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Savigny's Family/Patrimony Distinction and its Place in the Global Genealogy of Classical Legal Thought†

This Article begins with a close analysis of the distinction between family law and patrimonial law that Savigny developed in the chapter of his System of Modern Roman Law laying out the structure of the corpus juris. *It then examines the place of the distinction in that overall structure. The second part begins by placing Savigny's distinction in the global genealogy of Classical Legal Thought, referring particularly to British developments. It then offers a tentative analysis of the way the distinction resonated with the British Indian colonial policy (similar to that adopted by all the new nineteenth-century colonial powers) of distinguishing sharply between qualified respect for family and religious law and a strongly interventionist policy in the law of the market.*

Introduction

In the first part of this essay, I offer a close reading of the English translation of Chapter One of the Second Book of Friedrich Carl von Savigny's *System of the Modern Roman Law,* published in eight volumes in Germany between 1840 and 1849. The first volume of the *System,* including the text discussed here, was translated by William Holloway and published in 1867.[1] Savigny was an elite German jurist, who lived from 1779 until 1861, and was both a professor, in a time when law faculties decided appellate cases, and eventually a cabinet member in the Prussian government. He was the most famous and influential proponent of two important and, it is sometimes thought, radically incompatible ideas of nineteenth-century Continental legal thought.

The first idea, associated with the term "historical school," was that the true origin of legal norms is in the *Volksgeist* or spirit of the

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1. Friedrich Carl von Savigny, System of the Modern Roman Law (William Holloway trans., Hyperion Press 1979) (1867).

particular people they govern, worked out through the unconscious long-term development of customs, then rationalized by national "legal science," and (sometimes) given concrete form and compulsory effect in legislation. He first set forth his version of this idea in *The Vocation of our Age for Legislation and Jurisprudence*,[2] in 1814, in opposition to the proposal to codify German law on the model of the French civil code. This work was translated into English and published in 1831.

The second idea was that the actually existing law of the German people of his time, based in Roman law but historically transformed into German customary law, was a "system," rationally working out a strikingly universalistic idea:

> Man stands in the midst of the outer world, and the most important element, to him in this surrounding of his, is the contact with those who are like him, by their nature and destination. If now in such contact free natures are to subsist beside one another mutually assisting, not hindering themselves, this is possible only through the recognition of an invisible boundary within which the existence and activity of each individual gains a secure, free space. The rule, by which those boundaries and that free space are determined, is the law . . . .
>
> From the stand-point now gained, each single jural relation appears to us as a relation between person and person, determined by a rule of law. This determination by a rule of law consists in the assignment to the individual will of a province in which it is to rule independently of every foreign will.[3]

The first part of this Article analyzes the way Savigny develops the concept of "family law," in relation to his other legal categories, in the chapter of the *System* that presents private law and explains what Savigny thinks are the basic principles of its organization. The earlier chapters of the first volume of the *System* present his general ideas about law and I will introduce them when they seem necessary to understand his theory of the place of family law in the *corpus juris* as a whole.

Savigny's text is very interesting and impressive in its own right, but it also has, in my view, a place in the transnational development of legal thought over the whole modern period. I do not want to make any strong assertions about its actual influence outside Continental

2. FREDERICK CHARLES VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE (Abraham Hayward trans., The Lawbook Exchange 2002) (1831).

3. SAVIGNY, *supra* note 1, at 269-71.

Europe, where it is regarded as a seminal text. For the English-speaking world, we have little evidence of its reception,[4] although Janet Halley's work in progress on the history of American family law will go some distance to remedying that situation.[5] In the second part of the Article, I propose that the main value, for today, of a close reading of the text is in the way it clarifies two developments.

First, Savigny is a very important figure in the genealogy of Classical Legal Thought, and particularly of what we often call today the "market/family" dichotomy.[6] Second, although family law has only relatively recently become an organizing doctrinal category in the common law world,[7] it played an important role in the policies of all the nineteenth-century imperial powers. They chose to organize the law of the colonies around a distinction between the area in which "native" law would be more or less respected, and that in which it would be displaced by the supposedly universal rational law of contract and property.

I. FAMILY LAW IN SAVIGNY'S *SYSTEM*

For Savigny, the contrast between family law and what he calls "potentialities law" (as translated, but commonly referred to today in English as "patrimonial law"), which includes property and the law of obligations, is the primary division within private law, but also a key to the structure of the corpus juris as a whole.[8]

The modern civil law concept of obligations includes both contract and tort law, but, as I will explain later, Savigny is typical of his time in that tort law is virtually absent from his system. In his view, family law consists of the rules about marriage, divorce and parenthood, and the rules that protect the rights of fathers in their wives and children. As we will see, it does not include the rules governing the rights and duties of husbands and wives and parents and children vis-a-vis one another. Also included in family law are the rules governing (family) "relationship," which come into prominence in the law of inheritance, a field which is for Savigny a mixed domain.

A. Family Law vs. Potentialities Law within Private Law

Savigny distinguishes family law from potentialties law along two main dimensions: that of the individual versus the organic whole,

4. *But see* Michael H. Hoeflich, *Savigny and His Anglo-American Disciples*, 37 AM. J. COMP. L. 17 (1989).

5. Janet Halley, *What is Family Law? A Genealogy*, 22 YALE J.L. & HUMAN. (forthcoming 2010).

6. *See generally* Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

7. Halley, *supra* note 5.

8. SAVIGNY, *supra* note 1, at 276.

and that of the necessary versus the arbitrary or "merely positive." Each of these axes is quite complex.

1. The Complete vs. the Incomplete Person and the Individual vs. the Organic Whole, as Distinguishing Family and Potentialities Law

The first basis for the sharp distinction between family law and potentialities law as the central duality within private law is the contrast between two aspects of every person. On the one hand, each of us is an "independent whole," a "concluded whole," "extraneous" to all others, and "homogeneous" in relation to them.[9] On the other hand:

> Wholly different in this respect is the second possible relation to the extraneous person which is now to be exhibited. Here we regard the individual man not as being subsisting for himself [sic] but as a member of the organic whole of mankind in the aggregate. Inasmuch now as his connexion with this great whole is continually brought about through the medium of individuals determined, his relation to those individuals is the foundation of a new, entirely peculiar sort of jural relations. In this the individual appears to us, not as in obligations, an independent whole but as an incomplete being needing its complement in a large natural coherence.[10]

Man is an "incomplete being" because men need women to be complete and vice versa, and because men and women need children, and children need paternal care, in order to overcome mortality and live forward in time.[11]

The legal order reflects these two aspects of man. Family law governs the relations of husband and wife and parent and child (plus guardian and ward).[12] By contrast, potentialities law governs the relations between independent individuals exercising their wills vis-a-vis one another: property deals with an individual will controlling an object (to the exclusion of other wills), obligations with one will controlling another.[13]

Savigny immediately elaborates the initial distinction, emphasizing that although both family law and obligations govern relations between individuals, and so might seem to belong together in the general scheme, obligations-law is in fact more similar to property law (whence their combination in potentialities law) than to family law:

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9. *Id.* at 276.
10. *Id.* at 276-77.
11. *Id.* at 277.
12. *Id.* at 277-78.
13. *Id.* at 275-76.

> The obligation has for its object-matter a single act, the family relation the person as a whole in so far as he is a member in the organic coherence of collective humanity. The matter of obligations is of an arbitrary nature for at one time this, at another that, act may become the contents of an obligation; the matter of the family relations is determined by the organic nature of men, therefore bears in itself the character of necessity. The obligation is as a rule of a transitory nature, the family relation is destined for an enduring existence.[14]

To a modern ear, considerable legal substance is being smuggled in to what passes as mere description here. That the family relation is "destined for an enduring existence" is an implicit endorsement of what Savigny sees as an important accomplishment of modern law, namely the prohibition of divorce (which was freely available in Rome), through the reception of Christian doctrine.

