Introduction

The comedy *Modern Family* is currently one of the most successful TV shows in the United States, as well as in other countries. The show, which was created by Christopher Lloyd and Steven Levitan and first aired in September 2009, focuses on three families: a wealthy divorced man married to a much younger Colombian divorcee, co-parenting her child with her; a gay couple — a lawyer and a stay-at-home dad — who have adopted a Vietnamese girl; and a traditional married heterosexual real estate agent and housewife, raising their three biological children. It is quite apparent that the creators of the show have attempted not to miss any of the characteristics of the contemporary idea of what a family is. Surprisingly, the show is very successful among conservative as well as liberal viewers. This may imply that the social acceptance of untraditional families is widespread. On the other hand, the show's success may also be explained by the fact that although the three families are quite diverse, they all conform to traditional and conservative roles and division of labor. The reaction of law to the contemporary family reflects these explanations. Law seems to acknowledge the variety of family constellations, but mostly when they adopt characteristics of the traditional heterosexual family. In other words, law is being transformed, but not as quickly — or as deeply — as families themselves.

The challenge at the basis of this issue is to tackle — and start bridging — the gap between the dramatic changes that have formed contemporary families, on the one hand, and the lagging family legal discourse and theoretical conceptualization, on the other. While families keep changing, legislators and scholars often linger behind. As for courts, since the judicial process is *ad hoc* by nature and usually quicker than legislative processes and theoretical research, courts do tend to be more responsive to the rapid changes. However, they too are bound by the existing legal and theoretical frameworks, and thus keep stumbling over the gap between law and social reality. This results in courts' reaching inconsistent results, creating a confusing and unstable patchwork of adjudication.

The changes within the family institution are both ideological and social. Among the most influential ideological changes is the rise of feminism, which keeps challenging the patriarchal origins and characteristics of families and family law, leading to major changes in working patterns and division of labor in both the public and private spheres. In addition, liberalism has brought with it a changing conception of marriage as contract rather than status,

allowing couples to formulate their own relationships and making divorce and several forms of post-divorce relationship (e.g., second marriage, cohabitation, etc.) easier and more acceptable. Alongside feminism and liberalism, the multicultural turn of the last few decades has led to calls for the preservation of traditional families and religious family laws, creating all together a large variety of family constellations and conceptions, and challenging Western family law.

Accompanying these ideological revolutions, globalization — one of the most influential social changes of the past decades — has set the stage for new challenges stemming from migration, fertility tourism, transfer of ideas and ideologies between countries and cultures, etc. Impressive technological developments have enabled assisted reproduction and raised new questions, such as paternal identity (in the case of sperm donations) and legal motherhood and the concern about compromising human rights (in the case of surrogacy). These technologies also enable single women, as well as homosexual couples, to have children, hence contributing to new kinds of family formations.

The many questions arising due to rapid social and ideological changes and the lagging behind of legal discourse can be analyzed in light of several familiar axes. First, on the realism/dogmatism axis, we may ask whether law should indeed follow those changes and be transformed in accordance with them, or whether it should serve as a dogmatic tool that clearly indicates what the normative family should look like. The answer may lie at any point on this axis, and its exact relative location is a debated and contested issue.

Another axis extends between intervention and abstention. Many of the traditional questions raised in the context of this axis are no longer contested. For instance, state and legal intervention within the familial sphere in cases of domestic violence is widely accepted. However, some more fine-tuned questions are still disputed: Should law intervene where non-egalitarian customs are practiced? Should it determine the labor, monetary and property division between spouses? Some scholars argue that law should intervene only with regard to children's rights and care, while others argue that it should also intervene with regard to relationships between adults. Moreover, law tends to intervene in pathological instances, yet determining what should be considered pathological is, of course, hotly disputed.

On the last axis, that of collectivism/individualism, the main question is whether law should treat the family as a unit or separately address each of its members. A radical collectivist approach — usually attributed to nationalism, religion or communitarism — would view the family as a closed community and mostly refrain from intervening in it, while an individualistic approach would intervene in order to ensure each of the individuals' welfare and rights. The claim is often made that as time goes by family law tends to proceed

towards the individualistic edge, but in many instances law tends to view the family as a closed unit, sometimes preserving subversive relationships within it.

