Economic History and the Remaking of Family Law

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In looking at the history of family law, we locate family law – and the status of women and children within it – as a function of political economy. That is, family law is shaped by a societal system that allocates access to, and control of, sources of wealth, decision-making power, and responsibility for dependents. As the nature of family assets has changed from land to male wage labor to two incomes and a complex set of complementary employer and state-provided benefits, so too have family dynamics and, ultimately, family law. They have evolved into the contemporary system, with a distinct allocation of decision-making power necessary to channel greater investment into children, manage the relationship between two more financially independent adults, and coordinate the investments in more complex family relationships.

While these legal changes govern all families, families do not necessarily interact with the legal system in the same ways. As a practical matter, couples with assets tend to drive the legal changes as they are more likely to bring cases that produce precedent-setting legal developments or engage in the political lobbying necessary to enact legislative changes. At the same time, couples without assets often form families, dissolve them, and form new ones without necessarily interacting with the legal system at all. This makes family law, that is, the body of statutes and decided cases, "middle class family law," reflecting and reinforcing the norms of those with assets.

In this article, we trace both the evolution of the dominant family law of the middle class as these doctrines have changed in response to new economic systems, and the ways that families without assets have emerged from the shadows of the law, becoming

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more visible over time and thus posing more of a challenge to mainstream doctrines.

Introduction

Family law has sometimes been treated as though it is sui generis: a body of law that addresses the distinctive relationships within the family, governed by principles tied to morality or sentiment.[1] In accordance with this view, the law reflects cultural shifts, such as the increasing status of women, transforming institutions such as marriage from mandatory and necessarily permanent arrangements to voluntary unions that reflects the consent of presumptively equal spouses.[2]

In looking at the history of family law, however, we take a different approach.[3] We locate family law – and the status of women and children within it – as a function of political economy. That is, family law is shaped by a societal system that allocates access to, and control of, sources of wealth, decision-making power, and responsibility for dependents. Over time, as a result of a changing economy, the nature of family assets has changed from land to

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1 *See, e.g.,* Carl E. Schneider, *The Channeling Function in Family Law*, 20 Hofstra L. Rev. 495, 496 (1992) (maintaining that "the law recruits, builds, shapes, sustains, and promotes social institutions" that contribute to shared moral understandings).

2 *See, e.g.,* Joanna L. Grossman & Lawrence M. Friedman, Inside the Castle: Law and the Family in 20th Century America 58 (2011) (describing a major shift to "expressive marriage," in which "[h]usband and wife were looking for personal fulfillment; they evaluated their marriage 'in terms of self-development, as opposed to the satisfaction they gained through pleasing their spouse and raising their children" (emphasis omitted) (quoting Andrew J. Cherlin, The Marriage-Go-Round: The State of Marriage and the Family in America Today 88 (2009)); *id.* at 12 (maintaining that whereas nineteenth-century married couples stayed together "until death do us part," modern couples stayed together until the marriage "no longer contributed to personal growth and fulfillment, for either partner").

3 Of course, we are not alone. Indeed, linking family history and economics arguably begins with Friedrich Engels, *The Origin of the Family, the State and Private Property* (1884). For a more recent historical analysis, see Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective,* 51 Stan. L. Rev. 221, 226 (1999) (observing that that economics, sex, and the law are linked and that "the legal assignment of economic abilities and disabilities to sexual relationships distributed wealth not only between men and women, but also between whites and blacks.").

male wage labor to two incomes and a complex set of complementary employer and state-provided benefits. With these economic changes, family dynamics have evolved, with a different allocation of decision-making power necessary to channel greater investment into children, manage the relationship between two more financially independent adults, and coordinate the investments in more complex family relationships.[4]

While these legal changes govern all families, families do not necessarily interact with the legal system in the same ways. As a practical matter, couples with assets tend to drive the legal changes as they are more likely to bring cases that produce precedent-setting legal developments or engage in the political lobbying necessary to enact legislative changes. At the same time, couples without assets often form families, dissolve them, and form new ones without necessarily interacting with the legal system at all.[5] This makes family *law,* that is, the body of statutes and decided cases, "middle class family law," reflecting and reinforcing the norms of those with assets.

With the growth of the state, however, the tensions between the formal regulation of family membership and private understandings have grown. Today, state benefits have become a much more important component of family life than they were at the time the country was founded and state benefits are often tied to the legal recognition of family membership, that is, formal statuses. Family courts have accordingly become more likely to adjudicate disputes that involve families that form and dissolve in accordance with more varied norms, norms that may be at odds with the formal law. These tensions parallel the shifts in the formal law as it

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4 For a description of these changes, see Naomi Cahn & June Carbone, *Uncoupling*, 53 Ariz. St. L.J. 1 (2021)[hereinafter Cahn & Carbone, "*Uncoupling*"]. *See also* Philip de Sa e Silva, *Throuples and Family Law,* 108 Minn. L. Rev. 1559 (2024) (describing complexities posed by three-person adult relationships).

5 Indeed, the history of common law marriage involves the effort of the mainstream system to give legitimacy after the fact to couples who formed families without marrying and later to abolish the common law doctrines to express disapproval of those who failed to marry. *See* Jennifer Thomas, *Common Law Marriage*, 22 J. Am. Acad. Matrim. Law. 151, 160-62 (2009) (observing that the combination of greater urbanization making formal marriage easier to arrange, fear of fraud, and disapproval of informal cohabitation led to the abolition of common law marriage in most of the country).

evolves over time to better address the relationships between the family and the broader society.

Examining history with attention to the parallel developments in mainstream family law and in the family norms of other groups points to three broad eras that produced different bodies of family law. The first is the agricultural era in existence at the time of the country's founding. Family law's most important objective in this era was establishing the legal basis for property ownership and the hierarchical order that governed the relationships between property owners and dependents. Government involvement in the family, other than establishing the terms for marriage, inheritance, and the rare divorce, was minimal and families without assets had limited contact with the legal system.

The second era in American family history starts with the industrial revolution, which began in the urban Northeast as early as the 1840's. It changed the foundation of the middle-class family from farm ownership to the professions and the managerial positions of the new economy. Production – whether agriculture or dress-making – moved out of urban middle-class homes and so did the husbands who once oversaw everything taking place in the homestead from the sons' tutelage to the wives' acquisition of the fabrics needed to clothe the family.

The purpose of the remade middle-class home became investment in children, investment overseen by the mothers of the new era. While this system of the "separate spheres"[6] or "cult of domesticity" is identified with women's oppression in the late twentieth century, in the nineteenth century, it gave women a promotion from the "weaker vessel" to the "more moral" sex[7] (and contributed to the rise of the United States as the best educated country in the world by 1900).[8] It also changed the view of children, with mandatory education requirements and increasing regulation of child labor. This new system, dependent on a male family wage that could support a family, remained beyond the reach of much of the population until after World War II (and never described the ma-

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6 *See, e.g.*, Cathy M. Davidson, *Preface: No More Separate Spheres!,* 70 Am. Lit. 443 (1998) (discussing the debate about the use of the term "separate spheres").

