *supra* note 301, at 87-91.

304. *Id.* at 91-92.

305. JUDITH AREEN, CASES AND MATERIALS ON FAMILY LAW (1978) [hereinafter AREEN, FAMILY LAW (1st ed.)].

> of the family privacy doctrine argue that it is unfair to the needs of abused wives or children. But at the same time, growing fears about the intrusiveness or clumsiness of modern government have provided new support for the policy of leaving families alone. Both views are, of course, right in some respects. The challenge to the student or practitioner of family law is to adjust the tension in a way that maximizes the strengths of family life, yet provides protection for individuals endangered in a particular family.[306]

Areen's second edition, published in 1985, translated this formulation slightly. The anti-privacy point of view was no longer that of "critics" who "argue" but of experts who know – "As our knowledge of the special needs of working wives or the dangers of child abuse grows . . ."[307] – and what they know is that the field must become more responsive to the needs of women and children. For all the concon bottomlessness of the rights/privacy conundrum, Areen displays here as well a nonmilitant but insistent presumption that men and fathers benefit from family privacy at the expense of women and children, and that the role of rights is to correct things for vulnerable family members by bringing in their ally the state. This is a quietly feminist book: it enacts rather than pronounces feminism. It presumes rather than complains that women and children share a lot, specifically problematic men.

Whereas Drinan had expressed surprise and anguish over the uncertainty that flooded into postwar legal thought, Areen faced it with steely resolve. The tensions simply had to be resolved in the best way. In 1985, she calmly, competently professed herself "uncertain of law's ability to grapple with [the]. . . complexities" of family life. [308] The tone is angst-free, agnostic. The problem was not that society was unraveling and that the social control capacities of law were crumbling; it was that ideological conflict and normative incommensurability made it impossible to say with certainty what the social or legal problem *was*. Had no-fault divorce introduced social crisis, as Pound had feared and as Foote, Levy and Sander knew? Areen professed uncertainty about whether America even *had* no fault divorce.[309] What we now call the culture wars had begun, and it was impossible to say, without taking sides, whether Schouler's domestic sphere was still the normative core of family law:

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306. *Id.* at xix-xx.

307. JUDITH AREEN, CASES AND MATERIALS ON FAMILY LAW, at xxi (2d ed. 1985) [hereinafter AREEN, FAMILY LAW (2d ed.)].

308. *Id.* at xxii.

309. *Id.* at xxi.

> Identifying the proper balance between individuals and family is complicated by the fact that the social consensus as to what constitutes acceptable family life is weaker than ever. A few figures:
>
> > By 1980 almost one of four children aged seventeen or under did not live with both parents. This was true for 17.4 percent of white children and 57.8 percent of black children.
> >
> > . . .
> >
> > More than 20 percent of the children in the United States are born to unmarried parents. Almost 50 percent of non-white babies are born to unmarried parents.[310]

The problem of unwed motherhood that Foote, Levy and Sander presented as the inaugural issue has become a problem of racial difference: single, unmarried parenthood was predominantly *black* parenthood. It was not a problem to be solved but a normative difference to be deferred to. Fornication and illegitimacy had become nonmarital cohabitation and single parenthood; they were as acceptable in minority communities as marital cohabitation and parenthood were in white ones, and figuring out how to run a legal order that enabled people to travel both paths without enduring stigma and moral derogation was the challenge. We see here a liberal-multicultural commitment to crediting racial minorities when they chose to opt out of the marriage system and to finding a posture of normative disengagement in the midst of ideological conflict. To be a good lawyer was to be a good multiculturalist. But throughout, to be a good multiculturalist was also to be a *feminist*: whatever the racial/cultural differences at stake, women and children would persistently need protection against men. Deciding when to invade family privacy to deliver that protection required careful balancing; the balances needed would differ along a racial gradient; and the result would be a family law open to diverse outcomes.

For all that it commits itself to cool-headed balancing, Areen's *Cases and Materials on Family Law* also registered the concon shift to rights. The constitution pops up constantly. Part I, devoted to "Husbands, Wives and Lovers," includes separate sections on the "Constitutionality of Marriage Restrictions," the "Constitutional Limits on Gender Discrimination," and "The Constitutional Right to Privacy[.]" [311] Part II,

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310. *Id.*

311. AREEN, FAMILY LAW (1st ed.), *supra* note 305, at 34-50, 99-116, 156-68.

on "Children, Parents and the State," is shot through with constitutional law and, in the second edition, includes a separate section for constitutional "Encroachments on the Doctrine of Family Privacy."[312] Entirely without irony, the "Constitutional Right to Privacy" as between husbands, wives and lovers is a classified as one of the "Encroachments on the Doctrine of Family Privacy": rights to contraception and abortion are the public-law rights of *women* to make reproductive decisions without *male* interference.[313]

Areen reshaped the field to give effect to the critique of FLE advanced at the NYU Conference and later elaborated by Taub and Schnieder. Not only the Constution but new developments in "Tort and Criminal Law" encroached upon family privacy.[314] This section includes cases abolishing the tort for criminal conversation; rejecting a jury verdict for alienation of a wife's affections as too high; and recognizing a new tort for loss of consortium on behalf of a spouse whose spouse is injured by a third party.[315] The subsection on "Intra-Family Torts and Crimes" is grounded in the feminist campaign against domestic violence, though that term never appears. Areen's cases tend to describe the social problem here as "wife-beating"; she renamed it "Spouse Abuse."[316] She showcased the abolition of interspousal tort immunity in the twenty-first state to adopt this reform and the rejection of a husband's equality challenge to a statute specifically criminalizing a husband's assault on his wife.[317] She highlighted a broad-spectrum class action seeking declaratory and injunctive relief against multiple state police departments for neglecting to intervene in and effectively condoning "wife-beating" by husbands.[318] She surveyed restraining-order and peace-bond statutes and found them wanting: not only are these remedies so difficult to obtain as to be useless

312. AREEN, FAMILY LAW (2d ed.), *supra* note 307, at 919-34.

313. AREEN, FAMILY LAW (1st ed.), *supra* note 305, at xii.

314. *Id.* at 168-92.

315. Excerpts from the following occupy AREEN, FAMILY LAW (1st ed.), *supra* note 305, at 168-79: Rodriguez v. Bethlehem Steel Co., 12 Cal. 3d 382 (1974) (recognizing loss of consortium claim for injuries to a spouse); Fadgen v. Lenkner, 469 Pa. 272 (1976) (abolishing cause of action for criminal conversation); Alaimo v. Schwanz, 56 Wis. 2d 198 (1972) (reducing jury verdict for alienation of affections on grounds of the bad marital relations between plaintiff husband and his errant wife). When Areen selected these cases, they were all *new*.

316. AREEN, FAMILY LAW (1st ed.), *supra* note 305, at 185.

317. AREEN, FAMILY LAW (1st ed.), *supra* note 305, at 179-81 (excerpting Windauer v. O'Connor, 12 Ariz. App. 442 (1970)); *id.* at 189-92 (excerpting People v. Cameron, 53 Cal. App. 3d 786 (1975)).

