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## After Gender: Tools for Progressives in a Shift from Sexual Domination to the Economic Family

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# After Gender: Tools for Progressives in a Shift from Sexual Domination to the Economic Family

Janet Halley\*

When transnational law looks at sex, gender, and sexuality today, what does it identify as “the problem”? I think it is safe to say that the answer is “male domination, in, through, and *as* sexuality”—that is, the core idea of Catherine A. MacKinnon’s structuralist sexual-subordination feminism (“SSSF” for purposes of this Essay)—complexified somewhat by some cultural feminist inputs, such as the idea that women’s maternal role gives them access to redemptive strategies that men cannot be counted on to understand.<sup>1</sup> The papers collected in this Symposium suggest, however, that this delimitation of “the problem” is itself a problem—that at the very least, the remedial imaginary of transnational law needs to add a concern for the dominations that occur in and as gender (and thus to add a more positive project on behalf of men and masculinity as sites of deprivation and injury) and in and as the repression of nonnormative sexuality (and thus to work on behalf of sexual minorities and erotic liberation generally).<sup>2</sup> I

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\* Many thanks to Darren Rosenblum for organizing this Symposium and to the *Pace Law Review* editors for their patient work converting it to print. © Janet Halley.

1. The latter appears in transitional-justice projects, where the idea that women are pacific agents has found a foothold, and in development agendas that identify women as the preferred target of entrepreneurializing economic reform strategies. Though these are very significant new forms of governance feminism, I set them aside in this Introduction.

2. I use “gender” here to indicate the whole range of social practices distributing maleness and femaleness, masculinity and femininity, and every elaboration of the relations between these ideal modes of human performance; their social mutabilities and fixities; and their various relationships to power. I do not include in my use of the term the currently canonical feminist-internationalist sense of the term to refer to the “socially

think that many Symposium contributors have the intuition that the SSS feminists “got there first” with their ideas about sexuality as domination, and that we are in a deep game of catch-up. I believe the alliance between structuralist feminists working against male domination through sex and sexuality, on one hand, and social conservatives working to enforce their ideas of sexual morality, on the other, makes us feel outnumbered, outgunned.

But there are many ways in which contributions to this Symposium map well onto the structuralist feminist idea of what international law is and is good for. When Hilary Charlesworth, Christine Chinkin, and Shelly Wright set forth the reform template in their seminal 1991 article *Feminist Approaches to International Law*, they clearly understood that human rights were the best wedge for piercing the private/public distinction.<sup>3</sup> Charlesworth, Chinkin, and Wright took aim at a private/public distinction that constructs the masculine as the public and the feminine as the private; international law as the public and sovereign autonomy as its private; objectivity as a public virtue and subjectivity as a private one; and public affairs as the concern of international law and the suffering of women in daily life as the private, the local, housed within the sovereign. Human rights, which purport at least to commit nation states internationally to manage the populations within their own borders in accord with declared minima for the conduct of daily life, constituted the ideal instrument for piercing this distinction, for infiltrating international law with feminist thinking and feminist projects and for tethering autonomous sovereigns to its prescriptions. It was also a way of pressuring Western societies to adopt those prescriptions: having held them high as

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constructed,” as opposed to “given,” dimensions of the M/F distinction. This latter definition of gender implies the sexual-subordination idea; it presumes the domination of F by M not only in, but *as*, culture. For a discussion of this idea as feminists partially installed it in the Rome Statute, see Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 MICH. J. INT’L L.1 (2009).

3. Christine Chinkin, Hilary Charlesworth & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT’L L. 613, 625-34, 638-43 (1991).

ideals for the third—or developing—world, first-world or developed nations could be shamed into adopting them as their own. The turn to human rights fit well within the focus on political and civil rights that has conventionally fallen within the comfort zone of the internationalist North and West. Women's participation (political rights) and relief from sexual domination figured as the elimination of discrimination (civil rights) would do the trick; there was no need to deal deeply with social and economic factors which could lead one to think in the disfavored register of social and economic rights.

That, at least, was the idea. And it still is: I think it animates much of the work by participants in this Symposium and their allies within human rights law and humanitarian law. We want to work within the basic internationalist feminist framework, but we want to do it with dysphorias and utopias about sex, gender, and sexuality that depart—mildly or radically—from the SSSF idea. This Symposium has been a wonderfully rich sharing of our best ideas for how to do that.

In introducing this Symposium, I want to suggest one way to depart from (and not discard!) that basic template. I refer to the “Up Against Family Law Exceptionalism (UAFLE)” project which I have helped to develop over the last several years with many collaborators.<sup>4</sup> In this project, we agree that the

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4. For an introduction to the Up Against Family Law Exceptionalism conference, see Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law*, 58 AM. J. COMP. L. 753 (2010) [hereinafter Halley & Rittich, *Critical Directions*]. That article introduces a special issue of the *American Journal of Comparative Law* which I edited, entitled *Critical Directions in Comparative Family Law*, 58 AM. J. COMP. L. (2010). It contains essays emerging from the UAFLE conference. For the genealogy of Family Law Exceptionalism, see Duncan Kennedy, *Savigny's Family/Patrimony Distinction and its Place in the Global Genealogy of Classical Legal Thought*, 58 AM. J. COMP. L. 811 (2010); Isabel J. Jaramillo, *The Social Approach to Family Law: Conclusions from the Canonical Family Law Treatises of Latin America*, 58 AM. J. COMP. L. 8 (2010); Philomila Tsoukala, *Marrying Family Law to the Nation*, 58 AM. J. COMP. L. 873 (2010); and Lama Abu Odeh, *Honor Killings and the Construction of Gender in Arab Societies*, 58 AM. J. COMP. L. 911 (2010). For studies of the modern economic family, see 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); Chantal Thomas, *Migrant Domestic Workers in Egypt: A Case Study of the Economic Family in Global*

private/public distinction that Charlesworth, Chinkin, and Wright identified as the problem is an ideological scrim. But we go on to observe ways in which human rights traverses the global scene with problematic, and not necessarily redemptive, force. And we suggest that the household can be an alternative frame—semiautonomous from sex, gender and sexuality—within which to figure out emancipation projects, to identify constituencies on whose behalf one can meaningfully spend one's energies, and to locate legal levers with which to help them.

My message: we are not just up against SSSF—we are also up against family law exceptionalism. We are UAFLE!

In setting out briefly the potential rewards of this turn, I am first going to set forth a historical account of how family law exceptionalism (FLE) emerged (Part I below); then suggest some analytic procedures for dealing with it (Part II below); and then, finally, apply those procedures to an international law project in which SSSF has played an important formative role—the new trafficking regime (Part III).

## I. How Family Law Came to Exist, and to Be Exceptional

The private/public distinction, as William Blackstone constructed it in 1765, was remarkably different from our own.<sup>5</sup>

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*Context*, 58 AM. J. COMP. L. 987 (2010) [hereinafter Thomas, *Migrant Domestic Workers in Egypt*]; Kerry Rittich, *Black Sites: Locating the Family and Family Law in Development*, 58 AM. J. COMP. L. 1023 (2010); and the articles by Philomila Tsoukala and Lama Abu Odeh just cited. For an overview of what we sought as “Critical Directions in Comparative Family Law,” see Fernanda G. Nicola, *Family Law Exceptionalism in Comparative Law*, 58 AM. J. COMP. L. 753 (2010); and for a critical assessment of FLE as a linchpin for core/periphery dynamics in law, see Maria Rosaria Marella, 19 AM. U. J. GENDER SOC. POL’Y & L. 721 (2011). Works in progress include Hedayat Heikal, *Family as Jurisdiction: From Dispossession to the Family in Colonial Algeria* (2009) (unpublished manuscript) (on file with the author); Sylvia Kang’ara, *Western Legal Ideas in African Family Law* (2010) (unpublished manuscript) (on file with the author); Yun-Ru Chen, *Maneuvering Modernity: Family Law as a Battlefield in Colonial Taiwan* (2011) (unpublished manuscript) (on file with author).