7 Joan C. Williams, *Deconstructing Gender*, 87 Mich. L. Rev. 797, 830 (1989).

8 June Carbone, *The Fight to Expand Education: Two Centuries Apart*, 71 Fla. L. Rev. F. 164 (2019).

jority of Black families).[9] Led, however, by the middle classes most likely to appear in court, industrialization contributed to important shifts in family law over the course of the nineteenth century, including the Married Women's Property Acts (MWPAs), greater female will-making and inheritance, increasing albeit still low rates of divorce, and the rise of the maternal custody presumption. The propertyless, however, still overwhelmingly managed their families outside of the formal system. "Poor man's divorce," at the height of the Great Depression, for example, was more likely to involve desertion than divorce and extended family relationships, more important to immigrant and low income families than to the native born middle class, received relatively little formal recognition.[10]

The New Deal, which engineered a far-reaching expansion in the role of government,[11] changed the relationship of family law to the propertyless. The mature industrial economy of the middle of the twentieth century made the male family wage a norm of secure employment in the "good jobs" of the manufacturing era, and the supplementation of these jobs with retirement, workers' compensation, and other benefits available to a much larger part of the population. Increased home ownership also meant that formal divorce, rather than desertion, was more likely to determine family obligations upon dissolution of the relationship. And as state-administered benefits became more important, so did determination of the formal family relationships that determined eligibility.

The intersections between the formal family system and more economically and culturally diverse families accelerated with the third historical era, the information age or the post-industrial economy, which changed the economic foundation of the family in

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9 Married Black women have historically had higher labor market participation rates than white women, with a greater degree of convergence only after white women's paid employment rates increased after the sixties. Richard B. Freedman, *Changes in The Labor Market for Black Americans, 1948-1972*, Brookings Papers on Economic Activity (1973), https://www.brookings.edu/wpcontent/uploads/1973/01/1973a_bpea_freeman_gordon_bell_hall.pdf.

10 *See, e.g.,* Moore v. City of East Cleveland, 431 U.S. 494 (1977). "In New York, desertion is called in popular speech the 'poor man's divorce' due to the practical inability of many poor persons to obtain a divorce." Sidney B. Jacoby, *Legal Aid to the Poor*, 53 Harv. L. Rev. 940, 957 (1940); *see also* Michael J. Higdon, *Common Law Divorce*, 74 Ala. L. Rev. 365, 398 (2022).

11 *See* Cahn & Carbone, *Uncoupling, supra* note 4, at 18-22 (describing the rise of the social welfare state).

three distinct ways. First, the new economy increased the demand for women's labor; women were no longer intrinsically dependent on their husbands' income or property. Second, the "male family wage" that made it possible for a single breadwinner to support a middle-class family largely disappeared for all but the economic elite at the top of the economy; two incomes became the norm for the economic middle of the population. Third, jobs generally and jobs for low and middle income workers in particular became more precarious.[12] This has contributed to a change in the role of marriage. Marriage has become associated with creation of the assets necessary to provide a secure cushion and to fund even greater investment in children for the middle class; the family law of the post-industrial age accordingly seeks to reinforce the connections between parents and children both within and outside of marriage. At the same time, greater precarity has made family commitments more perilous for those without a financial cushion; many of the relationships of those without a college degree take place outside the ambit of family law altogether.[13]

Revisiting the history of these three eras in ways that link family law changes to the shifting economic organization of middle class families leads to a number of insights. First, it challenges the notion, shared by some members of the Supreme Court,[14] that the family – and the central elements of family law – have historically been fixed and unchanging. The vast majority of families in both the agricultural and the industrial ages determined family relationships through marriage; yet, family law in the two eras still differed notably with respect to such issues as the governance

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12 We describe the transformation from the "organization man," who enjoyed lifetime tenure, to the "winner-take-all" economy of today in Naomi Cahn, June Carbone & Nancy Levit, Fair Shake: Women and the Fight to Build a Just Economy (2024).

13 *See* June Carbone & Naomi Cahn, *The Triple System of Family Law*, 2013 Mich. State L. Rev. 1185 [hereinafter Carbone & Cahn, *Triple System*].

14 *See, e.g.,* Obergefell v. Hodges, 576 U.S. 644, 689-90 (2015) (Roberts, C. J., dissenting) (observing that marriage "has existed for millennia and across civilizations" and "[f]or all those millennia, across all those civilizations, "marriage" referred to only one relationship: the union of a man and a woman."). He added that: "This universal definition of marriage as the union of a man and a woman is no historical coincidence. . . . It arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship." *Id.*

of family assets, custody presumptions, and the permissibility of divorce – and the application to groups such as the enslaved. Second, recognizing the degree to which family law doctrine is focused on governing the connections between economic resources, parents, and children illuminates those who have historically been excluded from the mainstream system. Third, the changing status of women affects not just the normative foundation for relationships, but also the connection between the family and the sources of investment in children. It further affects the implicit bargain driving family law dynamics, including the terms on which partners enter into and exit intimate relationships. Finally, family law, precisely because of its central focus on the allocation of assets, exacerbates societal inequality. In today's society, those who can manage the trade-offs in two income households – or secure a single elite salary – have dramatically greater advantages that they can pass on to their children.[15] At the same time, precarious employment and volatile income undermines the relationship stability of lower income families.[16]

This means that the extent to which formal family law governs families is not simply a matter of imposition of a universal set of rules or adoption of the right moral values but of the creation of a secure foundation for families that allow every family to be able to realize the advantages of the mainstream system. Examining history helps to make visible the ways that family law has always been partial; that is, the ways that family law doctrines reinforce mainstream norms while often pushing others into the "'shadow of the law."[17] Contemporary law and scholarship have made more

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15 *See, e.g.,* Sara McLanahan, *Diverging Destinies: How Children Are Faring Under the Second Demographic Transition*, 41 Demography D 607, 613-14 (2004) (showing a steady increase in divorce rates into the nineties after which the rates diverge by class); *see generally* Melissa S. Kearney, The Two-Parent Privilege: How Americans Stopped Getting Married and Started Falling Behind (2023)(arguing that children of married couples are better able to achieve those advantages).

16 Cahn & Carbone, *Uncoupling*, *supra* note 4, at 35-36 (describing the role of income volatility in destabilizing families).

17 The phrase, bargaining in the shadow of the law, can be interpreted in two ways. One is that the law influences private bargains, changing the bargaining power of the parties. *See. e.g.,* Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 Stan. L. Rev. 167, 171–72, 203 (2015) (describing how the differing laws governing paternity inside and outside of

visible the ways that lower income families face hostile courts and greater difficulty accessing government benefits where their family norms differ from mainstream ones.[18] What has received less attention is how many families simply opt out of formal institutions; that is, they operate within the shadows of the law because the assumptions of the new system do not apply to them.[19] The challenge today is that the post-industrial economy has once again remade the terms of admission to the middle class and reorganized families to facilitate the investment necessary to realize the benefits of the new model. This model depends in large part on a remaking of the respective roles of men and women and, in doing so, the new middle-class model has once again been placed beyond the reach of much of the population.[20]

This article sets forth the three eras of family law, starting with the relationship between agriculture and land ownership, then proceeding to women's changing roles within the middle-class families of the industrial era, and finally considering how the new

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marriage affect fathers' bargaining powers). The other is that parties, by effecting voluntary agreements rather than litigating, remain in the shadows reaching settlements that the courts either cannot or will not order directly. *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950, 955-56 (1979) (showing how "the legal system processes undisputed divorce cases involving minor children" in ways that suggest "that parents actually have broad powers to make their own deals," including deals at odds with formal legal provisions).

18 These efforts start with tenBroek, who has inspired a vast literature documenting the inequities of the "dual system of family law." *See infra* discussion at notes 104-115 and accompanying text.

