

Introducing the Political Family: A New Road Map for Critical Family Law

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All families are political, each in its own way. Nevertheless, the diversity of family politics has not negated, by and large, patriarchal influence on the Political Family. This Article introduces the Political Family as a key concept in a scholarly and activist movement in family law studies which I identify as Critical Family Law. In Part I a reminder is offered that “alternative families” have existed since the dawn of history. However, I argue that despite constant changes in the configuration of the family, for the most part all family forms have adhered to patriarchy. Part II offers a brief overview of some of the central themes in contemporary critical study of family law. I show how dichotomies such as private/public and intervention/autonomy have lain at the basis of the definition of the family since antiquity, constantly shifting the very meaning of the family across time, cultures and legal traditions, but rarely challenging its patriarchal ideology. Such challenges necessitate a critical look at the language of rights and obligations within the family, in acknowledgment that this very discourse is already saturated with ideology and biased preconceptions. Under the umbrella of “Critical Family Law,” I explore the potential for promoting such a shift, discussing articles in this issue.

In memory of Paula Ettelbrick, 1955-2011

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INTRODUCTION

The Greek historian Plutarch tells the story of Quintus Hortensius, a Roman consul, who asked Cato the Younger for his daughter Porcia's hand. It did not matter to Hortensius that Porcia (one of the few women lawyers in Rome) was already married to Bibulus, an affluent man in his own right, and had already borne him two sons. As outrageous as his request might sound, argued Hortensius, it "was honourable and good for the state that a woman in the prime of youth and beauty should neither quench her productive power and lie idle, nor yet, by bearing more offspring than enough, burden and impoverish a husband who does not want them."¹ Furthermore, Hortensius was also willing to commit to give Porcia back to Bibulus, if that should be Bibulus's desire, after she had borne Hortensius a child.²

Despite his high appreciation for Hortensius, and despite thinking "highly of a community of relationship with him," Cato deemed it inappropriate to interfere with his daughter's marriage. Hortensius then, without hesitation, asked for the hand of Cato's own wife. Marcia, tells us Plutarch, was still young enough to bear children and, in fact, pregnant by Cato himself at the time of Hortensius's request. Strangely, Cato did not refuse, and, after obtaining Marcia's father's approval, Hortensius married her, and she gave birth to Cato's biological child while married to Hortensius.³ Under Roman law, paternity was established according to the mother's status at the time of birth.⁴ Therefore, the newborn's father was the man to whom the mother was married at the time of birth, and not necessarily the biological father. Hortensius's move, then, was a bold one: He wanted to have a child with Cato, in order to strengthen the political and social bonds with him "by a community of children."⁵

1 VIII PLUTARCH, *THE PARALLEL LIVES* 293-96 (Bernadotte Perrin trans., 1919), available at http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Plutarch/Lives/Cato_Minor*.html.

2 *Id.*

3 According to a different version of the story, Cato divorced Marcia prior to her marriage to Hortensius, see EVA CANTARELLA, *PANDORA'S DAUGHTERS: THE ROLE AND STATUS OF WOMEN IN GREEK AND ROMAN ANTIQUITY* 131 (Maureen B. Fant trans., 1987); JANE F. GARDNER, *WOMEN IN ROMAN LAW AND SOCIETY* 82 (1991).

4 Eva Cantarella, *Marriage and Sexuality in Republican Rome: A Roman Conjugal Love Story*, in *THE SLEEP OF REASON: EROTIC EXPERIENCE AND SEXUAL ETHICS IN ANCIENT GREECE* 269, 275-76 (Martha Craven Nussbaum & Juha Sihvola eds., 2002).

5 PLUTARCH, *supra* note 1, at 295. There are several other documented stories of "stomach lease contracts" — Roman pregnant women were called *venter*,

This is an ancient story about family ties, “new” families, and the deconstruction of kinship. It shows that human fascination with “new families” is millennia-old. It also shows that the understanding of the family as a political unit has been around for quite a while. The notion of the family has always been a political one. Terms and ideas such as husband, wife, motherhood, fatherhood, and parenting, as well as housework, children’s best interests, communal property and many others, are politically charged and subject to constant debates and challenges. Curiously, across cultures, religions and times, their meanings have been ascribed in accordance with patriarchal values, which have usually been deemed “natural” and “objective.”

Each and every family — whether “traditional” or “alternative” — is political, in the sense that it is both the product and the promoter of collective decisions and values. Members of the family are not only individuals, but also actors who perform pre-assigned roles, according to culturally and legally sanctioned scripts. The Husband, the Wife, the Father, the Mother, the Son, the Daughter, and so on, are all political beings with political roles (breadwinning, caretaking, inheriting, etc.), whether or not they are aware of it.⁶

The Political Family is organized around various axes. An important one, extensively explored, is the private-public axis; another is the market-non-market axis. Related to these two axes are the dichotomies of intervention versus family autonomy, biological versus psychological, traditional versus new, and “normal” versus “deviant” (or, to use politically correct language, “alternative”) family. The aim of this Article is to contextualize some of the major themes explored in the “Rights and Obligations in the Contemporary Family: Retheorizing Individualism, Families and the State” conference which took place in December 2010 at the Faculty of Law at Tel Aviv University. In doing so using the notion of the Political Family and in light of the organizing dichotomies, my aim is to both demonstrate family politics and deconstruct it.

Part I offers a reminder that “alternative families” have existed since the dawn of history. However, despite constant changes in the configuration of the family, for the most part all family forms have adhered to patriarchy. Part II offers a brief overview of some of the central themes in contemporary critical

stomach or belly — for similar purposes. One of the most famous cases is that of the Roman Emperor Nero, who asked for Claudius’s pregnant wife’s hand. Additionally, there are surviving contracts for the “lease” of a married non-pregnant woman, *see* Cantarella, *supra* note 4.

6 *See* Lucian Laur, *Thinking About Maternal Performativity*, 16 HAMISHPAT [C. MGMT. L. REV.] 411 (2011) (Isr.) (discussing this issue indirectly in an article on being a gay male “mother:” a stay-at-home dad whose role is being constantly redesigned by external and internal cultural and psychological expectations and demands).

study of family law. I show how the dichotomies set out above have lain at the basis of the definition of the family since antiquity, constantly shifting the very meaning of the family across time, cultures and legal traditions. Gathered under the umbrella of “Critical Family Law,” these themes and methodologies promise to provide theoretical breakthroughs in thinking about the family.

While critical studies exist in many disciplines in the human sciences, Critical Family Law, like feminism and Critical Race Theory, is the joint product of knowledge and research carved out by both academia and the field. I therefore conclude by arguing that scholarly Critical Family Law can enrich our understanding of the consequences of choices and changes made at the field level, and help us better recognize and address the needs, shortcomings, and potential of the Political Family.

I. THE POLITICAL FAMILY: A BRIEF INTRODUCTION

All families are political, each in its own way. Some are political unconsciously, adhering to social norms and existing laws, while other families are political consciously, intentionally challenging social norms and existing laws. However, even though non-nuclear families, including such familial bonds as the one between Cato and Hortensius described above, have been around for thousands of years,⁷ two central qualities of the family have not changed: The first is the constant political negotiation over the configuration of the legally and socially recognized family; the second is the treatment of women. Women’s voices have been largely absent from politics in general and from the Political Family in particular, and family ideologies — whether “traditional,” religious or liberal — have been overwhelmingly patriarchal across history and across cultures and religions.

