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Ann Shalleck

*American University Washington College of Law*, [shalleck@wcl.american.edu](mailto:shalleck@wcl.american.edu)

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# INTRODUCTION COMPARATIVE FAMILY LAW: WHAT IS THE GLOBAL FAMILY?

## FAMILY LAW IN DECOLONIZATION, MODERNIZATION AND GLOBALIZATION

ANN SHALLECK<sup>\*</sup>

This volume of essays from the *Workshop on Comparative Family Law: What is the Global Family? Family Law in Decolonization, Modernization and Globalization*, sponsored by the American University, Washington College of Law's Women & International Law Program and the Harvard Law School Program on Law and Social Thought's "Up Against Family Law Exceptionalism Project," emerges from years of collaborative work among a fluid group of scholars who have come together at different sites and in different intellectual contexts to develop critical frameworks to challenge common understanding across legal systems of what is labeled family law.<sup>1</sup> Several of them appear as contributors to this issue of the *Journal of Gender, Social Policy & Law* and others to the Special Issue of the *American Journal of Comparative Law* on Critical Directions in

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<sup>\*</sup> Professor of Law and Carrington Shields Scholar, American University, Washington College of Law. JD. Harvard Law School, 1978; A.B. Bryn Mawr College, 1971.

1. We in the Women and the Law Program at the Washington College of Law, particularly Professor Fernanda Nicola and Daniela Kraiem, Associate Director of the Women and the Law Program, and I have worked closely with Janet Halley and others at Harvard and Kerry Rittich at the University of Toronto on this conference and on the underlying collective inquiry. The work has proceeded in many different sites and contexts. These two volumes mark an important moment in the development of the overarching project. We all want to acknowledge the work of Angie McCarthy, the Coordinator of the Women and the Law Program, for executing with great skill and unfailing care each aspect of making this workshop welcoming to all who participated. We thank the Canadian Government for their support of both this second workshop in a series on comparative family law, this one held on March 20-21, 2009, and this volume of essays. They both were carried out with the assistance of a program supported through a contribution by the Government of Canada. We also thank the editors of the *Journal of Gender, Social Policy & the Law* for their hard work on and commitment to this endeavor.

Comparative Family Law. This ongoing collective inquiry about the family and family law has at its foundation a commitment to the comparative project, even when examining particular domestic systems of family law. How we understand the content, methods and operation of family law in any country or region, or among any group, results not just from a particular history, although the context of each iteration of family law in a particular place or among a particular group matters enormously. Comparative study holds the potential, largely unrealized or even suppressed until now within Comparative Law, to reveal how family law is essential to the formation of legal thought in other domains of private and public law, and how family law interacts with those other domains to structure and govern the relations and activities of different societies.

This collaborative work began within a series of workshops designed to explore the exceptionalism of family law. These gatherings engaged scholars across different fields of law, located at different institutions and from different legal cultures. Through the presentation of tentative ideas, works in progress, accounts of projects, fully-formed papers, and intense and wide-ranging discussion, the group in its shifting form worked on elaborating the idea of Family Law Exceptionalism. In their Introduction to the Special Issue of the *American Journal of Comparative Law*,<sup>2</sup> the companion volume to this collection of essays, Janet Halley and Kerry Rittich provide a multi-dimensional account not just of the meaning of the concept of Family Law Exceptionalism, but of the exploratory work that the project is meant to accomplish. In short, the Family Law Exceptionalism project includes investigating the descriptive and normative dimensions of the specialness of family law that emerge when the frame of family law exceptionalism guides exploration of the meaning and operation of family law across legal systems; the project also offers a critical approach to understanding how the exceptional character of family law is crucial in structuring the relationships and interactions among different domains of law in the ordering of life within and across societies.