19 *See infra* discussion of "the triple system of family law" at notes 141-174.

20 We emphasize that this process sometimes involves different norms. For example, while middle class couples have moved toward a two-parent norm at separation, low-income couples describe a presumption of maternal custody. *See* Kathryn Edin & Timothy Jon Nelson, Doing the Best I Can: Fatherhood in the Inner City 169, 208-09 (2013) (reporting expectations that children live with the mother following separation and that the mother will control access to the children). More commonly, however, low income couples share similarly attitudes about institutions such as marriage and parenting but cannot meet the preconditions for the mainstream system. *See, e.g.,* Juliana Menasce Horowitz, Nikki Graf & Gretchen Livingston, *Why People Get Married or Move in with a Partner*, Pew Res. Ctr. (Nov. 6, 2019), https://www.pewresearch.org/social-trends/2019/11/06/why-people-get-married-or-move-in-with-a-partner/ [https://perma.cc/84JH-8RVB] (indicating that the lack of financial readiness is an important reason why cohabitants do not marry).

middle class family bargains of the post-industrial age fail to establish a legal foundation for others. In each of these eras, those who could not attain the middle-class model were effectively subject to a different set of rules.

I. "Little Kingdoms": The Family Law of the Agricultural Era

At the time the Unites States, was founded, the state itself was a minimal enterprise. The Founders debated whether the federal government should even maintain a standing army, and state and local governments had relatively modest functions: police forces did not arise until urbanization, education was a local enterprise with the Southern states adopting public education systems only after the Civil War, and infrastructure was minimal.[21] Accordingly, the family constituted the basic unit of society and, at a time when ninety percent of Americans were living on farms,[22] the farm provided the primary source of sustenance.[23] Family law's principal focus accordingly addressed the connection between real property ownership and his family membership, that is, the rights of the male head of household over land ownership, his responsibility for and authority over family dependents, and his transmission of land rights to the next generation. In the treatises of the time, family law resided in the same place as master/servant, reflecting the husband's role as well as the overlap between market and home.[24]

The family law focus on the connection between family and property proceeded from the nature of the farm-based families

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21 Michael Grossberg, Governing the Hearth: Law and the Family in Nineteenth-Century America 17 (1985) (describing the limited state role of the era).

22 Beth Waterhouse, *A Sustainable Future?*, PBS, https://www.pbs.org/ktca/farmhouses/sustainable_future.html [https://perma.cc/K33P-8DTN] (last visited Oct. 8, 2024)(contrasting the 90% of the nineteenth century with the 1% who live on farms today).

23 Grossberg, *supra* note 21, at 5 (referring to novel circumstances in the New World including the availability of land).

24 *See, e.g.*, Kaiponanea T. Matsumura, *Unifying Status and Contract*, 56 U.C. Davis L. Rev. 1571, 1575 (2023)("Certainly the common law statuses of marriage and domestic servitude left much to be desired, especially for wives and servants.")

of the era as self-sufficient, interdependent households[25] that served as a basic unit of production *and* community.[26] Most farms operated on a subsistence basis; that is, they produced products primarily for their own consumption, though some invested in commercial crops for sale, and most farm families also raised animals, or hunted and fished.[27] Farmwives made their own clothes; farm parents trained their children in the agricultural methods and crafts necessary to sustain an agricultural economy.[28] Farm families were often multigenerational, caring not only for the young but the elderly and other dependent relatives.[29]

Family law cemented the husband's authority as a patriarch.[30] Marriage was central to the husband's authority. First, inheritance law made legitimacy, that is, birth within marriage, a prerequisite

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25 Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 Tul. L. Rev. 955, 964–65 (1993). "This 'little commonwealth' of family life was public not only in the economic sense, but as the phrase implies, in the full political sense as well." *Id.* at 965.

26 Grossberg, *supra* note 21, at 4–5 (describing the comprehensive roles of families).

27 Dailey, *supra* note 25, at 966 n.25 (stating that before the nineteenth century, most farms involved cooperative economic activities whether production was for subsistence or sale).

28 *See* Martha L. Minow, "*Forming Underneath Everything that Grows:" Toward a History of Family Law,* 1985 Wis. L. Rev. 819, 854-56 (observing that while men and women often performed different tasks – and while women were more likely to assist the men than men were to assist with "women's work" – the activities were not as sharply differentiated as they would be in later time periods).

29 Indeed, in 1850, 75% of those over the age of sixty-five lived in multigenerational families compared to fewer than 20% in 1975. Steven Ruggles, *Patriarchy, Power, and Pay: The Transformation of American Families, 1800-2015*, 52 Demography 1797, 1798 fig.1 (2015).

30 *See* Grossberg, *supra* note 21, at 5 ("[T]he colonial household was hierarchical, patriarchal, and vested with overlapping and undifferentiated internal and external obligations. The community charged each male governor with the duty of maintaining a well-governed home and sustained his authority by granting him control of its inhabitants as well as of family property and other resources."); *id.* at 235 (identifying paternal authority with property ownership); Carole Shammas, Marylynn Salmon & Michel Dahlin, Inheritance in America from Colonial Times Until the Present 209 (1987) (estimating that men owned 85-90% of property well into the nineteenth century); *see also* Richard Chused, *Married Women's Property Laws 1800-1850*, 71 Geo. L.J. 1359, 1364 (1983)(citing Lee Sotlow, Men and Wealth in the United States, 1850-1870, at 200 n.12 (1975)); Davis, *supra* note 3, at 288 n.28.

for inheritance rights.[31] Studies of wills from the beginning of the nineteenth century further indicate that male land owners overwhelmingly left real property to their sons.[32] Second, while women could own land during this period,[33] principles of coverture treated the husband as head of the family, with the power to administer all of the family's resources, including any separate property the wife may have owned before the marriage or income she received during the union.[34] In return, the husband had a duty to support the wife, while the wife was expected to provide domestic services.[35] And the concept of family privacy limited legal interventions in an on-going family. Yet, divorce was legally difficult and rare;[36] if the couple separated, the husband would typically retain

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31 Grossberg, *supra* note 21, at 200 (describing how "bastardy law" sought to ensure birth within marriage).

32 *See* Chused, *supra* note 30, at 1364, 1382. That had started to change by the end of the nineteenth century. A study of Los Angeles testators in the late nineteenth century found that:

> These files demonstrate that, in some ways, Los Angeles in the 1890s was ahead of other parts of the country in women's rights. For example, men in Los Angeles routinely named their wives as executrix of the estate, unlike those in Pennsylvania. Relatively few men tied up legacies to a wife or daughter in a trust or a life estate, choosing instead to give the beneficiary fee simple rights to the property. On the other hand, perhaps because California law at the time gave women no right to devise their share of the community property, women constitute a smaller percentage of both the testate and the intestate than in studies from the same time period on the East Coast.

Kristine S. Knaplund, *The Evolution of Women's Rights in Inheritance*, 19 Hastings Women's L.J. 3, 39 (2008).

33 *See* Richard H. Chused, *History's Double Edge: A Comment on Modernization of Marital Status Law*, 82 Geo. L.J. 2213, 2215 (1994) (explaining the effect of coverture).

34 Coverture involved a complicated system that treated marriage as the union not just of husband and wife, but of two different family lines administered in the context of a system of male descent. *See, e.g.*, Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. Rev. 2139, 2150 (2019); Allison Anna Tait, *The Beginning of the End of Coverture: A Reappraisal of the Married Woman's Separate Estate*, 26 Yale J.L. & Feminism 165, 174 (2014) (explaining how women's lack of control even of property held in their names made the husbands' support critical).