Moreover, obligation and property are essentially similar because each can be reduced to money, and the fluctuating elements in a person's holdings of properties and obligations, both positive and negative, can be summed in a single whole, namely his patrimony (what we would call his net assets or estate).[15] Although this is not the place to expound it, there is radical circularity in the definition of potentialities as *a priori* translatable into money, as the European—and common law—history of recovery for "non-patrimonial" injury amply demonstrates.

2. The Distinction Between the "Necessary" and the "Arbitrary" (or "Merely Positive") Switches Back and Forth Between Family Law and Potentialities Law

A striking aspect of Savigny's scheme is the linking of the distinction between complete individuals and incomplete participants in organic wholes with another distinction: that between the "necessary" and the "arbitrary" or, when legal rules are the topic, the "merely positive." In one of its deployments, the necessary is closely linked to the natural, and then to the organic wholes that underlie family law:

> The matter of each of these relations is a natural relation which simply as such stretches beyond the limits of human nature *(jus naturale)*. Hence in accordance with their existence generally, a necessity independent of positive law must be ascribed to them although the special shape, in

14. *Id.* at 279.
15. *Id.* at 275-76.

> which they are recognized, is very manifold according to the positive law of different peoples.[16]

Family law is not, however, merely natural. It has a tripartite nature:

> This natural relation is however to men likewise of necessity a moral one and since last of all the form of law steps in, the family embraces three indissolubly united forms, the natural, the moral and legal. Hence it follows that the relations of family only partly carry in them a juridical nature; indeed we must add that the juridical side of its nature is plainly the smaller for the most important belongs to a province quite other than that of law.[17]

There is a clear contrast with potentialities law:

> [A] pervading contrast to family-law here shows itself. In the two parts of potentiality's-law, the matter does not, as in the family, consist in a natural-moral relation; . . . they belong not to the *jus naturale* and the recognition of their existence appears less necessary, more arbitrary and positive, than in the institutions of family-law. On the other hand the doubt cannot here arise, in what their real legal contents consist; for since a widening of the individual freedom is to be embraced in them, this very power, this mastery which they procure for us, is that which furnishes them, as institutions of law, with their contents.[18]

Along with this first sense of the necessary as associated with the natural and the organic, there is a second sense, stated quite clearly in the "on the other hand" part of the above quotation. This is necessity as conceptual; that is, as the necessary legal content that follows from a particular abstract idea or institution. Savigny is asserting that the abstract conceptual definition of legal relations as establishing co-existing provinces of absolute mastery for the individual will, provides a single, necessary content for the actual rules of property and obligations. (In the actual unfolding of potentialities law, he consistently acknowledges, as we will see, a large space for the merely positive.)

By contrast, with regard to the rules of family law it appears that "doubt" can "arise in what their real legal contents consist." The reason for this seems to be that family law is not merely natural, but also cultural, because it is intrinsically "moral," and morality is an

16. *Id.* at 281.
17. *Id.* at 281-82.
18. *Id.* at 301.

aspect of the *Volksgeist,* i.e., of the spirit of each particular people. I have already quoted Savigny mentioning that, in spite of its naturalness and necessity, "the special shape, in which [family relations] are recognized is very manifold according to the positive law of different peoples."[19] True to the anti-natural-law program of the historical school, Savigny recognizes that different peoples with different spirits produce different norms fully deserving the name of law:

> Thus *e.g.*, the existence of monogamy is an institution of positive law, while we ascribe to marriage, in whatever shape it may present itself, a universal necessity; nevertheless it must not be said that a choice between polygamy and monogamy happened to be determined by accidental circumstances; polygamy is rather to be regarded as a lower stage in the moral development of nations . . . . The healthy living feeling however of all nations as of all times and stages of culture would corroborate our assertion even if it had not found its highest verification in the Christian view of life. In like manner the artificial way in which they at times arise belongs to the positive developement [sic] of the institutions of families, *e.g.* the fatherly power by adoption. Further the inhibition of marriage between those very nearly related has its root in the moral feeling of all times but the extent of this prohibition is of an entirely positive nature.[20]

The contrast between the derivation of necessary contents of potentialities law from the will theory and the "very manifold" contents of family law reverses the prior association of family law with natural necessity and potentialities law as relatively "arbitrary." But, as we shall see, it also resonates strongly with the future development of both fields.

There is yet a third kind of necessity that makes the picture even more complex. In Section XVI of the long introductory book of the *System*, Savigny introduces a basic distinction applying across all the areas of law:

> In respect to the relation in which the rules of law stand to the jural relations governed by them the following difference is found—some of those rules govern with an immutable necessity without leaving any play-room to the individual will: I call these *absolute* or *mandatory* rules of law. The grounds of this necessity may lie either in the very nature of the organism of law as it shows itself in positive law or in political and politico-economical views or immedi-

19. *Id.* at 281.
20. *Id.* at 281 n.(a).

> ately in ethical considerations. Other rules at first leave free power to the individual will and only take its place in order to give the necessary definiteness to the jural relation where that will has failed to exercise its power: these rules, which one may regard as interpretations of the will which has remained incomplete, I call *mediate*.[21]

When we eventually get to family law, it turns out that this distinction is important:

> We regarded [the jural relations appertaining to the family] first as completions of the individuality in itself incomplete. Hence their proper nature consists in the place which the individual obtains in these relations, in his being not merely man in general but specially husband, father, son, therefore in a LIFE-FORM firmly determined, independent of the individual will, grounded in a large natural coherence.[22]
>
> The family relations therefore belong especially to the *jus publicum i.e.* to the absolute law . . . . Hence also each family relation of a man is called especially a *status* of that man, that is to say, his place or his existence in relation to other men determined.[23]

By contrast with family law, potentialities law is, we would say, facilitative, or consists of default rules. This means that the actual content of contracts and of property holdings is infinitely varied, according to the will of the parties. As Savigny puts it in a sentence already quoted: "The matter of obligations is of an arbitrary nature for at one time this, at another time that, act may become the contents of an obligation; the matter of the family relations is determined by the organic nature of men, therefore bears in itself the character of necessity."[24]

Here again there is a complex reversal. Family relations are "firmly determined independent of the individual will," because they flow from "ethical considerations" that are specific to the people in question, while particular potentialities are infinitely variable and thus arbitrary. But because family law rules are determined by the *Volksgeist*, they are variable from country to country, as well as "absolute" and "mandatory":

> It must at the same time be added that the positive shape, in which these relations enter into a particular posi-

21. *Id.* at 46.
22. *Id.*at 284.
23. *Id.* at 284 n.(c).
24. *Id.* at 279.

> tive law, bears in this law the absolute character, since it is determined by the moral view of life of this special people.[25]

To sum up: first, family law rules are rooted in nature and it is therefore necessary for every society to have them. By contrast, potentialities law rules are more "arbitrary" since it is not a requirement of nature that they exist at all. Second, many particular family law rules are "merely positive." Once the basic "natural" architecture has been set up, the particulars are not "necessary." Because family law has a strong moral content, and morality varies from country to country according to the spirit of the people, with Christian countries representing the highest stage, it is to be expected that these merely positive aspects will vary widely from country to country. In potentialities law, by contrast, the actual contents of the legal rules are determined by the goal of creating mutually exclusive provinces of free will, so those rules are more "necessary" than those of family law. However, the actual content both of particular contracts and of particular property holdings is infinitely variable (according to all those individual wills). By contrast, family law rules are mandatory, since they reflect the morality of the particular people.

	Within country	Between countries
Invariable	Rules of family law	Rules of potentialities law
Variable	Contents of contracts and property holdings according to the will of the parties	Rules of family law

B. Family Law in the Organization of the System as a Whole

The family/potentiality distinction plays two different roles in Savigny's *System.* On the one hand, he sometimes uses it as the basis for developing contrasting substantive legal principles, as I will illustrate with the case of private international law. On the other hand, distinctions closely analogous to family/potentiality are basic to the overall organization of the corpus juris. The complete individual and the organically connected group, the necessary and the arbitrary, and mandatory and facilitative law—all used to distinguish family and potentialities law within private law—reappear when it comes time to distinguish public from private and international from municipal law.