Bringing together scholars from different parts of the world and from different disciplines, this collection deals with these questions, dilemmas and axes from various fascinating perspectives, in order to contribute to the construction of a body of theory about family law that will help scholars and policymakers address current challenges. The first four articles stress some of the theoretical foundations needed for reconceptualizing family law(s). The next four articles dive into specific issues through which the authors offer new theoretical observations on family law. The issue then turns to critical analysis of the ways some countries have responded to the changes described above, and it concludes with an article that introduces the themes of the political family and critical family law and posits each of this issue's articles within those themes.

Elisabeth Beck-Gernsheim opens this issue with an overarching description of the effect that individualization and globalization have had on the concept of the family. Whereas, in the past, "family" represented a clear and fixed formula of a man, woman, and their children, assigning them traditional and gendered roles, today the boundaries are quite blurred and new types of family — or rather families — have been created. The effect of individualization and globalization has found its way into family law as well and requires providing answers for the growing variety of families. Beck-Gernsheim illustrates those legal and cultural changes by using the examples of marriage, divorce, fertility, etc. She concludes by predicting that the future will bring yet more changes and debates over contested familial rights and obligations.

Shahar Lifshitz, in the second article of the issue, presents a detailed analysis of the liberal transformation of spousal law. Stressing three dichotomies (private/public, individualist/family-as-unit, and egalitarian/non-egalitarian) and using various examples and cases, such as property division between spouses, cohabitants, same-sex marriage, and many more, Lifshitz presents the liberal revolution as both historical narrative and normative framework. He criticizes the current rival camps that attempt to formulate and theorize spousal law, and suggests guidelines for a new theoretical framework that negates the existing three dichotomies.

Still within a liberal framework, John Eekelaar invokes the age-old question regarding the relationship between the state's law and the family. He examines, both descriptively and normatively, the different mechanisms for regulating families. After criticizing the common representation of modern individualism as sheer selfishness, Eekelaar suggests three possible models of state intervention. According to him, since social and moral values live

and breathe within families, there is no justification for the application of broad legal norms regarding them, and thus the state should usually refrain from intervening within them. General laws, however, may still be applied in cases that do invoke the need for state's intervention, for instance, when family members' actions do not conform to social norms.

Turning the family-state dyad into a threefold relationship, Maxine Eichner brings in the market, and discusses not only the relationship between the family and the market, but also the state's role in its formulation. Contrary to feminist scholars who call to blur the boundaries between the family and the market because they believe that those boundaries channel women into the private sphere, Eichner leans on Michael Walzer's theory of separate spheres and reveals the dangers of blurring the boundaries. Specifically, she shows that when market forces penetrate the private sphere they tremendously influence caretaking and human development activities. Allowing the market alone to order these activities will result, according to Eichner, in an unjust distribution within and between families. Thus, she argues, the state should provide a buffer between families and the market, while developing welfare policies that support families' caretaking roles.

Ayelet Blecher-Prigat's article, the first in a series of articles diving into specific family law issues, questions the existing legal frameworks in which the costs of raising children are allocated between parents. Blecher-Prigat indicates that law treats parents either within horizontal-romantic relationships or within vertical relationships with their children. However, it ignores their horizontal relationships and responsibilities as co-parents. Thus, she argues, the current legal frameworks usually used for allocating the costs of raising children between both parents, such as alimony, property division, and child support, are deficient. They all tend to miss the sustained loss of income and extra investment contributed by the primary caretaker. Using the example of relocation, Blecher-Prigat lays the foundations for a new theoretical and practical legal framework that would dictate a just allocation of the costs of raising children.

Still in the area of parents and children, Cynthia Bowman raises the issue of the legal relationships between cohabitants and their partners' children. Although the number of cohabiting households in the United States has risen tremendously during the last decades, creating new forms of emotional and financial dependency, law has yet to develop a legal framework that defines and sets the rights and obligations stemming from these relationships. Specifically, law should pay attention to the issues of custody, visitation and child support when a cohabitating relationship is dissolved either by separation or by the death of the biological parent. Bowman concludes her article with suggestions for a comprehensive legal framework.

Another interesting aspect of the parents-children relationship is analyzed by Michael Freeman and Alice Margaria. The authors explore the very delicate subject of giving birth anonymously. By comparing two contradictory models — the French system of *accouchement soux X* which allows anonymous births, and the English system which compels birth-givers to be identified as mothers — Freeman and Margaria address the ethical and legal dilemmas this issue encompasses. Mainly, they are concerned with the right of the child to know his or her identity and origins, as opposed to the right of the mother to renounce her maternity. The authors conclude that children's rights should prevail, and thus the French model of anonymous birth should be rejected.