35 Tait, *supra* note 34, at 179.

36 *See, e.g.*, Allison Anna Tait, *Divorce Equality*, 90 Wash. L. Rev. 1245, 1255 (2015) (observing that the southern states did not adopt judicial divorce until after the Civil War).

the farm while the wife had limited means of support and few places to go.[37] If a husband died, adult sons would typically inherit the family's property; the wife would have only a modest dower interest giving her a one-third life interest in property owned during the marriage. This interests secured the widow's support, but not decision-making power over the land. A widower, in contrast, received a 100% life interest in his wife's separate property, securing his continued control, so long as children were born during the marriage.[38] Custody in turn followed property ownership. If a father died, his brother or another man with the resources to provide for the children would typically be awarded custody of the children. And custody rights were close to absolute; the head of the family was expected to police children's behavior and was entitled to the child's earnings. The concept of family privacy meant that neither spouses nor children enjoyed much protection from violent or abusive men.

The law of domestic relations thus reflected and reinforced a system in which land was the principal source of wealth, and land ownership, transfer, and management was a family affair. Accordingly, family law was not just about "domestic relations," but about the bedrock of the economy. The limited state did one thing well: it secured property rights, with the United States leading much of the rest of the world in establishing a secure title system.[39]

Given the emphasis on property rights in family law, the propertyless enjoyed little recognition or protection. The slave system in the South provides a particularly egregious example. It addressed the enslaved almost exclusively through the law of master and servant.[40] The enslaved could not marry and thus received

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37 At death, farmland typically passed to the sons, who cared for the dependent widow. The widow's dower interest prevented the sale of the farm without her consent, but it entitled her to only a one-third life interest. On inheritance patterns, see Richard H. Chused, *Married Women's Property and Inheritance by Widows in Massachusetts: A Study of Wills Probated Between 1800 and 1850*, 2 Berkeley Women's L.J. 42, 47–49 (1986).

38 Jesse Dukeminier et al., Wills, Trusts, and Estates 423 (7th ed. 2005); Naomi Cahn, .*What's Wrong About the Elective Share "Right"?,* 53 U.C. Davis L. Rev. 2086, 2094-95 (2020).

39 K. Sue Park, *Property and Sovereignty in America: A History of Title Registries & Jurisdictional Power*, 133 Yale L.J. 1487 (2024).

40 Ann L. Estin, *Family Law Federalism: Divorce and the Constitution,* 16 Wm. & Mary Bill Rts. J. 381 381-82 (2007).

no legal recognition of the families they created; only their masters' property interest in the enslaved received recognition and protection.[41] And in states that promoted slavery, family law reinforced the concentration of property ownership in white families. It provided only limited – if any – recognition of the families of the enslaved or of those created by slave owners who wished to recognize the interracial families they had created. The families of the enslaved thus existed outside of family law altogether.[42] For example, the law of intestate succession did not recognize as "inheritable blood" the children of a mother whom the father who could not marry because of her enslavement, even when the father, an emancipated former slave, acknowledged and helped raise the offspring.[43]

The failure to recognize the family ties of the enslaved also restricted the ability of slaveowners to provide for their enslaved children. South Carolina, for example, prohibited testamentary emancipations[44] and "devises or bequests to slaves, including those made through trusts."[45] A slaveowner who wanted to free his own children had to do so during his lifetime. Even then, the freed children could not remain in the state nor could they own property there.[46] A well-informed and resourceful property owner, however,

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> Malinda and Sarah could not claim as heirs proper of their father, for the reason that both the father and mother were slaves, and persons in that condition are incapable of contracting marriage, because that relation brings with it certain duties and rights, with reference to which it is supposed to be entered into. But the duties and rights which are deemed essential to this contract, are necessarily incompatible with the nature of slavery, as the one cannot be discharged, nor the other be recognized, without doing violence to the rights of the owner.

In Malinda & Sarah v. Gardner, 24 Ala. 719, 723-24 (1854).

42 Davis, *supra* note 3, at 237 (discussing the complicated case of *In Malinda & Sarah*, 24 Ala. at 723-24).

43 *See id*.

44 *Id.* at 253.

45 "[A] devise or bequest for the benefit of a slave is declared null and void." Jolliffe v. Fanning & Phillips, 44 S.C.L. (10 Rich.) 186, 197 (1856).

46 *See, e.g.,* Bernie D. Jones, *"Righteous Fathers," "Vulnerable Old Men," and "Degraded Creatures": Southern Justices on Miscegenation in the Antebellum Will Contest*, 40 Tulsa L. Rev. 699, 710 (2005) (observing that "[w]hite family members fought for all they could get, for the law of slavery tended to support their property interests. Huge sums of money—real

who did free his children during his lifetimes could provide for them out of state. The South Carolina Supreme Court, for example, upheld the will of Elijah Willis, a slaveowner who died in 1855, and devised his estate to his executors with instructions to . . . liquidate the remainder of his estate to purchase land and homes for his family in a free state."[47] While the South Carolina Supreme Court referred to "the disgust which is properly felt at the course of conduct that supplied the motive to make such provisions as the will contains,"[48] it upheld the right of the patriarchal landowner to dispose of his property as "an autonomous, respected . . . sovereign rights-holder."[49]

The rights of property owners, including their testamentary freedom, was central to the organization of the families of the agricultural era; the rights involved, however, as Adrienne Davis emphasizes, were the rights of the testator to bestow; the recipients enjoyed no legally cognizable entitlements.[50] And the courts upheld landowners' rights only when they did not undermine the system of slavery.[51]

II. The "Separate Spheres" and the Middle-Class Family of the Industrial Era

The family of the agricultural era preceded the United States; it had been centuries in the making.[52] Over the course of the

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property, cash, securities, and personal property, including the slaves at the heart of the case—could be at stake.").

47 Davis, *supra* note 3, at 250.

48 *Id*. at 256.

49 *Id.* at 266 ("The author of a valid will exercises testamentary freedom as an autonomous, respected individual—a sovereign rights-holder.").

50 *Id.* at 257 (observing that "deference in the face of social misconduct strengthened the image of the sovereignty of the testator over his property" and that "the feelings that gave rise to the testamentary transfers were pushed into a special, pre-social set of 'natural sentiments,' laudable in their way, but reflective of charity rooted in animal sympathy rather than ethical duty rooted in law.")

51 S*ee* Hinds v. Brazealle, 3 Miss. 837, 2 How. 837 (Miss. 1838) (invalidating a bequest and bequeathing the property, including the enslaved, to white heirs because the testator's children with an enslaved woman had continued to live in Mississippi after their manumission).

52 *See generally* June Carbone, From Partners to Parents: The Second Revolution in Family Law (2000) (describing an extensive (and often speculative, contested, and Eurocentric) literature linking the rise of monogamy

nineteenth century, the foundation of the American economy shifted from agriculture to manufacturing; so too did the legal regulation of the family undergo a transformation. That transformation was long and gradual, beginning with the middle class in urban areas of the Northeast in the 1840's and coming fully within the reach of the majority of the white population only after World War II. [53] This section traces the developments of this new legal approach to the family.

