other laws, some of which have a direct impact on women's bargaining power, are excluded from the legal reform agenda. In *Engendering Development*, labor and employment regulations, for example, are placed in a separate domain called "economic institutions" and are thus excluded from the equal rights framework altogether.[76] This is important, both because they are, of course, also legal rules and because their primary function is to redress the systematic imbalance in bargaining power between workers and employers.[77] Unlike other proposed legal reforms, labor and employment laws are subject to an extended cost-benefit analysis: concerns are expressed about regulatory burdens and administrative capacity; calls are made for more evidence about their effects; and attention is directed toward enduring social and cultural norms.[78] In the end, legal reforms to improve women's status and bargaining strength in the labor market are subordinated to norms about good economic governance and receive no endorsement.

A number of things are worth noting about this gender equality proposal. The first is how much it locates gender equality problems within the domestic sphere and the domain of politics; the second is how completely it is invested in the beneficent possibilities of market participation for women; and the third is, notwithstanding how much stress is placed on participation in markets, how much gender empowerment is delinked from legal reforms in the market, even as reforms in the domestic and political spheres are identified as essential. Here we can see both the ideology of good market governance at work and a degree of blindness about the inner workings of the household, bargaining models notwithstanding. An important part of the exercise involves reading issues of substantive economic equality out of the definition of gender equality[79] and consigning decisions about the allocation of household resources to the black box of household "choice."[80] By attributing so much variation in market outcomes to women's and household choice *and* by equivocating about the benefits of different market regulations for women, *Engendering Development* avoids most of the problems, such as systemically lower income and impaired market opportunities for women, that are documented with such monotonous regularity in the labor markets of the world.

Engendering Development predicts both the empowerment of women and beneficial changes to the household division of labor based on greater participation by women in the market. But impaired market outcomes for women are themselves linked as much, or more, to

76. *Id.* at 124-39.
77. OTTO KAHN-FREUND, LABOUR AND THE LAW 9 (1972).
78. WORLD BANK, *supra* note 15, at 124-39.
79. *Id.* at 35.
80. *Id.* at 70.

entrenched norms about the intrahousehold division of labor than to any simple animus against women *per se*,[81] as well as to employers' *perceptions* that in a conflict women will, in general, put family before work.[82] In short, there are as many reasons to suppose that market processes might work to transmit and reinforce as to undermine household norms about the division of labor. This is clearly the case if, as discussed next, other development reforms are reinforcing those very households norms at the same time.

B. *Social Protection: The Case of Conditional Cash Transfers*

For more than a decade, development banks and policy makers have identified "investing in women" as a promising development strategy on the theory that resources directly targeted at women tend to be an especially efficient way to generate improvements in the well-being of children and families.[83] The World Bank now emphasizes that better health and educational outcomes redound not only to the benefit of families but, because of the increased human capital and productivity of future workers such investments generate, to the economy as a whole.

Among the most popular ways to support the development of human capital are through conditional cash transfers.[84] Classic second generation policies that straddle the social and the economic, conditional cash transfers are designed to serve the dual goals of immediate poverty alleviation and longer term investments in human capital, by tying income transfers to compliance with policies such as regular school attendance, vaccinations, or attendance for health checkups.[85] Specific "at risk" populations are targeted, and resources are then normally sent to women in the households on the theory that it is they who will, in fact, ensure that the conditions are met. Recipients are often subject to community work requirements in exchange for the transfers and monitored for compliance with both the health and educational polices and the work requirements. Initially popularized in Mexico, conditional cash transfers have been imple-

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81. *See generally* LABOUR LAW, WORK AND FAMILY: CRITICAL AND COMPARATIVE PERSPECTIVES (Joanne Conaghan & Kerry Rittich eds., 2005).

82. *See* Amanda K. Baumle & Mark Fossett, *Statistical Discrimination in Employment: Its Practice, Conceptualization and Implications for Public Policy*, 48 AM. BEHAV. SCIENTIST 1250 (2005).

83. For a classic statement, see MAYRA BUVINIĆ, CATHERINE GWIN & LISA M. BATES, INVESTING IN WOMEN: PROGRESS AND PROSPECTS FOR THE WORLD BANK (1996).