The first characteristic of the family, namely its multitude of forms and representations (as opposed to its uniform representation by many scholars, activists and politicians), is still quite contested. Elisabeth Beck-Gernsheim points out that nowadays we no longer speak about “the Family,” but of “families.”⁸ However, contrary to claims of “tradition,” “nature,” and other arguments referring to the family as a stable, universal and ancient social structure, the family has been constantly changing and evolving throughout

7 YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES 6-17 (2002).

8 Elisabeth Beck-Gernsheim, *From Rights and Obligations to Contested Rights and Obligations: Individualization, Globalization, and Family Law*, 13 THEORETICAL INQUIRIES L. 1, 2 (2012); see also Maxine Eichner, *The Family and the Market — Redux*, 13 THEORETICAL INQUIRIES L. 97, 102 (2012).

human history, and so has socio-legal treatment of it. In this sense, human history — as opposed to human ideologues — has always been of “families.”

The family has never fully conformed to the ideal of the husband-wife-children model. Even linguistically the family has been an ever-evolving concept. The word “family” was absorbed into English from the Latin *familia*. The meaning of *familia* in Latin is the household, including the slaves, servants and livestock; *familiar* is derived from *famulus* which means “slave.”⁹ In the Hebrew Bible the word “family” always connotes — both in the original Hebrew (*mishpacha*) and in translation — this ancient meaning of tribe, household, etc. Only in the seventeenth century did the word “family” begin to connote a social unit that contains a father, a mother and children.¹⁰ The first definition of family as we know it today, referring to what is called the nuclear family, appeared in the Oxford English Dictionary only in the nineteenth century: “The group which consists of a Father, Mother and Children is called a Family.”¹¹

Let us examine, for example, the concept of cohabitation. Legal preference of married couples over cohabitants, as critically discussed in Cynthia Bowman’s article in this issue,¹² as well as in her recent book,¹³ is not universal, and is not even ancient. Roman law did not require an official marriage ceremony, and a man and a woman were deemed married after a yearlong cohabitation.¹⁴ Indeed, Roman marriage was not a question of status, but rather of “social fact, about the creation and termination of which the law had very little to say, and which had almost no effect on the legal condition of the parties.”¹⁵ This is not to say that the Romans did not struggle at all with dilemmas that more modern family law systems struggle with, such as double standards concerning women’s sexual behavior as opposed to men’s. Nevertheless, it is helpful to look back at the history of the family and take note of its complexity as well as diversity, especially when in doing so we can refute claims about a “natural order of things.”

The Roman state’s “liberal” (or, perhaps better put, permissive) approach to cohabitation and marriage did not mean lack of state interference. To

9 RAYMOND WILLIAMS, *KEY WORDS: A VOCABULARY OF CULTURE AND SOCIETY* 131 (rev. ed. 1983).

10 *Id.*; see also JOHN AYTO, *DICTIONARY OF WORD ORIGINS: THE HISTORIES OF MORE THAN 8,000 ENGLISH-LANGUAGE WORDS* 218 (1990).

11 *Quoted in WILLIAMS, supra* note 9, at 132-33.

12 Cynthia Bowman, *The Legal Relationship Between Cohabitants and Their Partners’ Children*, 13 *THEORETICAL INQUIRIES L.* 127, 136-46 (2012).

13 CYNTHIA GRANT BOWMAN, *UNMARRIED COUPLES, LAW AND PUBLIC POLICY* (2010).

14 GARDNER, *supra* note 3, at 47.

15 BARRY NICHOLAS, *AN INTRODUCTION TO ROMAN LAW* 80 (1962).

the contrary, the law regulated almost every aspect of women's lives, from marriage or cohabitation, to sexual conduct, medical condition,¹⁶ and inheritance. Adultery laws, for example, were particularly elaborate, and they unequally targeted women, declaring adulterous women ineligible for marriage or deserving of divorce, and, in some cases, justified honor killing of adulterous wives and their accomplices.¹⁷ Children's lives were also heavily regulated under Roman law. Considered the *paterfamilias*'s property, he could even sell them into slavery.¹⁸

Secondly, although diverse, families have always conformed to patriarchy. Patriarchy, "an anthropological term, describing families and cultures that are headed by fathers,"¹⁹ is common to many societies and cultures.²⁰ A central feature of patriarchy is the emphasis on women's bodies as the carriers of men's honor. Being wonderfully pliable, patriarchy can be socialist or capitalist, democratic or fascist, religious or secular,²¹ Christian, Jewish or Muslim, as long as male supremacy (over all women and some of the men) is preserved. From a legal point of view, women have been defined "by the role they played in relation to their husbands or families"²² — as mothers, wives, divorcees, widows, spinsters, deserted wives, or concubines.²³ As Chris

16 Women's bodies and maladies were perceived as signs of weakness, both physical and moral, *see, e.g.*, MARY R. LEFKOWITZ & MAUREEN B. FANT, *WOMEN'S LIFE IN GREECE AND ROME: A SOURCEBOOK IN TRANSLATION* 225-43 (2d ed. 1992).

17 GARDNER, *supra* note 3, at 129.

18 NICHOLAS, *supra* note 15, at 67. The *paterfamilias* could also kill the children, *id.*

19 CAROL GILLIGAN, *THE BIRTH OF PLEASURE: A NEW MAP OF LOVE* 7 (2003).

20 The existence of matriarchal societies has been much debated in both history and anthropology. Eva Cantarella, for example, has argued that some historians' findings of prehistoric matriarchal societies are the results of misinterpretation of the historical sources, and that there is no proof for the existence of such societies or of a pre-patriarchal world, CANTARELLA, *supra* note 3, at 3-19. There are, however, anthropologists who have found matriarchal societies, such as the Mosuo tribe in China, *see, e.g.*, CAI HUA, *A SOCIETY WITHOUT FATHERS OR HUSBANDS: THE NA OF CHINA* (Asti Hustvedt trans., 2008).

21 Secularism does not necessarily mean gender equality. For example, secularists in Turkey preserved the Islamic family laws that discriminate against women, in a pact common to other countries (such as Israel) in which secular and religious men share basically the same values, *see* Seval Yildirim, *Aftermath of a Revolution: A Case Study of Turkish Family Law*, 17 *PACE INT'L L. REV.* 347 (2005).

22 CHRIS CLARKSON, *DOMESTIC REFORMS: POLITICAL VISIONS AND FAMILY REGULATION IN BRITISH COLUMBIA, 1862-1940*, at 209 (2007).