5. The following six paragraphs compress and revise passages from Janet Halley, *What is Family Law?: A Genealogy Part I*, 23 YALE J.L. &

In his book on the Rights of Persons, the first chapter is devoted to the “Absolute Rights of Individuals.” Here is the harbinger of the general individual of modern liberalism.<sup>6</sup> But following this, we encounter a series of explicitly public kinds of persons: Parliament,<sup>7</sup> King,<sup>8</sup> the King’s Royal Family,<sup>9</sup> through to “the People, whether Aliens, Denizens, or Natives,”<sup>10</sup> and concluding with “the Military and Maritime States.”<sup>11</sup> Blackstone then turned to a series of “*private* oeconomical relations”: master and servant, husband and wife, parent and child, guardian and ward, and corporations.<sup>12</sup> Note that “marriage” is only his second “private relation of persons”; master and servant come first. The “*private* oeconomical relations” housed what we would now call employment (master/servant), marriage (husband/wife), parentage (parent/child), and wardship (guardian and ward).<sup>13</sup> It also housed corporations.

A brief etymological digression is needed to get us back to what Blackstone could have meant by calling these relations “oeconomical.” The term derives ultimately from the ancient Greek word οἶκος<sup>14</sup> and is our etymological root for the term *economy*.<sup>15</sup> At the time Blackstone used the term, it meant “of or relating to household management, or to the ordering of private affairs; domestic.”<sup>16</sup> Later, early in the nineteenth

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HUMAN. 1, 7-9 (2011).

6. 1 WILLIAM BLACKSTONE, COMMENTARIES, \*121 (photo. reprint 1979) (1765).

7. *Id.* at \*146.

8. *Id.* at \*190.

9. *Id.* at \*218.

10. *Id.* at \*366.

11. *Id.* at \*407.

12. *Id.* at \*422, \*466 (emphasis in original).

13. *See id.* at \*422-66.

14. *Oeconomus Definition*, OXFORD ENGLISH DICTIONARY ONLINE, <http://www.oed.com/viewdictionaryentry/Entry/130498> (last visited Nov. 21, 2011).

15. *Economy Definition*, OXFORD ENGLISH DICTIONARY ONLINE, <http://www.oed.com/viewdictionaryentry/Entry/59393> (last visited Nov. 21, 2011).

16. *Economic Definition*, OXFORD ENGLISH DICTIONARY ONLINE, B.1.a., <http://www.oed.com/viewdictionaryentry/Entry/59384> (last visited Nov. 21,

century, a new sense of the word emerged: one “relating to the management of domestic or private income and expenditure.”<sup>17</sup> In this economy, husband and wife, parent and child, guardian and ward, master and servant (master and slave, where slavery was recognized, although not in Blackstone’s England) lived out their hierarchical lives; reciprocal, not equal, rights prevailed. These legal relations were, moreover, no more or less economical than corporations. Beyond the world of legal concepts, considered as an architectural space and a social form, this classification invokes not the home or the family but the *household*, a space for both human and material production, for the making, consumption, and distribution of wealth and material goods. The legal distinction between the family and the market finds no expression in this legal or social order; the future trajectory of the word “economy” is one index of its gradual, as-yet-unforeseen emergence within it.

By 1870, when American legal minds had finally put this classification completely to rest, the modern uses of the word “economic” had turned it *from* the household *to* the market. By the mid-nineteenth-century we begin to see uses of “economical” to mean “of, relating to, or concerned with the science of economics or with the economy in general; relating to the development and regulation of the material resources of a community or state.”<sup>18</sup> By the time classical legal thought took hold, “economic” had completely ceased to refer to the household and was primarily a term for monetary, financial, and commercial relations, with a smattering of meanings tying it to thrift and good management *of* those relations.<sup>19</sup> That is to

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2011). The *OED* declares that this sense of the word “economic” is obsolete, and gives a final example dated 1791. *Id.*

17. *Id.* at B.1.b.

18. *Id.* at B.4.a. The *OED* first example of “economic” used to describe a national economic system dates from 1815. *Id.*

19. In addition to the senses quoted above, see *id.*, at B.3.a. (“Esp. of a person: characterized by thrift (sometimes, parsimony); careful in the management of financial resources”; the first example of this use is dated 1755): B.3.b. (“Characterized by or tending to economy in the use of resources; efficient, not wasteful”; the first example of this use is dated 1794): B.4.c. (“Relating to the generation of income; maintained for the sake of profit”; the first example of this use is dated 1854).



say, the word “economic” had been completely captured for *the market*.

Over the *longue durée* of the rise of liberal capitalism, another word went through similarly significant changes: the word *family*. It derives from the Latin term for servant or slave (*famulus*), and its first English meaning was “[t]he servants of a house or establishment; the household.”<sup>20</sup> Not the domestic space as a whole; not husband and wife/parent and child: just the servants. The *Oxford English Dictionary (OED)* indicates that this sense is quite old—the earliest example dates from 1400—and that it is obsolete; it provides no examples after 1794. But we could add an example from 1839, a rare item in the Harvard Law Library, its first book on file titled “Family Law.” This title shows that it still made sense then to think of the family as a managerial network rather than a domestic space: *The Family Law Advisor: Containing Plain Advice to Landlord and Tenant . . . Master and Servant . . . Executors and Administrators . . . To Make a Will . . .*<sup>21</sup>

The next sense to emerge was “[t]he body of persons who live in one house or under one head, including parents, children, servants, etc.”<sup>22</sup> In 1631, Star Chamber heard a case involving a man of whom it was said, “[h]is family were himself and his wife and daughters, two mayds, and a man.”<sup>23</sup> This sense emerged in the mid-sixteenth century; the *OED* does not

20. *Family Definition*, OXFORD ENGLISH DICTIONARY ONLINE, <http://www.oed.com/viewdictionaryentry/Entry/67975> (last visited Nov. 21, 2011).

21. HENRY WASHBOURNE, *THE FAMILY LAW ADVISOR: CONTAINING PLAIN ADVICE TO LANDLORD AND TENANT . . . MASTER AND SERVANT . . . EXECUTORS AND ADMINISTRATORS . . . TO MAKE A WILL . . .* (1839). The ellipses in the title do not reflect omissions but rather appear on the title page and in the official entry in the Harvard Hollis catalogue. Hollis describes this entry as “[a] publisher’s collection of four of his own separately issued popular law manuals, here bound up (without original title leaves) with a general title.” *Hollis Entry for THE FAMILY LAW ADVISOR: CONTAINING PLAIN ADVICE TO LANDLORD AND TENANT . . . MASTER AND SERVANT . . . EXECUTORS AND ADMINISTRATORS . . . TO MAKE A WILL . . .*, HARVARD COLLEGE LIBRARY, <http://discovery.lib.harvard.edu/?itemid=|library/m/aleph|002032951> (last visited Aug. 19, 2011). Clearly someone thought that this collection of topics made sense to the law-book-buying public.

22. *Family Definition*, *supra* note 20, at I.2.a.

23. *Id.*

say it is obsolete but gives no examples after 1859, the eve of the American Civil War. And surely it *is* obsolete; when we now read about antebellum Southern slave-owners expressing concern for “[m]y family, black and white,”<sup>24</sup> the expression strikes us as the absolute height of hypocrisy, but I think we have to face it: to them it was merely descriptive.

So before the Civil War, “family” still meant the household, with its relations of husband and wife, parent and child, and master and servant. So far, the “family” cohered well with Blackstone’s “*private* oeconomical relations.” But after the Civil War, servants were decidedly dropped from the referent of “family”: the standard sense of the word became “[t]he group of persons consisting of the parents and their children, whether actually living together or not; in wider sense, the unity formed by those who are nearly connected by blood or affinity.”<sup>25</sup> The *OED* quotes James Mill referring in 1869 to the still smaller unit sometimes called the companionate, nuclear, or bourgeois family: “The group which consists of a Father, Mother and Children, is called a Family.”<sup>26</sup>

Over the course of these etymological transitions, the words economy and family travelled along chiasmatic trajectories. From a single household that was both economic and familial, the English lexicon gradually moved to sever these two characteristics: the household became the family and in the process became not-economic; and the economic became

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24. See ELIZABETH FOX-GENOVESE, *WITHIN THE PLANTATION HOUSEHOLD: BLACK AND WHITE WOMEN OF THE OLD SOUTH* 32, 100-01, 133, 204 (1988).