318. *Id.* at 181-85 (excerpting Bruno v. Codd, 396 N.Y.S. 2d 974 (1977)).

but, once obtained, they provided no practical protection.[319] Inside this time capsule we find a vivid portrait of feminists' desperate search for legal tools to address what we now call domestic violence.

Areen's second edition showed a significant upgrade in the feminist tort and criminal arsenal. Abolition of the tort action for criminal conversation and near-abolition of alienation of affections: check.[320] Recognition of loss of consortium claims on the death of a spouse and abrogation of interspousal tort immunity: check.[321] Modification of the marital testimonial privilege so that spouses cannot bar their spouses from testifying against them: check.[322] Admissibility of expert testimony about battered women's syndrome when women kill their assailants: check.[323] The desperate search for tools against domestic violence had by now produced statutes providing for powerful injunctive protection orders on an *ex parte* basis, and Areen included a case rejecting a constitutional due process challenge to this expedited procedure.[324] The section concludes with the United States Attorney General's 1984 report recommending mandatory arrest in cases of family violence.[325] The feminist version of the anti-FLE agenda was beginning to take hold in legislation, case law, and policy.

At the core of the Areen casebook is *Rose v. Rose,* a "case" presented as "materials." *Rose v. Rose* was a bitter and protracted custody dispute; trial court testimony occupied 16 days.[326] Areen gives us a redacted transcript of these hearings, following it with the trial court's first placement decision, the appellate court's decision affirming that decision, and (in the

319. *Id.* at 185-89.

320. The following occupy AREEN, FAMILY LAW (2d ed.), *supra* note 307, at 184-98: Fadgen v. Lenkner, 469 Pa. 272 (1976) (abolishing the cause of action for criminal conversation); Nelson v. Jacobsen, 669 P.2d 1207 (Ut. 1983) (narrowing the claim for alienation of affections to instances where the defendant's actions were the controlling cause of the alienated spouse's infidelity).

321. The following occupy AREEN, FAMILY LAW (2d ed.), *supra* note 307, at 199-206: Rodriguez v. Bethlehem Steel Co., 12 Cal. 3d 382 (1974) (recognizing a loss of consortium claim for injuries to a spouse); Shook v. Crabb, 281 N.W.2d 616 (Iowa 1979) (abrogating interspousal immunity).

322. *Id.* at 206-10 (excerpting Trammel v. United States, 445 U.S. 40 (1980)).

323. *Id.* at 212-19 (excerpting State v. Kelly, 478 A.2d 364 (N.J. 1984)).

324. *Id.* at 219-24 (excerpting State *ex rel.* Williams v. Marsh, 626 S.W.2d 223 (Mo. 1982) (en banc)).

325. *Id.* at 224-26 (excerpting U.S. ATTORNEY GENERAL, FINAL REPORT, TASK FORCE ON FAMILY VIOLENCE (1984)). Except for *Fadgen v. Lenkner*, 469 Pa. 272 (1976), and *Rodriguez v. Bethlehem Steel Co.*, 12 Cal. 3d 382 (1974), which had been included in the first edition of Areen's casebook, all the entries in this subsection were produced between the dates of Areen's first and second editions: they were *new*.

326. Rose v. Rose: . . . *The Trial Court Decides*, *in* AREEN, FAMILY LAW (1st ed.), *supra* note 305, at 561.

second edition only because this last opinion was not issued until 1979) the trial court's later modification of the initial custody award. Taking into account the interim order, which is not separately reproduced, these court records take us through the following custody voyage for baby Jason:

> Trial Court's interim order: custody in Steven Rose, the father, with minimal supervised visitation for Diane Rose, the mother;[327]
>
> Trial Court's final order: custody in Diane, with reasonable visitation for Steve;[328]
>
> On appellate review: affirmed[329];
>
> Trial court ruling on Steve's motion for modification based on changed circumstances: custody in Steve, with reasonable visitation for Diane.[330]

The legal rule governing *Rose v. Rose* is that Mother of All Standards, the best interests of the child standard (BIC).[331] Right after the trial materials in *Rose v. Rose,* Areen presented *Ex parte Devine*, a 1981 decision in which the Alabama Supreme Court held that the so-called tender years presumption favoring mothers was an "unconstitutional gender-based classification," and replaced it with BIC.[332] When Areen added this case to the second edition, it was *new*: it was issued after the publication of her first edition. It was part of a sweeping feminist-inspired law reform in which formal equality in marriage erased the rules of coverture one by one. BIC was a bittersweet victory for feminists, who celebrated formal equality but bemoaned the resulting substantive inequality it perpetuated. This shift to a fully neutral principle meant that fathers like Steve Rose could lay claim to custody of children at the time of divorce and litigate it under a standard so open-ended and indeterminate that the outcome was, technically at least, completely unpredictable. Mothers were now equal before the law, but far more vulnerable to losing custody of their small children.

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327. AREEN, FAMILY LAW (1st ed.), *supra* note 305, at 478, 519.

328. *Id.* at 559-61.

329. Rose v. Rose*: . . . The Appeals Court Decides*, *in id.* at 561-62.

330. Rose v. Rose *Revisited: The Court Changes Its Position: June 6, 1979*, *in* AREEN, FAMILY LAW (2d ed.), *supra* note 307, at 551-54.

331. On the radical indeterminacy of BIC, see Robert Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROBLEMS 226, 249-55 (1975).

332. AREEN, FAMILY LAW (2d ed.), *supra* note 307, at 425-32 (excerting *Ex Parte* Devine, 398 So.2d 686, 695 (Ala. 1981)).

I cannot possibly reproduce here the poisonous atmosphere evoked by the transcript, the sense that a truly insane family system has broken up into adversarial units represented by winner-take-all counsel intent on bringing family members' psychological disturbances, malign alliances, prevarications and outright lies into court. The two parents were backed up by their own parents, whose testimony vastly ramified the viciousness and spite on display. The stories presented by the adversaries are so diametrically opposite and so morally charged that it is difficult not to take sides, but here is an attempt at an objective statement of the dispute. Diane's case rested on her claim that Steve, in alliance with his mother, had so intimately and relentlessly attacked Diane's mothering that Diane attempted suicide, jumping out of an eighth story window and suffering severe injuries. Otherwise she was an excellent mother to their son Jason. Jason should not be deprived of his mother's custody because his father's daily hectoring and her mother-in-law's interference had made it almost impossible for her to care for her child; now that the couple was separated, Diane was the obvious caretaker parent and should get custody. Steve's case rested on the claim that Diane's suicide attempt was merely an episode in her chronic mental instability, that she was still a candidate for suicide, and that her suicidal history represented her willingness to outright abandon her child in the most damaging way possible. Her absence from Jason's life after the suicide attempt and under the interim custody order had rendered the mother a virtual stranger to her son; if Jason was to have continuity of care Steve must retain custody.