84. *See* Sudhanshu Handa et al., *Opening Up Pandora's Box: The Effect of Gender Conditionality and Targeting on Household Spending Behavior in Mexico's Progresa Program* 37 WORLD DEV. 1129 (2009); Maxine Molyneux, *Mothers at the Service of the New Poverty Agenda: Progresa/Oportunidades, Mexico's Conditional Transfer Programme*, 40 SOC. POL'Y & ADMIN. 425 (2006).

85. *See* Handa et al., *supra* note 84, at 1129.

mented in Brazil, Columbia, and other parts of Latin America and are being considered in other regions as well.[86]

Part of the appeal of conditional cash transfers is that they so closely reflect general norms and assumptions within development institutions about how best—and how not—to alleviate poverty and improve social welfare. The World Bank is acutely concerned to reduce or forestall "dependency" and to ensure that all social programs lead ultimately to enhanced market participation.[87] Thus, the goal of empowerment for the poor, widely endorsed in development policy circles, has in practical terms come to mean training and education for the market,[88] while greater participation by those affected by development initiatives—another development touchstone—is often ensured through responsibility or co-responsibility by those on the receiving end of state assistance. Underpinning these moves is the reconceptualization of social welfare in terms of "social risk management":[89] social risk management aims to increase the economic security of the poor *not* primarily through redistributing resources, but instead by developing household capacity to reduce and cope with economic risk through strategies such as "income smoothing" over a lifetime.[90]

Both because conditional cash transfers are expressly given to women and because of the gendered division of labor that tends to obtain within households, it is women who bear the responsibility for ensuring compliance. For this reason, transfers are, at best, equivocal in their effects on gender equality. But they are also ambiguous with respect to households and markets. While they may be egalitarian with respect to girls, they are deeply maternalist in their assumptions about women,[91] and for a variety of reasons women may end up more, rather than less, tied to their households and less, rather than more able, to participate in markets in the mode envisioned by development planners. Thus, any benefit to the household that comes by way of conditional cash transfers needs, at minimum, to be counterbalanced by the possibility of impaired market opportunities for women.

The reasons are not hard to divine. Community work obligations impose significant additional work burdens in themselves, and household work for women may increase when children who formerly worked go to school. The time associated with more community and household work may well interfere with women's own labor market activities. Women may have difficulty, for example, both fulfilling job

86. Molyneux, *supra* note 84, at 425.
87. *See also* STANDING, *supra* note 63.
88. Molyneux, *supra* note 84, at 430.
89. WORLD BANK, *supra* note 16.
90. HOLZMANN, SHERBURNE-BENZ & TESLIUC, *supra* note 16.
91. Molyneux, *supra* note 84, at 438.

requirements and ensuring the attendance of their children at school. Nor is it always possible to plead for amendments to work schedules, even when family obligations compel only occasional deviations from workplace norms. In addition, programs typically provide no child care. Thus, in myriad ways, conditional transfers may influence the degree and quality of women's labor market participation, and women who seek to benefit from such transfers may find themselves having to forego economic opportunities they might otherwise have pursued. To the extent that this is true, they both impede the imagined route for greater gender equality and run at cross-purposes with the general objective of encouraging higher-value participation in markets. At minimum, then, they raise a fundamental development question: the balance to be struck between ensuring the labor market participation of current workers and cultivating the human capital of future workers.

Moreover, while conditional cash transfers *do* shift household risks and opportunities, their effect on internal household structures and dynamics may be both different and less than imagined. To the extent that they hold women responsible for compliance, they may well entrench the pre-existing household division of labor. But men may also work less in response to new income coming into the household,[92] and control over cash may not equate to different spending decisions as all the "investing in women" projects presume.[93] Nor is it clear that conditional transfers do, in fact, increase the outlays on health and education and thereby enhance the human capital of children more than would unconditional social transfers: most households appear to just regard them as replacement income for income formerly generated by children.[94] In such cases, conditional transfers simply impose discipline and (expensive) bureaucratic control over the household, to no obvious development or other end.