A. *Private Family Law 1840 to 1930*

The key to understanding the new set of family relationships – and the applicable legal regulations – requires starting with the changing investment in children that contributed to the economic foundation of the new middle class. While the agricultural order depended on land ownership and children working on the farm, the middle class families of the industrial era depended more centrally on the transmission of human capital: formal education and training were the important pathways to the "good jobs" of the manufacturing age.[54] And this change, from self-sufficient farm households that oversaw both commercial and domestic production to complex urban societies, compelled a change in family law that affected the relationship between family and state, the decision-making power of husbands and wives, and the changing role of children as the principal preoccupation of a remade domestic order.

Women's virtue became central to the new middle-class model and within the new order, women received a promotion from the

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and the emphasis on legitimacy and patrilineal descent to the rise of agriculture).

53 S*ee* Cahn & Carbone, *Uncoupling*, *supra* note 4, at 18-26 (describing the rise of New Deal policies and extension of the white working class following World War II).

54 *See* W. Eliot Brownlee & Mary M. Brownlee, Women in the American Economy: A Documentary History, 1675 to 1929, at 26 (1976) (observing that the "increased Victorian emphasis on education, within as well as without the family, represented an effort to increase society's investment in 'human capital.'"); Mary P. Ryan, Cradle of the Middle Class: The Family in Oneida County, New York, 1790-1865, 184–85 (1981) (describing how middle-class status required greater moral instruction and supervision of the young in nineteenth century Utica, New York).

"weaker vessel"[55] in need of a man's protection to the more virtuous sex (albeit still vulnerable, without formal civic rights), and to the overseer of children's education and moral upbringing. The changes in marriage and fertility patterns were dramatic. In 1800, the average married woman gave birth to between seven and eight children; by 1900, that number had fallen almost in half,[56] and then decreased further to between two and three by 1930.[57] Moreover, in 1800, wealthier women had more children than other women; by 1900 they had fewer children.[58] During the colonial era, "bundling," that is, physical contact among teen couples was common; an unintended pregnancy simply moved up the wedding date. With greater emphasis on later marriages, brides experienced more pressure to remain virgins until their wedding night. In 1800, 30% of brides gave birth within eight and a half months of their nuptials, but by 1860, that number had fallen to 10%, again with better off couples leading the way.[59] As a practical matter, what produced

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55 Antonia Fraser, The Weaker Vessel: Woman's Lot in Seventeenth-Century England 1-6 (1984).

56 Linda Hirshman & Jane Larson, Hard Bargains: The Politics of Sex 148 (1998); Ryan, *supra* note 54, at 184.

57 Hirshman & Larson, *supra* note 56; *see also* Martha J. Bailey & Brad J. Hershbein, *U.S. Fertility Rates and Childbearing, 1800 to 2010*, 75, 83, *in* The Oxford Handbook of American Economic History (Louis P. Cain ed. 2018) ("the decline in fertility began in the mid to later nineteenth century. . . .Women born around 1850 averaged about 5 births during their childbearing years, whereas women born twenty-five years later in 1875 averaged 3.3 births over their lifetimes. This trend continued: women born in the early twentieth century averaged just 2.3 births over their lifetimes.").

58 J. David Hacker & Evan Roberts. *Fertility Decline in the United States, 1850-1930: New Evidence from Complete-Count Datasets*, 138 Annales de Demographie Historique 143 (2019) ("The negative relationship between education and fertility . . . is one of the most consistent findings in different societies and over time."); *see also* Carbone, *supra* note 52, at 63 (describing how the historical relationship between higher birthrates and class standing was reversed following industrialization); *Limiting Births in the Early Republic*, Digital History (2021), https://www.digitalhistory.uh.edu/topic_display.cfm?tcid=134#:~:text=Where%20the%20typical%20American%20mother,at%20the%20age%20of%2033 ("Beginning in the late eighteenth century, however, Americans began to have fewer children. Between 1800 and 1900 the birth rate fell 40 percent and even more sharply among the middle and upper class.").

59 *See, e.g.*, Hirshman & Larson, *supra* note 56, at 92; Eleanor Brown et al., *Fertility, Immigration, and Public Support for Parenting*, 90 Fordham L. Rev. 2485, 2507 (2022); Jane Larson, *"Women Understand So Little, They*

this transformation in marriage and fertility patterns was women's greater ability (and obligation) to say "no," both before and after marriage.[60] Barbara Welter describes this transformation in terms of a new female ideal, which she described as "True Womanhood," characterized by "four cardinal virtues – piety, purity, submissiveness, and domesticity. Put them altogether and they spelled mother, daughter, sister, wife—woman."[61] Angela Harris described the new model as an "elaborately articulated" redefinition of gender roles: "men were to participate in the market as wage laborers, and women to be leaders in family relations, performing unpaid work both to reproduce the next generation and to care for the declining older generation."[62] Women's domestic roles, once thought of as simply service to their husband's ability to manage their kingdoms, became an independent source of authority within the family.[63] And these roles critically involved standing up to men when necessary to limit the number and timing of children and instill the necessary values that would allow their sons to succeed in more competitive workplaces and their daughters to replicate the remade values of the middle class.

Call My Good Nature 'Deceit"': A Feminist Rethinking of Seduction, 93 Colum. L. Rev. 374, 392 (1993).

60 Economists, therefore, explain the nineteenth and early twentieth century declines in childbearing as driven by changes in demand. Falling fertility rates are a by-product of rising costs (due to rising adult wages and productivity as well as the separation of production from the home), diminishing returns (due to falling farm sizes and changes in children's care of their aging parents), and rising incomes (which induces greater investments in each child and a reduction in total number). Martha J. Bailey & Brad J. Hershbein, *U.S. Fertility Rates and Childbearing, 1800 to 2010*, at 3, 15, in preparation for Oxford Handbook of American Economic History (Sept. 2015), https://websites.umich.edu/~baileymj/OUP_fertility_9_30_15.pdf.

61 Barbara Welter, *The Cult of True Womanhood: 1820–1860*, 18 Am. Q. 151, 152 (1966).

62 Angela P. Harris, *Theorizing Class, Gender, and the Law: Three Approaches*, 72 Law & Contemp. Probs. 37, 45 (2009).

63 Mary Ryan, The Empire of the Mother: American Writing About Domesticity 1830-1860, at 97 (1982) ("The 1850's saw two icons—the isolated home and the imperial mother—installed at the center of popular discourse. In ideology, at least, it was possible to devise a domestic physics that placed the family in a close and narrow social space and at the same time put its cloistered female occupant at the helm of an empire.").

Family law gradually reflected these changes, enhancing women's status within marriage, without dismantling its patriarchal structure.[64] The Married Women's Property Acts, enacted between 1839 and the 1870's, acknowledged wives' independent economic existence, albeit in a limited manner.[65] Wives gained the ability to administer property titled in their names, keep their individual earnings, enter into enforceable contracts, and sue and be sued. The Supreme Court even considered married women's ability to establish a domicile different from her husband's.[66] In addition, many of the states adopting Married Women's Property Acts also abolished dower and curtesy, replacing them with provisions that allowed either spouse to claim a forced share of the deceased spouse's estate in fee simple rather than as a life estate.[67]

Enacted between 1839 and the end of the nineteenth century, the acts reflected a number of forces. First, as a practical matter, the new economy (and the family's well-being) rested to a much greater degree on the husband's business ownership or wage labor, assets still within his sole control. Second, the economic instability of the nineteenth century American economy increased the attractiveness of allowing families to hold some assets in the wife's name, protecting those assets from the husbands' creditors.[68] The Panic of 1837 prompted adoption of the first of the Married Women's Property Acts and the Panic of 1873 helped persuade the

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64 June Carbone & Margaret Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change and Divorce Reform*, 65 Tulane L. Rev. 953 (1991).