25. *Family Definition*, *supra* note 20, at I.3.a. From the earliest to the latest dates comprised by this story, an additional, always less salient meaning also existed: “Those descended or claiming descent from a common ancestor; a house, kindred, lineage.” *Id.* at I.4.a. Almost all the examples tip the term in the direction of aristocratic lineage: “People of no ‘family.’” *Id.* at I.4.b. (quoting JEREMY BENTHAM, *ELEMENTS OF THE ART OF PACKING, AS APPLIED TO SPECIAL JURIES, PARTICULARLY IN CASES OF LIBEL LAW* 146 (1821)). This is the sense in which Savigny used the term. See generally FRIEDRICH CARL VON SAVIGNY, *SYSTEM OF THE MODERN ROMAN LAW* (William Holloway trans., Hyperion Press 1979) (1867). But there was no useable sense of “family” at this time, in America, to correspond with the affinal patriarchal family which was Savigny’s actual object of attention. *Id.*

26. *Id.* at I.3.a. (quoting 2 JAMES MILL, *ANALYSIS OF THE PHENOMENA OF THE HUMAN MIND* 218 (1869)).

the market and in the process not-familial. Millions of unnamed users of the English language gradually drew a market/family distinction—indeed, a market/family *opposition*—that is completely harmonious with liberal capitalism and separate spheres ideology. It is hard to believe that these coincidences are purely accidental; instead, I am going to posit them as symptomatic of modernist ideology.

Another transition, this one specifically legal, was simultaneously underway, one that allocated contract to the market and status to the family, and that posited the transnational character of the former and the national character of the latter. These new meanings were specifically legal, and were sedimented onto the family/market distinction during the rise of classical legal thought, the dominant mode of imagining law in the latter half of the nineteenth century.<sup>27</sup> What follows is a highly compressed summary of the place of the family and family law in colonialism<sup>28</sup> and postcolonial nationalism,<sup>29</sup> focusing on work done in and around the UAFLE project by Duncan Kennedy, Maria Rosaria Marella, Philomila Tsoukala, Yun-Ru Chen, Hedayat Heikal, Sylvia Kang'ara, and many others.<sup>30</sup>

As Kennedy shows in a close reading of some seminal pages by Friedrich Carl von Savigny, an immensely influential legal thinker of the nineteenth-century German Historical School, the global spread of German legal ideas during the rise of classical legal thought carried to every corner of the world a

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27. For the classic account of classical legal thought in American legal consciousness, see DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* (1975). Kennedy describes classical legal thought as a global wave of influence in Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 19 (David M. Trubek & Alvaro Santos eds., 2006) [hereinafter Kennedy, *Three Globalizations*].

28. Lama Abu-Odeh, *Modernizing Muslim Family Law: The Case of Egypt*, 37 *VAND. J. TRANSNAT'L L.* 1043 (2004); JUDITH SURKIS, *Civilization and the Civil Code: The Scandal of "Child Marriage" in French Algeria*, in *SCANDALOUS SUBJECTS: INTIMACY AND INDECENCY IN FRANCE AND FRENCH ALGERIA* (forthcoming).

29. Partha Chatterjee, *The Nation and its Women*, in *THE NATION AND ITS FRAGMENTS: COLONIAL AND POSTCOLONIAL HISTORIES* 113 (1993).

30. See *supra* note 4.

pattern highly compatible with the lexical and ideological shifts I have just outlined.<sup>31</sup> Kennedy reveals how Savigny's *System of the Modern Roman Law* was expressly concerned to pitch family law against the law of obligations (the law of contract and property) and to make this distinction both profound and rich with signification.<sup>32</sup> Summarizing Kennedy's analysis, Kerry Rittich and I derived what we have called the Savignian pattern, pitching paired opposites against each other:

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

The Savignian pattern posits a conceptual dependency of

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31. This paragraph, including the chart on the next page, is derived from Halley & Rittich, *Critical Directions*, *supra* note 4, at 757.

32. Kennedy, *supra* note 4 (giving an analysis of FRIEDRICH CARL VON SAVIGNY, *SYSTEM OF THE MODERN ROMAN LAW* (William Holloway trans., Hyperion Press 1979) (1867)).

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

This pattern emerged repeatedly in the colonial and postcolonial contexts—not always of course, and persistently with highly distinct features that require close local study. Still, it may be safe to generalize colonial/postcolonial FLE this way: colonial powers considered it important to establish transnational rules and jurisdictional structures for the administration of commerce and to ensure that, as far as possible, those rules and institutions would conform with European law (Savigny's law of obligations). At the same time, they either made deals with local elites to keep their hands off genuinely local law, which turned out again and again to be the law of husband and wife, parent and child, marriage, divorce, and sometimes inheritance (Savigny's family law), or simply forgot the law of the household because it did not interfere with their projects.<sup>33</sup> Colonial elites and postcolonial nationalists again and again (although not always) found in the Savignian pattern a reason to frame the rules governing their households as "family law"—which had to remain untouched by imperial interference because it expressed the spirit of the people—while figuring out ways to maintain the integration of law governing commerce with European legal sources. The fact that, in many non-Western contexts, the household was still

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33. For an account of intense colonial management of family law in Christian Sub-Saharan Africa, see Kang'ara, *Western Legal Ideas in African Family Law*, *supra* note 4. Abu-Odeh gives an account in which the Islamic rules of marriage and divorce, and of parental rights and duties, were ignored by the architects of English indirect rule in Egypt, effectively residualizing what was later to become housed in Egyptian Personal Status Law or "family law." See Abu-Odeh, *Modernizing Egyptian Family Law*, *supra* note 28.

fully economic and the law of husband and wife (and so on) were not categorically distinct from the law of commerce did not matter: to modernize meant to find some way to accommodate the distinction.<sup>34</sup> We are left with a family that is in fact exceptionalized from the market—and that is not. FLE is both real and a mirage.

At the same time, in the colonial order, sexual wrongs against women remained a matter for the colonist's concern. Targeting footbinding, sati, and child marriage demonized the patriarchal culture of the colony, legitimating colonial intervention not only in the family but *tout court*. Lurid sexual dominations occurring in the East and the South were not, like the family, relegated to the local; their laws ran the gamut from colonial prohibition to colonial administration.<sup>35</sup> Feminists were quick to reimport the condemnation, analogizing coverture, registered prostitution, and the sexual double standard at home with practices officially denounced only when located far away.<sup>36</sup> I am sure I am not the first to detect precursors of today's SSSF constructs in human rights in these colonial morals campaigns.

Why is this story worth telling today? Because we still live in the world constructed by a family/market distinction nested in a national/international distinction. In that distinction, the family is presumptively local and indigenous; in the rise of nationalism it became national. This was part of an emerging modern international order that simultaneously secured the assumption that the law of the market was or should be smoothly transnational. The family was never private: it was one term in a division of legal authority on an international scale.

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34. For a dramatic account of the merger of Savigny's two columns in pre-contact Chinese law, see Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STAN. L. REV. 1599 (2000).

35. For a detailed account focusing on British imperial practice in India, see Janaki Nair, 'Social Reform' and the Woman's Question, in WOMEN AND LAW IN COLONIAL INDIA: A SOCIAL HISTORY 49-68 (2000).

36. ELIZABETH W. ANDREW & KATHARINE C. BUSHNELL, THE QUEEN'S DAUGHTERS IN INDIA (1899). Thanks to Prabha Kotiswaran for bringing this rich source to my attention.

## II. Tearing Away the Scrim: How to Notice the Economic Family

James Q. Whitman cleverly notes that what we now call family law was, in pre-modern and early-modern Europe, the equivalent of our contemporary law of mergers and acquisitions. The economic significance of marriage, parentage, and related elements of the legal order is now scaled down from the state and the princely household, and broadened to the population. Thanks in part to FLE, it has disappeared. But it has not gone away. Hence the second part of the UAFLE project: The Economic Family.

The hypothesis here is that the “family” is a mystified but crucial economic factor. Its law—the body of rules that directly govern adult/adult dependent intimacy and parentage—is an historical accident, but we have it now. In the UAFLE project, we have developed a series of tools for undoing the ideological effects flowing from the construction of family and family law in FLE terms.<sup>37</sup> I will set out two of them here.