As descriptive and normative matters, this project proceeds from the proposition that family law and the family are often deemed to be imbued with a special character that is used to distinguish them from other areas of law and life. Family law has its distinctive rules, policies, norms, procedures and practices. Intrinsic to these is an analogously distinctive set of characteristics attributed to the family and which are associated with intimacy, altruism, emotion, solidarity, and connection to the sacred. By

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2. Janet Halley and Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, Introduction to the Special Issue on Comparative Family Law, 58 AM. J. COMP. L. 753 (2010).

foregrounding this exceptionalism, this project both opens up vast areas of new and innovative inquiry and suggests new stances for critical analysis, policy direction and action. The need for this foregrounding comes from multiple, intersecting common experiences. In legal academia, we encounter the label family law in the organization of the curriculum, in course titles, casebooks and treatises. We find it in the structure of statutory codes. Judges, lawyers and litigants experience it in the organization, operation and even physical design of courts. The legal profession recognizes it as a distinct area of practice occupying a particular legal domain. In comparative law, scholars, whatever methodology they use, distinguish the study of family law from the study of other bodies of law.<sup>3</sup> All these common encounters with family law involve its marginalization.

To accomplish the project of recasting family law, this group of scholars has simultaneously pursued two interwoven strands. The first requires challenging the exceptionalism of family law and the family. The second requires viewing with a critical comparative lens family law as it diffuses through societies. The two can only artificially be disaggregated as the processes producing the exceptional character of family are global in character.

For the first strand, challenging family law exceptionalism requires a methodology for breaking out of definitional confines. At its heart is the formulation of a different way to conceptualize the law of the family that enables us easily and usefully to mark different meanings of family law and move among them. The first set of meanings, labeled Family Law 1, reflects what we find in the standard legal materials and institutions that surround us. Family law in its modern form concerns the regulation of the formation and dissolution of what are now considered the basic relationships within the nuclear family: marriage, other relationships that substitute for marriage in family formation, divorce, custody, support, alimony, property division, and so forth, as well as matters relating to parental status and parental rights and duties.<sup>4</sup> As to matters within the family, regulation of violence constitutes the one area where law internal to the functioning of the family has been elaborated to any degree. In matters regarding children, where their behavior is treated as a threat to society (delinquency) or in matters where parents are treated as inadequate in their duties (child abuse and neglect), both constituting a distinct branch of family law that almost exclusively implicates the lives of the poor, Family Law 1 operates through the state to regulate what are considered deviant families.

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3. *Id.* at 755.

4. *Id.* at 761.

Family Law 2 moves the inquiry to other bodies of law not designed explicitly for the regulation of family life—seemingly for entirely separate purposes—where the family appears only as a category in the structure or operation of the rules governing some other area of life such as immigration, the tax system, or the social welfare system. These laws, far more than what we normally call family law, directly affect the ongoing functioning of the family. Also, seemingly silently, these bodies of law sometimes also structure how families actually form and dissolve, whatever the formal law of Family Law 1 says about these matters. For example, immigration law contains many provisions concerning which relationships count as family, with significant consequences. Social welfare law determines the nature of familial responsibility for the care of dependents and who within a family can receive state benefits for which family-related purposes. Tax law structures multiple provisions around family statuses, rather than individual obligation. Employment law governs who can get leave from work for what family-related purposes. Thus, both the daily life of a family, as well as long-term planning for a family, implicate vast areas of legal regulation seemingly disconnected from the family and family law that affect the relationships among the members of a family and the distribution of power, resources, work and mobility within a family.<sup>5</sup>

Family Law 3 refers to background rules that in their operation have enormous consequences for the family, without referencing directly the family. For example, although a framework of individual rights structures anti-discrimination law, protections against arbitrary or biased interference in areas such as job-related or education-related participation in society affect how and when family members seek access to or security in basic social activities such as education or employment, matters at the center of family decision-making and functioning. Law that tolerates the gendered availability of public education affects the distribution of family resources and work as some family members are singled out for focus on learning and advancement through the acquisition of new skills, with other family members remain responsible for fulfilling a family's daily needs. Limitations on the applicability to work within a family of basic labor law protections regarding wages and working conditions determine much about the organization and allocation of responsibilities within a family, even the composition of families. When background rules affect labor-market participation by creating or tolerating gendered disparities in pay, advancement or security, they similarly shape roles within a family. Family Law 3 treats the consequences of these background rules for families as central to those legal domains and as foundational to legal