25. *Id.* at 282 n.(a).

1. The Distinction Between Family Law and Potentialities Law Deployed in Private International Law

I will argue in the next section that the distinction between family law and potentialities law, as I have just described it, is foundational in Savigny's organization of the corpus juris as a whole. At the same time, it is worth noting that it served as one of the key divisions in his seminal treatise on private international law, which was the eighth volume of the System, published in 1849. This work was translated by William Guthrie and published in Edinburgh in 1869.[26]

Savigny's thesis is that the different types of legal relations have, according to their natures, different "seats."[27] The seat determines the law to be applied to the relation (with complex exceptions). In the following quotation, we can see Savigny redeploying the family/potentiality distinction (here better translated by Guthrie as family/patrimony), reiterating the contrasting traits of its two sides, and then quickly deriving a key principle from it:

> Rights arising from the family relations . . . are essentially distinct from the patrimonial relations by which a person is brought into connection with external and arbitrarily chosen objects. On the other side, considerations, partly moral and religious and partly political, have great influence upon them, for which reason statutes of a coercitive and strictly positive nature most frequently occur in this department.
>
> A. MARRIAGE.—There is no doubt as to the true seat of the marriage relation; it must be presumed to be at the domicile of the husband, who, according to the laws of all nations and of all times, must be recognized as the head of the family.
>
> . . . In this there is neither a peculiarly Roman provision, nor a positive rule of any kind, but only the incidental recognition of the relation which necessarily springs from the general nature of marriage.
>
> For this reason, too, the territorial law of every marriage must be fixed according to it; and the place away from the domicile where the marriage may be celebrated is quite immaterial.
>
> Many doubt this last proposition, because they regard marriage as an obligatory contract, but are accustomed in

26. FRIEDRICH CARL VON SAVIGNY, PRIVATE INTERNATIONAL LAW AND THE RETROSPECTIVE OPERATION OF STATUTES (2d ed, William Guthrie trans., Edinburgh, T & T. Clark Law Publishers 1880) (1869).

27. *Id.* § 361, at 139.

> such contracts to regard the place where they are made as determining the local law. The first of these two views is false, because marriage has nothing in common with the obligatory contracts.[28]

When a court not located at the "seat" of the marriage is asked to enforce the law of the seat, it should do so subject to several classes of exceptions. One of these consists of "absolute statutes" (meaning mandatory rather than facilitative, as per his s. 16, discussed above) that have their

> [E]nd and object beyond the province of pure law apprehended in its abstract existence, so that they are enacted *not* merely for the sake of the persons who are the possessors of rights. Laws of this class may rest on *moral* grounds. Such is every marriage law which excludes polygamy . . . .
>
> All such statutes are among the exceptional cases, so that, in regard to their application, every state appears completely separate and distinct. If, therefore, the law of our state forbids polygamy, our judges must refuse the protection of the law to the polygamous marriages of foreigners, to whom they are permitted by the law of their own country.[29]

In other words, the family/patrimony distinction first establishes a basic principle as to the law that governs, and then a key exception when a foreign court is asked to enforce that law.

This kind of deployment and redeployment of the distinction is quite different from use of the general or abstract contrast between the complete individual and the organically connected group as a key element in the architecture of the whole *System*, to which we now turn.

2. The "Nesting" or Reproduction of the Individual/Organism Distinction at Different Levels of the System to Form a Pyramid

Savigny builds the *System* by the method that is sometimes called "nesting," according to which within a given distinction there is another distinction, on each side, that reproduces the initial distinction.[30] At the same time, he arranges the contrasting entities at each

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28. *Id.* § 379, at 290-91 & n.(b) (other footnotes omitted).

29. *Id.* § 349, at 78-79 (footnotes omitted). Savigny's second class of exceptional laws includes those based on "reasons of *public interest*," and his main example is "laws which restrict the acquisition of immoveable property by Jews." *Id.* at 78. On Savigny's anti-semitism, *see* Alfred Dufour, *Pour ou contre de nouveaux Codes: Autour d'un des écrits programmatiques les plus négligés de Savigny*, 1 ANNUAIRE DE L'INSTITUT MICHEL VILLEY 77, 90-91 (2009).

30. On nesting, see Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75 (1991); an enlarged version is in DUNCAN KENNEDY, LEGAL

level, beginning within private law but then at the levels of public law and international law, to construct a pyramid in which the organic collective side has a strong politically conservative valence.

a. Organism vs. Individual Distinguishes Public from Private and International from Municipal Law

Here is how Savigny deals, in the first volume of the *System*, with the relation between public and private law. First of all, the source of all law is "the people":

> In the general consciousness of a people lives positive law and hence we have to call it peoples' law. It is by no means to be thought that it was the particular members of the people by whose arbitrary will, law was brought forth . . . . Rather is it the sprit of a people living and working in common in all the individuals, which gives birth to positive law, which therefore is to the consciousness of each individual not accidentally but necessarily one and the same.[31]

Each people undergoes "continual organic developement," it has a "common nature," "united life," "intellectual communion" and "common intelligence," within a "natural whole."[32] The people, like the family, has a temporal dimension: it "runs through generations constantly replacing one another, and thus it unites the present with the past and the future."[33] Peoples for all their distinctiveness are not utterly unrelated: "What works in an individual people is merely the general human spirit which reveals itself in that people in a particular manner . . . . [T]his product of the people's mind is sometimes entirely peculiar to that single people, sometimes equally present in more peoples."[34]

In every people, according to Savigny, there "works in that people an irrepressible inclination to manifest the invisible unity in a visible and organic form. This bodily shape of the intellectual communion of a people is the state and by it are likewise supplied definite boundaries of the unity."[35] As peoples differ, so there is a "particular shape presented by the state in each people."[36]

On this basis, according to Savigny, taking

REASONING: COLLECTED ESSAYS (2008); *see also* Jack M. Balkin, *Nested Oppositions*, 99 YALE L. J. 1669 (1990).

31. SAVIGNY, *supra* note 1, at 12.
32. *Id.* at 14-15.
33. *Id.* at 16.
34. *Id.* at 17.
35. *Id.* at 17-18.
36. *Id.* at 18.

> Law as an aggregate, we discern in it, two provinces states-law and private law. The first has for its object-matter the state, that is the organic manifestation of the people; the second the totality of jural relations which surround the individual man in order that in them, he may lead his inner life and fashion it in a defined shape.[37]

Because different peoples have different spirits, they have different states-law, but of course within a given country there is only one states-law, which is obligatory on all the people, as well as an emanation of the people as a whole.

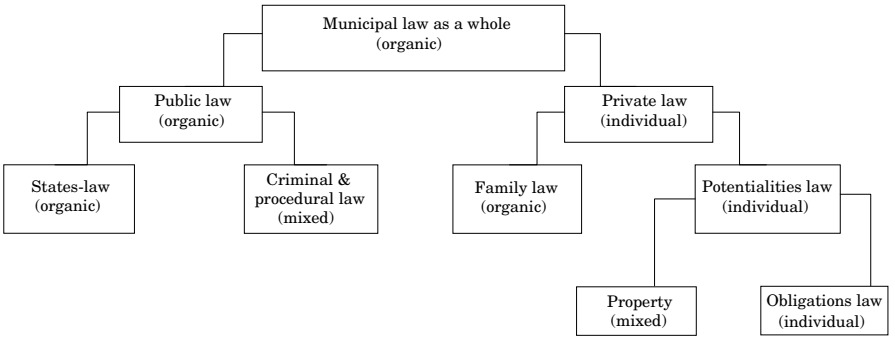
The relationship between the people, seen as an organic unity, and "states-law" is like the relationship between the organic unity of the family and family law.