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> The married women's property acts served interests of family protection: adopted in a period of economic turbulence, the statutes insulated a portion of family assets from a husband's creditors. . . . It was not until the 1850's that state legislatures began to reform the common law of marital status as it governed wives' capacity to engage in legal transactions, and to modify the doctrine of marital service that gave husbands ownership of their wives' earnings.

Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 Yale L.J. 1073, 1082–83 (1994).

66 Barber v. Barber, 62 U.S. 582 (1858)(finding that a legally-separated wife could establish a domicile that was different from her husband's).

67 Lawrence Friedman, A History of American Law 375-76 (1973).

68 *See U.S. Business Cycle Expansions and Contractions*, Nat'l Bureau Econ. Res. (Mar. 14, 2023), https://www.nber.org/research/data/us-business-cycle-expansions-and-contractions.

remaining states to do so.[69] Third, "[p]roponents often drew on the literature celebrating women's virtues to argue that wives should be afforded a measure of protection from their intemperate or improvident husbands" while "radicals" advocated formal equality for women.[70]

As the norms changed, so did the content of wills. While primogeniture never took hold in the United States the way it did in England,[71] "farmers often tried to keep the family farm intact, leaving it to a single son on the condition that he support his widowed mother or sisters from the proceeds."[72] Testators accordingly left land overwhelmingly to their sons, preferring cash bequests for daughters, often in the form of a trust that limited the daughter's control over the funds – and kept the money out of the hands of improvident husbands and their creditors.[73] By the 1840's, however, these practices changed, and wills began to leave assets somewhat more equally to sons and daughters.[74] This reflected the lesser significance of farmland – other assets were easier to divide – and women's relatively more equal status as property held in their names was no longer automatically within the control of their husbands.

Central to the changing family was the increased importance of childrearing,[75] and custody presumptions changed accordingly.

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69 *See* Norma Basch, In the Eyes of the Law: Women, Marriage and Property in Nineteenth Century New York 114-17 (1982); Maxwell Bloomfield, American Lawyers in a Changing Society, 1776-1876, at 112-13 (1976). Mississippi enacted the first such act in 1839, following the financial panic of 1837. *See* Melissa J. Homestead, American Women Authors and Literary Property, 1822-1869, 43-44 (2005); Angela Boswell, *Married Women's Property Rights and the Challenge to the Patriarchal Order: Colorado County, Texas*, *in* Janet L. Coryell, Negotiating Boundaries of Southern Womanhood: Dealing With the Powers That Be 89, 92 (2000).

70 Carbone & Brinig, *supra* note 64, at 1010 (citing Basch, *supra* note 69, 115-16, 121-23, 135, 136-48, 162-83 (chronicling the use of literature by feminists to support property law reform).

71 *Id.* at 964 n.49.

72 *Id.,* citing Basch, *supra* note 69, at 105-08.

73 *See* Chused, *supra* note 30, at 1382.

74 *Id.*

75 Increasingly, the care of children appeared to be mothers' sole work and the work of mothers alone. The expansion of nonagricultural occupations drew men and grown children away from the household, abbreviating their presence in the family and their roles in child rearing. Mothers and young children were left

At the beginning of the nineteenth century, courts favored fathers over mothers in custody disputes because the fathers controlled access to the resources needed to provide for children.[76] This meant that if a father died, custody might be entrusted to his brother, rather than an otherwise fit mother, on the theory that the brother was better positioned to provide for the child's care.[77] As the new ideology celebrated the traits that only mothers could bring to the young, the paternal presumption changed in favor of a maternal one, at least for children of tender years.[78]

The new economy also created greater possibilities for divorce.[79] By the end of Reconstruction, the states had all passed legislation replacing cumbersome and expensive legislative divorce

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in the household together just when educational and religious theories each both newly emphasized the malleability of young minds. Enlightenment psychology drew tighter the connection between early influence on the child and his or her eventual character, just as mothers' influence on young children appeared more salient. Nancy Cott, The Bonds of Womanhood: "Woman's Sphere" in New England 1780-1835, at 46 (1977).

76 *See* Grossberg, *supra* note 21, at 234-42; Michael Grossberg, *Who Gets the Child? Custody, Guardianship, and the Rise of a Judicial Patriarchy in Nineteenth Century America*, 9 Feminist Stud. 235, 238-39 (1983).

77 Mary Ann Mason, From Father's Property to Children's Rights: The History of Child Custody in the United States 19-20 (1994). *See also* June Carbone, *The Missing Piece of the Custody Puzzle: Creating a New Model of Parental Partnership*, 39 Santa Clara L. Rev. 1091, 1107-09 (1999) (describing changes in custody standards).

78 Lee F. Teitelbaum, *Family History and Family Law*, 1985 Wis. L. Rev. 1135, 1155:

> Modification or elimination of the common law doctrine regarding custody to some extent reflects both the enhanced position of women and the perception of separate spheres. The special moral and cultural qualifications of mothers were relied on to explain custodial preferences in their favor, and it was concomitantly assumed that fathers would rely on servants or female relatives to care for children, their own time and energy being occupied by activities in the public arena.

While the changes in custody presumptions rewarded mothers' investment in childrearing, they also came at a time when children changed from economic assets to liabilities. *See generally* Kermit L. Hall, The Magic Mirror (1989); Stephen B. Presser & Jamil S. Zainaldin, Law and Jurisprudence in American History (2d ed. 1989).

79 Carl Deglar, At Odds: Women and the Family in America From the Revolution to the Present 168 (1980) (arguing that the growing divorce rate reflected "woman's drive for greater autonomy within marriage and the family").

with more readily administered judicial divorces.[80] Although divorce remained rare through the end of the century, it became relatively more accessible[81] and the fault standards were interpreted more favorably for women than they had been earlier in the century.[82] After the turn of the twentieth century, as the majority of families left rural areas for the cities, divorce rates grew steadily over the next half century, with women initiating the majority of divorces. [83] Divorce in the context of the subsistence of farms of the agricultural era had been legally and practically difficult; the husbands typically retained ownership of the family property but without necessarily enough income to support a second household. With urbanization and wage labor, property became easier to divide, with women receiving the property titled in their own names, alimony became a more realistic possibility at least for better off families, and women in urban areas had greater access to wage labor or, in some cases, extended family support. While divorce still left most wives in dire financial circumstances, the *relative* increase in women's independence still fueled increased demand for divorce, a demand that would continue to grow over the course of the twentieth century.

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80 *See* Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 Va. L. Rev. 1497, 1501 (2000).("But some northern states had established a system of judicial divorce as early as the end of the eighteenth century: Courts, not legislatures, granted divorces. This system ultimately replaced the legislative divorce. Judicial divorce was almost universal by 1900, except in South Carolina, which did not allow absolute divorce at all.").

81 Lawrence Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 Or. L. Rev. 649, 651-54 (1984).

82 Naomi Cahn, *Faithless Wives and Lazy Husbands: Gender Norms in Nineteenth-Century Divorce Law,* 2002 U. Ill. L. Rev. 651; Nancy Cott, *Divorce and the Changing Status of Women in Eighteenth Century Massachusetts*, 33 Wm. & Mary Q. 586, 611-12 (1976).