C. *Formalizing Labor Markets*

In large parts of the developing world, the majority of people are engaged in productive activities primarily to satisfy household consumption needs; traded activities may form a marginal part of their economic world. Access to resources often depends on formal or informal rights to land and other resources; sometimes those entitlements are embedded in familial relations. Resources may be jointly or communally held, while economic security may depend on complex and cross-cutting structures of reciprocity and redistribution that are in important senses inseparable from the social and family structures

92. *Id.* at 437.
93. Handa et al., *supra* note 84, at 1139.
94. *Id.* at 1138.

out of which they emerge.[95] Where families and the economy are interwoven in this way, legal reforms will not only affect the economy, including the household economy: they are likely to be socially and political transformative in far-reaching ways as well.

Often, involvement in markets means informal markets,[96] conventionally described as those in which economic activity either de facto or de jure lies beyond the reach of the state and outside the structures provided by formal legal norms, rules, and institutions.[97] Many of these informal economic activities have some connection to the household; some take place *in* the household, particularly where they involve women.[98]

Formalizing informal labor markets now constitutes an important plank in the development strategies proposed for states in regions as disparate as Latin America and Sub-Saharan Africa. The principal rationale for tackling informality as a development issue,[99] rather than just a matter of poverty alleviation or improving the conditions of work,[100] is the association of informality with low productivity.[101] Moreover, informality is increasingly imagined as a *legal* problem: it is attributed to inflexible and burdensome labor market regulation and poorly designed, as well as unwanted, social protection. If low rates of economic growth can be attributed to low productivity, then formalization, especially if accompanied by labor market "deregulation," might seem like a promising strategy to promote development.

The causal connections, however, between informality and low productivity are elusive; indeed, the causes of informality itself are disputed in ways that lead to very different proposals for tackling

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95. For an extended discussion, see Celestine Nyamu-Musembi, Gender, Property and Social Relations in a Pluralistic Social Setting (2001), (unpublished SJD dissertation, on file with Harvard Law School library). *See also* SALLY FALK MOORE, SOCIAL FACTS AND FABRICATIONS: "CUSTOMARY" LAW ON KILIMANJARO, 1880-1980, 86-88 (1986).

96. Numbers range from about fifty percent in most of Latin America to about ninety-three percent in India, Anne Trebilcock, *Using Development Approaches to Address the Challenge of the Informal Economy for Labour Law, in* BOUNDARIES AND FRONTIERS OF LABOUR LAW: GOALS AND MEANS IN THE REGULATION OF WORK 63 (Guy Davidov & Brian Langille eds., 2006).

97. INTERNATIONAL LABOUR ORGANIZATION, "RESOLUTION CONCERNING DECENT WORK AND THE INFORMAL ECONOMY" (June 1, 2002), http://www.ilo.org/asia/info/lang—en/docName—WCMS_098314/index.htm.

98. Trebilcock, *supra* note 96, at 67.

99. GUILLERMO E. PERRY ET AL., INFORMALITY: EXIT AND EXCLUSION (2007).

100. INTERNATIONAL LABOUR ORGANIZATION, DECENT WORK IN THE AMERICAS: AN AGENDA FOR THE HEMISPHERE 2006-15: SIXTEENTH AMERICAN REGIONAL MEETING, BRASILIA, MAY 2006 (2006), http://www.ilo.org/global/What_we_do/Publications/ILOBookstore/Orderonline/Books/lang—en/docName—WCMS_071488/index.htm.

101. Perry et al., *Informality, Productivity, and the Firm, in* PERRY ET AL., *supra* note 99, at 1, 157-58.

it.[102] Nonetheless, we can reflect on a number of features linked to families and households that might make informal work seem so unproductive and worrisome.

For one, informality may be a marker of the uncertain divide between market and non-market production. It often occurs in contexts in which people are engaged in subsistence production as well as market activity.[103] Informal work, particularly that of women, often takes place in and around the household; it is also common in family businesses. Imagine a typical working scenario in either case. It is unlikely that all working time will be devoted to productive activities defined as those that are directed to selling products or services in the market. Instead, goods and services will be produced for direct consumption, and family and household needs and preoccupations, ranging from food preparation and laundry to care of children, are likely to be part of the working day as well. In such situations, there may be no uncontroversial way to distinguish a "family" from a "business" expense. In addition, workers may come and go from the worksite; people, such as young children, who contribute little if anything to productive activity, and who may even interfere with it, may routinely be brought into it. Moreover, workers may be less interested in maximizing sales or income or otherwise expanding their economic horizons than in simply managing their total workloads, paid and unpaid. Their goal may simply be to ensure that through a mix of self-provision, income generation, "volunteer" contributions from family members, and perhaps barter or trade with those in a similar position, basic household demands for goods, services, and care are met and the household's total resources are adequate to meet its expenditures. In addition, work arrangements may be designed on the understanding that income will flow in from some household members, at the same time as unpaid family workers provide goods and or services that enable these members to generate income. In short, the informal sector is marked by porous and uncertain boundaries at every turn: between home and work, between market and non-market spaces, and between productive, non-productive, and reproductive activities.