"When we compare these two departments of law, there are not wanting transitions and affinities. For the family has in its enduring membership as also in the relation of government and obedience an unmistakeable analogy to the state . . . ."[38] One of the things that makes Savigny fascinating as a theorist is his recognition of affinities across his distinctions, combined with an unwavering belief in their meaningfulness. In this case, he reasserts the public/private distinction in a way that seems close to disingenuous, given the manner in which he has developed the distinction between family law and potentialities law in the passages we reviewed in the last section:

> Nevertheless between the two departments this firmly established difference remains; in public law the whole appears as the end, the individual as subordinate, while in private law on the contrary, the individual man is on his own account an end, and each jural relation has reference only to his existence or his special circumstances.[39]

States law in turn is part of a larger and according to Savigny less distinct whole of "public law," which includes criminal law and criminal and civil procedure,[40] although these of course have to do with individuals as well as with the state. The upshot is a structure that looks like this

37. *Id.* (footnote omitted).
38. *Id.*
39. *Id.* at 18-19.
40. *Id.* at 22.



Savigny uses the same duality in his treatment of international law:

> [S]everal independent states may voluntarily apply that which in each resides as law so far as it is suitable and as they find it convenient; but still no law arises in this way. Nevertheless among different peoples a community of legal consciousness may arise like that which generates positive law in a people. The basis of this intellectual communion consists partly of a community of race, partly and principally in common religious convictions. Thereon grounds itself the international law which exists especially among the Christian states of Europe . . . . And we ought to regard it as positive law although on two grounds as incompletely formed . . . .[41]

It is "incomplete," both substantively and because there is no state to enforce it, but still very different from the norms governing relations with the "other":

> [T]he progressive moral education as based on Christianity leads each people to apply analogically that positive international law to entirely foreign peoples by whom this mode of thinking is not shared and this practice not requited. Such an application however has a purely ethical character and not the nature of a positive law.[42]

He is as far as can be from the typical late nineteenth century "positivist" notion, not because he does not understand positivism but because he restricts that way of thinking to potentialities law, which is indeed totally determined by its mission, namely the facilitation of the exercise of individual will.

41. *Id.* at 27-28.
42. *Id.* at 27.

b. The Pyramidal Structure of Organic Law and its Political Significance

It is interesting that we are dealing with an intellectual operation that is more complex than the simple nesting I have been describing up to now. According to Savigny, the highest form of family law is Christian, with the embrace of monogamy and the prohibition of divorce. Polygamy in Muslim lands is to be sure a genuine legal regime, reflecting the spirit of the peoples in question, but it is at a lower "stage" of development.

The legal family is the analogue, within private law, of the state within public law. But more than that: "In families are embraced the germs of the state and the completely formed state has families, not individuals immediately for its constituent parts."[43] At the national level, the purpose of all "people's law" is the propagation of Christian morality. At the next level, the coherent whole constituted by Christian Europe, which is the basis of international law, has Christian states as its building blocks. So the coherence side of Savigny's construction is pyramidal: there is a common Christian dimension to the spirit at each level, generating the law of that level, and each level is the basis for the next one up.

A second theme at each level of the pyramid is what this order is *not*: it is not produced at any of its levels by the Liberal (in the large sense) mechanisms of consent. The rules flow from the organic coherence: since everyone participates in the coherence, the rules are those of everyone. Disobedience is understood as a splitting of an individual will between the good will, which is *a priori* in accord with the natural coherence of which the individual is, like it or not, a part, and the bad, disobedient will. In order to perfect the whole, the father, the state, or the international community, sanctions the disobedient one.

This anti-Liberalism is completely explicit in Savigny. As Wieacker put it:

> Just before the Wars of Liberation [against Napoleon] a group of conservative and Christian romantics . . . was formed alongside the romantic freedom-loving nationalists. Their concern was for the organic nature of state and society, a political form of Romanticism which was to become the dominant ideology of the Holy Alliance and the Restoration after the Congress of Vienna, and bears some responsibility for the way in which the larger German states, Italy, and Poland repressed the liberal movements which demanded a constitution and national unity. It had increasing influence on Savigny's attitudes and conduct when he was close to the Prussian crown, and came into ever sharper conflict with the

43. *Id.* at 279.

> freedom-loving Romantic nationalists of the Germanist school . . . .[44]

The confrontation between liberalism and reaction operated at each of the levels of Savigny's system. In the domain of the family, the background is the radicalism of a faction of the French revolutionaries allied with Napoleonic dynastic politics, who took the liberal individualist position all the way to legalizing divorce and abolishing the duty of obedience. One of the first acts of the Bourbon Restoration was to re-establish the Catholic Church along with its family law regime.

For Savigny, the prohibition of divorce figures along with the abolition of slavery as two of the most striking ways in which Christian European law has progressed beyond Roman law. But the more subtle point is that Savigny denies that the duties of husband and wife and parent and child are legal at all. He begins by critiquing the superficially plausible idea that marriage and parenthood involve the subjection of one individual will to another, in the form of reciprocal obligations.[45] His alternative position is worth quoting at some length:

> However from the very stand-point of the Roman law this opinion is to be entirely rejected. Here the father sure enough has absolute mastery over the son, a mastery which, in the oldest time, is scarcely to be distinguished from genuine property. This mastery however does not constitute the true contents of the jural relation. It is the natural characteristic of the paternal power in which the father asserts himself by his proper power as in the mastery over his slaves, his house or his horse. There is nowhere any question of a juridical obligation of the son to obedience, as little of a complaint against the disobedient son as against the disobedient slave. Only when extraneous persons infringe upon the mastery of the father of the family, actions are given against them. Still more manifest however is our assertion as to the free marriage. In this there is no question at all of rigid authority and obedience and still the Roman law knows nothing of legal claims of one of the married persons against the other, no actions for the protection of such individual rights, for the case of their denial. It is NOT therefore the partial subjecting of one person to another which forms the

44. FRANZ WIEACKER, A HISTORY OF PRIVATE LAW IN EUROPE: WITH PARTICULAR REFERENCE TO GERMANY 287-88 (Tony Weir trans., 1996); John Toews, *The Immanent Genesis and Transcendent Goal of Law: Savigny, Stahl, and the Ideology of the Christian German State,* 37 AM J. COMP. L. 139 (1989).

45. SAVIGNY, *supra* note 1, at 283.

> jural character of the family relations, therefore the peculiar contents of this class of jural relations.[46]

From the side of wives and children, the delegalizing move is just as striking:

> It is therefore in no way denied here that to marriage, loyalty and self-sacrifice, as to the paternal power obedience and reverence, belong; but these in themselves, most important elements of that relation stand under the protection of morals not of law, just as the honorable and humane use, which the father of a family can make of his power over the family must also remain left to morals alone . . . .[47]

More research on just what this means would be very interesting. My guess would be along these lines: this is a discussion of family law as private law, in other words, of reciprocal rights and duties enforceable through civil process. I think Savigny is saying that there are neither contract nor tort actions of family members against one another, i.e., that there is a general regime of inter-spousal private law immunity. Criminal laws that apply to all individuals in relation to other individuals could still apply consistently with his claim of complete delegalization of the relation in private law (although it would be interesting to know his position about marital rape as a crime).

What seems problematic is that duties of spousal support in exchange for obedience, and parental duties of support, along with legal limits on patriarchal punishment of wives and children, seem to have been enforceable by various kinds of legal process in the early modern period, at least in theory.[48] Moreover, not just Kant,[49] but also the Catholic canonist scholars of his day[50] were happy to analogize the marital relation and the husband's various rights in his wife to patrimonial contract and property rights (e.g., to conceptualize the right to spousal sexual intimacy as a kind of easement). If Savigny is suggesting that the duty of spousal support, for example, should "be left to morals alone," he would seem to be taking an extreme position for his time.