The transcript begins with a list of "Dramatis Personae" and the "Setting": though it is designated "The Trial," we are invited to read the transcript as a play. If it is indeed a play, it can only be read as tragedy. Whereas the treatises focused on the law alone; whereas the first Cases and Materials casebooks sought to bring social science knowledge to lawyers attempting to solve social problems by the election of the optimal legal rule; and whereas Foote, Levy and Sander sought to convene experts in a last-ditch effort to manage and ameliorate the suffering of broken families – Areen seeks to expose us as directly as possible to a family so riven by internal aggression and desperate emotion that one can only say of the little child whose custody is under dispute: "Poor Jason!"

By presenting *Rose v. Rose* as a theatrical drama, complete with judicial opinions reversing Jason's placement twice, Areen enlists us as anxious beholders of a continually unfolding indeterminacy in which some or all of the courts involved seem just as willfully indifferent to Jason's well

being as the parties allow themselves to be. And by presenting the judicial opinions not with legal citations but with journalistic headlines like "*Rose v. Rose* The Courts Decide" and "*Rose v. Rose* Revisited: The Court Changes its Position: June 6, 1979," Areen framed them as incidents in a politically and ideologically controversial "famous trial." *Rose v. Rose* is spectacle.

The transcript makes it much easier to take Diane's side than Steve's. Steve Rose was first called as an adverse witness by Diane's attorney, so that we meet him as he is being examined as an adverse witness, denying a vast range of factual assertions which, if true, would be highly damaging to his credibility and character.[333] Areen introduced him in a miasma of suspicion. Diane, subsequently examined on direct, was the first witness to relate the couple's courtship, marriage, and parenthood, and the suicide attempt, in a comprehensible first-to-last story; and of course that story is highly sympathetic to her character as a wife and mother.[334] There was a feminist way to connect these dots. Diane was a victim of psychological abuse by her husband and his mother; her suicide was an act of desperation produced when they overwhelmed her psychological defenses; and the idea that she might be deprived of custody in the child's best interests was a horrifying travesty of the policy purposes of the new standard and a ratification of male domination. If Diane had emotional problems, they were attributable to Steve's abusive treatment of her, and he should not be allowed to benefit from his wrongdoing. The facts that Steve planned to move far away from Diane immediately after the trial in order to attend medical school and that he would inevitably devolve the care of Jason first to his mother and eventually to a paid caretaker, while Diane was prepared to care for him on a daily basis, would disqualify Steve if the supposedly neutral BIC standard weren't covertly biased against women and their caretaker role, preserving men's dominance in the family because of their privileged role in market. Areen never told her readers to interpret the case this way, but it is eminently possible to do so.

Joseph Goldstein appeared as an expert witness for Steve. He had co-authored, with Anna Freud and Albert Solnit, a daring intervention into family policy entitled *Beyond the Best Interests of the Child*, and his testimony applied that book's recommendations to the question of Jason's

333. AREEN, FAMILY LAW (1st ed.), *supra* note 305, at 440-42, 446-55.

334. *Id.* at 466-74.

custody. At the crux of the Goldstein/Freud/Solnit approach were two arguments: that each child has one primary psychological parent,[335] and that continuity of care by that parent is the primary and preeminent determinant of the child's healthy psychological development.[336] Their corollary claims were that custody should always lie with the psychological parent, and that the custodial parent needed the untrammeled authority to prohibit or permit the child's contact with the noncustodial parent.[337] (Why the latter rule? Court ordered visitation unwanted by the primary custodian would directly undermine the child's sense that he enjoyed the stable protection of at least one parent.) Finally, doctrine should recognize that courts could not realistically aim to provide children whose custody came up for adjudication with a solution that was in their best interests; the legal test should reflect an achievable goal, the identification and enforcement of the least detrimental available alternative.[338]

Goldstein admitted from the outset that he had not examined Jason.[339] Nevertheless he observed that Diane had been relatively absent from Jason's life dating from the suicide attempt, concluded that Steve was the psychological parent of the child, and recommended that the court should vest exclusive custody in Steve, with the authority to deny Diane even visitation.[340] He was undaunted by the prospect that Steve would hire paid caregivers; Jason would see that Steve was constantly there even as babysitters came and went, and this would strengthen his sense of security and continuity.[341] On cross examination Goldstein admitted that even a kidnapper would get custody under his analysis; punishment for the wrongdoing that initiated such a parent/child relationship was for other legal instruments, not the law of custody.[342] He admitted that a father's hostility to a mother's involvement in a child's life was bad for the child: he started out describing it as "not particularly beneficial" to the child but, pressed by Diane's attorney, eventually conceded that "it can be very

335. JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 17-20 (1980).

336. *Id.* at 31-49.

337. *Id.* at 38.

338. *Id.* at 53-64.

339. AREEN, FAMILY LAW (1st ed.), *supra* note 305, at 513.

340. *Id.* at 514-15.

341. *Id.* at 516.

342. *Id.* at 518.

harmful to the child[.]"[343] He admitted that Steve's plan to break off Jason's relationship with his grandmother would disrupt the continuity of Jason's care but, like the transition from daycare to babysitter, would only emphasize Steve's abiding presence in his life.[344] The facts that Diane had had custody of Jason for four hours twice a week and every other weekend ever since the interim custody order, and that the child exhibited strong, affectionate ties to his mother, led Goldstein to conclude that she *could become* Jason's psychological parent as long as Steve's primary role as the current psychological parent were maintained, but not otherwise.[345]

The judges clearly discarded Goldstein's testimony. His idea that Jason had only one psychological parent found no takers among the judges deciding and reviewing the case; nor did the idea that visitation was in the gift of the custodial parent. The trial court rejected Steve's version of the facts, accepted Diane's, granted custody to Diane because Steve's hectoring and arrogance supported the conclusion that Diane would be the better caretaker and because she would not delegate Jason's care to paid caregivers but would provide it herself. Steve would get visitation, the schedule to be negotiated between the parties.[346] The appeals court explicitly held that "both the husband and wife are psychological parents" and affirmed the trial court's decision on de novo review.[347]

When the trial court modified the award four years later, it found that Steve had mellowed somewhat and remarried, that Diane had become very unstable emotionally after moving out on her own, and that the child was being harmed by being "a pawn between two well meaning parents." The new ruling: primary custody to Steve, and a crisp visitation schedule determined by the court.[348] At the original hearing Goldstein had quite gratuitously testified that, once custody was allocated, even if in legal error, it should never be modified.[349] At the time he offered this rule of decision, it favored Steve; by the time Steve sought modification, it favored Diane. There is no trace of it in the modification order.

Thus the only ideas from the Goldstein/Freud/Solnit kitbag that made it into the judges' BIC thinking were that children have psychological

343. *Id.* at 519-20.
344. *Id.* at 520-21.
345. *Id.* at 519.
346. *Id.* at 561.
347. *Id.* at 562.
348. AREEN, FAMILY LAW (2d ed.), *supra* note 307, at 551-54.
349. AREEN, FAMILY LAW (1st ed.), *supra* note 305, at 523.

parents and need continuity of care by *them*. Otherwise his entire approach was silently dismissed. If the judges had opined on the value of his testimony, they would have observed that his rigid prescriptions bore no resemblance to the myriad and evolving conflicting considerations that a difficult custody decision like Jason's presented. He comes off as a formalist clueless about the custody+visitation world in which he was operating.