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5. *Id.*

inquiry considered as family law.<sup>6</sup>

Finally, this methodology for approaching family law has a fourth aspect, Family Law 4, in its recognition of practices and norms that, while not written down in authoritative materials, operate as a kind of law in that they effectively regulate and are recognized as governing rules for the family. While this area remains undeveloped and requires interdisciplinary work, this conception of law is part of the broad sweep that Family Law Exceptionalism seeks to include in its project of recasting the meaning of Family Law.<sup>7</sup>

This methodological approach to family law has enormous consequences for analysis of gender and families. For example, feminist family law scholars rooted in Family Law 1 have examined and criticized formal rules of exit and entry in terms of gender, have analyzed how various custody regimes that operate at divorce reflect and shape understandings of care of and responsibility for children and the allocation of gendered participation in the family and in the labor force, have explored different paradigms for the allocation of property at divorce, and a myriad of other topics. However, feminist analysis of the relationship of gender and family law has largely remained constrained by current dominant conceptions of family law and its relationships to other domains of law considered separate and distinct. With the explicit inclusion of Family Law 2, 3 and 4, however, we can identify new paths for systematic analysis and critique of family law in its multiple gendered aspects, as other domains of law become intrinsic to understanding family law, the operation of families, and the consequences of participation in multiple domains of life. Within a recast paradigm of family law, the current ever-present dichotomy between work and caregiving either dissolves into incoherence or appears as an ideological framing that masks the constructed character of caregiving as essentially different than work within other spheres of society.

Analogously, Family Law Exceptionalism extends ways to see the role of sexuality in family law. Within Family Law 1, sexuality appears primarily in the expansion of access to marriage by contesting the assumptions underlying and the requirements of heterosexual marriage that limit marriage to two individuals of opposite genders. Yet, marriage remains the critical site for understanding the role of sexuality in the operation of families and in the relationship of family law to other domains of law. With Family Law 2, 3 and 4, we extend our understanding how the role of sexuality in marriage relates both to the operation of families and to the operation of rules in legal domains that reference the family, as well as

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6. *Id.* at 762.

7. *Id.*

background rules in other domains that implicate sexuality in families. Thus, analysis of marriage equality as a subject of family law becomes a larger inquiry into how legal treatment of sexuality in multiple legal domains interacts with the lived experience of families.

In addition to this methodological step in investigating and recasting family law, the project of Family Law Exceptionalism proceeds from the insight that the market and its law and the family and its law are not radically distinct domains of life and law. The exceptionalism of the family rather is both a product of and a force in creating the family/market dichotomy that is so present across legal systems. Family Law Exceptionalism, in challenging the origins and operation of this dichotomy, creates a critical stance for examining the meaning and consequences of this dichotomy for law and society. In addition, in revealing the mutually constitutive relationship between these domains, as well as the role of this dichotomous structure for all of law, Family Law Exceptionalism opens a space for examining the interaction of state, family and market, as well as community, and for reformulating inquiry and policy that pulls in all these domains.

As with methodology, this challenge to the distinctiveness of the domain of family law and its reformulation as infused with and infusing the law of the market and the state suggests new ways to examine how fundamental values get articulated and situated. For example, fundamentalism, now associated primarily with religion, has often been situated primarily within the sacred realm of the family. This recasting of family law assists in the framing of principles heretofore seen as deriving from and associated with public or individualist commitments instead as similar to those basic commitments associated with the affective solidarity of families.