But it is very possible that I have misread the passage, or the German law in the background. It is worth noting that Savigny asserts that the civil, not criminal legal rules that protect persons against force, fraud and dispossession, i.e., tort law, are "wholly posi-

46. *Id.* at 283-84.
47. *Id.* at 285.
48. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES ch. 15, at *433-45.
49. *See infra* text accompanying notes 69-74.
50. *See* FILIPPO E. VASSALLI, DEL IUS IN CORPUS, DEL DEBITUM CONIUGALE E DELLA SERVITÙU D'AMORE OVVEROSIA LA DOGMATICA LUDRICA (Rome: Bardi, 1944).

tive," meaning that they are not derived rationally from a single concept and therefore not part of private law as he understands it.[51] This, along with his rejection of the contractual view of marriage, could explain the complete omission of intra-family rights and duties from this part of the *System* (and he never published a volume of the *System* on family law).

In either case, it is striking that the delegalizing position situates intra-family duties outside law as rationally conceived. As with the development of "separate spheres" privacy doctrine in U.S. law in the second half of the nineteenth century,[52] it seems fairly clear that delegalization in the concrete sociological context of Western family life in this period was understood to reinforce patriarchal power, in opposition to the various liberal moves toward formal legal equality and the contractualization of domestic relations.

In the national context, the issue is roughly democratization, whether in the form of constitutional monarchy, republicanism or more radical positions like majority rule (unicameral parliamentarism with universal suffrage, for example). Savigny sees the individualist theories of the state as subversive, as he indicates at the end of this attack:

> [T]here is a widely prevalent opinion in accordance with which states must have taken their rise in the will of individuals, therefore in contract; this opinion has in its development led to results as pernicious as they are false. There is the assumption that the people who found it advantageous to found this particular state, could just as well have remained entirely without a state, or have united and confined themselves to a state as they actually did so, or in a different manner or that they might have selected a different constitution. In this theory therefore not merely is the natural unity preserved in the people, as well as the inner necessity once more overlooked but especially also the circumstance that wherever such deliberation is possible, there will infallibly be a state existent as fact and law, so that there can no longer be any question, as these people would have it, of the arbitrary invention of a state but at the utmost a question of destroying it.[53]

Internationally, the issue is "legitimacy." The enemy is the liberal leadership (e.g., Mazzini, Kosciuczko) of ethnic fragments of the Russian, Austrian, and Ottoman Empires struggling for independent

51. *Id.* at 273-74.

52. Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996).

53. SAVIGNY, *supra* note 1, at 23-24.

statehood. If the state is an emanation of the spirit of the people as developed historically rather than the product of a social contract or majority rule, then the empires and monarchies in all their ethnic crazy quilt have a greater claim to rule than the liberal individualist advocates of popular sovereignty.[54] Even Greece, upon obtaining independence from a non-Christian empire, will have to install a German king in order to secure diplomatic recognition of the new national entity.

These political conflicts are quite different from those that characterized the second half of the nineteenth century in industrializing states, where a dominant liberal *bourgeoisie* confronted a rising working class allied with small farmers or peasants who were losing out to large landowners and agribusinesses. In 1840, the "left," so to speak, is still the rising urban middle class, and the right is not *laissez-faire*, but "ancien regime." Savigny's position takes elements from both sides: potentialities law is the law of the free market, while the law of the building blocks of the social order is frankly authoritarian.

Even with respect to the market, however, we need to recognize the ways in which Savigny is not at all a doctrinaire liberal, but much more like a Disraeli style conservative.

> We must also avoid attempting to fix rigidly the limits of the family-law for all times and nations and must rather recognize the possibility, for each positive law of a free developement [sic]. This progressive developement [sic] shows itself in a specially remarkable way in one of the most extended relations of our modern condition, the law of hired servitude. From the stand-point of the Roman law, this admits of being conceived merely as a contract *(operae locatio)* and this contracted treatment was sufficient for the Romans, since by reason of the excessive number of the class of slaves the need of free domestic servants was almost wholly imperceptible. It is otherwise with us who have no slaves; whence that relation has become of very important and extended necessity. Now we are not satisfied with the narrow treatment of it like any other contract for labour and thus in the Prussian land-recht, the law of hired service has been perfectly correctly received not under contracts but into the law of persons.[55]

After pointing out that the varieties of potentialities law derive all of their content from the rational elaboration of their purpose,

54. *See* KARMA NABULSI, TRADITIONS OF WAR: OCCUPATION, RESISTANCE, AND THE LAW (2005).

55. SAVIGNY, *supra* note 1, at 298-99 (footnote omitted).

which is "the widening of individual freedom,"[56] Savigny deals with the question of whether they have a "moral foundation":

> Of course they have such inasmuch as the rich man ought to regard his wealth as goods entrusted to his management; only this view remains completely foreign to the dispositions of law . . . . [I]n the potentiality's-relations the mastery of legal institutions is completely accomplished and that without reference to the moral or immoral exercise of a right. Hence the rich man can allow the poor one to perish either through the denial of assistance or the harsh exercise of the right of a creditor and the remedy admitted against this, springs not from the ground of private, but from that of the public law; it consists in the institutions for the relief of the poor to which of course the rich man can be compelled to contribute although perhaps his contribution is not immediately perceptible.[57]

This is not the night-watchman state, but closer to Hegel's notion of a redistributive public welfare law layered on top of the "law of civil society."[58]

II. The Contemporary Interest of Savigny's Scheme

Savigny's treatment of private law as composed of the two primary segments, family law and potentialities law, with the complex interlocking of the two organized around the ideas of natural coherence vs. individuality, morality vs. law, necessity vs. arbitrariness, has for me a lot of interest and appeal as a feat of systematizing legal scholarship. But I think its exposition can also be useful for two purposes: in order to better understand the genealogy of Classical Legal Thought, and in order to appreciate more fully the contribution of Classical Legal Thought to the enterprise of late nineteenth-century colonialism.

A. Savigny in the Genealogy of Classical Legal Thought

It seems to be now quite generally agreed that in the second half of the nineteenth century the Western legal systems entered a new phase, Classical Legal Thought (CLT), involving a variety of transformations of the legal thought of the previous early modern period that began in the seventeenth and lasted into the early nineteenth century. CLT has been characterized in a variety of ways, and there has

56. *Id.* at 301.
57. *Id.* at 302.
58. On the similarities and many differences between Savigny and Hegel, see Aldo Schiavone, Alle origini del diritto borghese: *Hegel* contra *Savigny* (Roma: Laterza, 1984).

been a tendency to identify it with "formalism," "deduction," or "conceptual jurisprudence."[59]

In my own work, I have wanted to insist that the single most important characteristic was actually the will theory, i.e., the theory that law derives either from private or from public will, with the distinction between the two being of primary importance, and with the dominant imagery being that of wills as "powers absolute within their spheres." A second salient characteristic was the deployment and redeployment of the public/private distinction as the central way of organizing legal rules *within* both public and private law; in other words, the nested (*chiasmatic)* repetition of the distinction within each of its iterations. For me, the preference for deductive method, the idea of law as deductive science, is an important trait of CLT, but not the most important. Moreover, within CLT, all the typical reasoning techniques of earlier periods continued to be deployed.[60]

1. Legal Genealogy

To my mind, Savigny is one of the important figures in the genealogy of CLT. The term genealogy is often used synonymously with "origin." In this usage, the intellectual historian is preoccupied with finding an origin for the idea he is studying, and tracing forward from that origin to the present. Important exercises include showing that origins are earlier or later than had been thought, or that there was a different origin than previously imagined.

The notion of genealogy I use derives from two classic texts of social theory, Nietzsche's *Genealogy of Morals*,[61] and Foucault's *Nietzsche, Genealogy, History*.[62] Nietzsche and Foucault are explicitly *against* the search for origins. Their genealogical method is to understand a modern idea that interests us as constituted by the confluence of a variety of earlier ideas, each of which was transformed at its moment of combination with another idea. The image is of the family tree, rather than of the seed that grows into a tree. In a family tree, there are more ancestors the further you go back in time, and ancestors "generate" the person we are looking at in the present by combining to produce new things generation by generation. So the idea of an intellectual genealogy is to find multiple ancestors and study the way each was transformed by combination, narrowing the search through time until we find the immediate progenitors of the present idea. At every point, the emphasis is on the transformation of

59. *E.g.,* Thomas C. Grey, *Langdell's Orthodoxy,* 45 U. PITT. L. REV. 1 (1983).