23 For a critical discussion of this phenomenon in the Israeli context, *see* Daphna

Clarkson points out, “the numerous categorizations existed to reserve power to men. Women’s rights depended upon exactly how they were related to men and, hence, how those rights would affect men.”²⁴

Unsurprisingly, the biological differences between men and women have served as justifications for limiting women’s freedoms. Women have been compared to men from the perspective of what they are lacking: The assumption was that the male body is the correct and complete one, the norm.²⁵ The misuse of biological differences between men and women to justify male supremacy was one of Emma Goldman’s main arguments in her well-known critique of marriage, which is perhaps among the first Critical Family Law analyses made at the beginning of the twentieth century. Goldman argued that the institution of marriage is based upon certain assumptions regarding women’s nature and character — that women have no soul and that they are superficial, incapable of making moral decisions, submissive, and have to be absorbed into their husband’s personality.²⁶

Goldman’s observations on the subordination of women in general and within the institution of marriage invoked the Political Family. Goldman saw no connection between marriage and love.²⁷ Marriage, according to Goldman, was a contract made for economic reasons.²⁸ The wife within the marriage contract was “dependent and parasitic.”²⁹ The husband basically purchases the wife and her services. According to Goldman, young girls are channeled from a very young age to believe that marriage is their destiny, and that they should

Hacker, *Single and Married Women in the Law of Israel — a Feminist Perspective*, 9 FEMINIST LEGAL STUD. 29 (2001).

24 CLARKSON, *supra* note 22, at 209.

25 In antiquity, Aristotle most famously referred to women as “impotent females,” because they do not produce semen, *see* Aristotle, *The Differences Between Men and Women*, in HISTORY OF IDEAS ON WOMAN: A SOURCEBOOK 43, 44 (Rosemary Agonito ed., 1977); *see also* Sigmund Freud, *Woman as Castrated Man*, in HISTORY OF IDEAS ON WOMAN: A SOURCEBOOK, *supra*, at 299. Catharine MacKinnon has challenged the sameness/difference debate within feminist theory, arguing that both approaches accept the notion that the standard is male, CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32, 34 (1987).

26 EMMA GOLDMAN, *Marriage and Love*, in ANARCHISM AND OTHER ESSAYS 133, 135 (2005); *see also* DAVID A.J. RICHARDS, WOMEN, GAYS, AND THE CONSTITUTION: THE GROUNDS FOR FEMINISM AND GAY RIGHTS IN CULTURE AND LAW 173-78 (1998).

27 GOLDMAN, *supra* note 26.

28 *Id.*

29 *Id.* at 137.

prepare themselves for that in any way possible.³⁰ The educational system in many countries devotes time to teaching girls relevant skills for being good wives.³¹ Women who enjoy sex are deplored.³² Women are encouraged to abandon their desires and marry the men who can provide for them, not the men they love and desire.³³ Women view their jobs as temporary, until they get married, and then the husband is supposed to provide for them.³⁴

Another patriarchal aspect organizing families is sexuality. Non-romantic, non-sexual partnerships, such as cohabiting siblings, are generally not eligible for the legal protection or benefits that the law awards sexual-romantic partners.³⁵ Furthermore, in many countries, sexuality is at the center of most limits upon marriage and romantic spouses: There are prohibitions on polygamy, minimum age requirements, prohibitions on marriage between relatives (incest), prohibition on same-sex marriages, deportations of non-citizen spouses, prohibitions based on race, prohibitions based on religious grounds, and many other limitations.³⁶

The Political Family is the reason for all these limitations as well as a result of them. Legal benefits and prohibitions have a channeling function through which “the law recruits, builds, shapes, sustains, and promotes social

30 This observation has been later confirmed in empirical studies, *see, e.g.*, GISELA KONOPKA, *YOUNG GIRLS: A PORTRAIT OF ADOLESCENCE 15-22* (1983).

31 GOLDMAN, *supra* note 26, at 134-35.

32 *Id.*

33 *Id.*

34 *Id.* at 136.

35 *See, e.g.*, *Burden v. The United Kingdom*, 47 Eur. Ct. H.R. 38 (2008) (denying the claims of two cohabiting sisters against the application of Britain’s death duty tax, on the grounds that British partner law which grants tax benefits to couples does not apply to two single sisters who live together); *In re Adoption of Robert Paul P.*, 63 N.Y.2d 233 (1984) (a fifty-seven-year-old gay man petitioning to adopt his fifty-year-old partner of twenty-five years in an attempt to create a legal relationship between the two, in the absence of same-sex marriage. The petition was denied, and the Court noted that the use of adoption in lieu of marriage is against public policy and is inconsistent with the goals of adoption, meaning providing a child with a parent-child relationship).

36 I have included migration and race under “matters of sexuality” because, as I have argued elsewhere, these categories are features of patriarchy’s preoccupation with women’s sexuality and its regulation through marriage and determination of the men who are eligible to marry women from within the community, *see* Zvi H. Triger, *The Gendered Racial Formation: Foreign Men, “Our” Women, and the Law*, 30 WOMEN’S RTS. L. REP. 479 (2009).

institutions.”³⁷ Nowadays this means that the law still encourages couples to live together in a legally sanctioned marriage. Given that the supremacy of heterosexual marriage as the preferred way to create a family is not and has never been the only family model throughout human history, this channeling function is political and its product is the Political Family. In this sense, the intervention in our romantic and sexual lives formulates the Political Family.

In the next Part I describe trends in family law scholarship which I shall characterize as “Critical Family Law” (CFL). I argue that since every form of the political family thus far has been patriarchal, Critical Family Law’s major task is to expose and undermine it. And finally, I map out the main directions which contemporary notions of Critical Family Law have taken, and suggest further avenues for exploration, which I believe can both enrich family law theory and promote justice and equality.

II. CRITICAL FAMILY LAW

A. Current Critical Family Law

The Political Family has been throughout history an important building block of the community, the state, and, in modernity, the nation. Nation-building projects, of both democracies and dictatorships, have almost always reformed family law as part of their effort to create a community and define its borders. Such was the case in British Columbia in the nineteenth century, where family law reform was utilized as part of its efforts to cease to be a British colony and become a white settler Canadian province.³⁸ Similar processes of family law reform as part of a wider nation-building project took place in both Nazi and post-Nazi Germany,³⁹ in Spain (several times),⁴⁰ in Italy (several times as well),⁴¹ in Israel,⁴² in the post-revolutionary Soviet

37 Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992).

38 CLARKSON, *supra* note 22.

39 See, e.g., DAGMAR HERZOG, *SEX AFTER FASCISM: MEMORY AND MORALITY IN TWENTIETH-CENTURY GERMANY* (2005).

40 See, e.g., Julio Iglesias de Ussel, *Family Ideology and Political Transition in Spain*, 5 INT’L J.L. & FAM. 277 (1991).

41 See, e.g., Valerio Pocar & Paola Ronfani, *Family Law in Italy: Legislative Innovations and Social Change*, 12 LAW & SOC’Y REV. 607, 607-12 (1977-1978).

42 After much deliberation, the Israeli legislature decided to adopt British Mandatory family law, due to its perceived benefits for the Israeli nation-building project. Therefore, in the Israeli context the “reform” means consciously rejecting an

Union,⁴³ and in many other countries.