Seen from the mostly silent but steady feminist perspective that permeates Areen's casebook, moreover, Goldstein's testimony was not merely out of step with judicial expectations and legal realities; it was positively malign. All of his arguments could just as easily have produced a recommendation for Diane's custody of Jason; from the casebook's implicit feminist point of view, Goldstein was a misogynist in expert's clothing. His conclusions were arbitrarily tilted to bestow custody to a vindictive, arrogant, antagonistic and misogynist father while forcing an innocent and nurturing yet repeatedly victimized mother to listen to expert testimony that she was not even her own child's psychological parent. No wonder she became emotionally unstable.

We have already met Goldstein as the co-author, with Jay Katz, of the breakthrough 1965 casebook *The Family and the Law*. While she was a student at Yale Law School, Areen had taken Family Law from Katz and Anna Freud and a course on psychoanalysis and the law from Goldstein.[350] She was now producing a casebook in competition with her former teachers' heavily psychoanalytic one. Indeed, Areen got the very idea of including trial materials along with successive trial and appellate court opinions, and of giving them journalistic rather than legalistic titles, directly from Goldstein and Katz's casebook.[351] One subtle point of the *Rose v. Rose* centerpiece to her *Cases and Materials on Family Law*: there was a new kid on the family law block, a feminist one, and she was willing to expose her former teacher as hopelessly passé in a family law

350. E-mails from Judith Areen to author (July 2011) (on file with author).

351. Goldstein & Katz, *The Family and the Law* begins with *Lesser v. Lesser*, a separation, divorce and custody case far more protracted and if anything even more toxic than *Rose v. Rose*. GOLDSTEIN & KATZ, THE FAMILY AND THE LAW, *supra* note 253, at 13-59, 176-216, 261-64, 302-07, 518-57. Areen and her teachers follow a path very different that hewn by Foote, Levy and Sander, who included legal file materials, but whose focus was not on trials and family psychodrama. Instead, they included juvenile court administrative proceedings ranging from lawyer's memos to the reports of the various bureaucrats involved. *See* text at note 253 above. Who is the hero? We have gone from the professor (CLT), to the administrator and policy maker (the social), to the judge (concon). *See* Kennedy, *Three Globalizations*, *supra* note 4, at 21 (designating the "legal agency" imagined to be primary in the three globalizations).

that was increasingly answerable to feminist concerns.[352]

A genealogical point: a Diane litigating custody today on the facts related above would charge Steve with spousal or domestic abuse and argue that placement with him was not in the best interests of the child and perhaps even that he was unfit. The word "abuse" appears nowhere in the *Rose v. Rose* transcript because the DV element of the feminist family law campaign had not yet gained sufficient legal and cultural traction to appear in any settings outside the fledgling domestic violence protection order regime. In 1985, Areen's only cases on domestic violence involved the question whether expert testimony on battered-woman's syndrome was admissible to support a woman's claim of self-defense in the killing of her husband,[353] and whether protection orders issued *ex parte* violated the defendant's due process rights.[354] At the time Areen included them, these cases were *new*: *State v. Kelley* was only one year old. This segment of the casebook grew rapidly in subsequent editions. By the time Areen published her third edition in 1992, she could add cases abrogating the marital rape exception and extending municipal liability for failure to enforce a protective order, along with extensive notes.[355] The fifth edition, published in 2006 with Milton Regan as a new coeditor, doubled coverage of the topic: sixty-four pages were devoted to a new subsection entitled "Domestic Violence."[356] It also included a new section under "No-Fault Divorce" on the recognition of interspousal tort claims for emotional cruelty filed along with divorce actions.[357] The successive editions of Areen's casebook can be used to guage the rise of governance feminism:

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352. Goldstein noticed the affront. In 1986, he co-authored *In the Best Interests of the Child*, a plea to family lawyers to defer to psychoanalytic expertise. It includes a lengthy attack on the trial judge in *Rose v. Rose* for "assum[ing] a professional role for which he was not qualified. . . . He assumed the role of expert in child development" and ruled for Diane "despite uncontroverted expert evidence" – Goldstein's own – in favor of Steven. In a deft move, Areen appended a long excerpt of this rambling *ipse dixit* condemnation in the third edition of her casebook. JUDITH AREEN, CASES AND MATERIALS ON FAMILY LAW 568 (3d ed. 1982) [hereinafter AREEN, FAMILY LAW (3d ed.)] (quoting JOSEPH GOLDSTEIN, ANNA FRIED, ALBERT SOLNIT & SONJA GOLDSTEIN, IN THE BEST INTERESTS OF THE CHILD 23 (1986)).

353. AREEN, FAMILY LAW (2d ed.), *supra* note 307, at 211-19 (excerpting State v. Kelly, 97 N.J. 178 (1984)).

354. *Id.* at 219-24 (excerpting Williams v. Marsh, 626 S.W.2d 223 (Mo. 1982) (en banc)).

355. *See* AREEN, FAMILY LAW (3d ed.), *supra* note 352, at 261-93, where she includes *Raucci v. Town of Rotterdam*, 902 F.2d 1050 (2d Cir. 1990) (affirming municipal liability under state law for failure to enforce a restraining order) and *Warren v. State*, 255 Ga. 151 (1985) (abolishing the marital rape exception).

356. JUDITH AREEN & MILTON C. REGAN, JR., CASES AND MATERIALS ON FAMILY LAW 281-345 (5th ed. 2006) [hereinafter AREEN & REGAN, FAMILY LAW (5th ed.)].

357. *Id.* at 393-408.

there is more and more *feminist law* to teach.

If anything, the fifth edition of Areen's *Family Law* casebook, published in 2006, intensifies its commitment to concon balancing and feminist neoformalism. A new opening section displaces the law of marriage with the question "What is a family?" and collects a rich array of materials asking, basically, whether, as more and more people enter into family and care/dependency arrangements without marriage, we should extend some sort of legal recognition to their arrangements. This section is neither sociological nor real realist but it is functionalist: its capstone is Carl E. Schneider's article "The Channelling Function in Family Law," a classic argument that the normative functions of family law, especially the function of channeling people into socially desirable behaviors and institutions, should be the central reference point in deciding how deeply law should follow a changing society.[358] Should nonmarital sexual cohabitation – which he assumes *arguendo* is immoral – receive legal recognition? We have to decide case by case:

> I doubt that so far, at least, the American family has become so deinstitutionalized that the channelling function is no longer useful or relevant to family law. But this does not mean, of course, that every use of the function is justifiable. What is needed, rather, is to ask case by case whether the channeling function can plausibly be said to work effectively.[359]

Social-purpose functionalism is back, but now the institutions (in addition to the particular rules) have many (rather than single) functions.[360] So far Schneider revives Llewellyn's real realism; and indeed he quotes from Llewellyn's "Behind the Law of Divorce" repeatedly.[361] But with a difference: Is and Ought have reunited; the problem before us is not to describe but to use law to saturate social life with normative guidance. There will be costs, but they may not have to be bitterly high: it might be good, even for cohabitants, to deny cohabiting couples legal recognition if in turn we preserve the channeling function of marriage and usher those wayward souls into a more stable way of life. Llewellyn's appetite for

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358. *Id.* at 47-55 (excerpting Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992)).