One is to undo the construction of family law by extending our topic beyond the bounds they have been given in the emergence of FLE. We call the law that happened to fall within family law Family Law 1. There is a lot of law that directly regulates the family contained within legal topics commonly understood to be both economically significant and nonfamilial: employment law; the law governing social security programs, both public (welfare) and private (pensions and the like); immigration law; criminal law; tax law; and the list could go on. For instance, a spouse typically is legally entitled to a deceased spouse’s unpaid retirement plan funds; such a provision may be more decisive to the ongoing life of a household than, say, a Family Law 1 regime like divorce. We call that law Family Law 2. And we consider law that helps to set the bargaining terms of family members with each other, with employers, and so on, but that is silent about family

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37. For a full account, see Halley & Rittich, *Critical Directions*, *supra* note 4, 761-67. The following two paragraphs are compressed and revised from these pages.

relationships, to be equally relevant, though hidden by FLE in the background. For instance, in the U.S., public school funding is typically local, so that the quality of public education is tethered to the wealth or poverty of the school district in which schools are located and funded; and a child is entitled to attend public schools only in the school district where he or she resides. As a result, families with children strive to live in the best school district they can afford, and they hold onto their homes even if divorce, bankruptcy, or their own job locations make doing so catastrophically costly for them. The school funding and attendance laws do not mention families or family law. But they have such a significant impact on the class strategies of actual parents that it seems almost insane not to consider them Family Law. We call law with this “disparate impact” on family behavior Family Law 3. Figuring out how these three domains of family law interact is one way of undoing the tendency of FLE to hide the economic functions of the family.

A second pathway is to undo the construction of the social family to take into account dependency relations that intertwine those of spouses, legal cohabitants, and parent and child but that did not make it into the legal family. The term “family” entrenches marriage and parentage and occludes many additional and/or alternative economic relations that are continually routing through the domestic space. We are not talking about the much-vaunted effort to get recognition and legal “dignity” for nonnormative relationships; this is a purely descriptive project. *Merely to describe*, we need to get beyond the family. Where to?

Working from a definition of the modern household developed by neo-Marxist World Systems theorists Immanuel Wallerstein and Joan Smith, we add to the term “family” a quite different term: the “household.”<sup>38</sup> Usefully, Wallerstein and Smith deem a household to be a human association bounded through social negotiation and aimed at securing

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38. Immanuel Wallerstein & Joan Smith, *Households as an Institution of the World-Economy*, in *CREATING AND TRANSFORMING HOUSEHOLDS: THE CONSTRAINTS OF THE WORLD ECONOMY* 3, 7, 11, 13 (1992). Thanks to Meredith Petrin for bringing this source to my attention.



human reproduction, including reproduction from day to day of its members as well as the production of new human beings. In liberal economic orders, it is an important source of social security. In modern capitalism, it is a crucial site of consumption. It may be either larger or smaller than the legally recognized family, may include non-family members, and may be made up of people with no recognized family relationship to each other. All household members may live in the same residence, or they may not. What is crucial is that households pool income and labor resources in that they allocate work responsibilities and income streams among household members for the purposes of reproducing both existing and new humans, securing social security, and contextualizing and distributing the costs and benefits of consumption.

In the Wallerstein/Smith model, any one person may be a member of more than one household. The polygamous husband and the live-in nanny can be examples, but so can young adults living in a university dormitory where students cook meals for one another but return home for vacations.

Above all, the household is economic both in the sense that it has an internal economy that can be studied and in the sense that it is continuous with the market economy—including the informal economy<sup>39</sup>—in which it is inextricably embedded and with which it engages in myriad dynamic transactions.

### III. Applying the Tools to a Problem in the International Legal Recognition of Sex, Sexuality, and Gender

To conclude, I want to apply the tools described in Part II of this Introduction to an important real-world phenomenon which, I think, SSSF got wrong: trafficking of the sex worker.<sup>40</sup>

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39. A key tool of the UAFLE project has been to attend not only to formal, but to informal relationships; not only to formal but to informal markets. The work of Chantal Thomas is consistently acute here. *See, e.g.*, Thomas, *Migrant Domestic Workers in Egypt*, *supra* note 4.

40. For an account of the SSSF approach to the international legal prohibition of trafficking, see Chantal Thomas in Janet Halley, Prabha

If we collaborate with FLE, the migratory sex worker is completely different from the migratory nanny. The household labor that the nanny does and the sex work that the sex worker does inhabit distinct domains: one works in the home and the other in the market. On a moral or an equality-oriented metric, one engages in labor that is perceived as unproblematic while the other engages in highly problematic labor. Nothing could be more different than taking care of kids for pay and giving a stranger a blow job for pay. But let us unpin that. We can see marriage as a complex exchange that includes bargained-for sex that is only ideationally distinct from bargained-for sex obtained in the market.<sup>41</sup> And we can make both of those continuous with the problem of finding someone to care for children, the ill, and the elderly. From the point of view of a young, economically desperate woman taking the plunge into illegal migration, there is actually a decision to be made here: which of these forms of labor is more or less unbearable, more or less remunerative, safer/more dangerous, etc.?

Now, following the lead of many of the contributions to this Symposium, we can unpin the presumption that our migratory heroine is gendered female: we can make him male. We can now put migration for work in construction, mining, agriculture, or industry on a continuum with our nanny/sex worker.

All of these figures, moreover, participate in households: the households from which they migrate and the households into which they migrate. For the nanny, this pattern is especially interesting because the second of these households is usually seen as *someone else's family*. Part of the project here is to specify the foreground and background rules that sustain the working conditions and wages of these different figures, and to give the households in which they pool income their due

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Kotiswaran, Hila Shamir & Chantal Thomas, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 349-51, 388-93 (2006).

41. Prabha Kotiswaran, *Wives and Whores: Prospects for a Feminist Theory of Distribution*, in SEXUALITY AND THE LAW: FEMINIST ENGAGEMENTS 283 (Vanessa E. Munro & Carl F. Stychin eds., 2007).

as crucial nexuses of their welfare. Case studies in the UAFLE project have demonstrated, I think conclusively, that the legal regimes relevant to the migrant nanny, for instance, are, at a minimum: immigration law, labor/employment law (from which she is likely to be present by her absence), welfare law, and family law of the destination country; almost all of these in the country of origin, and finally the international legal regimes regulating labor migration.<sup>42</sup> For the migrant sex worker who lives and works in a brothel, substitute the brothel for the family, and do the analysis again from the top. And for the migrant miner, substitute the company dormitory for the brothel and the family, and do it yet again.

These re-framings are important because they open up the possibility of performing a distributive analysis of the relative advantage and disadvantage enjoyed and suffered by economically desperate migrants. They constitute the first step in identifying the bargaining endowments of differently-situated migrants. The safety and danger of their migration and their work do not depend abstractly on the label we attach to their endpoint work sector—prostitution/work sex, domestic work, agricultural work—but on specific pathways by which they deal with pervasively coercive economic need.

What was it about SSSF ideology that took these moves off the table? I think the narrowing of the migratory labor picture that we see there is attributable to several ideological commitments. One of them is a strong preference, almost categorical, for female constituencies. Another is a continuing commitment to the sexual-subordination thesis, either with or without exceptions allowing for nontrafficked prostitution.<sup>43</sup> But another, hidden in the deep background, is the family/market distinction. Migratory female labor destined to sex work is represented in the SSSF paradigm to be categorically unlike migratory female labor destined to domestic service; and both of these are represented, in turn, to be completely unlike migratory male labor destined for work in labor markets, whether formal or informal. Unpinning FLE

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42. See, e.g., Shamir, *supra* note 4; Thomas, *supra* note 4.

43. Thomas in Halley et al., *supra* note 40, at 349-51, 388-93.

helps to reveal continuities between these phenomena and enables us to develop descriptive and normative projects that span various distances along the resulting continuum.

I am going to run that analytic on a centerpiece of SSSF law reform in the international sphere: the trafficking regime. In the SSSF representation of international trafficking, facilitating prostitution in any way is per se trafficking because prostitution exemplifies sexual domination: it is all-inclusive. Trafficking of women and girls into prostitution and other segments of the sex industry fully occupies the field of illegal trafficking: it is all-exclusive. The trafficking of men into prostitution does not warrant anything approaching the concern granted to the trafficking of women and girls into prostitution. The trafficking of women into domestic labor goes unmentioned. The trafficking of men and women into seriously exploitative work that lacks any particular gender ordering drops off the agenda completely.

The legal tools are criminalization and rescue. The primary goal is to use the international criminal law and the international human rights system to require and/or recruit states to abolish sex work at the international level and at the level of national law. Inasmuch as abolition is the declared goal, criminal law tools—criminalizing traffickers, “criminalizing demand”—occupy the horizon of the legal tools imagined to be useful to protect the project’s preferred victims. And inasmuch as prostitution is identical to sexual slavery on a collapsed continuum of sexual injury,<sup>44</sup> women’s choices to participate in it are themselves evidence of their domination in the sexual order: will they or nil they, they must be removed from prostitution even if that means returning them to the conditions from which they fled into it.