Notice that this may be a completely functional set of arrangements for the workers themselves, given family structure, the nature of household obligations, and the alternatives available in the market. Indeed, it is not dissimilar to the calculus that women in *formal* markets engage in when they choose work with limited hours or obligations, even where that does not appear to be in either their

102. Contrast, for example, the exit model described in PERRY ET AL., *supra* note 99 with the exclusion model in INTERNATIONAL LABOUR ORGANIZATION, *supra* note 100.

103. This is also true of many low-income women workers in industrialized countries. *See* Lucy Williams, *Poor Women's Work Experiences: Gaps in the 'Work/Family' Discussion, in* LABOUR LAW, WORK AND FAMILY, *supra* note 81, at 195.

immediate or overall economic interest. But it does look like an unsatisfactory set of arrangements from the standpoint of maximizing economic returns in the market. And if the concern is productivity, it looks as if economic actors are continually underperforming, putting aside their market work, and becoming distinctly *un*productive. It is also a worry that even when people *are* devoting their attention to producing for the market, productivity is not the sole, or even necessarily the primary, focus. Notice that it is also almost impossible to reliably measure productivity where the household is the locus of market activity as well as myriad family concerns. Given the mixed objectives and activities of the actors involved and the flexible and fluid nature of working time and space, definitively allocating labor and other costs in such circumstances raises a host of classification conundrums.

What you would want to see if you were fixated on conventional measures of development is more and more people focused more exclusively on transacting and maximizing returns in the market. Formalization might be a way to ensure this, as it sharpens the separation between family and market concerns by subjecting a subset of household activities to discipline and surveillance by the state. Indeed, the obligation to pay taxes, including the legal rules that define the nature and extent of permissible business expenses, which normally follows from the formalization of economic activity is likely to *force* a degree separation between home and work spaces and activities where none previously existed. Formalization may have effects on household function as well as form, provoking greater substitution of market for family-provided services, for example, and producing the side-effect of an apparent increase in the size of the economy.[104]

One aim of development projects is clearly to move people out of household-based economic activities and production into the space of the market. Yet the intermingling of household economic concerns with other objectives that is so common within the informal sector suggests that any association between intensified market activity and greater welfare will be contingent on a range of factors. Whether it represents a net gain for the household, for particular household members, or even for society as a whole is open to question. It would surely depend on where people end up working, and under what terms and conditions.

104. The reverse is also true: hence the oft-cited example that if a man marries his housekeeper, the "national dividend" or GDP suffers a loss. *See* Arthur Pigou, *The National Dividend, in* THE ECONOMICS OF WELFARE, Part I, ch. III, (4th ed., 1932).

D. *Land Titling*

Like labor markets, land is marked out for formalization on the list of legal reforms in aid of development.[105] Indeed, land titling is regarded as virtually a *sine qua non* for effective participation in global markets, and it is almost invariably at the top of the list of reforms to promote growth and poverty alleviation in countries in which any significant amount of land is held under customary arrangements.[106]

The justification for titling directly tracks the vision of development through greater market integration. First, the registration of land title is designed to enable the creation of new markets in land where either custom or uncertainty about entitlements prevents the sale of land altogether or impedes its easy alienability. Second, formalization is intended to make land usable as collateral for loans that support either new economic ventures or the productive enhancement of those already underway.[107] In an image popularized by Hernando de Soto, through formalization land will lose its status as "dead capital" and be transformed into a source of wealth that both enriches the many people who lack other assets and drives the general process of economic development.[108] The overall aim of titling is to commodify resources that lie either outside the reach of the market altogether or beyond the full force of its logic so that they may be deployed to generate greater income. Ideally, title should also be vested in an owner with sufficient power to deal with the land according to commercial norms; thus, titling may also involve eliminating or altering the complex structure of user rights and informal norms that are a common feature of customary land-holding arrangements.[109]

It is far from clear that land titling does in fact operate as advertised in development policy. The justification for titling is pervaded with images of property that bear little relation to property rights as they are organized in advanced capitalist markets,[110] and the actual impact of titling will be contingent on other institutional arrangements, formal and informal. Whether, and how much, titling either

105. The rationale for land titling initiatives in contemporary development policy is set out in a World Bank Policy Research Report, KLAUS DEININGER, LAND POLICIES FOR GROWTH AND POVERTY REDUCTION (2003).