359. Schneider, *supra* note 358, at 519.

360. "The functions of law which I posit are, of course, primarily analytic constructs. Legislators may not think in terms of them when they write statutes. Nor does any crystalline line divide them. On the contrary, they may often overlap and even conflict. Further, a statute may and often does serve more than one function." *Id.* at 497 n.5.

361. *Id.* at 501, 504-05, 506 n.25, 512, 531 n.95.

paradox and and his enthusiastic curiosity about social resistances are gone; Foote, Levy and Sander's attention to problematic informality has returned to center stage; but now we identify not with the lawyer at Child Protective Services trying to work out a lifeplan for a desperate unmarried teenage mother and her infant but with Policy itself, made from a panoptic vantage point high over society as a whole.The tradeoffs can only be made by careful, wise balancing case by difficult case. Concon.

It is not clear that Areen and Regan would agree with Schneider's tentative conclusion that fewer rather than more institutional options for intimate and dependent relationships is the right way to go. Their materials include a proposal to disestablish marriage altogether in favor of the legal recognition of dependency relationships whether they are conjugal or not,[362] and a highly sympathetic treatment of the Oneida Community's practices of communal property and free love.[363] But they share with Schneider the idea "we" are in a position to "decide" how far legal recognition should go:[364] "If we expand our legal categories to encompass a wider range of relationships, how inclusive should we be?"[365] And they are equally sure that defining "family" inextricably calls for assessments of Is and Ought: "defining this term is as much a normative as a descriptive exercise."[366]

Into this matrix Areen and Regan pour a sustained approach to policy decisions through feminism and rights. After the modification order in *Rose v. Rose* shifting custody of Jason from Diane and back to Steven, for instance, the Note material refers to an "excellent overview" of custody modification by Joan G. Wexler,[367] recording its conclusion that modification can be harmful to the child and quoting at length from its denunciation of continuing jurisdiction over divorced families as "Orwellian[.]" Allowing modification of custody orders converts the noncustodial parent and the family court into "Big Brother."[368] The imagined victim of this intrusion is the mother:

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362. AREEN & REGAN, FAMILY LAW (5th ed.), *supra* note 356, at 19-28 (excerpting LEGAL COMMISSION OF CANADA, BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS (2001)).

363. *Id.* at 39-46 (excerpting WILLIAM M. KEPHART, THE FAMILY, SOCIETY AND THE INDIVIDUAL (1977)).

364. *Id.* at 2.

365. *Id.*

366. *Id.*

367. *Id.* at 602-03 (excerpting Joan G. Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L.J. 757 (1985)).

368. Wexler, *supra* note 367, at 817.

> Has she nurtured her child sufficiently in a matter acceptable to the court? Has she done anything else that in the court's eye constitutes less than acceptable parenting? . . . . Any rule of law that puts the government in a position to oversee the most private of matters and sensitive of interests raises serious constitutional questions.[369]

This demand for constitutional privacy protection is entirely missing from the section on domestic violence, where the casebook accepts almost all the new tools for invading family privacy in favor of victims of abuse. These materials begin with a history of the marital rape exception, laying out a specifically feminist strategy for repeal; and then present cases establishing the precise – by now highly technical – parameters for the legal relevance of expert testimony on battered women's syndrome in the murder trials of a women who have killed their male partners; holding that BWS expert testimony can be invoked to toll the statute of limitations in a woman's tort suit against her husband for abuse; and interpreting domestic violence protection order statutes (who can seek one, against whom, when the relationship is not husband and wife?; can a husband move to vacate an abuse order if the wife reestablishes contact with him?). The section ends with the Supreme Court's rejection of an argument that a woman has a due process clause property interest in the effective enforcement of a protection order against a husband known to be violent.[370] The strong implication is that a highly salutary legal reform has taken place and the question is how far it should extend. But the center of the section is dedicated to an anguished consideration of mandatory arrest and no-drop policies, sought by many feminist advocates and adopted in many jurisdictions. First, does arrest deter?; whom does it deter? And then

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369. *Id.*

370. Excerpts from the following occupy AREEN & REGAN, FAMILY LAW (5th ed.), *supra* note 356, at 289-321: People v. Humphrey, 921 P.2d 1 (Cal. 1996) (admissibility of BWS testimony in a murder defense); Ba v. United States, 809 A.2d 1178 (D.C. 2002) (holding a man criminally liable for violating protection order despite the fact that the plaintiff had voluntarily moved in with him for a period of time); C.O. v. M.M., 813 N.E.2d (Mass. 2004) (citing an insufficiently substantial relationship for plaintiff to maintain the action); Mitchell v. Mitchell, 821 N.E.2d 879 (Mass. 2003) (containing a husband's motion to vacate a protection order); Turner v. Lewis, 749 N.E.2d 122 (Mass. 2001) (holding that a grandmother cannot bring an action against a granddaughter who does not live with her); Giovone v. Giovone, 663 A.2d 109 (N.J. 1995) (admissibility of BWS on behalf of a wife suing her husband, to toll the statute of limitations); R. v. Malott, [1998] S.C.R. 123 (Can.) (BWS testimony in a murder defense); Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1375 (2000). The section ends with Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005) (holding that no constitutionally protected property interest exists in effective enforcement of a protection order). AREEN & REGAN, FAMILY LAW (5th ed.), *supra* note 356, at 336-45.

the real kicker: what if the strict removal of discretion from DV cases leads to the arrest and conviction of *women?* What if requiring *women* to pursue DV cases even though they don't want to re-enact the domination of abuse, this time at the hands of the state?[371] Then and only then do we encounter the implication that anti-DV legal tools intruding on family privacy may have gone too far.

The consideration of alimony similarly pivots on the needs of wives and mothers. In a concluding section on "Divorce Awards and Gender Roles," the casebook authors warn: "To put it bluntly, the traditional division of labor within households often leaves the husband in better financial shape than the wife at the time of divorce,"[372] and then offers a lengthy excerpt from a specifically feminist reconsideration of alimony.[373] The casebook follows this quite elegant synthesis of ostensibly opposed feminist positions with the editors' own protracted denunciation of current property division and alimony law for directing judges to consider too many contradictory factors: "is it really plausible to contend that such a system reflects the rule of law, as opposed to virtually unfettered judicial discretion?"[374] Areen and Regan don't say but they do imply that the solution – rules protecting rights – should emerge from a basically feminist inquiry. Too many conflicting considerations; the man deciding will not be wise; it's time for some rights! Rights neoformalism.