Propounders of SSSF immediately took note when the relatively rich and powerful countries of the global North and West sought treaty commitments from the relatively poor and weak countries of the global East and South to stanch the flow

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44. Sharon Marcus, *Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention*, in *FEMINISTS THEORIZE THE POLITICAL* 385, 389 (Judith Butler & Joan Scott eds., 1992).

of unwanted migration into the former from the latter. Discussions leading to the 2000 Palermo Protocols focused on two forms of trade that the powerful nations wanted to constrain: human migration from the developing world into the developed world, and arms trafficking. Palermo was a large initiative aimed at expanding international criminal law in part by boosting it with expanded domestic border control. Three protocols emanated from the Palermo meetings: a Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children; a Protocol against the Smuggling of Migrants by Land, Sea and Air; and Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition.<sup>45</sup> The signatories promised to criminalize the illegal weapons trade, human smuggling, and human trafficking.

Structuralist sexual-subordination feminists organized a vigorous effort at Vienna, where the Protocols were drafted, to influence the trafficking protocol; feminists who disagreed with SSSF on almost every key point of their program mobilized promptly to exert counter-influence; and U.N. agencies and NGOs seeking to advance the cause of human rights struggled to convert a border control initiative into a human rights victory at best and to forestall a human rights debacle at worst. Overall, their conjoint influence was swamped by the will of the developed world to recruit the developing world into a world with stronger borders, pinned down more intensely by criminal law at the international and the national levels. But precisely because the trafficking piece of Palermo mattered so much to these feminist pugilists, extremely divergent feminist projects came away from Palermo sharing a stake—sometimes overlapping, sometimes conflicting—in the trafficking regime.

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45. Protocol Against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/255, Annex, U.N. Doc. A/RES/55/255 (May 31, 2001); Protocol Against the Smuggling of Migrants by Land, Sea and Air, G.A. Res. 55/25, Annex III, U.N. Doc. A/RES/55/25 (Nov. 15, 2000) [hereinafter Smuggling Protocol]; Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, G.A. Res. 55/25, Annex II, U.N. Doc. A/RES/55/25 (Nov. 15, 2000) [hereinafter Trafficking Protocol].

As Anne Gallagher explains in her magisterial treatise on the international trafficking regime, the Palermo Trafficking Protocol provides a tripartite definition of trafficking: to be trafficking, a practice must exhibit a prohibited act, a prohibited means, and a prohibited purpose.<sup>46</sup> The prohibited acts are “the recruitment, transportation, transfer, harbouring or receipt of persons.”<sup>47</sup> The prohibited means are “the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person.”<sup>48</sup> The prohibited purpose is “exploitation.”<sup>49</sup> The nonexhaustive list of prohibited purposes begins with “the exploitation of the prostitution of others or other forms of sexual exploitation,” followed by “forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”<sup>50</sup>

This definition of trafficking gives prostitution pride of place among the prohibited purposes—a clear SSSF victory. But the prohibited means deny the SSSF axiom that prostitution is per se coerced, a categorical defeat for SSSF. More ambiguously, the Trafficking Protocol makes “the exploitation of the prostitution of others” a form of exploitation: it is not clear whether this redundancy renders prostitution per se a form of exploitation (the SSSF reading) or whether prostitution must be tainted with exploitation to constitute exploitation (the liberal/non-structuralist feminist reading). The Trafficking Protocol requires practices that facilitate prostitution (and other purposes) to be classified as trafficking if they involve “the abuse of power or of a position of

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46. ANNE T. GALLAGHER, *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING* 78 (2010).

47. Trafficking Protocol, *supra* note 45, at art. 3(a).

48. *Id.*

49. *Id.*

50. *Id.* Article Three also provides that, where a prohibited means is employed, the consent of a trafficked person does not take the practice out of the definition of trafficking, *id.* at art. 3(b), and that children are victims of trafficking whenever a prohibited act conjoins with a prohibited purpose, *id.* at art. 3(c). The prohibited means are irrelevant to the definition of child trafficking.

vulnerability.”<sup>51</sup> SSSF deems these elements to be supplied per se by the sexual subordination inherent in prostitution, but the more sex-positive and/or liberal feminist opposition would look here for evidence of social or economic dominance or vulnerability stemming from dynamics *other* than the “purpose” of prostitution alone.<sup>52</sup> As between the feminists at Palermo, this provision was a draw.

United Nations agencies dedicated to human rights protection and human rights NGOs, meanwhile, were alarmed that trafficking had come to the attention of the countries of the developed world as a crime and border control issue. They intervened directly in the Vienna discussions and sought to strengthen human rights recognition and enforcement within the developing trafficking and smuggling Protocols. Observers sympathetic with this effort consistently conclude that the bitter and protracted battles over the place of prostitution in the definition of trafficking, pitting SSS feminists against human rights NGOs, materially weakened the latter in their larger battle to convert the Trafficking and Smuggling Protocols into human rights instruments.<sup>53</sup>

Meanwhile, the Clinton Administration and Congress had become concerned that the U.S. was becoming the unwilling recipient of illegal labor migration, and, increasingly during the late 1990s, *trafficking* became a consensus way for opposing political forces to capitalize on U.S. border control anxieties. SSS feminists, religious conservatives, and anti-immigration forces could all decry trafficking and get behind legislation to criminalize it. The result was the Trafficking Victims Protection Act of 2000 (TVPA).<sup>54</sup> This statute commits

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51. *Id.* at art. 3(a).

52. See Thomas in Halley et al., *supra* note 40, at 347-60.

53. Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT'L L. 437, 447 (2006); Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975, 1002-03 (2001); Thomas in Halley et al., *supra* note 40, at 438-60.

54. See Trafficking Victims Protection Act (TVPA) of 2000, Pub. L. No. 106-386, div. A, 114 Stat. 1464 (codified as amended in scattered sections of 8, 18, 22 U.S.C. (2006)). The TVPA has since been revisited and altered three times. See Trafficking Victims Protection Reauthorization Act (TVPRA) of

the U.S. to criminal anti-trafficking efforts and makes U.S. foreign aid dependent on receiving countries' compliance with "minimum standards for the elimination of trafficking."<sup>55</sup> To warrant retention in the United States' favor, countries "should prohibit severe forms of trafficking in persons and punish acts of such trafficking."<sup>56</sup> The TVPA established a Trafficking in Persons (TIP) Office of the State Department to produce annual TIP reports on countries around the world, assessing the degree to which they meet the TVPA's minimum standards for reducing severe forms of trafficking. Countries are ranked in a three-tier scale; U.S. development and security aid is categorically denied to Tier 3 states.

In the making of the TVPA, the SSSF agenda was, again, relatively successful in installing its preferred focus on the abolition of prostitution. The TVPA defines "severe forms of trafficking in persons" to mean:

- (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
- (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, though the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.<sup>57</sup>

A person who is subjected to any of these acts is a "victim of a

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2003, Pub. L. No. 108-193, 117 Stat. 2875 (codified in scattered sections of 8, 18, 22 U.S.C.); Trafficking Victims Protection Reauthorization Act (TVPRA) of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006) (codified in scattered sections of 18, 22, 42 U.S.C.); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (codified in scattered sections of 6, 8, 18, 22, 42 U.S.C.).

55. TVPA § 108(A).

56. *Id.* § 108(A)(1).

57. *Id.* § 103(8).



severe form of trafficking.”<sup>58</sup> Once again, the SSSF aim of defining commercial sex as per se trafficking went down to defeat. But in another way, SSSF got better traction in the definition of trafficking in Washington than it did in Vienna. The TVPA segregates prostitution as a distinct type of severe trafficking and places fewer conditions on its being deemed to be severe trafficking than on labor in any other conceivable sector.<sup>59</sup> The sale of sex does the work for prostitution that recruitment, harboring, transportation, provision or obtaining of a person—*plus* the purposes of subjection in involuntary services, peonage, debt bondage, or slavery—do in all other sectors, to qualify a transaction as severe trafficking. Clearly, the TVPA asks enforcers to regard trafficking into sex work as categorically worse than trafficking into domestic service or agricultural work.