The second strand of this collaborative work assumes and assures a comparativist approach to analysis of family law. To complement the workshops on Family Law Exceptionalism, we began a series of workshops on Comparative Family Law. We do this at a time of rapid development within comparative family law. Until recently, scholars of family law rarely used a comparative methodology to understand either how their own domestic legal systems developed or how transnational migration, communication, economic organization and legal discourse have interacted with the structure and operation of families and of family law. Simultaneously, comparative law scholars have until recently often overlooked family law as an important site for understanding global and transnational political and economic developments. These comparative family law conferences have brought together scholars seeking to explore and create new critical paths in comparative analysis of family law as it has developed across borders. For this project, the comparison of family law systems reveals far more than similarities and differences in legal rules

about family formation and dissolution or parent-child obligations. The work instead highlights the interaction of family law and families with economic globalization, demographic change, population movement, state regulatory regimes, the law of the market within nations, and political governance. This volume marks the product of the second of those conferences.

Comparativist study grounds the ongoing work of this group of scholars in several ways. First, this project views the specialness of family law as arising in the differentiation of family from market at least partially through the diffusion of Western law and legal thought throughout the world. In the interplay of multiple legal systems within the legal structures of political and economic development around the world, family law assumes a central role. Standard accounts of the processes of colonization, decolonization, post-colonial development, nation building and the expansion and consolidation of neoliberal international economic, political and legal orders have marginalized the role of the family and family law. These accounts of diffusion of law and legal thought across societies and groups have assumed and sought to explain a Western core of law—market law—traveling to encounter and transform a periphery of local, traditional forms of law into the modern law of the world. In this process, family law has been understood as the site for maintenance of the particularized, traditional and local.

This critical comparative project challenges the standard narrative. Through comparative analysis of colliding, sometimes intruding, family law systems, this project seeks to destabilize the standard account within comparative law. By exploring in colonial sites, as in the West, the dynamic between market and family law and the creation of distinctly different domains of market and family in various parts of the world, this project reveals and examines the distribution of power and resources within families, as well as the operation of family law in the multiple facets of the processes of legal, political, and social domination and transformation. The position and operation of families and family law in these developments move to the center from the periphery.

Second, a critical approach to the comparative study of family law highlights how family law gets constructed as part of the process of colonization, rather than having a natural existence as part of the static traditions of a people. Tradition often gets invoked after the creation of a family law that is separate and distinct from the market, imbuing the character of family regulations with the attributes of that tradition. This process of creating and invoking a tradition-laden family law can serve various purposes in the confrontation of colonial powers with subject peoples or in the struggles among groups in the contested process of nation building. When viewed through the critical comparative lens, the role of a



constructed family law in the organization and structure of power and governance becomes apparent.

Third, this approach to comparative family law highlights the ways that family law is embedded in other domains of law and is, along with the law of the market and the law of the state, a part of global distribution of wealth, power, leisure, and security in society and a critical site for analysis of development strategies. In subjecting these other realms to scrutiny for their distributional consequences, but excusing the family and family law, policy makers deploy distorted perspectives, often with unintended consequences. Whether these are deemed harmful or beneficial, the immunization of family law from this kind of dynamic distributional analysis keeps fundamental decisions that affect the operation of daily life from careful, systematic scrutiny.

As with Family Law Exceptionalism, methodology is central.<sup>8</sup> At the most obvious level, Comparative Family Law examines and compares how different legal systems regulate intimate relationships, such as marriage and parentage. However, the comparativist methodologies that take this approach replicate the constricted world encompassed within Family Law 1. Comparison of parallel lists of the limited range of formal rules and policies implicated within this sphere reveal little about the role of the family and family law in the operation of the underlying legal systems, the relationships among different legal systems, or the consequences of these systems for the actual operation of and decision-making within families.

Using another methodology, comparative study of the family can examine the functions that rules related to the family play in society, either in terms of broad, abstracted, seemingly neutral social purposes or in terms of contextualized variations in the operation of rules that depend upon particular social structures and patterns and cultural norms.<sup>9</sup> This second type of functional analysis—called positive-sociology functionalism—focuses on the plurality of legal functions of family law, the connection of these to the operation of other domains of law, and the contextualized understanding of rules in action. Together they provide a beginning point for a critical comparative family law.<sup>10</sup> This critical comparative family law focuses on the role of family law and the family in governance in society, in the organization of the state, and in the structure and operation of society. Critical comparative family law thus has the capacity to highlight through its methodology Family Law 2, 3 and 4. Other domains of law that reference the family, even if about seemingly entirely different

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8. Fernanda G. Nicola, *Family Law Exceptionalism in Comparative Law*, 58 AM. J. COMP. L. 777, 785-87, 792-804 (2010).