On the level of the individual, as Susan Moller Okin argued in her groundbreaking book, *Justice, Gender, and the Family*, the family is our first and therefore most important school of justice.⁴⁴ It is in the family that children first observe adult human interaction and are exposed to justice and reciprocity — or to their absence from family life. Peggy Cooper Davis has pointed out that “[t]he family sits strategically between government and individual. It is thought to have a duty and a special ability to socialize and govern the youth. It is also thought to be a uniquely good site for the development and perpetuation of values.”⁴⁵ CFL has yet to take on recent empirical data that prove children’s own influence on their parents. There is a significant amount of evidence showing, for example, that fathers of daughters tend to be more sympathetic towards gender equality and vote accordingly.⁴⁶

Given its political and social importance, it is quite surprising that family law has been marginalized, cast out to the periphery of law.⁴⁷ Family law is no longer a mandatory course in most law schools and faculties in Western countries, a fact that attests to its relative marginality in the legal profession. This stands in stark contrast to the family’s and family law’s centrality both in the national context and in the lives of most human beings, whether or not they are legal professionals. The key to understanding the family’s marginality is to recognize that there is no such thing as the “family,” but only the Political

egalitarian modern family law system. *See, e.g.*, Triger, *supra* note 36. For a sociological study of interreligious Israeli couples and analysis of related national and nationalistic themes, see Daphna Hacker, *Inter-Religious Marriages in Israel: Gendered Implications for Conversion, Children, and Citizenship*, 14 ISR. STUD. 178 (2009).

43 *See, e.g.*, WENDY Z. GOLDMAN, *WOMEN, THE STATE AND REVOLUTION: SOVIET FAMILY POLICY AND SOCIAL LIFE, 1917-1936* (1995).

44 SUSAN MOLLER OKIN, *JUSTICE, GENDER AND THE FAMILY* 21 (1983).

45 PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 10 (1997).

46 *See, e.g.*, Ebonya L. Washington, *Female Socialization: How Daughters Affect Their Legislators’ Fathers’ Voting on Women’s Issues*, 98 AM. ECON. REV. 311 (2008). Other scholars have found that fathers of daughters move to the left in their voting choices, *see, e.g.*, Andrew J. Oswald & Nattavudh Powdthavee, *Daughters and Left-Wing Voting*, 92 REV. ECON. & STAT. 213 (2010); Andrew J. Oswald & Nattavudh Powdthavee, *Further Results on Daughters and Left-Wing Voting: Germany 1985-2002* (working paper, 2005), available at <http://www2.warwick.ac.uk/fac/soc/economics/staff/academic/oswald/daughtersgospowd2005.pdf>.

47 Maria Rosaria Marella, *Critical Family Law*, 19 AM. U. J. GENDER SOC. POL’Y & L. 721, 723-24 (2011).

Family. Paradoxically, the family has greatest importance in the eyes of those who marginalize it (traditionally, but not exclusively, coming from the right wing of the political-economic map). Thus, the downgrade of the Political Family (and of family law in general) to the elective course level (both literally and metaphorically) has to be an ideological move. Consequently, perhaps one of the first goals within the CFL project has been to challenge this marginality and expose its ideological reasons and consequences.

Scholars and activists — especially feminist ones — have been engaged in Critical Family Law for quite a while. The challenges to the institution of marriage voiced by Goldman during the early twentieth century were perhaps among the first to ignite debates over the very foundations of family law and its Western-patriarchal attributes.⁴⁸ Three generations later, Paula Ettelbrick would persuasively challenge the lesbian, gay, bisexual, and transgender (LGBT) fight for recognition of same-sex marriage, noting the flaws in an approach that aims at adopting a politically problematic institution and joining it, instead of doing away with it altogether.⁴⁹ Martha Fineman would urge an important paradigm shift in family law, focusing on the protection of the nurturing ties between mothers and children rather than on the sexual bond between husband and wife (a shift that might easily be applied to same-sex couples as well).⁵⁰ Along the same line, Nancy Polikoff has more recently argued that the law should recognize all families, and give legal privileges to all family units, heterosexual and homosexual, not only to married couples, taking into account such bonds as those between parents and children, whether biologically related or not.⁵¹ Goldman, Ettelbrick, Fineman, and Polikoff are but a few examples of CFL's evolution and of its deeply rooted feminist commitment. In addition to its clear stance on egalitarianism and justice within the family, this commitment also exposes, *inter alia*, the falseness behind the family's marginality.

It is not surprising that CFL is first and foremost a feminist endeavor. After all, as Shelly A.M. Gavigan points out in an article included in this

48 GOLDMAN, *supra* note 26.

49 Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, in SAME-SEX MARRIAGE: PRO AND CON: A READER 118 (Andrew Sullivan ed., 1997). Recently, Suzanne Kim has argued for a third way of thinking about same-sex marriage: advocating marriage equality for same-sex couples while at the same time taking a skeptical stance towards marriage, Suzanne A. Kim, *Skeptical Marriage Equality*, 34 HARV. J.L. & GENDER 37 (2011).

50 MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 143-76 (1995).

51 NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW (2008).

issue, family patriarchal ideology shapes family law and relations “even at the outskirts of family law — where one might or might not find a resident patriarch.”⁵² An interesting example of this claim is French authorities’ refusal to allow a lesbian woman living with her partner of eighteen years to adopt a child, citing her incapacity to provide the child with a “father figure” as justifying their refusal.⁵³ Ruth Halperin-Kaddari and Marsha Freeman also remind us that there is a close connection between family law, patriarchy, and women’s status.⁵⁴ It is therefore no coincidence that Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),⁵⁵ which safeguards gender equality in the family, “is the most reserved substantive article in the Convention.”⁵⁶

Queer theorists have also tackled the Political Family in general, and the central role that marriage plays in its constitution. They have exposed the Political Family’s heteronormativity and analyzed its oftentimes detrimental impact on questions of justice and sexual equality.⁵⁷ Furthermore, feminist

52 Shelley A.M. Gavigan, *Something Old, Something New: Retheorizing Patriarchal Relations and Privatization from the Outskirts of Family Law*, 13 THEORETICAL INQUIRIES L. 271, 298 (2012).

53 *E.B. v. France*, 2008 Eur. Ct. H.R. 43546/02 (the European Court of Human Rights held that this was a violation of Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to respect for private and family life) of the European Convention on Human Rights).

54 Ruth Halperin-Kaddari & Marsha A. Freeman, *Economic Consequences of Marriage and Its Dissolution: Applying a Universal Equality Norm in a Fragmented Universe*, 13 THEORETICAL INQUIRIES L. 323 (2012).

55 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (Dec. 18, 1979).

56 Halperin-Kaddari & Freeman, *supra* note 54, at 330; *see also* Frances Raday, *Culture, Religion, and Gender*, 1 INT’L J. CONST. L. 663, 679-80 (2003) (critically analyzing the significance of these reservations and their impact on gender equality). Interestingly, at least fifty-five states have entered reservations to CEDAW, making it the most reserved of all international human rights documents.

57 *See, e.g.*, MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS AND THE ETHICS OF QUEER LIFE* 96 (1999); Aeyal Gross, *Sex, Love, and Marriage: Questioning Gender and Sexuality Rights in International Law*, 21 LEIDEN J. INT’L L. 235, 246-47 (2008); Janet Halley, *Recognition, Rights, Regulation, Normalisation: Rhetorics of Justification in the Same-Sex Marriage Debate, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW* 97 (Robert Wintemute & Mads Andenaes eds., 2001). For a response to the normalization and exclusion critiques, *see, for example,*

critique of same-sex marriage has shown that LGBT relationships are not necessarily free of gender norms,⁵⁸ partly because the labor market tends to impose a gendered breadwinner-caregiver dichotomy on families of any kind.⁵⁹

Like all critical theories, CFL is not monolithic, and critical studies of the family and of family law have different foci and sometimes opposing agendas. I do not include under the umbrella of CFL critical analyses of contemporary developments in family law scholarship that oppose egalitarian deconstructions of the family and of family law. Thus, for example, while queer and feminist objections to same-sex marriage are, in my mind, typical manifestations of CFL analyses,⁶⁰ traditionalist heteronormative objections⁶¹ are not.