Moreover, SSSF influence on the drafting of the TVPA resulted in an anomalous series of provisions relating to trafficking generally, without the requirement that it be severe. A person is a “victim of trafficking” if subjected to any of the acts detailed in the definition of “severe forms of trafficking” quoted just above *or* to acts defined in the subsequent subsection, defining “sex trafficking.” Sex trafficking “means the recruitment, harboring, transportation, provision or obtaining of a person for the purpose of a commercial sex act.”<sup>60</sup> A “commercial sex act” is defined, in turn, as “any sex act on account of which anything of value is given to or received by any person.”<sup>61</sup> These provisions mark the high water mark of SSSF influence on the drafting of the TVPA: engaging in prostitution is per se trafficking, without any requirement that it be coercive. Nothing in the TVPA grants the State Department authority to condition a country’s tier status on the degree to which it prohibits and punishes mere trafficking: the provisions I have quoted in this

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58. *Id.* § 103(13).

59. Chuang, *supra* note 53, at 467 & n.146. For other ways in which the TVPA regime exceeds the Palermo Protocol in exceptionalizing sex work, see *id.* at 467-70.

60. TVPA § 103(9).

61. *Id.* § 103(3).

paragraph receive no further elaboration across the entire expanse of the TVPA. But they are there, ready to spring to life if SSSF pressure on Congress can ever produce legislation directed solely to trafficking.

One of the four minimum standards set out in the TVPA specifically focuses attention on sex trafficking, making it an indispensable, though not the exclusive, focus of the regime. Countries should “prescribe punishment commensurate with that for grave crimes, such as forcible sexual assault[,]” for the following acts: “the knowing commission of any act of sex trafficking involving force, fraud, coercion, or in which the victim of sex trafficking is a child incapable of giving meaningful consent, or of trafficking which includes rape or kidnapping or which causes a death . . . .”<sup>62</sup> And one of the eleven factors that the TIP office must take into account when deciding whether minimum standards have been met is:

- (11) Whether the government of the country has made serious and sustained efforts to reduce the demand for—
  - (A) commercial sex acts; and
  - (B) participation in international sex tourism by nationals of the country.<sup>63</sup>

As between the SSSF position and that of the liberal/sex-work feminists, these provisions too are a draw. The idea that prostitution is *always* forced or coercive was rejected: to be severe trafficking within the TVPA, trafficking of an adult into prostitution must *also* involve force, fraud, or coercion. But the TIP Office is authorized to penalize countries that fail to make sustained efforts to “reduce demand” for commercial sex. “Ending demand”—for prostitution, not for other forms of dangerous labor—is a central aim of the SSSF agenda, and it now enjoys positive U.S. policy enforcement on a global scale.<sup>64</sup>

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62. *Id.* § 108(a)(2).

63. 22 U.S.C. § 7106 (b)(11) (2008).

64. For the SSSF theory that “ending demand” is a promising abolitionist vehicle, see, for example, Janice G. Raymond, *Prostitution on*

The SSSF agenda in the trafficking regime is therefore to capture its considerable enforcement resources for a global anti-prostitution campaign. Every other element of the international management of labor flows falls off the SSSF agenda. In my remaining pages I will take two steps to recontextualize trafficking, one reconnecting the Palermo Trafficking Protocol and the TVPA to northern border control anxieties; the other reconnecting victims of coerced sex work with vulnerable migratory labor generally.

How intently does the Trafficking Protocol, augmented by the TVPA, protect victims? The regime provides several protective and/or remedial commitments for victims of trafficking. Signatories to the Palermo Trafficking Protocol promise to protect privacy and confidentiality of victim information where appropriate and to the extent possible;<sup>65</sup> to provide victims information and an opportunity to be heard in appropriate cases;<sup>66</sup> to take into account the age, gender, and special needs of victims;<sup>67</sup> and to provide means for victims to claim compensation.<sup>68</sup> Article 8 commits signatories, when they are the country of origin for a trafficking victim, to “facilitate and accept . . . the return of [the trafficking victim] without undue or unreasonable delay . . . but with due regard to the safety of [the victim].”<sup>69</sup> The Trafficking Protocol is silent on the important human rights priority, that receiving countries should not prosecute trafficking victims for illegal in-migration. One could argue that this silence differentiates the Trafficking

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*Demand: Legalizing the Buyer as Sexual Consumer*, 10 VIOLENCE AGAINST WOMEN 1156 (2004). For an argument that decontextualizing demand produces misleading descriptive analysis and misdirected policy recommendations, see BRIDGET ANDERSON & JULIA O’CONNELL DAVIDSON, IS TRAFFICKING IN HUMAN BEINGS DEMAND DRIVEN?: A MULTI-COUNTRY PILOT STUDY (2003). For a recent TIP Office “Fact Sheet” largely adopting the SSSF “end demand” platform, see OFFICE TO MONITOR & COMBAT TRAFFICKING IN PERSONS, PREVENTION: FIGHTING SEX TRAFFICKING BY CURBING DEMAND FOR PROSTITUTION (June 2011), available at <http://www.state.gov/documents/organization/167329.pdf>.

65. Trafficking Protocol, *supra* note 45, at art. 6 para. 1.

66. *Id.* at art. 6, para. 2(b).

67. *Id.* at art. 6, para. 4.

68. *Id.* at art. 6, para. 6.

69. *Id.* at art. 8, para. 1, 2.

Protocol from the Smuggling Protocol, which provides that receiving countries can prosecute smuggled (but not trafficked) illegal migrants for violating domestic immigration law.<sup>70</sup> By implication, trafficking victims cannot be prosecuted for status offenses. But as Gallagher reports, receiving countries worried about their exposure to immigration categorically refused to tolerate the insertion of a similar ban into the Trafficking Protocol when human rights NGOs proposed one.<sup>71</sup> The lacuna could be read to imply not prohibition but permission.

Many of the most lauded remedies for trafficking victims achieved at Palermo and enforced through the TVPA's surveillance/sanctions regime are merely recommended, not mandatory. The Palermo Trafficking Protocol provides that states "shall consider" "provid[ing] for the physical, psychological and social recovery of victims . . . in appropriate cases, in cooperation with non-governmental organizations . . . and, in particular, [providing]: (a) Appropriate housing; (b) Counselling and information . . . regard[ing] their legal rights . . . ; (c) Medical, psychological, and material assistance; and (d) Employment, educational and training opportunities."<sup>72</sup> They are similarly encouraged to, but not required to, "permit victims . . . to remain in its territory, temporarily or permanently, in appropriate cases."<sup>73</sup> *If* they adopt a visa program, they *must* "give appropriate consideration to humanitarian and compassionate factors."<sup>74</sup> In the TVPA the

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70. The Smuggling Protocol provides that "Nothing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law," Smuggling Protocol, *supra* note 45, at art. 6, para. 4, *and* that "Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol," *id.* at art. 5. Article Six contains the Protocol's definition of human smuggling. *Id.* at art. 6. Thus migrants *can* be liable to criminal prosecution under domestic law except when the relevant provisions of domestic law were adopted to comply with Protocol obligations. That is to say, the Palermo Smuggling Protocol permits states to criminalize illegal in-migration but cannot be invoked to *increase* smuggled in-migrants' exposure to criminal sanctions.

71. Gallagher, *supra* note 53, at 990-91.

72. Trafficking Protocol, *supra* note 45, at art. 6, para. 3.

73. *Id.* at art. 7, para. 1.

74. *Id.* at art. 7, para. 2.

U.S. promised to certify trafficking victims present in the U.S. as temporary legal aliens only if they cooperated with the prosecution of their traffickers, and only for the duration of their cooperation.<sup>75</sup> This was an innovation; nothing in the Palermo regime indicates that victim cooperation may be made a condition of their non-repatriation. Most victims would regard cooperating with law enforcement as a seriously costly enterprise. Inclusion of this provision in the TVPA signals that, in the TIP enforcement system, the U.S. would permit other countries to condition permission to stay on cooperation with law enforcement. Finally, the Palermo Protocol provides that repatriation “shall preferably be voluntary,”—a provision that permits coercive repatriation (trafficking in reverse?).<sup>76</sup> A provision banning involuntary repatriation was proposed and rejected at Vienna.<sup>77</sup>

Human rights advocates at Vienna were well aware that migrants with plausible claims for refugee status and asylum in the receiving country, and with a corresponding right to non-*refoulement* to the country from which they have fled, might be caught up in the anti-trafficking and anti-smuggling machinery and repatriated before they could invoke protection under refugee law.<sup>78</sup> In the closing sessions of the Vienna process, they managed to persuade the drafters to include in the Smuggling Protocol a saving clause providing that “[n]othing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law,” explicitly including refugee law.<sup>79</sup> That human rights advocates had to fight so hard to obtain this victory, and that they did so only in the closing hours of negotiation over the

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75. TVPA, 22 U.S.C. § 7105 (b)(1)(E) (2006).