Focusing on the relationships between spouses, rather than between parents and children, Ira Mark Ellman and Sanford L. Braver examine the lay views of Arizona citizens regarding alimony. The authors conducted a survey that confronted respondents with specific cases, in an attempt to reveal the implicit principles upon which they reach decisions. Strikingly, the survey has shown some considerable divergence between respondents' opinions and current American family law. Specifically, it revealed that people's intuition regarding alimony is much more generous than the official American standards. For instance, unlike Arizona's family law, which grants alimony only in cases in which spouses were married, Ellman and Braver's respondents downplayed the importance of marital status, allowing alimony to cohabitants as well. Given the paucity of theoretical justifications of current American law, these empirical results may pose a challenge to policymakers.

Shelley Gavigan turns the spotlight on Canada's family law. She exposes the ongoing importance of patriarchal notions in the area of the Canadian family periphery, while exploring some tensions within feminist socio-legal theorizing of family and welfare law. Gavigan looks into Canadian law regarding single mothers, lesbian spouses and polygamous wives, and reveals that despite patriarchy's alleged demise — and despite Canada's relatively progressive legislation — patriarchy still has a major influence in all of those cases, even though in most of them there is no resident patriarch.

Reg Graycar shows us that patriarchy has also not vanished in Australia, but has taken quite a different form. Graycar discusses reforms that were introduced to the Australian *Family Law Act* regarding children's custody and guardianship after parents' separation. Through a detailed analysis of the reforms' history, she argues that they were passed without any clear rationale or need and that, while being very responsive to fathers' groups, Australian lawmakers have tended to ignore evidence-based research. Graycar then turns to a few other countries, such as the United Kingdom and Canada, and raises a very interesting question: Why did Australian fathers' groups have such a

major influence on legislators, while similar groups in other countries were not as successful?

Mulela Margaret Munalula's article demonstrates that different countries face different challenges. While some Western countries are attempting to raise birth rates due to their sharp decline, Munalula raises a strong argument for reducing birth rates in Zambia, based on the best interests of children. She draws connections between Africa's poverty and the rapid population growth stemming from cultural customs as well as from the belief that additional children contribute to the family's income. The attempt to find a tenable legal argument takes the author along several paths, analyzing the right to procreate as opposed to the best interest of the child principle; the tort law concept of wrongful birth; and a child's entitlement to support from the perspective of family law and international human rights law. Confronting moral and legal dilemmas, such as the subjective status of the unborn child, she concludes that the right to procreate bears with it the duty to do so responsibly.

Ruth Halperin-Kaddari and Marsha Freeman provide us with an extensive and detailed analysis of the noncompliance of many states with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Article 16 of the convention addresses women's rights within families and the economic aspect of those rights. However, it is also the CEDAW article to which the most reservations have been made by signatory States, because its content collides with current discrimination against women in different regimes around the world, often justified under the title of "multiculturalism." The authors claim that under this title States receive from the United Nations the same treatment as minority subnational cultural groups, although this stands in stark contradiction to the egalitarian constitutions and commitments of the States themselves. Thus, Halperin-Kaddari and Freeman question the adequacy of the multiculturalist argument when applied to States, and set guidelines for local legal reforms that would ensure women's equality and rights while still preserving cultural perceptions and customs.

Concluding this collection, Zvi Triger introduces the concepts of the Political Family and Critical Family Law (CFL). Freshly put, Triger asserts that the phenomenon referred to as "the new family," i.e., the diversity of family constellations, is not in fact novel, and can actually be traced back as far as ancient Rome. Questions about the definition of the family and its members, as well as the nature of the power relations among them, have been hotly debated for many centuries. Families, in this sense, have always been political, whether they conformed to or rejected common views about what a family is. Nonetheless, throughout history all family forms have turned out to be patriarchal. That is why, according to Triger, the evolving CFL project is first and foremost a feminist endeavor. Corresponding with the rest of the

articles in this issue, Triger explores current trends in CFL and urges legal scholars and activists to turn from criticizing primarily the allocation of rights and obligations to questioning, more fundamentally, the justifications and foundations of those rights and obligations.

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