Another major strand of CFL has been concerned with the public/private divide in its various formulations. Some, like Elisabeth Beck-Gernsheim, look at the shift from the family unit as one that is protected by the law to the individuals that make up the family and their individual rights.⁶² Others examine questions of outside intervention in family formation, life and dissolution.⁶³

William N. Eskridge, Jr., *The Ideological Structure of the Same-Sex Marriage Debate (And Some Postmodern Arguments for Same-Sex Marriage)*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW, *supra*, at 113, 118-22; Aeyal Gross, *Challenges to Compulsory Heterosexuality: Recognition and Non-Recognition of Same-Sex Couples in Israeli Law*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW, *supra*, at 391, 411-14.

58 See, e.g., Ettelbrick, *supra* note 49.

59 As discussed in Eichner, *supra* note 8. On the traditional gendered division of labor, see, for example, Laura T. Kessler, *Is There Agency in Dependency? Expanding the Feminist Justifications for Restructuring Wage Work*, in FEMINISM CONFRONTS HOMO ECONOMICUS 467 (Martha Albertson Fineman & Terence Dougherty eds., 2005).

60 See, e.g., Ettelbrick, *supra* note 49; see also sources cited in *supra* note 57.

61 See, e.g., George W. Dent, Jr., *Straight Is Better: Why Law and Society May Justly Prefer Heterosexuality*, 15 TEX. REV. L. & POL. 359 (2011); John Finnis, *The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations*, 42 AM. J. JURIS. 97 (1997); Lynn D. Wardle, "Multiply and Replenish": *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL'Y 771 (2001).

62 See, e.g., Beck-Gernsheim, *supra* note 8, at 6.

63 To be sure, despite its good millennia-old reputation, the family could be quite a dangerous environment — sometimes even the most dangerous place, especially for women and children, see AM. MED. ASS'N, DIAGNOSTIC AND TREATMENT GUIDELINE ON DOMESTIC VIOLENCE 5-6 (1992), available at <http://www.vahealth.org/Injury/projectradarva/documents/older/pdf/AMADiag&TreatGuide.pdf>.

Questions of family autonomy versus state regulation are still hotly debated.⁶⁴ So are questions of status versus contract as the main organizing principles of familial obligations and rights,⁶⁵ as well as the complex relationship between the market and the family.⁶⁶ Thus, what Shahar Lifshitz calls the “Liberalization Narrative”⁶⁷ of family law is historically inaccurate. As I showed earlier, the shift from status to contract has been circular and irregular rather than linear. Plutarch’s story and Roman law demonstrate how old the

Feminist scholars and activists were highly instrumental in raising consciousness to this darker aspect of the family.

64 John Eekelaar, *Self-Restraint: Social Norms, Individualism and the Family*, 13 THEORETICAL INQUIRIES L. 75, 82, 91 (2012) (highlighting some of the risks in the over-legalization of family life; arguing that despite the rise of individualism, “people in them have not completely abandoned moral or social rules in regard to their families,” and therefore current tendencies to replace social norms with legal rules can lead to unwanted results; acknowledging the feminist critique of a noninterventionist approach; and distinguishing his approach from the traditional patriarchal “total immunity from the law” stance); see also Ira Mark Ellman & Sanford Brayer, *Lay Intuitions About Family Obligations: The Case of Alimony*, 13 THEORETICAL INQUIRIES L. 209, 210-11 (2012) (providing a fascinating peek into instances that justify legal intervention in family life due to the failure of social norms to mitigate conflicts within the family, and arguing that such intervention is most necessary in times of serious conflicts which lead to family dissolutions).

65 Eekelaar, *supra* note 64, at 93-94; see also Shahar Lifshitz, *The Liberal Transformation of Spousal Law: Past, Present and Future*, 13 THEORETICAL INQUIRIES L. 15, 30-34 (2012). The rise of the contractual approach to family relations is a radical departure from common law doctrine, according to which such contracts are against public policy. Two of the most famous cases that applied this doctrine are the British case, *Balfour v. Balfour*, L.R. 2 K.B. 571 (C.A. 1919), and the American case, *Miller v. Miller*, 78 Iowa 177 (1889). The *Miller* case involved an agreement between a husband and a wife, according to which the husband would pay the wife 200 dollars a year (in monthly installments), and in return the wife “shall keep her home and family in a comfortable and reasonably good condition.” They also agreed “to live together as husband and wife and observe faithfully the marriage relation, and each to live virtuously with the other.” The Court ruled that such an agreement between a husband and a wife was not enforceable, because this was a private agreement between the two, and the wife gave no consideration in exchange for the husband’s commitment to pay her, *Miller*, at 178-79. In *Balfour*, a British case, a contract between a husband and a wife was deemed “an ordinary domestic arrangement which could not be sued upon,” *Balfour* at 572.

66 Eichner, *supra* note 8.

67 Lifshitz, *supra* note 65, at 22-28.

contractual view of the family is. While Lifshitz criticizes the contractual approach, and shows that contract is not necessarily the key to gender equality and protecting children within the family, I believe that the very narrative should be challenged, as it is part of what constitutes the Political Family. Maxine Eichner takes a step in this direction. Drawing on Michael Walzer's *Spheres of Justice*,⁶⁸ and noting the failure of the "marketization" of the family and its contribution to growing inequality in American society, she argues in this issue for a reinstatement of the family-market demarcation,⁶⁹ and for "cushioning families from unconstrained market forces"⁷⁰ in order to enable family members to better support each other and meet their caretaking needs.⁷¹

CFL has a two-tier stance on the private/public divide: On the descriptive level, it confronts the ideology of separate spheres and shows that in reality there is, and always has been, extensive public involvement in the family, even when the official stance was noninterventionist.⁷² This is contrary to Beck-Gernsheim's observation that family law has shifted its focus in recent decades from protecting the family to protecting individuals,⁷³ or Eekelaar's assertion that our age is characterized by increasing amounts of legislative attention to the family, as opposed to previous eras in which family obligations were determined through moral or social norms.⁷⁴ At the same time, CFL's normative stance is that corrective involvement is good and that, in some cases, there needs to be even more involvement, in order to strengthen the family and its members.⁷⁵ In this sense, CFL is antagonistic to legal abstention advocacy. While even Eekelaar claims that such abstention is not a "total immunity from the law,"⁷⁶ the guidelines he provides for what in his eyes is legitimate legal intervention are vague, and could potentially put the family at the top of a slippery slope whose bottom is the classical common law noninterventionist approach.

68 MICHAEL WALZER, *SPHERES OF JUSTICE* (1983).

69 Eichner, *supra* note 8, at 99-100.

70 *Id.* at 103.

71 *Id.* at 121; *see also* Hila Shamir, *The State of Care: Rethinking the Distributive Effects of Familial Care Policies in Liberal Welfare States*, 58 AM. J. COMP. L. 953 (2010).

72 *See, e.g.*, MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS* 23-26 (2010); DAVID J. HERRING, *THE PUBLIC FAMILY: EXPLORING ITS ROLE IN DEMOCRATIC SOCIETY* 41-58 (2003).