60. *See* DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT (Beard Books 2006) (1975).

61. FRIEDRICH NIETZSCHE, THE GENEALOGY OF MORALS (Horace B. Samuel trans., Boni & Liverwright 1913) (1887).

62. MICHEL FOUCAULT, *Nietzsche, Genealogy, History*, *in* THE FOUCAULT READER 83 (Paul Rabinow ed., 1984).

the ideas in the genealogy, rather than on their identity through time.

In this view, Savigny is not the intellectual father of CLT, but one of the most important figures in its genealogy. We can show this by illustrating the numerous ways in which his work transforms the previous generation's classificatory scheme, and then the ways in which as a progenitor he resembles, but is also different from, his progeny.

2. Savigny Contrasted with his Predecessors

Where does the legal category "family law" come from? According to Savigny, "this terminology is not taken from the Roman law," but is "certainly in accordance with modern phraseology, just as my mode of summarizing is the only one suitable for our modern condition of law."[63]

a. Pufendorf and Blackstone: "Domestic Relations"

Müller-Freienfels identifies the origin in Pufendorf's early eighteenth-century category of domestic relations, which includes master/servant along with husband/wife, parent/child and guardian/ward.[64] Blackstone used the same scheme.[65] In this "early modern" eighteenth-century classification, the domestic relations are placed on a continuum. They are part of the law of persons, which begins with individuals, endowed usually with some "original" rights, such as to bodily security, moves to domestic relations, and then progresses further to what we would call more public relations, such as priest/parishioner, officer/soldier, and, at the end of the sequence, the relationship between the kings and their subjects.[66]

In Müller-Freienfels's next stage of legal conceptual development, Hugo and Heise separate out family law, including master/servant, but according to him they use it simply as a convenient mode of exposition. Savigny is the first to make it a

> truly "intrinsic systematization." In doing so, Savigny idealistically understood the "inner order of the Law" as an order of existing leading principles. He also believed in the old fundamental postulate of the natural lawyers that legal materials should be compiled in such a way that each legal subject would "have it own place, from which the answer to

63. SAVIGNY, *supra* note 1, at 278 n.(e).

64. Wolfram Müller-Freienfels, *The Emergence of* Droit de Famille *and* Familienrecht *in Continental Europe and the Introduction of Family Law in England*, 28 J. FAM. HIST. 31, 34 (2003).

65. *Id.* at 40.

66. *See* Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979).

every legal question, the solution to every judicial problem, could be derived."[67]

It is worth noting that Savigny does not state an "existing legal principle" for family law. Indeed, we know it mainly by its contrast with potentialities law. It comes from nature and from the state, which is the embodiment of the people, and is not a matter of free will (except with respect to the decision to marry), and it is rooted in and heavily dependent on morality. But moralities differ. The rules of property and obligations, on the other hand, are the rational working out of the conditions of coexistence of autonomous individuals, giving maximum possible autonomy to individual wills, and are purely legal, disconnected from morality except as creating conditions of individual freedom within which individuals choose to be moral or immoral.

b. Savigny and German Idealism

Wieacker, in his rich contextualization of Savigny within the German thought and culture of his time, argues that Savigny was heavily influenced by German idealism, but that he straddled and combined elements from the romantic and classical sides of idealism. On the romantic side of idealism, there was spirit, the invocation of trans-individual organic wholes at every social level, and the insistence on the non-rational, unwilled character of the historical development of peoples. On the classical side of idealism, there was the centrality of will, individual self-realization as the end of culture, and the fetish of rational order.[68] In short, in the terms of the analysis in this paper, the romantic and the classical correspond to family law vs. potentialities law, and at the next level, public law vs. private law.

c. Kant Compared and Contrasted

Kant is both a major influence on, and a major opponent of, Savigny. To begin with, the rhetoric of provinces of freedom for the will constructed so as to be consistent with like freedom for everyone seems to come directly from Kant's *Metaphysics of Morals*.[69] Likewise, the sharp distinction between the domain of law and the domain of morals echoes Kant's right/virtue distinction, although Savigny is brutally clear that rights can be exercised immorally,[70] while Kant seems to equivocate on this question. The notion that the con-

67. Müller-Freienfels, *supra* note 64 at 38 (quoting ANDREAS SCHWARZ, RECHTSGESCHICHTE UND GEGENWART 101 (Karlsruhe 1960)).

68. WIEACKER, *supra* note 44, at 286-92.

69. IMMANUEL KANT, THE METAPHYSICS OF MORALS (Mary Gregor trans., Cambridge University Press 1996) (1797).

70. SAVIGNY, *supra* note 1, at 302.

tent of potentialities law is determined by the abstract statement of its fundamental principle seems clearly a development of Kant's methodology for the definition of right in the first part of the *Metaphysics*. On the other hand, according to Wieacker the main influence on the actual content of Savigny's will theory of obligations was the eighteenth-century law of reason, particularly Pufendorf, rather than Kant.[71]

Kant's language with respect to marriage and parenthood is resolutely individualist and legalist. The law of "domestic relations" in general involves "rights to persons akin to rights to things":

> In terms of the object, acquisition in accordance with this principle is of three kinds: a *man* acquires a *wife*; a *couple* acquires *children*; and a *family* acquires *servants*. Whatever is acquired in this way is also inalienable and the right of possessors of these objects is the *most personal* of all rights . . . . Natural sexual union takes place either in accordance with mere animal *nature* (*vaga libido*, *venus volgivaga*, *fornicatio*) or in accordance with *law*. Sexual union in accordance with law is *marriage* (*matrimonium*), that is, the union of two persons of different sexes for lifelong possession of each other's sexual attributes . . . . Even if it is supposed that their end is the pleasure of using each other's sexual attributes, the marriage contract is not up to their discretion but is a contract that is necessary by the law of humanity, that is, if a man and a woman want to enjoy each other's sexual attributes they *must* necessarily marry, and this is necessary in accordance with pure reason's law of right.[72]

In short, Savigny's construction of family law through the notions of the incomplete individual, natural coherence, forms of life, and above all the omnipresent organic, is contrary to Kant. As he succinctly puts it: "In this matter Kant has erred in wishing to make the purely natural constituent in marriage, the sexual instinct, the object-matter of an obligatory jural relation; by this the nature of marriage is necessarily entirely misunderstood and degraded."[73]

Wieacker has the last word: "[W]e should avoid the tiresome tendency of historians of ideas to see the historical school simply as the product of these forces, and consider it on its own terms as a centre of gravity in the context of that general movement of the German intellect."[74]

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71. WIEACKER, *supra* note 44, at 295-99.
72. KANT, *supra* note 69 §§ 23-25, at 61-62 (footnotes omitted).
73. SAVIGNY, *supra* note 1, at 283 (footnote omitted).
74. WIEACKER, *supra* note 44, at 286.

3. Savigny in Relation to Classical Legal Thought

A number of important aspects of Savigny's text seem to prefigure CLT. He enbraces the will theory for private law as a whole, the notion of powers absolute within their spheres, the sharp distinction between public and private will in organizing legal rules, and the nesting of legal categories. As in CLT, the distinction between law and morality is central, with the two contrasted along a rational vs. non-rational, or religious dimension. Savigny is an important contributor, as Gordley has shown, to the full flowering, only toward the end of the nineteenth century, of the classical will theory of contracts.[75] Most important of all, he is a primary expositor of the idea of "system" as more than a convenient scheme of exposition—of system as revealing the relationship between particular rules and basic categories of social life.[76]

A striking difference is the typically early modern explicit reference to Christianity as the underlying purpose of all law and as representing the highest stage in the legal evolution of family law. In the private law of CLT, this idea may have been extremely influential, but it had become a tacit premise, rather than an open declaration; classical public international law "universalized" itself over the course of the late-nineteenth century.[77] The "Christian states of Europe" became the "civilized" states, the distinction serving as one of the legitimators of colonial enterprise, and then the category broadened to include states that had attained sovereignty in fact. In this process, the Savignian definition played a role in the publicists' struggle with Austinian positivists for the recognition of their field as "really" law.[78] (Constitutional law was still often understood, in CLT, as having a strong religious element through, for example, the "divine right of kings" or the establishment of the Roman Catholic Church.)