106. COMMISSION ON LEGAL EMPOWERMENT OF THE POOR, MAKING THE LAW WORK FOR EVERYONE, vol. II, (2008), http://www.undp.org/legalempowerment/reports/concept2action.html.

107. DEININGER , *supra* note 105.

108. *See generally* HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2002).

109. See, for example, MOORE, *supra* note 95.

110. Thomas Grey, *The Disintegration of Property*, *in* MODERN UNDERSTANDINGS OF LIBERTY AND PROPERTY 291 (Richard Epstein ed., 2000); Joel Ngugi, *Re-examining the Role of Private Property in Market Democracies: Problematic Ideological Issues Raised by Land Registration*, 25 MICH. J. INT'L L. 467 (2004).

alleviates poverty or advances economic growth will also depend on the wide range of choices about the design of property and other legal rights that the argument for titling itself leaves open. For example, whether new markets in land in fact "spring up" after titling may depend on the presence of credit markets; creating such markets, at least for those who do not yet have access to them, is likely to involve significant institutional (and social) transformation in itself.[111] Thus, it is difficult to connect property reforms even with basic development objectives like higher rates of growth. Whether titling reliably alleviates poverty and promotes objectives like greater equality rather than merely increases the access of those with resources to assets now out of their reach is even more in question, in part because titling does not aim to change the underlying distribution of property.

In addition, there are myriad ways in which titling might work to either advantage or disadvantage specific social groups.[112] The first thing to notice is the potential for direct impact on the status and resources of household members. Depending on how property rights are structured and the changes that titling precipitates, those with pre-existing entitlements at customary law may find those entitlements alternatively strengthened, modified, or eliminated. If, for example, the head of household is identified as the husband and he becomes the formal property owner, a not uncommon scenario, other family members may be effectively dispossessed. If, by contrast, wives' (and others) entitlements are enhanced or formally recognized, they may have newfound status and bargaining power within the household or new modes of exercising the power that they already enjoy.

But the indirect effects of land-titling on the household may be just as profound. Formalization is intended to change the nature and intensity of economic activity, and given the overlap between the household and economic activity, if in fact it does so, that is likely to mean change to the household and its functions too. The new access to capital and to markets that titling, at least in theory, provides is expected to provoke a shift to higher value-added economic activity oriented toward income-generation rather than household consumption. In economies in which subsistence activity dominates economic life, we should expect titling to intensify the displacement of people from traditional economic activities through greater, for example,

111. Celestine Nyamu-Musembi, *Breathing Life into Dead Theories About Property Rights in Rural Africa* (Institute of Development Studies Working Paper 272, 2006).

112. For discussions of possible effects on gender relations, see Nyamu-Musembi, *supra* note 95; Kerry Rittich, *The Properties of Gender Equality, in* HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT 87 (Philip Alston & Mary Robinson eds., 2005). *See also* Thomas Kelly, *Unintended Consequences of Legal Westernization in Niger: Harming Contemporary Slaves by Reconceptualizing Property,* 56 AM. J. COMP. L. 999 (2008).

mechanization of agricultural processes and the sale of land for changes like tourism and mining, changes that do indeed generate higher market returns and foreign currency earnings as well.

Whether people are directly displaced or merely nudged out of traditional economic activities to make way for new market-centered ones, we could imagine knock-on effects of land titling that reconfigure the family in a variety of ways, particularly if land titling occurs in tandem with other economic reforms, like trade and financial market liberalization, designed to spur the integration of local into global markets.[113] One is the fragmentation of the household or family unit; the other is the emergence of a distinction between economically productive and unproductive family members.