Areen's transformation of the field had two unforeseen and unintended consequences. As feminism secured its grip on the field and generated more and more of the law it contained, men fled. Cases in point: Frank Sander first, and then Robert Mnookin, decamped to make a new field, Alternative Dispute Resolution or Negotiation, in which they would not have to face the moralistic confrontations that saturated family law as the culture wars moved in. The course became a women's ghetto. Thus was

371. Excerpts from the following occupy AREEN & REGAN, FAMILY LAW (5th ed.), *supra* note 356, at 321-336: U.S. ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE 22-24 (1984) (recommending mandatory arrest); Liza Mundy, *Fault Line*, WASHINGTON POST, Oct. 26, 1997, at W8. Mundy presents a series of cases in which mandatory arrest seemed to her to be a vastly excessive response to everyday conflicts: of the first five of them, four involve the arrest of women and one of a son who had thrown food at his father. Mundy, *Fault Line*, *supra*. A note on no-drop policies is similarly conflicted, entirely within a feminist frame. Taking away prosecutors' option of dropping a DV case once it has been opened has considerable feminist support, represented by one citation, but feminist detractors too: it can "replicate the dynamics of the battering relationship." AREEN & REGAN, FAMILY LAW (5th ed.), *supra* note 356, at 345.

372. AREEN & REGAN, FAMILY LAW (5th ed.), *supra* note 356, at 758.

373. *Id.* at 758-63 (excerpting June Carbone & Margaret Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TULANE L. REV. 953 (1991)).

374. *Id.* at 763-69, 769.

revived a problem that has beset the field again and again since Schouler: it became a degraded field, *retardataire* for all the vanguardism of the feminist overhaul. This preserved the field from the reductive instrumentalism and the presumption of neoliberal tenets that overtook corporations, the new embodiment of the law of the market, as law and economics and behavioral economics swept the curriculum, but it did nothing to display the crucial role that the family and its law play in the society-wide distribution of welfare. Men are coming back now, especially as openly gay men become hireable onto law faculties and bring their gender-bending ways and their investments in same-sex marriage with them; but the sense that the field lacks prestige because it is marginal to the grand distributive questions of our time persists. I offer some thoughts about this distressing state of affairs in the Conclusion.

## CONCLUSION

James Schouler predicted in 1870 that the law of husband and wife and of parent and child would eventually stand alone as the "law of the family,"[375] and that the law of master and servant would evolve to embrace all the various relations that belong in the market. The family/market distinction that he drew was not ideologically innocent: it carried, almost in its DNA,[376] the ideas of *laissez faire* and the separate spheres. In Schouler's era, it carried the idea of fundamental freedom enshrined in right for the market and duty determined by the state for the family. The legal form this took was the market as contract and the family as status:

> To an unusual extent, therefore, is the law of family above and independent of the individual. Society provides the home; public policy fashions the system: and it remains for each one of us to place himself under rules which are, and must be, arbitrary.
>
> So is the law of family universal in its adaptation. It deals directly with the individual. Its provisions are for man and woman; not for corporations or business firms.[377]

375. SCHOULER, DOMESTIC RELATIONS (1st ed.), *supra* note 12, at 7.

376. Not quite: Savigny, who is my earliest source for the contract/family distinction, could not have known that it would eventually make sense in the languages of modern industrial capitalism, global-scale colonization, and separate spheres ideology. For an account of how American jurists translated Savigny's idea into a classical idiom, see Halley, *What is Family Law?: Part I*, *supra* note 1, at 55-71.

377. SCHOULER, DOMESTIC RELATIONS (1st ed.), *supra* note 12, at 7, 9.

In this Part I have shown how, despite repeated attacks over the course of the twentieth century, Schouler's idea persisted, transformed across successive waves of legal consciousness to fit into new ideological settings but carrying with it the market/family distinction.

But we have also seen three great waves of anti-FLE thinking. The first started in the Family Court movement and Pound's social-purpose functionalist attack on classical legal thought and culminated in Llewellyn's real realist assessment of divorce and in the Columbia curricular reform project. It reached its most comprehensive expression in the Jacobs/Angell Report, but then died out completely. After WWII it was revived by enthusiasts for family law in the practicing bar and eventually produced a casebook – the Foote, Levy and Sander's *Cases and Materials on Family Law* – that exemplifies what anti-FLE thinking can do in the vocabulary and consciousness of the social.

The third wave had its fountainhead not in the practicing bar but in a wide social movement: feminism. If Schouler lived in a world in which contract was free and family was the site of state-sanctioned duty, in the family-law world envisioned and partly constructed by third-wave feminism, the family is both the site of intensified legal supervision *and* of fundamental freedoms. Feminists broke the hold of FLE to extend legal tools that govern the market and the public sphere to the home: tort law and criminal law on behalf of women against men. As Jeannie Suk put it, "criminal law comes home."[378] But they also revived FLE, flipping the market/family distinction so that the *family* is the site of fundamental freedoms: *Roe v. Wade* as the new *Lochner v. New York.*[379] When Justice Douglas defended his decision in *Griswold v. Connecticut* from the attacks for Lochnerizing that he knew were coming, he shielded himself with Schouler's distinction, uncannily unchanged over almost 100 years. "Marriage," he wrote, "is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; *a bilateral loyalty, not commercial or social projects.* Yet it is an association for as noble a purpose as any involved in our prior decisions."[380] FLE was back. Again.

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378. Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2 (2006). For a more extended treatment, see SUK, CRIMINAL AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY (2009).

379. Roe v. Wade, 410 U.S. 113 (1973); Lochner v. New York, 198 U.S. 45 (1905).

380. Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (emphasis added).

I argue elsewhere that the same-sex marriage campaign has produced a convergence between the pro's and the anti's around the idea that marriage is status: they extol the sacredness, permanence, fundamentalness, indispensability, moral stature and *specialness* of marriage.[381] All of these have been attributes of marriage imagined as status-not-contract since Joel Prentiss Bishop introduced the idea into American legal thought in 1852.[382] The pro's and the anti's are making marriage more conservative, at least in ideology. And they may make it more conservative in fact. In the course of her decision recognizing same-sex marriage as a necessary component of Massachusetts law, Justice Marshall repeatedly described marriage as "exclusive," once even describing it also as "permanent," despite the facts that Massachusetts makes divorce relatively easy and that people frequently resort to this state facility.[383] And William Eskridge, one of the most articulate and thoughtful US legal academics promoting same-sex marriage, argued for a political deal between the same-sex pro's and social conservative anti's in which same-sex marriage would be recognized in exchange for making easy-to-get interstate divorces constitutionally invalid, and imposing a constitution requirement that all states make divorce more difficult:

> [W]e do want to interrogate and ask why has the sanctity of marriage declined, why do we have such a high divorce rate. And those reasons have nothing to do with gay and lesbian couples. They have everything to do with the ease of divorce in today's society. And so indeed my advice . . . would be to work with President Bush to amend the Constitution not to prohibit same-sex marriages but to make it more difficult for people to divorce, people of all orientations, and to make it more difficult for the Full Faith and Credit clause to be used as a way of allowing a husband to leave to go to Nevada and get a quickie divorce that would then be binding on the wife.[384]

If same-sex marriage enthusiasts really mean to pursue these divorce

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381. Janet Halley, *Behind the Law of Marriage: From Status/Contract to the Marriage System*, 6 UNBOUND: J. OF THE L. LEFT 1, 4-12 (2010).