76. Trafficking Protocol, *supra* note 45, at art. 8, para. 2.

77. Gallagher, *supra* note 53, at 992.

78. *Id.* at 992, 994-95, 1000. *See also id.* at 998 (discussing the promulgation of the Palermo Smuggling Protocol).

79. As Gallagher relates, a saving clause with the language quoted above had already been included in the draft Trafficking Protocol, and the battle was over human rights advocates' insistence that it be included in the Smuggling Protocol also. Gallagher, *supra* note 53, at 839-40, 840 n.209. For the final provisions, see Trafficking Protocol, *supra* note 45, at art. 19, para. 1; Smuggling Protocol, *supra* note 45, art. 19 para. 1.

Smuggling Protocol, signals not only how rigorously they defended their constituencies at Vienna but also how hostile an environment they were working in. One scents the receiving countries' hope that, by strengthening anti-smuggling criminal law internationally, they could attenuate their commitments to refugee protection. The identification or categorization of migrants as agents of their own smuggling, victims of trafficking or refugees has been relegated to the discretion of law enforcement and border-control bureaucrats.

Now let us assess the idea that the Palermo/TVPA anti-trafficking regime is a human rights regime. In the law on the books, victims of trafficking are probably but not certainly protected from criminal prosecution for illegal entry; a receiving country may at its discretion make trafficking victims eligible for visas allowing them to stay there legally; it may make cooperation with law enforcement the condition of extended legal stay; but the only remedy signatory states committed themselves to is repatriation. Countries of origin must accept their nationals back; and repatriation is only preferably, not necessarily, voluntary on the part of the trafficking victim. Narrow that further by focusing this small remedial project on trafficked *sex* workers, as the Bush administration did exclusively, and as the Obama administration is doing predominantly. Expand it, however, by augmenting it with the Smuggling Protocol, which makes it easy for refugees entitled to non-*refoulement*, and trafficking victims perhaps entitled to non-criminalization and even in some receiving countries to social services and visa eligibility, to be charged with criminal entry, detained, and deported before they appear in the field of vision of anyone competent to, and moved by any incentive to, determine whether they are entitled to more protection.<sup>80</sup>

Chantal Thomas classifies the Trafficking Protocol as international criminal law, not international human rights

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80. For a convincing claim that this is happening in the U.S., see Dina Francesca Haynes, *Exploitation Nation: The Thin and Grey Legal Lines between Trafficked Persons and Abused Migrant Laborers*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 44 (2009).

law.<sup>81</sup> Plotting refugee law, human rights law, the conventions of the International Labor Organization, trade law, and international criminal law on one axis registering their devotion to individual rights and on another registering their policy commitment to state sovereignty, she limns in international criminal law as purely sovereigntist: the existence of the Trafficking Protocol does not move her to credit international criminal law with even a blip of protection for migratory workers.<sup>82</sup> Implicitly she asks: How is it a human right to be forcibly repatriated to the state which one was fleeing, at the behest of a receiving country unwilling to allow entry? That is border control, not human rights.

She has a point. I hope my highly abbreviated description of the various bits of legal real estate won by SSSF and its religious conservative allies, by receiving countries and by human rights advocates in the construction of the anti-trafficking regime allows readers to begin the process of deciding for themselves whether they want to see the regime as

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81. Chantal Thomas, *Convergences and Divergences in International Legal Norms on Migratory Labor*, 32 COMP. LAB. L. & POL'Y J. 405, 437-39 (2011). Thomas analyzes bodies of international law that condition the bargaining power of labor migrants and their families with respect to a specific set of human rights: (1) the general right to nondiscrimination; (2) the right of territorial entry; (3) the right to work and conditions of work; (4) freedoms of expression, association, and assembly; and (5) criminal due process. She accurately concludes that the Trafficking Protocol establishes no binding obligations with respect to these specific rights. *Id.* at 437-39. Rather, she concludes, its primary effect is to establish provisions for substantive and institutional criminal law enforcement related to trafficking. *Id.* Indeed, though Thomas acknowledges the hard-won savings clause discussed above, she also correctly observes that the Protocol establishes no binding obligations to adopt human rights measures more generally. Respect for human rights figures in the Protocol, instead, in aspirational language, for instance, stating as a central purpose the respect for victims' human rights, Trafficking Protocol, *supra* note 45, at art. 2, requesting State Parties to "give appropriate consideration" to humanitarian concerns, *id.* at art. 7, and requesting State Parties to "take into account" victims' human rights as part of law enforcement training, *id.* at art. 10. Thomas, *Convergences and Divergences*, at 437-39. For all these reasons, Thomas has characterized the document elsewhere as prioritizing border control and criminal law enforcement over victims' human rights. Thomas in Halley et al., *supra* note 40, at 388-90.

82. Thomas, *supra* note 81, at 437-39.

Thomas does or in more optimistic terms.

I myself am reluctantly inclined to join Thomas in a pessimistic reading of the new anti-trafficking regime. Without doubt it does include levers which hard-working advocates for endangered and coerced migrants can work with. It is important to identify and use them, to teach them to our students, and to support their expansion wherever possible. But to misconstrue a border-control regime that grants a few penurious protections for migrants *as a human rights regime offering categorical succor to some of the world's most vulnerable populations* is to legitimate the basic message of that border-control regime: however bad it is for you in your passport country, that is where the countries participating in the anti-trafficking regime have determined that you should stay. Similarly, making an international spectacle of rescuing migrant workers from coerced exploitation effectively legitimates non-coerced exploitation. The narrowness of these exceptions proves their rules. In the background, the passport system buttresses the superior bargaining power of international capital as it manages its need for exploitable labor. And progressives barely realize that they lack a legal and political vocabulary for describing and addressing the plight of workers who must consent to their own exploitation or starve.<sup>83</sup>

SSSF has fostered this misprision. The widespread capture of anti-*trafficking* by SSSF and religious conservative anti-*prostitution*, and the almost ubiquitous representation of prostitution as an extreme form of victimization, helped to make it possible to represent this largely (though not exclusively) criminal legal order as a human rights regime. Exaggerating the human rights commitment of the anti-trafficking regime in this way legitimates border control; the organized forgetting of anti-trafficking *as* border control fosters widespread inattention to the potentially devastating consequences for labor migrants both of falling outside and of

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83. I have just reproduced key moves in the legal realist critique of rights, with thanks to Robert Hale, *Coercion and Distribution in a Supposedly Noncoercive State*, 38 POL. SCI. Q. 470 (1923).



coming within the scope of the Trafficking Protocol's protections.<sup>84</sup> Meanwhile, the trafficking of women into relatively safe or acutely dangerous labor market sectors other than sex work falls into oblivion; and the trafficking of men goes almost entirely dark. For feminists, this cascade of misprisions remains either common sense or confusingly difficult to resist, not only because feminists remain loyal to M/F, M>F, and carrying a brief for F, but because they assume that sex for sale, as paradigmatic bad sex, is marked off from other exploited labor by a family/market distinction.

Let us try to pick up the resulting legal event not by the handle labeled "bad sex"—but instead by the handle labeled "safe migration." For an example, consider a 2004 report to the International Organization on Migration by the Bangladesh Thematic Group on Trafficking (BTGT), entitled *Revisiting the Human Trafficking Paradigm: The Bangladesh Experience (Part I: Trafficking of Adults)*.<sup>85</sup> The BTGT gathered observations about relatively successful and dangerous migration from migrants themselves, from experts on international migration, and from aid workers directly serving migrant communities. It was an international *labor* law initiative, not a trafficking initiative. The image of endangered cross-border labor migration that it generated was profoundly different from the one currently sustained by anti-trafficking rhetoric and practice.

The BTGT developed a "matrix" or "flowchart" assembling the background conditions, both social and legal, against which people decide to migrate, actually migrate, and either enjoy or suffer various "migration outcome[s]."<sup>86</sup> The Group sorted factors that lead to a "Harm/Problem" outcome<sup>87</sup> and those that

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84. GLOBAL ALLIANCE AGAINST TRAFFICKING IN WOMEN (GAATW), *COLLATERAL DAMAGE: THE IMPACT OF ANTI-TRAFFICKING MEASURES ON HUMAN RIGHTS AROUND THE WORLD* (2007).