It is a virtual certainty that more people will end up engaged in wage labor, as mechanization and changing land uses eliminate traditional subsistence options and start to compel the purchase of more goods and services in the market. Given the paucity of other economic options, those displaced workers may very well choose, or be compelled, to leave home and join the growing flows of migrants from rural to urban areas. If so, many are likely be absorbed into the burgeoning informal labor markets of the urban and peri-urban cities of the developing world, the repositories of vast numbers of workers who have been displaced from rural life.[114] There, they may be engaged in any number of informal sector activities from street vending to construction to garbage picking to industrial home work; if they are women, perhaps their fate will be domestic work.[115] Or they may form part of the pool of transnational migrant labor whose remittances are now so important to both their families and countries of origin.[116]

Whatever their actual *jobs*, they are almost certain to have precarious economic and social status—uncertain income, poor conditions of work, and little voice and influence in determining either—in their new working lives.[117] To the extent that titling feeds the expansion of informal labor markets, then, it may be difficult to connect with poverty alleviation or other equality and welfare-enhancing objectives. But such labor market outcomes suggest why titling may also generate ambivalent effects on economic growth.

113. For a discussion of the impact of trade liberalization on women, see GAMMAGE ET AL., *supra* note 2.

114. See, for example, Jan Bremen, *The Myth of the Global Safety Net*, 59 NEW LEFT REVIEW (2009).

115. See, for example, Chantal Thomas, *Migrant Domestic Workers in Cairo; A Case Study of Informality in Legal and Economic Ordering* 58 AM. J. COMP. L. 987 (2010).

116. Sassen, *supra* note 8.

117. GOOD JOBS, BAD JOBS, NO JOBS: LABOR MARKETS AND INFORMAL WORK IN EGYPT, EL SALVADOR, INDIA, RUSSIA (Tony Avirgan, L. Josh Bivens & Sarah Gammage eds., 2005).

At the same time, forms of labor that were formerly seen as productive, or that occupied an uncertain status because there was no reason to classify them one way or the other, may be designated as unproductive. This, of course, may also change the relative status of family members, rendering some economically "active" and others "inactive." Echoing patterns long familiar in the histories of family law and modernization in different jurisdictions, we can discern the potential for titling not simply to provoke more market-centered economic growth, but to aid in the material and ideological reformation of the family, at the same time turning the household into a private and essentially non-economic domain and transforming productive into (apparently) unproductive work.

V. Revisiting the Economic Family in Development

The burgeoning attention to family behavior and household decision-making within development policy, their role in human capital formation and influence on labor market participation in particular, has begun to underscore the status of the household as an economically significant entity. Not only are the production of goods and services and the provision of welfare underway in both families and markets; welfare functions and productive activities are now visibly moving *between* the family, the market, and the state, often provoked by legal and policy reforms directed at enhancing measurable economic performance in markets. Tracing the effects of policies like land and labor market formalization, both on each other and in and out of the household, and noticing how they might trigger both expected and unexpected changes at home and in markets, only confirms the economic significance of the household; it also gives us new purchase on the functionality of development reforms themselves. For this reason, it now takes a great deal of *work* to hold the economic family in abeyance in the field of development: even where technocrats or policy-makers wish to do so, household economic activity slides back into view, often mirroring and framing the economic activity in the market.

At this point, the exclusion of the family and the household from general assessments and analyses of economic growth and development starts to look like a classic case of exceptionalizing—normative and descriptive differentiation that both carries normative projects and blocks important economic and political processes from view.[118] What is the payoff for bringing the family as an economic entity (all the way) back in? Here I suggest that reintegrating the family/household more completely into the development calculus is important for analytic purposes as well as for normative ones. The preceding dis-

118. *See* Halley & Rittich, *supra* note 44.

cussion indicated some of the reasons that a legal analysis, one indebted to legal and post-realist thought, might be a productive means for doing so. At this point, we can draw some more general observations.

To reiterate, feminists, sociologists, and economists have long analyzed the productive, reproductive, and welfare functions of the family. Many have noted the adverse distributive consequences, particularly for women, of ignoring the economic value of household work; some have also observed that this exclusion distorts our perception of the economy itself and skews the assessment of the effects of policy and regulatory interventions. Bringing critical legal tools to bear *and* using an expanded template for thinking about the law of the family/household gives us a better vantage point for exploring these distributional and cognitive questions. Together, these moves allow an appreciation of the wide range of mechanisms that might generate distributive effects within the household and that, directly and indirectly, impel the creation (and recreation) of household and family forms. Attending to FL1, 2, 3, and 4 also illuminates not simply the myriad connections between the family and domains such as the market; it also gives us a means to see (more of) what is now placing households and markets under pressure and moving them to change.