382. For an account of what marriage-as-status-not-contract meant to the classical jurists, see Halley, *What is Family Law?: Part I*, *supra* note 1, at 36-48.

383. "[I]t is the *exclusive* and *permanent* commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage." Goodridge v. Department of Health, 440 Mass. 309, 331 (2003) (emphasis added). The majority opinion repeatedly describes marriage as exclusive. Goodridge, 440 Mass. at 312, 313, 329, 331, 343.

384. *Talk of the Nation*, NPR (Mar. 9, 2004) (downloaded from npr.org). Thanks to Libby Adler for bringing this interview to my attention.

reforms, they won't get any pushback from social conservatives.

Not surprisingly, the family law casebooks are once again calling marriage status.[385] We may be teetering into the turn that Jacobs made when he so radically altered his treatment of *Maynard v. Hill* – the 1888 Supreme Court case locking the status/contract distinction into the classical legal order as a matter of positive doctrine – between the first and second editions of his casebook.

A central point of this genealogy is that the family/market, status/contract, marriage/contract distinction is not a natural or inevitable part of our legal order or even our legal consciousness. Humans invented it, and over time they have bestowed it with an array of ideological significances and deployed it for ever-changing ends. It has been useful for many progressive projects of which I approve: it lent legal legitimacy to the rise of divorce in the nineteenth century, and it helped justify a rise of constitutional privacy rights which have partially liberated women from the unrelenting "cycle of births."[386] It doesn't have unilaterally good effects, however. The idea of marriage as status had a big role to play in the unconscionably long time it took women's marital equality to advance beyond the Married Women's Property Acts; and the idea that contract was its opposite was a powerful boon to capital in its conflict with labor.

One of the costs of FLE for the field of family law is its implication that the state and the market are agencies for distribution and *the family is not.* FLE carries an antidistributive bias for analysis of the family and its law. When Jacobs and Angell broke up the status/contract distinction, they were suddenly liberated to notice the crucial importance of marital property rules during the ongoing marriage as distributive forces within the family and between the family and the market. Llewellyn was able to notice how *all* the rules of family law eventually morph into bargaining endowments for family members, even if no divorce is on the horizon.

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385. DOUGLAS E. ABRAMS, NAOMI R. CAHN, CATHERINE J. ROSS, & DAVID D. MEYER, CONTEMPORARY FAMILY LAW 819-820 (2006); HARRY D. KRAUSE, LINDA D. ELROD, MARSHA GARRISON, & J. THOMAS OLDHAM, FAMILY LAW: CASES, COMMENTS AND QUESTIONS 175-177 (5th ed. 2003); PETER N. SWISHER, ANTHONY MILLER, & JANA B. SINGER, FAMILY LAW: CASES, MATERIALS AND PROBLEMS 2-3 (1998); WALTER O. WAYRAUCH, SANFORD N. KATZ, & FRANCES OLSEN, CASES AND MATERIALS ON FAMILY LAW: LEGAL CONCEPTS AND CHANGING HUMAN RELATIONSHIPS 89-90 (1994); D. KELLY WEISBERG, MODERN FAMILY LAW: CASES AND MATERIALS 114-115 (3d ed. 2006); *see also*, MILTON C. REGAN, FAMILY LAW AND THE PURSUIT OF INTIMACY (1993).

386. Gayatri Spivak, *Can the Subaltern Speak?*, *in* MARXISM AND THE INTERPRETATION OF CULTURE 271, 303 (Cary Nelson & Lawrence Groosberg eds., 1988) (quoting PANDURANG VAMAN KANE, HISTORY OF DHARMASATRA (ANCIENT AND MEDIEVAL RELIGIOUS AND CIVIL LAW IN INDIA) (1962-75)).

Jacobs and Angell were able to dethrone the adjudicated case and suggest ways to bring the vast expanse of administrative law that manages family life in minute daily ministrations, pervasive surveillance, and intense, life-changing reclassifications. Though Jacobs lost faith in this project and allowed FLE to restructure the second edition of his Domestic Relations casebook, in 1965 Foote, Levy and Sander revived their ideas and fully implemented them. Indeed, Foote, Levy and Sander graphically display the state's ruthless use of family law duties of support to divest itself of responsibility for human subsistence. The paternity action, in their representation of it, is not about social control or about justice for women and children but about the family as a highly coercive private welfare system.

FLE ratifies family privacy (except where it does not), and suggests that the exchanges into, out of, and especially within the ongoing family are not *legal*. Jacobs and Angell resisted this idea: the common law and community property rules allocating property between husband and wife were a major topic for them. They even understood that this part of family law was *economic*. I don't think they had any idea how transformative this idea was. Husband and wife, parent and child, master and servant, and corporations had belonged among the "*private* oeconomical relations"[387] for Blackstone, but the classical legal order had denied this. Master and servant and corporations migrated to the market, and "the economy" became their medium. The word "economic," which in preclassical English had referred exclusively to the household, gradually disinherited the residential space and referred to anything "relating to the development and regulation of the material resources of a community or state"[388]: the market. Meanwhile the word "family," which in preclassical usage had referred to master and servant just as firmly as it did to husband and wife and parent and child, became for the classics what we now call the nuclear family, precisely *not* the market.[389] Seeing the *family* as *economic* was a major anticlassical breakthrough. Llewellyn followed suit, insisting that, even in harmonious marriages, at some point someone

387. I WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 410 (photo. reprint 1979) (1765).

388. *Economic Definition* B.1.a, B.1.b, B.4.a, OXFORD ENGLISH DICTIONARY ONLINE, http://www.oed.com/viewdictionaryentry/Entry/59385 (last visited Dec. 20, 2010). For a more detailed account, see Halley, *What is Family Law? Part I*, *supra* note 1, at 8-9,74-75.