83 *See* Margaret F. Brinig & Douglas W. Allen, *"These Boots* Are *Made* for *Walking": Why Most Divorce Filers Are Women*, 2 Am. L. & Econ. Rev. 126, 128 (2000): Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 Wm. & Mary Bill Rts. J. 381, 393 (2007) (discussing a 1908 report describing a "worrisome" increase in divorce rates); *see also* William Buss & Emily Buss, *Escaping the American Blot? A Comparative Look at Federalism in Australia and the United States Through the Lens of Family Law*, 48 Cornell Int'l L.J. 105, 116, n. 57 (2015) (describing how divorce rates doubled over the first half of the twentieth century).

In addition, with the separation of home and market, the concept of family privacy took on new meaning.[84] The growth of a more robust state focused primarily on regulation of the market, leaving the home as private realm.[85] The courts refused to intervene to enforce a right to support in intact marriages or to validate express contracts between married couples.[86] A husband's rape of his wife was not a crime, although by the end of the nineteenth century, some states began to criminalize physical assault within marriage.[87] Still, family law saw divorce, with the ground of "extreme cruelty" redefined to include a broader category of misconduct, as the principal remedy for abusive marriages.[88]

All of these changes, public and private, remade family law in the same way the system of the agricultural era did – for families with access to the principal sources of income and wealth. The changing role of the state oversaw and complemented the system of wage labor that became the centerpiece of the new industrial system. Over time, industrialists like Henry Ford invested in a male family wage[89] that helped secure the loyalty of the large stable workforces important to manufacturing. The state complemented the private changes with benefits designed

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84 *See, e.g.*, Katharine K. Baker, *Making Some Sense of the Constitutional Family*, 72 Wash. U. J. L. & Pol'y 1, 5 (2023)(arguing that, at least as a matter of constitutional law, the "importance of the family first surfaced in the progressive era when the Supreme Court held that the constitutional right to 'liberty'—found in the Fourteenth Amendment—included the right to 'establish a home and bring up children' without government interference.").

85 It is also based on assumptions of self-sufficiency. *See* Maxine Eichner, *Free-Market Family Policy and the New Parental Rights Laws*, 101 N.C. L. Rev. 1305, 1311 (2023)("U.S. family policy is constructed on the expectation that families will privately supply the resources, services, and conditions that family members need to thrive, largely without the assistance of government.").

86 *See, e.g.*, McGuire v. McGuire, 59 N.W.2d 336 (Neb. 1953) (holding that so long as a couple remain together family living standards are a matter for the family and not the courts to determine even when husband controlled most of the family income and provided almost no support).

87 *E.g.,* Reva B. Siegel, "*The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 Yale L.J. 2117, 2139 (1996)

88 *See, e.g.,* June Carbone & Naomi Cahn, *Judging Families*, 77 UMKC L. Rev. 267, 302 (2008) ("courts circumvented the legislative stalemate through expansion of the category of "extreme cruelty" or manufactured cases of adultery.").

89 Cahn & Carbone, *Uncoupling*, *supra* note 4, at 15 to 18 (describing the rise of the male family wage).

to substitute for the loss of a male wage-earner through old age, unemployment, death, injury, or disability. Regulation of employment and state support for unionization helped systematize the benefits of the new system and extend it to a broader part of the population.

This system, however, like the family law of the agricultural system before it, never extended to the entire population.[90] The majority of white men could not afford to support a family on their income alone until well into the twentieth century, and lower income families supplemented male income with child labor and their wives' income. The MWPAs were also essentially irrelevant for women who owned no property. While these families were not explicitly excluded, the benefits of the system were beyond their reach.

The family law of a two income household, as described in the next section, looks different from the family law of a single, dominant breadwinner. The purpose of the family law of the industrial era was to protect women and children's access to the head of household's income, the single income that provided the foundation of middle-class families. Within this system, spouses were guaranteed a forced share of any property in the marital estate at death, divorce remained limited but with some protection for the "innocent" spouse, mothers' distinctive relationship to their children enjoyed acknowledgment, and a minimal set of public benefits extended the benefits of male wage labor to the rest of

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> By the end of the 19th century, therefore, a clear line had been drawn between the appropriate activities of "proper" white middle-class women and the activities associated with black, poor, and immigrant women. For the first time in the nation's history, women from the former group were not centrally involved in what the dominant culture defined as mainstream economic activities. Their less-well-off sisters, by contrast, provided a major source of cheap and marginal labor. The results were dramatically apparent in the 1900 census, which showed that 41 per cent of all non-white women were employed, while only 17 per cent of white women worked, most of them from immigrant stock.

William. Chafe, Women and Equality: Changing Patterns in American Culture 23 (1977). For a discussion of the type of household labor associated with white and Black women, see Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 Yale J.L. & Feminism 51, 55 (1997).

the marital family. These benefits did little for the portion of the public without access to a male family wage.[91]

Once again, those without access to the assets providing a foundation for family security largely did not participate in mainstream family law or did so on disadvantageous terms. One indication of the class divide in American family law during the industrial age is what has been called "poor man's divorce."[92] Jacobus tenBroek, explained that ceremonial marriage – and even more so, legal divorce – are expensive.[93] Over the course of American history, many low income couples moved in together without marrying[94] and even more married but then separated without a legal divorce. As tenBroek pointed out six decades ago, the cost of divorce made it "a luxury beyond [the] financial means" of low income families.[95] Instead, when families broke down, the husband simply left. Legal scholars, looking at private law, have maintained that the biggest problem with desertion was that ex-spouses often created new families and a second marriage could be declared invalid if the first had not been properly dissolved.[96]

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91 *See, e.g.*, Theda Skocpol, Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States (1992). And, later, "the new American welfare state "intentionally excluded black families . . . from access to social welfare benefits under New Deal Legislation."" Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 B.C.J.L. & Soc. Just. 233, 252 (2014).

92 Sidney B. Jacoby, *Legal Aid to the Poor*, 53 Harv. L. Rev. 940, 957 (1940) ("[D]esertion is called in popular speech the 'poor man's divorce' due to the practical inability of many poor persons to obtain a divorce.").

93 Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status Part III,* 17 Stan. L. Rev. 614, 617 (1965).

94 During frontier days, common law marriage doctrines regularized these unions but as industrialization took hold in a greater part of the country, the majority of states repealed recognition of common law marriage and by World War II, the vast majority of couples entered into ceremonial marriages. tenBroek notes that in Mexico and among Mexican immigrants, cohabitation remained much more common than in the United States generally. *Id*. at 618-19 (observing that "the largest group of families with children who . . . [might] be described as the offspring of a common-law relationship is of Mexican derivation," with 64.5% of Mexican and Mexican-American parents never marrying each other and "common-law marriage . . . an accepted custom among many Mexican families at the lower socio-economic level and is a legally recognized form of marriage in Mexico.").

95 *Id.*

96 Michael J. Higdon, *Common Law Divorce*, 74 Ala. L. Rev. 365, 398 (2022).

tenBroek argued that the different legal practices of low income couples "robbed" "many concepts dependent upon the legality of the marriage relationship, such as bigamy, adultery, and in part legitimacy of offspring, . . . of their traditional content."[97] These doctrines became important when second families sought a share of the husband's assets but mattered less for low income families who simply stayed out of court. Low income households managed their families without resort to legal formalities. The difficulties of divorce also affected women's ability to leave abusive husbands. Economists Betsey Stevenson and Justin Wolfers, for example, found "a striking decline in female suicide and domestic violence rates arising from the advent of unilateral divorce."[98] The state did not facilitate divorce nor did it protect those in abusive families but it largely looked the other way at those who did not seek formal legal remedies.