Broadening the effective law of the household and thinking of those laws as incentives and bargaining endowments that operate across the household/market divide encourages us to think about how different parties might respond to, and actively use, a wide range of legal rules for their own purposes and to notice how varied those uses and purposes might be. At this point, we are alerted to expect lots of different outcomes from development interventions because we can better see how legal rules—some of which seem remote from the family and household—might be replete with normative and practical implications for the family and hence might be drivers of change within as well as outside the household.

In the development enterprise itself, both the analytic payoff and the institutional implications for resituating the household within the broader economy are immense, particularly if that move is made in conjunction with attention to the distributive and constitutive properties of legal rules already described. Here are some of the consequences of doing so.

First, resituating the family within the economy changes the empirical picture in fundamental and, I suggest, helpfully destabilizing ways. Noticing the allocation of resources and the performance of activities across the household/market continuum might, in time, make it easier to see a greater range of possibilities for organizing production, reproduction, and welfare. For example, we might see programs like conditional cash transfers as simply one way to pursue the goal of human capital formation to foster high-skill economic growth. But it is only one of many: the same goal could be, and is in fact already, pursued through incentives to encourage greater private purchases of educational and health services, the direct provision of services by the state, or as is now common, through some mix of private and public provision within a broader policy framework and under some degree of regulatory supervision by the state. Leaving aside questions about the goal itself, whether conditional cash transfers are the *best* way to create human capital may depend on what follows, namely the *other* consequences that such policies generate.

Second, putting the household back together with the rest of the economy reveals the feedback loop that is continuously operating between households and markets and allows a better assessment of the effects of regulatory and policy interventions, not just on the household but on the market itself. Whether they are designed to do so or not, many interventions will provoke adjustments to household behavior, and those adjustments, in turn, may well precipitate unexpected as well as expected changes in markets, which may then affect families . . . and so on. These interlocking reactions and spillover effects may be beneficial or detrimental, or they may generate outcomes that could be described as both good and bad. Even assuming a wide range of opinion on such questions, knowing this is surely of interest. Conditional cash transfers, for example, may clearly alter the balance of household resources and power, especially if they are expressly given to women. But depending on how they are designed, they may alternatively promote or discourage the labor market participation of different groups. The formalization of labor markets will also likely have ambiguous effects on households, and thus on welfare, too.

Where customary entitlements prevail, land titling may shift resources between husbands and wives, but it may also affect the access to resources—for better and for worse—of many others within the family or kinship network. Indeed, land titling may well set in motion both beneficial and worrisome changes to the household and to the economy as a whole.[119] In short, there are costs and benefits all over the place, many of which are currently not visible. If development policies serve to disguise this distribution of costs and benefits or to shift costs to the household and thereby change the apparent outcomes of development interventions, putting the household back in the picture should help make these processes clearer.

Third, it helps to make the normative valence of interventions in both households and markets more visible. There is no single or obvious way to organize tasks or functions like production, consumption,

119. Rittich, *supra* note 112.

exchange, and the reproduction of culture or people.[120] Despite current efforts to normalize the allocation of economic burdens, risks, and responsibilities as among the family, the market, and the state in accordance with good governance norms and regulatory "best practice," there is no necessary, natural, or neutral way to do so, even within market societies.[121] Recognizing this makes the preoccupation with household and market governance, including any impulse towards harmonization or convergence of their legal rules, look much less like a technical enterprise and much more like a normative and political one. It should also make it more difficult to close down consideration of different regulatory and institutional options.[122] At minimum, it makes the stakes clearer; for that very reason, it is also likely to make such decisions more contentious.[123]

Fourth, the use of bargaining models, both as a description of intrafamilial dynamics *and* as a way to understand the operation and effects of legal rules across the household/market continuum, makes it more difficult to hold fast to some of the most important narratives and ideologies that organize mainstream development thinking. These narratives and ideologies not only frame our perception of economic life but also undergird specific claims about regulatory best practice and good economic governance.