73 Beck-Gernsheim, *supra* note 8, at 6.

74 Eekelaar, *supra* note 64.

75 Eichner, *supra* note 8, at 121. *But see* Eekelaar, *supra* note 64 (advocating for the abstention of law in most cases).

76 Eekelaar, *supra* note 64, at 91.

Another important dichotomy that CFL has addressed is the biological/psychological opposition, under which patriarchy has clearly preferred the biological.⁷⁷ Blood relationships have been the most prized of all types of kinship, and today's reproductive technologies both enable and implicitly encourage the preference for biology more than ever. The superiority of blood relationship pertains to, among other things, questions of stepparenting, as discussed by Cynthia Bowman who in her article urges lawmakers and policymakers to take account of parental bonds created without biological kinship.⁷⁸ Cultural preference for blood relationships is also the subject of Michael Freeman's and Alice Margaria's inquiry into the French institution of maternal anonymity.⁷⁹ While Bowman's article discusses bonds formed despite the lack of blood relationships, Freeman's and Margaria's article considers the question of overcoming biology in order to sever parental bonds.

International law has not been oblivious to the tensions discussed above, and it plays an increasingly important role as globalization affects the family with phenomena such as marriage tourism, divorce shopping, fertility tourism and migrations, and forces states to reexamine their definitions of the family.⁸⁰ These shifts in the makeup of families around the world raise new concerns about women's status, stemming from emerging global fertility, marriage and adoption markets, and require heightened attention to the impact these changes have on women's status within the family. So far, despite its strong

77 And not only the biological, but the one achieved within wedlock, *see* Judith Butler, *Is Kinship Always Already Heterosexual?*, 13 DIFFERENCES: J. FEMINIST CULTURAL STUD. 14 (2002).

78 Bowman, *supra* note 12, at 134-36.

79 Michael Freeman & Alice Margaria, *Who and What is a Mother? Maternity, Responsibility and Liberty*, 13 THEORETICAL INQUIRIES L. 153, 168 (2012) (arguing that Western culture is responsible "for constructing identity on genes, and so for under-evaluating the importance of social bonds for the development of personality and identity," but eventually accepting this construction as justifying limiting maternal anonymity). A fascinating case study of maternal anonymity is described in E. WAYNE CARP, *ADOPTION POLITICS: BASTARD NATION & BALLOT INITIATIVE 58* (2004). The passage of Measure 58 in Oregon in 1998 (1999 Or. Laws, ch. 2, § 1) allowed adoptees to request and receive their original birth certificates, and enabled them, eventually, to contact their birth parents (usually, their birth mothers). An organization called "Bastard Nation" (led mostly by adopted women) was instrumental in passing this measure and, despite its guerilla-like tactics (inspired by queer activism), promoted a conservative agenda: the restoration of biological kinship, and, perhaps of maternal responsibility and "correct" motherhood.

80 Beck-Gernsheim, *supra* note 8, at 9-13.

and unequivocal stance in favor of gender equality, international law has to a large extent failed to keep up with these changes and to safeguard women's equality within the family, whether traditional or "alternative," at least on the level of enforcement.⁸¹ Ceding to national/domestic norms, international norms have remained, for the most part, a mere statement (albeit an extremely important one) on the preferred legal regime.

B. Suggested Future Directions for CFL

Moving beyond marriage as the focal point of family law, CFL should address the more general question of rights and obligations. This question is oftentimes neglected, and it is an important preliminary question which pertains to almost any family law issue, from marriage to reproduction. What do rights such as the right to marry, reproductive rights or the right to know one's biological parents mean? Aren't they in fact political stances? And what are the socio-legal consequences of recognizing such rights? While challenges to the traditional *allocation* of rights and obligations within the family are extremely important, the *ideology behind their very definition as rights or obligations* should serve as an indispensable starting point for every CFL analysis. In other words, I am not fully convinced that the current directions CFL has taken (such as contesting the public/private dichotomy or its other variants) are sufficient in order to extract its full liberating potential, both theoretically and practically.

For example, the debate about the right to become a parent fails, to a large extent, to probe whether there is (or should be) such a right in the first place. Margaret Munalula asserts that "there is no right to irresponsible procreation,"⁸² but I would like to push the envelope a little further and ask whether there is a human right to procreation in general, responsible or not. The existence of such a right entails obligations on the part of states and individuals, as well as social expectations that might turn the right into the norm. For example, in a society in which such a right is recognized, and as a result gay couples have children through surrogacy, couples who choose not to have children become (ironically) deviants. Moreover, if this is a right, the state has the obligation to facilitate its fulfillment (such as supplying surrogate mothers and egg donors). Many of these questions, such as whether single women should have access to IVF, gay couples should have access to surrogacy, or a married woman should receive sperm donations from a man who is not her

81 See Halperin-Kaddari & Freeman, *supra* note 54.

82 Mulela Margaret Munalula, *Rethinking the Right to Procreate: An African Imperative*, 13 THEORETICAL INQUIRIES L. 303, 305 (2012).

husband, are very new. They did not exist in the pre-reproductive technology era, and have been, very quickly and uncritically, transformed into questions of human rights, specifically of the right to become a parent.

An even more basic question arises regarding the right to procreate, as Margaret Munalula points out in her article. Should we balance a man's or a woman's right to procreate (assuming that there is such a right) with the not-yet-conceived child's right to a dignified existence? What is a dignified existence? Is it related to economic means, to the number of parents, to their sexual orientation, to their parental skills? And how do we balance such competing rights? How can one measure the benefit (or harm) in being born to a poor family as opposed to a middle-class one? One can read Munalula's discussion as questioning the consensus around a human right to procreate, and, in this sense, it is indeed a CFL analysis.

The development and dissemination of reproductive technologies also reflect the social value of the superiority of blood relations over other types of relationship, such as adoption.⁸³ The availability of these technologies (as well as the availability of blood or tissue typing tests), in turn, strengthens this value and elevates access to such technologies to a human right. It is important to note that advanced technologies do not necessarily promote "advanced" values; they can actually both reflect and promote quite a conservative agenda. CFL can highlight and critically analyze this paradoxical role of reproductive technologies in enforcing traditional values, especially against the backdrop of their subversive potential to deconstruct blood relations and family structure. Reinforcement of biology, CFL can show, is not the only possible outcome of reproductive technologies.

In the same vein, scholarship and activism committed to promotion of equal access to marriage fail to question the basic tenets of marriage supremacy. CFL — more specifically, feminist and queer analyses — refuses to take such rights for granted, and insists on challenging these fundamental axioms. One of them is that marriage is good for everyone.⁸⁴ New CFL will have to address more specifically (and more directly) the tension between the theoretical development and deconstruction of the Political Family, and real

83 On the invention and dissemination of new technologies as both reflecting and enhancing societal values, see, for example, Gaia Bernstein & Zvi Triger, *Over-Parenting*, 44 U.C. DAVIS L. REV. 1221, 1228 (2011).

84 See KATHRYN EDIN & MARIA KEFALAS, *PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE* (2005); Kathryn Edin, *What Do Low-Income Single Mothers Say About Marriage?*, 47 SOC. PROBS. 112 (2000) (showing that oftentimes American black women are worse off if they marry unsuccessful black men); see also BOWMAN, *supra* note 13, at 240.

people's life experiences, which oftentimes challenge theoretical assumptions (such as "marriage is good/bad/patriarchal/subversive," etc.). After all, the Political Family is not only a construct, but also a functioning social unit.