85. BANGLADESH THEMATIC GROUP ON TRAFFICKING, *REVISITING THE HUMAN TRAFFICKING PARADIGM: THE BANGLADESH EXPERIENCE (PART I: TRAFFICKING OF ADULTS)* (2004).

86. *Id.* at 40.

87. *Id.* at 30.

lead to a “No-Harm/Safe Migration Outcome”<sup>88</sup> into subcategories and then scrutinized all of these factors for deeper enabling and disabling contributing conditions. Trafficking was not the modal migratory experience; indeed, trafficking was classified as kidnapping, not migration at all.<sup>89</sup> Migration on this model is by definition voluntary at some level, however compelling the conditions which cause particular migrants to go in motion. And outcomes that result in sex work are equivalent to those that place migrants in domestic labor, industrial work, and agricultural labor: all of them can sustain safe and unsafe outcomes.<sup>90</sup> The conditions of work in various industries, not the kind of work done there, indicate whether the work is harmful or safe.

The Report works inductively *up* to legal remedies from a highly diversified set of descriptors for a highly contingent but comprehensive array of migrant experiences. The BTGT constantly scoured cells in its matrix for conditions that could be changed to conduce towards safer migration. For instance, a segment of the flowchart looked beyond criminal enforcement for legal and policy tools fostering safe migration and intensifying the danger of some migrants’ experiences.<sup>91</sup> (This page is reproduced below as Appendix 1.) And another envisioned ways to keep anti-trafficking enforcement from further victimizing “trafficked persons[.]”<sup>92</sup> (This page is reproduced below as Appendix 2.) Policies that discourage households of origin from sending members into dangerous migration receive just as much attention as criminalization,<sup>93</sup> and socio-economic reintegration of trafficked persons depends just as much on policies aimed at strengthening the extended family as those targeting the community and the workplace.<sup>94</sup> The BTGT Report uncannily tracks the Wallerstein/Smith analytic, so that the wellbeing of an economically desperate

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88. *Id.* at 40.

89. *Id.* at 54.

90. *Id.* at 34.

91. *Id.* at 54.

92. *Id.* at 58.

93. *Id.* at 50.

94. *Id.* at 74.

person on the verge of illegal migration is understood to depend on market opportunities *and* household lifeways. The dynamics the Group sought to make intelligible require us to cast our eyes across the family/market divide.

This shift has implications for legal methodology. One of the biggest mistakes that SSSF made was to imagine that law does what it says it will do, so that, if they managed to build their vision of sexual injustice and sexual emancipation with the stuff of law, the law would put an end to the former and move us towards the latter. Many of us who question the abolitionist effort in prostitution and trafficking, for instance, do so because we do not believe commercial sex will be eliminated because it is prohibited: we think it may instead persist, go underground, and become more dangerous. We think the safety and wages of sex workers could well decline, subject to the same forces that may cause their clientele to become more insensitive to risk. The economic desperation that so commonly motivates women (and men) to turn to sex work will not go away either: partial criminalization may cause them to divert their energies from the sex industry to some other labor market, but they won't necessarily be safer or better paid there. They may become less able to bring income to their households and more dependent on their households to feed, clothe, and house them.

These distributional outcomes cannot be spoken in the abolitionist legal vocabulary: to articulate them, you need something like the BTGT's highly realist approach. They made their flowcharts by adopting the point of view of migrants, not on a collapsed continuum of harm but on a spectrum ranging widely across individual experiences and temporally within any one migrants' experience. They asked how the legal regimes that migrants actually come into contact with create bargaining endowments that condition their interactions with people and institutions all along the chain of migration. It is not just the lurid moment of coercion that captures their attention but the background rules and background conditions that make it more or less likely to happen. The same impulse animated the UAFLE conference to build the Family Law 1/Family Law 2/Family Law 3 analytic appears in the BTGT's

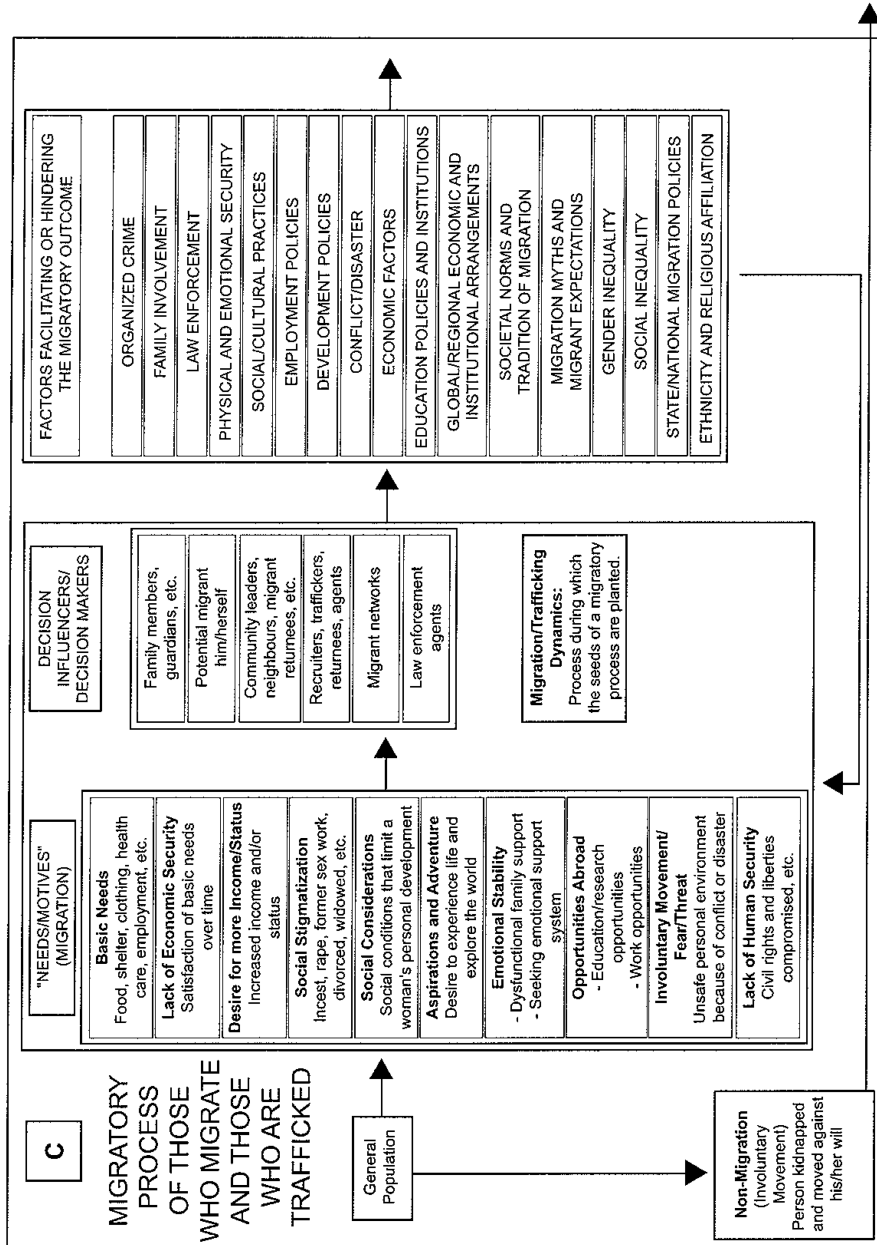
flowcharts as its multiplicity of conditioning institutions and social practices.

I offer *Revisiting the Human Trafficking Paradigm: The Bangladesh Experience* as an experiment in feminist legal realism, unbounded by a rigid commitment to female subordination/male dominance as the sine qua non of gender and fluidly capable of noticing human welfare and human vulnerability as they emerge dynamically across the family/market distinction. In dealing with this striking new strand of feminist thought and action, I think we can find ways to move, in our work on international law, beyond women, beyond even gender, even beyond minority groups, to study and address human welfare and human vulnerability across the household/market nexus.

## **Appendix I**

# **Revisiting the Human Trafficking Paradigm: The Bangladesh Experience (Part I: Trafficking of Adults) Page 54**

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## **Appendix II**

### **Revisiting the Human Trafficking Paradigm: The Bangladesh Experience (Part I: Trafficking of Adults) Page 58**

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