Among the defining features of market-centered development policy are the distinction between private and public ordering and the preference for private over public service provision. Replacing a stark family/market polarity with a household/market continuum goes some distance to eroding the public/private distinction at the level of description; considering the role of the state in ordering relations *within* families and markets erodes the distinction and its analytic purchase still further. If we are trying to trace the impact of development-driven legal reforms on household, this collapse of categories may do some useful work. For one, it allows us to pursue the intuition that the public/private dichotomy may no longer adequately map the facts on the ground. Given the rise of mixed public/ private ventures in both economic development and service delivery and the expanding role of private actors in governance and policy

120. *See* KARL POLANYI, THE GREAT TRANSFORMATION (1944).

121. Kerry Rittich, *Law and Distribution in the Market: A Post-Realist View, in* RITTICH, *supra* note 6, at 127.

122. For general arguments for greater institutional and legal diversity in the field of development, see David Kennedy, *The 'Rule of Law', Political Choices and Development Common Sense, in* THE NEW LAW AND ECONOMIC DEVELOPMENT, *supra* note 18, at 95; DANI RODRIK, ONE ECONOMICS, MANY RECIPES: GLOBALIZATION, INSTITUTIONS AND ECONOMIC GROWTH (2007).

123. Joseph E. Stiglitz, *Democratizing the International Monetary Fund and the World Bank: Governance and Accountability*, GOVERNANCE: INT'L J. OF POLICY, ADMIN. AND INSTITUTIONS 111 (2003).

formulation,[124] the familiar template for conceptualizing the options and actors—family, market or state[125]—seems progressively both less accurate and less useful. For another, it encourages us to consider regulatory and policy decisions that we might otherwise neglect. It is common, for example, to imagine the state as distributing resources to families and households only, or primarily, when it provides public services or directly transfers resources through mechanisms like cash transfers or tax rebates. However, these are only a subset of the ways in which the state redistributes resources; nor are such transfers necessarily the most economically significant. Rather, decisions about financial regulation, bankruptcy codes, labor and employment rules, trade and investment law, indeed myriad regulatory and policy decisions, may all dwarf their effects on the household at least in some contexts.

Another ideology that bargaining models bring into question is the rationality of the market itself; oddly, this is because bargaining models also point us to "familial" traits and logics in the market. The constant iteration of the claim that the market is the sphere of rational calculation inhabited by actors motivated by economic self-interest inhibits recognition of behavior and decision-making that is both ideologically driven and emotionally laden. It obscures the fact that markets are pervaded with irrationality and not infrequently produce bargains that are difficult to account for in terms of self-interest.[126] For example, workers routinely give more in the context of their employment than makes sense in purely financial terms; employers often hire, and pay, on bases that cannot be accounted for in terms of merit, productivity, or even the "going rate" in the market.[127] If markets are sites in which actors, if they are indeed rational, are engaged in processes of utility maximization that extend beyond material self interest and that incorporate a range of political, ideological and cultural objectives as well, then the fundamental narrative about markets as the engine of material progress and the foundation of improvements to both individual and household welfare appears in a new light. If, for example, markets are mechanisms for the transmission of cultural norms or the pursuit of political objectives, and if, as a result, household members are likely to have—or even to seek out—different experiences when they enter and participate in markets, perhaps we have different bases on which to

124. For a comparison of the features of "old" and "new" governance in the context of the European Union, see Joanne Scott & David M. Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, 8 EUR. L. J. 1 (2002).

125. *See* ESPING-ANDERSON, *supra* note 24.

126. See, for example, Christine Jolls, Cass Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1571 (1997-98).

127. George A. Akerlof, *Labor Contracts as Partial Gift Exchange* 97 Q. J. OF ECON. 543 (1982).

consider legal rules that alternatively support, interfere with or reorganize market processes. Against current governance norms, and thinking of them as part of the law of the household, we might look more favorably, or just *differently*, on a whole host of legal rules that affect the way that markets operate. Indeed, we might be more cautious about the links we assert between market participation and enhanced household and individual welfare *tout court*.

Whether the upheaval—analytic as well as normative—that the household/market encounter and the reframing of family law inject into development thinking and development policy is welcome is surely a question. However, there are immense benefits, in empirical accuracy, analytic precision, and normative vision, from both.