Such challenges to some of the fundamental socio-legal axioms of family law are necessary also because of the globalization of both family formation (for example, through marriage or reproductive tourism) and family maintenance (e.g., migrant caretakers). While Beck-Gernsheim discusses phenomena such as individualization and globalization as recent developments that are slowly breaking down the conventional understanding of the family, along with the rights and obligations it entails, I have argued above that the existence of "families" as opposed to "the Family" is not new. The trafficking in care-workers and spouses (or non-spousal sexual companions), in many cases in the form of slavery, is as old as human imperialism. Perhaps the novelty in contemporary CFL is its insistence on a discursive shift from "the Family" to "families," a shift that recognizes an existing reality, rather than identifying a new reality, as Beck-Gernsheim contends.⁸⁵ Recognition of the existence of "families," as opposed to "the Family," forces us to reconsider parents' obligations to their children, whether financial⁸⁶ or moral,⁸⁷ inasmuch as "Parent" is exposed as a political construct, a member of the Political Family, and not merely a "natural" fact.

Individualization and globalization are also responsible for a possible comeback of the ancient meaning of family as including the household, with its paid caregivers. In many Western middle- and upper-middle-class families, care for the young as well as for the elderly is outsourced to paid professional caregivers, who are very often labor migrants from less affluent countries. On the one hand, paid caregivers are employees. On the other hand, in many cases they are really companions, or perform very intimate chores, which even the care recipient's relatives do not perform. This duality is fascinating: an economic relationship that has the seed of emotional attachment. Should this be taken into consideration when we think about families? Most scholarly work on this question has been in labor law⁸⁸ and has largely not touched

85 Beck-Gernsheim, *supra* note 8, at 5; see also JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 109-55 (2011).

86 Ayelet Blecher-Prigat, *The Costs of Raising Children: Toward a Theory of Financial Obligations between Co-Parents*, 13 *THEORETICAL INQUIRIES L.* 179 (2012); Bowman, *supra* note 12, at 128.

87 Freeman & Margaria, *supra* note 79.

88 See, e.g., Guy Mundlak & Hila Shamir, *Between Intimacy and Allegiance: The Legal Construction of Domestic and Carework in the Welfare State*, in *MIGRATION AND DOMESTIC WORK: A EUROPEAN PERSPECTIVE ON A GLOBAL THEME* 161 (Helma

upon the shifts that these global trends produce in the very definition of the family. Do children raised primarily by a non-citizen migrant nanny have a right to a protected relationship with her? Does this right trump immigration policies or parental employment decisions? As families evolve and change in oftentimes unpredictable directions, sooner or later family law scholars will have to address these questions.⁸⁹ Being a fundamental question of what a family is and who are considered to be its members, the absence of paid caretakers from family law is a product of the Political Family. This is another example showing that CFL's role is to question basic rights rather than their allocation (though it may appear to be merely an issue of allocation), because it goes to the very root of the makeup of the Political Family. This is not a simple question of allocation, because it challenges the notions of the Political Parent and the Political Child. Therefore, opening the discussion to include the *familia* (in the sense of household members, whether or not they are biologically related, and as opposed to "the Family"), CFL can radically transform our understanding of this unit. An egalitarian reallocation of rights and obligations would (hopefully) follow.

A related issue is the growing recognition of the tensions between children's interests and parents' interests.⁹⁰ Three aspects of this tension are discussed in this issue: obligations between co-parents, anonymous birth, and stepparenting. The aspect of parent-child tension is discussed in Ayelet Blecher-Prigat's article.⁹¹ Blecher-Prigat advocates a shift from a vertical parent-child analysis of parental obligations to a horizontal analysis which treats parenting as a joint endeavor that creates rights and obligations between the parents themselves, not only between each parent separately and the child. Her observation that "[t]he way in which parenthood (or rather joint parenthood) operates within horizontal relationships between adults has failed

Lutz ed., 2008); Peggy R. Smith, *Elder Care, Gender, and Work: The Work-Family Issue of the 21st Century*, 25 BERKELEY J. EMP. & LAB. L. 351 (2004).

89 While migration of care is as old a phenomenon as the diversity of families described at the beginning of the Article, its modern properties and context are different: While in antiquity it was mostly forced (through the mechanism of slavery), today's care migration has a larger choice basis. It is also compensated (though unfairly, in many cases). Another important difference is that unlike in slavery care cultures, modern perception recognizes love, intimacy and relationships. The Child's Best Interest principle, for example (and children's rights in general), requires us to rethink the ramifications of the bonds between children and their paid caregivers.

90 Freeman & Margaria, *supra* note 79, at 174-78; *see also* Munalula, *supra* note 82.

91 *See* Blecher-Prigat, *supra* note 86.

to gain sufficient legal notice”⁹² shows the complexity of the political matrix within the Political Family: It is based not only on a gendered division of labor, but also on an age-based division between adults and children. Blecher-Prigat challenges the latter division, implying that it has an ideological impetus, and urges lawmakers and policymakers to think afresh about this web of ties within the family.⁹³

The remaining two aspects pertain to the notion of supremacy of blood ties. The French institution of anonymous birth, which gives women the choice of giving birth anonymously, is discussed in Michael Freeman’s and Alice Margaria’s article. While this institution contradicts the modern notion of “spontaneous parental acceptance,”⁹⁴ it is probably a remnant of the ancient practice of ritual acceptance (or rejection) of a newborn into the family (usually by the father or the *paterfamilias*).⁹⁵ In many cultures of the ancient East, paternity and maternity had to be actively asserted, and were not automatically recognized.⁹⁶ While the authors reject this institution for reasons related to the child’s “right to an open future,”⁹⁷ the existence of such a right is not convincingly enough explained, as it takes for granted the central role that culture assigns to blood ties in the formation of one’s identity.

Finally, stepparenting, a growing phenomenon in Western countries, provides a unique challenge to the parent-child tension, because of its subversive potential to undermine the cultural supremacy of blood relationships. Increasing socio-legal acceptance of cohabitation without marriage and of same-sex relationships (at least in some countries) is forcing the law to take account of relationships such as stepparent-child or non-biological parent-child, and to accommodate them. Law is gradually beginning to recognize the psychological reality of individuals involved in these old-new relationships and to take into account the consequences of severing these connections in the event of separation.⁹⁸ Such changes challenge the two-biological-parent model, which in itself is not as old and “natural” as patriarchal and traditionalist

92 *Id.* at 183.

93 *Id.* at 187-88.

94 Freeman & Margaria, *supra* note 79.

95 DAVID I. KERTZER, SACRIFICED FOR HONOR: ITALIAN INFANT ABANDONMENT AND THE POLITICS OF REPRODUCTIVE CONTROL 8 (1993); John Eastburn Boswell, *Expositio and Oblatio: The Abandonment of Children and the Ancient and Medieval Family*, 89 AM. HIST. REV. 10 (1984).

96 JOSEPH FLEISHMAN, HORIM VI’YLADIM BEMISHPATEI HAMIZRAH HAKADUM UVEMISHPAT HAMIKERA [PARENT AND CHILD IN THE ANCIENT NEAR EAST AND THE BIBLE] 13-41 (1999) (Isr.).