389. *Family Definition* I.1.a, I.2.a, OXFORD ENGLISH DICTIONARY ONLINE, http://www.oed.com/view/Entry/67975?redirectedFrom=family# (last visited Dec. 20, 2010). For a more detailed account, see Halley, *What is Family Law? Part I*, *supra* note 1, at 82-83.

puts his or her foot down, "and law provides the footing."[390] Foote, Levy and Sander devoted an entire chapter to the property rules governing the "Going Family."[391] For Areen, seven pages were enough.[392]

This atrophy of familial property law means that the most important background rules against which all ongoing marriages buy homes and cars, take out loans, receive inheritances, give gifts, make investments, pay for college, suffer foreclosure, begin retirement, go onto Medicare, consume uninsured nursing and hospital care, and go bankrupt *are not taught in the Family Law course.* These are the rules, too, that determine the contents of a married decedent's (and thus the contents of his or her surviving spouse's) estate. If roughly half of the marriages formed in the United States are dissolved not through divorce but through death of one of the spouses,[393] omitting these rules means that the basic contemporary family law course ignores the exit rules of half of the marriages. Death differs from divorce, moreover, in the salience of law as the decider: there are no settlement agreements in probate. The division of coverage between Family Law on one hand, and Trusts and Estates on the other, means that teaching the *comparison* of property allocation at divorce and at death – surely a basic question about how our family law system works – is unduly difficult. The division of intellectual labor between Family Law and Poverty Law or Welfare Law (if the latter is taught at all) obscures the state's constant, conscious use of the family as a private welfare system. Family Law teachers: start looking for this theme in the interstices of the casebook you teach, and you will see it everywhere! Feminist identity politics is obsessed with the homemaker wife's distributional fate at the time of divorce, despite the fact that women with no role in the paid workforce are a steeply declining demographic.[394] And

390. Llewellyn, *Behind the Law of Divorce*, *supra* note 136, at 1305.

391. FOOTE, LEVY & SANDER, FAMILY LAW, *supra* note 253, at 297-366.

392. AREEN, FAMILY LAW (1st ed.), *supra* note 305, at 193-99.

393. Divorce rates are notoriously difficult to measure. *See* CENTER FOR DISEASE CONTROL AND PREVENTION, NATIONAL CENTER FOR HEALTH STATISTICS, *National Marriage and Divorce Rate Trends*, *available at* http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm (last visited Aug. 19, 2011). The extremely rough measure used above is taken from Lynn A. Baker & Robert Emery, *When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 Law. & Hum. Behav. 439, 443 (1993) (deeming study subjects to be accurate in estimating the likelihood that any particular marriage will end in divorce as 50%).

394. According to U.S. Department of Labor statistics, the percentage of American women in the paid workforce, employed and unemployed combined, climbed from approximately 48% to approximately 67.2% between 1973 and 2010. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, *Employment & Earnings: January 2011*, at 195, *available at* http://www.bls.gov/opub/ee/empearn201101.pdf (last visited Aug. 19, 2011).

this emphasis crowds out attention to the distributions affecting their husbands, working women, and the second or third "chain" families that both spouses are likely to form. Now that FLE is back again, the picture that most current casebooks paint of the economic family is seriously partial.

FLE also obscures distribution by class. In a famous article published in 1964, Jacobus tenBroek exposed our "dual family law system."[395] He made it glaringly clear how, ever since the Elizabethan Poor Law, Anglo-American legal systems have maintained one family law for those with means and another for the poor. Jacobs and Angell, and Foote, Levy and Sander, were as interested in the latter as they were in the former; and satisfying that curiosity required them, in turn, to study family courts and a broad range of experts and institutions involved in managing deviant families and family members. The contiguities of family law with employment, juvenile delinquency, foster care and adoption, welfare provision, legal management of people with psychiatric disorders, and education became as important as the rules of divorce. FLE, when it regains ascendency, tends to foster a trend back to adjudication and back to families well off enough to go to court to solve their disputes. At the level of description, it carries a class bias.

Finally, FLE came into American legal thought in the form of the marriage/contract distinction, construed as the opposition of duty-soaked status and individualistic, *laissez faire* contract. This ideological implication has many regrettable consequences, but I will limit myself here to two. First, it sets up family law as altruistic and contract law as individualistic, and fosters the idea that contract *in* family is always an intrusion of individualism into a legal space that should be solidaristic. A large Is/Ought conflation plagues this preoccupation of the field: we are continually asked, "*Should* family law be status or contract?",[396] as if those alternatives weren't ideologically inter-implicated to the point of being mutually constitutive. All the ways in which contract law fosters solidarity and family law enables individual freedom are ruled out from the start. This is a serious descriptive deficit. Even worse, it ratifies neoliberal fantasies about the freedom of contract.

And second, this ideological allocation ratifies the centrality and specialness of *marriage.* For Jacobs and Angell, breaking the hold of FLE

395. Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 16 STAN. L. REV. 257 (1964).

396. *See supra* note 385.

meant taking seriously the domestic dependencies that actually occur in the world. Jacobs was at one point almost ready to acknowledge that three men living together could be a family. For Llewellyn, marriage was surrounded by informal bonds that duplicated its functions: indeed, pair marriage meant that "*extra*-marital sex desire can specialize on sex."[397] Foote, Levy and Sander began their casebook not with marriage but with the problem of illegitimacy. Until its most recent edition, which includes a wonderful chapter asking "What is a Family?" and considering a wide range of nonmarital family forms, the Areen casebook has been, almost entirely, a casebook on marriage, divorce, and the parent/child/state triad. I think it is safe to generalize that contemporary family law casebooks vastly lag behind social developments. We should be asking, "What is the family law of unmarried people?", not because we need to "recognize" them and honor the family forms they chose but because they are *there.* Finally, the emphasis on marriage distorts the distributive effects even of marriage which, of course, distributes not only into, out of and between marital families but between marital and nonmarital ones.

FLE thus has a series of problematic effects on the field of family law at the level of description. What about prescription? Is there any necessary redemptive or liberatory flavor to the attack on FLE? It is important to recall that the Family Court movement, one of the fountainheads of anti-FLE thinking, was at once progressive and intensely devoted to state-based social control of the problematic masses. And it is equally important to recall that, when both Goldstein and Katz, on one hand, and Foote, Levy and Sander on the other, set up expert judgment as the all-wise substitute for all-knowing social-purpose functionalism, they set themselves up for the kind of reversal inflicted on Goldstein by Areen's sly exposure of his biases. The left/right politics of the field seem resilient enough to make use of FLE *and* of attacks on it. FLE can still be very useful, moreover: for instance, I am not proposing to abolish the course, partly for fear that if we did that, all consideration of sexuality, gender and the sheer craziness of life would drop out of the non-seminar law curriculum altogether. At the moment, though, my strong hunch is that conservative trends coursing through both feminist and same-sex-marriage culture-wars struggles over the field suggest that attacking FLE is a good leftist move and can produce significant advances in progressive/leftist analyses of the roles of the family and its law in the

397. Llewellyn, *Behind the Law of Divorce*, *supra* note 136, at 1297.

distribution of human welfare.[398]

398. For some thoughts on how to do it, see Halley, *Behind the Law of Marriage, Part I*, *supra* note 381, and Halley & Rittich, *Critical Directions*, *supra* note 2. Readers of the latter may note that the Up Against Family Law Conference that Rittich and I helped organize developed tools very similar to, some of them identical to, those invented by the Columbia curricular reformers and by Foote, Levy and Sander. The odd fact is that, at that time, we were completely unaware of any of the precursors showcased in this genealogy except Llewellyn's *Behind the Law of Divorce*, *supra* note 136. I would suggest that this congruence makes manifest that the basic deficits of the status/contract distinction and the FLE it constructs have been remarkably stable across large shifts in legal ideology.