The most striking difference is the central place for the distinction between people as individuals and people as incomplete parts of the larger natural coherences of family, people, and the "family" of Christian European nations. In Savigny, this is the single most used nesting element. In CLT, the notion of a pre-rational large coherence is wholly absent, and nesting is organized through the public/private distinction, present in Savigny but in his work always coexisting with the organic/individual distinction.

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75. JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE (1991).

76. WIEACKER, *supra* note 44, at 293-97.

77. Arnulf Becker Lorca, *Universal International Law: Nineteenth Century Histories of Imposition and Appropriation*, 51 HARV. INT'L L.J. (forthcoming Summer, 2010).

78. Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1 (1999).

Finally, the prominence of family law in Savigny's scheme is surprising, to say the least, from the point of view of CLT. Of course family law is part of the *corpus juris* in CLT, but it is rigorously exceptionalized, using a whole variety of different techniques having in common only their marginalizing effect.[79] But Savigny's celebration of family law as a central element goes along with his sharp exclusion of it from the "purely legal" domain, in which the abstract conception of a law of freedom determines the entire content of the law of obligations (not including tort law, and with property law more often determined by "convenience" and the "merely positive" variations of national systems). We could therefore say that although Savigny is the opposite of an "exceptionalizer" of family law, his celebratory analysis of it opposes it to the "purely legal" in a way that invited exceptionalization, as CLT, and conservative thought generally, developed in a more and more rationalist, individualist direction.

B. Savigny's Scheme and the Legal Aspects of the European Colonial Project

When I first opened the Holloway translation of the first volume of Savigny's *System,* I barely noticed the 1867 date, and the note on the title page identifying Holloway as "one of the puisne justices of H.M.'s High Court of Judicature at Madras," which was also the place of publication. Now, some years later, these bits and pieces fit for me into a larger picture.[80]

1. Savigny and CLT in England

The first of these pieces has to do with CLT in England. It is well known that John Austin, the founder of modern legal positivism, was early identified by James Mill (father of John Stuart Mill) as the person who might continue and improve Bentham's work on law; that he went to study in Germany (with Thibaut) for some years and then returned to lecture on jurisprudence at King's College London in 1829-33; that the introductory part of the course became his classic, *The Province of Jurisprudence Determined*,[81] published in 1832 but renowned only when republished in 1861; that the lectures were ill-attended, though frequented by an elite group; and that Austin aban-

79. On family law exceptionalism, see Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: A Report from the Up Against Family Law Exceptionalism Conference*, 58 AM. J. COMP. L. 753 (2010).

80. *See generally* Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, *in* THE NEW LAW AND DEVELOPMENT: A CRITICAL APPRAISAL 19 (David Trubek & Alvaro Santos eds., 2006). This is a slightly expanded version of Duncan Kennedy, *Two Globalizations of Law & Legal Thought: 1850-1968*, 36 SUFFOLK U. L. REV. 631 (2002-2003).

81. JOHN AUSTIN, *The Province of Jurisprudence Determined* (Wilfrid E. Rumble ed., 1995).

doned any plan to publish them in his lifetime. After his death in 1859, his wife collated his notes for the lectures and, with support from Austin's famous friends, published them as *Lectures on Jurisprudence* in 1863. John Stuart Mill, an attendee of Austin's lectures, made his own notes of the lectures available to a new editor for the second edition. The book was popular enough to go through eight further editions over the next several years.[82] A student edition appeared in 1874 and had arrived at its twelfth impression in 1913.[83]

The lectures are often referred to as the foundation of the English school of analytical jurisprudence, but what is more important, for our purposes, is that their publication marked the arrival of classical legal thought and the influence of the German pandectist scholars in England. Here the point made by Pound in 1917 is worth continual repetition: the basics of the will theory, along with the categorical scheme of private law and the "modern" Roman concepts, were a specifically legal apparatus, adopted by legal thinkers and legal cultures with utterly diverse ideas about what law "is" or what its "end" may be.[84]

In other words, you could adopt the scheme of which Savigny was a notable developer because you were a follower of the historical school, like Savigny himself or his successor Sir Henry Maine (who published his *Ancient Law*[85] in 1861), or as a Lockean or Kantian natural rights believer, or as a utilitarian like Austin, with nothing but contempt for idealist philosophy in all its forms, or, eventually, as a social Darwinist like Herbert Spencer. The point is that the highly conceptualist legal apparatus ran by itself once the premises of freedom, or utility, or natural rights, or historical spirit, or adaptive "fitness" was in place, and all the nineteenth-century schools seem to have made it the vehicle through which their contradictory abstractions were put into quite similar practical legal effect.

2. Savigny and the British Colonial Project in India

And what might any of this have to do with colonialism? Again, it is common knowledge, supported in Eric Stokes's brilliant book, *The English Utilitarians and India*,[86] that the followers of Bentham, and particularly James Mill, saw India as their prime opportunity to put utilitarian ideas into effect. This included utilitarian ideas about law that could be tried out there for future re-importation as part of the

82. The above account is taken from Robert Campbell, *Introduction* to JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW: THE STUDENT'S EDITION (Murray, 1913) (1875).

83. *Id.*

84. Roscoe Pound, *The End of Law as Developed in Juristic Thought II: The Nineteenth Century*, 30 HARV. L. REV. 201 (1917).

85. HENRY SUMNER MAINE, ANCIENT LAW (2001) (1864).

86. ERIC STOKES, THE ENGLISH UTILITARIANS AND INDIA (Clarendon Press 1959).

movement for legal "reform" that dominated English legal circles for much of the nineteenth century. The legal reformers were not all utilitarians or positivists, nor advocates of codification, but what counts here is that they were the main figures after Austin in the reception and development of CLT.

Their Indian opportunity was dramatically expanded by the Sepoy Rebellion of 1857, a mass uprising triggered supposedly by a rumor that the British were going to force Indian soldiers of the East India Company to bite off cartridge ends soaked in pig's or cow's fat, taboo for Muslims and Hindus respectively. After they slaughtered the mutineers, the British put an end to the Company and assumed the direct administration of the colony. Queen Victoria made her famous declaration that:

> We declare it our Royal will and pleasure that none be in anywise favored, none molested or disquieted, by reason of their religious faith or observances, but that all shall alike enjoy the equal and impartial protection of the law; and we do strictly charge and enjoin all those who may be in authority under us that they abstain from all interference with the religious belief or worship of any of our subjects on pain of our highest displeasure . . . .[87]

Soon thereafter, the government began a process of codification, directed by a series of commissioners and consultants, for the transformation of the Indian legal system. These included, notably, Sir Henry Maine, Sir Fitzjames Stephen, and Sir Frederick Pollock, all leading figures of CLT in England. The declared strategy was, first, to continue the Company's policy of leaving religious and family law in place, except where they arguably contravened "natural justice" (Maine's codification of the Hindu law of marriage in 1867 was just one step in radically transforming family law in the name of preserving it). The second element in the strategy was to codify criminal, procedural, commercial, and contract law according to a rational scheme that would purge the peculiarities of English common law in favor of the general categories of the will theory as propounded by advanced legal thought (i.e., CLT).[88]

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87. 2 THEODOR GOLDSTÜCKER, LITERARY REMAINS 3 (London, W.H. Allen & Co. 1879) (quoting Queen Victoria, Proclamation (Nov. 1, 1858)).