97 Freeman & Margaria, *supra* note 79, at 178.

98 *See, e.g.*, Bowman, *supra* note 12, at 134-36.

approaches to the family claim. While I agree with Cynthia Bowman that clear standards for recognition of such relationships are necessary, I wonder to what extent setting a fixed period of coresidence as a prerequisite for imposing a child support obligation on a non-biological cohabitant parent in fact imitates marriage, in the sense that only an “objective fact” (marriage license, lapse of time) creates such an obligation. While psychological criteria such as attachment can prove to be murky and defy cultural predilections for predictability and clarity of standards, it is overreaching to presume that time is the only factor that can determine the level of legally recognized attachment. Not only does attachment between adults and children occur in different paces depending on the parties’ personalities, but it can also be quite significant without cohabitation or totally insignificant despite prolonged cohabitation. Thus, I would suggest using the coresidence period as only one of various factors, and without any strong presumptive power.⁹⁹

A related aspect of the parent-child tension, not directly discussed in this issue, concerns the number of parents a child can have. This stems from a larger notion of who are considered to be parents, stirred by empirical work in other fields, and it could be an additional and important undertaking of CFL: empirical studies of patriarchal claims regarding “nature.” Recent evolutionary anthropological research has shown that the multiple-parent model, called “alloparenting,” was the dominant parenting model among early hominids.¹⁰⁰ The involvement of non-biological parents in the raising of a child was “central to the success of early hominids,”¹⁰¹ without which “there never could have been a human species.”¹⁰² The patriarchal dyad, therefore, is a feature not of the ahistorical and natural human condition, but rather of an ideological order which seeks to enforce a gendered division of labor within a social context that values atomistic, monogamous, heterosexual relationships, disconnected from one another. Within this context, patriarchal mothering, meaning the prescription of the “good mother” as part of the “correct” and “natural” order, is in fact, as Sarah Blaffer Hrdy argues, the product of “pre-conceived Western ideals of how a mother *should* care for her infant.”¹⁰³

99 See Ayelet Blecher-Prigat & Daphna Hacker, *Strangers or Parents: The Current and the Desirable Legal Status of Parents’ Spouses*, 40 MISHPATIM [HEBREW U. L. REV.] 5 (2010) (Isr.) (exploring some of these questions in the Israeli context, showing that Israeli courts have failed to adopt consistent criteria for resolving cases involving stepparents, and suggesting a model for approaching such cases).

100 SARAH BLAFFER HRDY, *MOTHERS AND OTHERS: THE EVOLUTIONARY ORIGINS OF MUTUAL UNDERSTANDING* 109 (2009).

101 *Id.* at 147.

102 *Id.* at 109.

103 *Id.* at 84. For the psychological ramifications of Hrdy’s findings, see, for example,

While empirical work in evolutionary anthropology helps expose patriarchy as an ideology rather than a natural order, empirical data do not always inform family policies and legislation. Reg Graycar's article nicely demonstrates what happens when patriarchal ideology and a good helping of wishful thinking trump data and empirical research¹⁰⁴: Australian men's organizations working within a "gender war framework"¹⁰⁵ have succeeded in promoting problematic legislation that causes injustice to children and their mothers. Interestingly enough, those who invoke "nature" as justifying patriarchy seem to be the ones resisting empirical data and thus reinforcing the Political Family's uniform (ideal) makeup, while ignoring its actual manifold nature.

Tightrope walking along a thin, almost unseen (yet immensely strong) wire of patriarchal ideology that invokes nature and facts while opposing any attempt at putting them to the test, the Political Family is in need of CFL. CFL's promise is not to release the Political Family from its politics, but rather to help us better negotiate its makeup, so that it serves and fulfills the needs and desires of actual individuals, rather than those of imagined, idealized abstract concepts.

CONCLUSION

One of the main features of the family is that it fulfills basic human needs for connection, stability, and predictability. In today's world, connection, stability and predictability are all in danger. Our notion of connections and human bonds is constantly changing. Is a video conference call the same as sitting together at the family dinner table? Are text messages a good substitute for a phone call? Is online dating as effective as face-to-face dating or as matchmaking? I raise these questions not rhetorically, but as genuinely open questions. As regards stability, divorce rates and separation rates are as high as they have ever been. Because of internet dating we are all constantly exposed to countless romantic and sexual possibilities, and are under the impression

CAROL GILLIGAN, *JOINING THE RESISTANCE* 51-57 (2011). Bowman also points out that "it is now commonly accepted that children are able to adjust to multiple 'parents' — indeed, that those relationships may prove helpful or essential to their needs." Bowman, *supra* note 12, at 136. For a legal discussion of the definition of parenthood, see, for example, Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL'Y 47 (2007).

104 Reg Graycar, *Family Law Reform in Australia, or Frozen Chooks Revisited Again?*, 13 THEORETICAL INQUIRIES L. 241, (2012).

105 *Id.* at 268.

(or the illusion) that the most perfect match is out there and, if we only search diligently enough, we will find him or her.¹⁰⁶

In many countries family law seems to be lagging behind societal developments. It has to react to social facts such as cohabitation that ends in separation, same-sex custody disputes, and other cases of non- or partially recognized family relationships and configurations that stumble into conflict. Surprisingly, in many cases, society is more accepting than the law, although its members are convinced that the law is as advanced as they are.¹⁰⁷ In this sense, CFL is not only a theoretical endeavor, but also one that is practiced everyday by countless families around the world.

This may explain why family law is perhaps one of the most important fields of law when trying to understand the basic tenets of a legal system, and why family law reforms motivated by a national interest rather than a concern for human rights in general, and gender equality in particular, cannot achieve true equality. Its importance, however, stands in stark contradiction to family law's peripheral nature in law schools and practice. Is this a result of oversight, or of ideological choice? I believe that new CFL may help us solve this paradox and unravel the political and ideological forces behind the marginalization of family law. My tentative speculation would be that this marginalization is the product of an ideological choice, even if an unconscious one, and not of an oversight. The marginalization helps sustain the transparent nature of patriarchy within the Political Family and, indeed, the transparent nature of the "Political" within the Political Family.

Plutarch's gossip column on Cato, Marcia and Hortensius shows us that "alternative" is not always egalitarian. One important voice that is absent from Plutarch's story is Marcia's. She serves as a tool for establishing relationships between men.¹⁰⁸ The story resonates with the modern scenario of two gay men hiring a foreign surrogate mother to bear their child. CFL, as presented here, would recognize both the subversive potential of such a scenario (what will become of the patriarchal division of labor in such a case?), as well as the millennia-old narrative of two men using the female body to form and strengthen a relationship between them. This is a Political Family, with all its complexity, and CFL has yet to explore this scenario and many more alike.

106 ZYGMUNT BAUMAN, *LIQUID LOVE: ON THE FRAILTY OF HUMAN BONDS* 1-37 (2003); EVA ILLOUZ, *COLD INTIMACIES: THE MAKING OF EMOTIONAL CAPITALISM* 74-107 (2007).

107 See, e.g., Ellman & Braver, *supra* note 64, at 223.

108 On women's objectification within relationships between men, see Luce Irigaray, *Women on the Market*, in *THE LOGIC OF THE GIFT: TOWARD AN ETHIC OF GENEROSITY* 174, 175 (Alan D. Schrift ed., 1997).