9. *Id.* at 804.

10. *Id.* at 809.

social concerns, background rules that affect the operation of families without ever alluding to them, and practices and customs that operate as if they are law all become subjects of analysis for comparative family law study. This methodological approach guides the essays in this volume.

These essays present diverse contributions to the project of recasting comparative family law. They engage with widely different content. They focus in different ways on their subjects of analysis. They adopt diverse intellectual approaches and theoretical underpinnings. Some proceed to delve deeply. Others seek to scan a broad landscape. We invited and celebrate this diversity. Taken as a group, they present recurring powerful themes. That these themes emerge amidst such diversity and are so generative of further thought makes them even more compelling.

The first theme is the embeddedness of family law in other domains of law. The separateness of Family Law 1 from other legal domains seems almost eerily distorted after reading these essays. Instead, in these pages, family law appears as a dynamic sphere of regulation of daily life, constantly interacting with other spheres of law in ways that help us understand how families actually operate in both their routines and in their long-term decisions. The dynamism is even starker when viewed comparatively since we see the different ways that family law interacts with other legal domains around similar social phenomena.

Related to the last theme, the descriptive and normative claims to the family as a distinct sphere of altruism, solidarity, warmth and affective connection that comprise a sphere safe from the onslaught of the cold, hard, individualist market crumble under the weight of the impact of other legal domains, once made apparent. While in our current world violence is most commonly identified as the unwelcome enemy of these normative claims, justifying the aggressive transgression of the state from the public into the private realm to order the activities of family life, the actual effects of other spheres of law in ordering the family, often silently, create a far more powerful framework with which to analyze the diverse, powerful and contradictory impacts of law on the family. They also reveal the dimensions of the family currently obscured by standard family law. In particular, although certainly not exclusively, the economic family emerges—that is the family that engages in productive labor, engages in consumption that drives economies, allocates work in accord with market forces, changes in composition depending upon need, and provides for much of social dependency. With a broader understanding of the multiple levels of family law, we can better assess the conflicts that we face and choices that confront us in making policy that shapes family life.

Third, we see family law in action, as it happens and operates in the world, not as abstracted legal rules. While this theme is fundamental to the

legal realist tradition, as well as to sociological jurisprudence, including the sociological bent of some functionalist approaches to comparative family law, these essays place the formalisms of the limited rules of traditional family law into much-needed context. The precision and multiplicity of the details of the accounts of the actual operation of family law in particular contexts help us see pluralistic adaptations, even effective transformations, of prevailing rules. These accounts also guide us in evaluating how and why in some situations the formal rules of family law seem impermeable to change, while in others they appear susceptible to transformation.

Fourth, family law emerges in its relationship to powerful forces. These may be forces of domination and resistance, played out through the exercise of colonial or national power, neo-liberal economic policy, or in relationship to claims for individual rights, in particular claims to gender equality. Family law appears as a complex force in the operation of these national and global forces, as well as in relationship to rights-based movements that often conflict with the rules and norms governing the family.

This volume of the Journal of Gender, Social Policy and Law marks a moment in an ongoing intellectual project to transform our understanding of family law. It consolidates and propels forward, along with the companion volume, the Special Issue of the *American Journal of Comparative Law*, the foundational comparativist strand of this project. These essays, whether systematic analyses or experimental, tentative explorations will enable us, as a group, to deepen and strengthen our emerging enriched understanding of family law. The disparate, although connected, insights of these essays serve to propel us to transform our understanding of how family law operates in the world and how with that understanding we may intervene to shape policy and advocacy.