88. *See generally* Dirk H.A. Kolff, *The Indian and the British Law Machines: Some Remarks on Law and Society in British India*, *in* EUROPEAN EXPANSION AND LAW: THE ENCOUNTER OF EUROPEAN AND INDIGENOUS LAW IN 19TH- AND 20TH-CENTURY AFRICA AND ASIA (W.J. Mommsen & J.A. de Moor, eds., 1992); KARUNA MANTENA, ALIBIS OF EMPIRE: HENRY MAINE AND THE ENDS OF LIBERAL IMPERIALISM, ch. 3 (2010); Faisal Chaudhry, *Charting the Rise of the Law as an Object of Normative Consciousness in Late Colonial India* (2010, unpublished manuscript on file with the author).

At this first level, Savignian ideas, both from the *Vocation*, where he propounds his theory of the customary origins of law and of its relationship to "legal science" and legislation, and from his development in the *System* of the distinction between family law and potentialities law, were obviously relevant to the discussions of the British jurists as they went about their task. Of course, there were many and complex arguments for "indirect rule" in general, and, when the colonial administration tended toward more direct legislative intervention, for a nominally hands-off approach to family and religious law, contrasted with more intervention in matters of land law, taxation or commercial law.[89] And it is difficult, to say the least, to measure the actual influence of ideas like those of the historical school, let alone of specific texts.

My argument is a much more limited one. As we set out to understand the globalization of Western law through the nineteenth-century colonialism of Great Britain, France, the Netherlands, Belgium, Germany, the United States, and Japan, it is striking that they all adopted the same distinction between at least nominal respect for local family law and insistence on the adoption of the universal private law of the market. It is useful to know that Western legal thought, as it developed into CLT, had resources, as exemplified by Savigny's family/potentiality distinction, that could be deployed to rationalize this difference, or at least to make it more plausible than it might otherwise have seemed.

Perhaps we should understand the rise of a foundational family/potentiality distinction as a step in the transition from earlier approaches. For example, the sixteenth- and seventeenth-century successors of the Spanish Conquistadors justified conquest as necessary for wholesale conversion of indigenous populations, and their subjection to a Catholic canon law marital regime (with significant but reluctant concessions to intransigent local customs).[90] In British India, the Proclamation marked the end of the period of "liberal imperialism," during which leading officials of the Company, allied with Christian missionaries, had embraced the idea of a root and branch transformation of Indian culture in a Western Christian direction, however much they had been obliged in practice to honor Hindu and Muslim family law.[91]

89. *See generally* JANAKI NAIR, WOMEN AND LAW IN COLONIAL INDIA: A SOCIAL HISTORY (1996).

90. *See, in general,* JOSÉ MARÍA OTS Y CAPDEQUÍ, EL DERECHO DE FAMILIA Y EL DERECHO DE SUCESIÓN EN NUESTRA LEGISLACIÓN DE INDIAS (1921); ISABEL CRISTINA JARAMILLO, UNA HISTORIA DEL DERECHO DE FAMILIA EN COLOMBIA (Siglo del Hombre y Universidad de los Andes, Bogota, 2010) (forthcoming), *esp*. ch. 1.

91. 3 THOMAS R. METCALF, THE NEW CAMBRIDGE HISTORY OF INDIA: IDEOLOGIES OF THE RAJ 34 (1995); MANTENA, *supra* note 88, ch. 1.

The formal declaration of respect for "native" family law was, in turn, a step toward the development of a nationalist, native elite interpretation of the family as a domain set apart from imperatives of Westernization, a symbol of desirable difference and a basis of resistance to colonial imposition.[92] This kind of nationalist interpretation of family law, usually but not always stripped of the Christian bias shared by Savigny and the liberal imperialists, seems to have had some level of ideological appeal in a variety of contrasting post-colonial contexts, as shown for the Middle East and Greece, by Abu-Odeh[93] and Tsoukala,[94] and for Sub-Saharan Africa by Kang'ara.[95] The development of a pluralist understanding of family law corresponds in a striking way to the "universalisation" of public international law, by gradually relaxing the criteria first of Christianity and then of "civilization," as the nineteenth century progressed.[96]

There is a second dimension of the colonial encounter to which Savigny is relevant. As Dirk H.A. Kolff explained in a notable article:

> The provinces of British India, indeed were too autonomous in many respects, from a legislative as well as from an executive point of view, not to develop a distinct administrative style of their own that owed its character both to the incidents of colonial history and to the cultures and social dynamics of the regional populations. The result was considerable legal diversity. If Bentham, the inventor of the word "codification," had his adherents in London and Calcutta, the partisans of his great German antagonist Savigny, who had warned against following foreign models, preferring to keep the law in close organic relation with custom and common law, could be found in Bombay and Lahore.[97]

It is much too simple to see Savigny simply as Bentham's "antagonist," given that Bentham's followers were the originators of CLT in England, and strongly influenced by the German version of CLT, even if not by Savigny himself. Indeed, according to John Duncan Martin Derrett, Savigny's translator Holloway, as a High Court

92. *See* PARTHA CHATTERJEE, THE NATION AND ITS FRAGMENTS: COLONIAL AND POSTCOLONIAL HISTORIES chs. 6-7 (1993). For the sequellae, see BRENDA COSSMAN & RATNA KAPUR, SECULARISM'S LAST SIGH? HINDUTVA AND THE (MIS) RULE OF LAW (2001).

93. Lama Abu-Odeh, *Honor Killings and the Construction of Gender in Arab Societies*, 58 AM. J. COMP. L. 911 (2010).

94. Philomila Tsoukala, *Marrying Family Law to the Nation* 58 AM. J. COMP. L. 873 (2010).

95. Sylvia Wairimu Kang'ara, *Western Legal Ideas in African Family Law* (unpublished manuscript on file with the author).

96. Lorca, *supra* note 77.

97. Kolff, *supra* note 88, at 220.

judge, was the most prominent advocate for the use of Roman law and, more importantly, of the mid-nineteenth century German pandectist authors, in the judicial reformulation of Anglo-Indian patrimonial law after 1860.[98] Holloway's Savigny was the CLT rationalist, rather than the organicist.

But it is still fascinating that, after recounting the story of conflicts about custom in Bombay and Lahore, Kolff continues the story to the "Presidency" or regional capital of Madras, where the most extreme advocate of customary native law against the newly created Anglo-Hindu law of the colony was one J.A. Nelson, an administrator and district judge in the same court system as Holloway. Kolff links Nelson's approach to that of the Dutch legal anthropologist Van Vollenhoven, another spiritual descendant of Savigny, who struggled against centralizing tendencies and also against the colonial authorities subtle interpretative transformations of the customary "adat law" of the Dutch East Indies (now Indonesia).[99]

The point, for me, is that Savigny figures in two of the main genealogies of modern legal thought. The first is that of CLT and of all its successor forms of legal rationalism. In this one, his importance, as Wieacker put it, is that he made possible the reconfiguration of the eighteenth-century law of reason into the late nineteenth-century pandectist private law system, characterized by an unprecedented (and never repeated) level of (apparent) internal logical consistency.[100] In the other genealogy, we trace back to him from the founders of the sociology and anthropology of law (for example, Ehrlich, Durkheim, Santi Romano, Gurvich, Malinowski, Bohannan, S.F. Nadel, and latterly Teubner and deSousa Santos). They descend from the family law side of the *System,* the organicist side preoccupied with spontaneous moral order according to the spirit of a people as embedded in its course of historical development. It has had its ups and downs, and its political dark sides, just like its atomist rival. My preference is for embracing rather than overcoming their contradictions.

98. John Duncan Martin Derrett, *The Role of Roman Law and Continental Laws in India*, 24 Rabels Zeitschrift für ausländisches und internationales Privatrecht 657, 670-83 (1959).

99. Kolff, *supra* note 88, at 224.

100. Wieacker, *supra* note 44, at 314.