The family law of the industrial age thus remained patriarchal – protecting the prerogatives of the income-earning male head of household – and it did little to acknowledge, much less, protect the circumstances of those without middle class assets. The low income families who managed their own affairs through informal cohabitations or "poor man's divorce" were largely invisible within the remade private law system and likely to be the subject of stigmatized or punitive consequences when they ended up in court.[99] This changed when family relationships became important not just to the distribution of private assets but public benefits.

B. *The Public Families of the Industrial Era Sphere: 1933-1969*

The industrial era did not just remake the foundation of the middle class family; it also remade the relationship between the family and the state. Family farms could generally produce enough to survive even if commercial crops failed. The factory jobs of the industrial era, in contrast, were dirty, dangerous, and insecure. When workers were injured, laid off, or died, there was no built-in safety net for families dependent on the worker's income. The rise of the twentieth century social welfare state, often

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97 tenBroek, *supra* note 93, at 617.

98 Betsey Stevenson & Justin Wolfers, *Bargaining in the Shadow of the Law: Divorce Laws and Family Distress*, 121 Q.J. Econ. 267, 286 (2006).

99 tenBroek, *supra* note 93, at 617.

identified in the United States with President Franklin Roosevelt's New Deal in the 1930's, tied family security to an expanded public role providing old age insurance, unemployment compensation, workers compensation, survivors benefits, aid to families with dependent children, and ultimately subsidized health insurance.[100] These benefits, as they developed in the middle of the twentieth century, were generally designed to supplement wage labor or to compensate for loss of a wage-earner's income, and eligibility depended on legally recognized family relationships.

The New Deal, much like European welfare states, championed the idea of social insurance, that is, "government programs that provide monetary protection against risks associated with living in an industrial or post-industrial society in which income typically derives from paid work."[101] The watershed development was the federal Social Security Act of 1935.[102] The various programs rested on providing support for those unable to work because of unemployment, injury or old age, and those without a breadwinning parent.[103] With eligibility for benefits extended to a broader group of families, however, the state oversaw eligibility and passed judgment not just on family composition but also on family obligations such as the support unmarried fathers owed their children.

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100 Cahn & Carbone, *Uncoupling*, *supra* note 4, at 23-24. For a history of health insurance provisions, see Thomas C. Buchmueller & Alan C. Monheit, *Employer-Sponsored Health Insurance and the Promise of Health Insurance Reform*, 46 Inquiry 187, 188 (2009).

101 Mark C. Weber, *Disability Rights, Disability Discrimination, and Social Insurance*, 25 Ga. St. U. L. Rev. 575, 578 (2009).

102 *Id*. at 579–80.

103 King v. Smith, 392 U.S. 309, 328-329 (1968); *see* William H. Simon, *Rights and Redistribution in the Welfare System*, 38 Stan. L. Rev. 1431, 1446–48 (1986) (discussing market failure rationales for federal insurance programs). The Aid to Dependent Children (ADC) program provided coverage for children under sixteen who had been "deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent." Linda Gordon, Pitied but not Entitled: Single Mothers and the History of Welfare 277 (1994). "After the enactment of Aid to Dependent Children in 1935, morality requirements continued to exclude blacks; "man-in-the-house" rules simultaneously discouraged the formation of two-parent families while policing the behavior of single women." Catherine J. Ross & Naomi R. Cahn, *Subsidy for Caretaking in Families: Lessons from Foster Care*, 8 Am. U. J. Gender Soc. Pol'y & L. 55, 63–64 (1999).

In addition, an expanded welfare state policed the parenting of those receiving benefits. The result produced what tenBroek called "the dual system of family law" and Dorothy Roberts would later call the family policing system.[104]

tenBroek argued in the mid-sixties that while mainstream family law appeared to have one set of rules, it was implemented in practice through a dual system.[105] The first system governed parties who initiated private disputes such as divorce actions, with judges largely rubber-stamping privately negotiated agreements, even ones that diverged from the formal law.[106]

By contrast, tenBroek's second system, the public system of family law, primarily governed lower-income families receiving public benefits. Families who sought benefits such as Aid to Families with Dependent Children (AFDC), were required to cooperate with state authorities, who initiated child support enforcement actions against the fathers with the bulk of the proceeds going to the state.[107] In addition, applications for such benefits subjected families to home visits, often unannounced, from child welfare officials who would monitor the quality of the recipient's

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104 *See* Dorothy Roberts, Torn Apart (2022); Andrea L. Dennis, *Criminal Law as Family Law*, 33 Ga. St. U. L. Rev. 285, 329 (2017) ("the modern criminal justice regime has rewritten family law and family life, especially for Black families"); Tarek Z. Ismail, *Family Policing and the Fourth Amendment*, 111 Calif. L. Rev. 1485, 1500–01 (2023).

105 *See* Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status Part I*, 16 Stan. L. Rev. 257, 257-58 (1964) [hereinafter tenBroek, *Part I*] ; *see* June Carbone & Clare Huntington, *Fatherhood, Family Law, and the Crisis of Boys and Men,* 124 Colum. L. Rev. 1001, 1043-45 (2024).

106 *See* tenBroek, *supra* note 93, at 675-82 (describing the ability of couples with lawyers to effect their own bargains); *see also* Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status Part II*, 16 Stan. L. Rev. 900, 970-78 (1964).

107 While the AFDC program has been abolished, recipients of food stamps, Medicaid, and other public program remain subject to these requirements. *See* Jessica Tollestrup, *Child Support Enforcement: Program Basics* 3 tbl.1, Cong. Res. Serv. (2023), https://crsreports.congress.gov/product/pdf/RS/RS22380 (noting that in fiscal year 2022, the Child Support Enforcement program was involved in 12.3 million child support cases, established new support orders for 627,223 cases, and made collections for 7.66 million cases). *See also* Daniel L. Hatcher, Injustice, Inc.: How America's Justice System Commodifies Children and the Poor 54 (2023)(observing that in California, 40% of child support debt is owned to the state).

parenting, threatening to remove the children if the recipient was not providing an adequate home environment.[108] Within this public system, the state initiates legal actions, controls their disposition, and prioritizes protection of the public fisc rather than family autonomy or needs.[109] tenBroek concluded that the system is paternalistic and punitive,[110] imposing child support orders the custodial parent may have opposed[111] and that the nonresidential parent may be unable to pay[112] and subjecting benefit recipients to

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108 *See* Roberts, *supra* note 104, at 3; Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation* (June 16, 2020), https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/ [https://perma.cc/5P72-X79H]. In a related vein, see *Parrish v. Civil Service Comm'n*, 425 P.2d 223 (Cal. 1967), in which Alameda County made early morning raids on the homes of female welfare recipients to make sure that a man was not living there for welfare benefits purposes. The assumption of this project—named "Operation Bedcheck"—was that if a man was there, he would provide support for the woman and she would be removed from the welfare rolls for "misrepresent[ing] welfare eligibility." *Id.* at 226.

109 *See* tenBroek, *Part III*, *supra* note 93, at 676 ("Parental right is not necessarily paramount, parental fitness is examined rather than presumed, and the management, morality, and other conditions of the home are subject to the active interest of public officials.")

110 *See* tenBroek, *Part I*, *supra* note 105, at 257–59, 278 (identifying the "paternal, custodial, coercive, and punitive attitudes" underlying systems governing lower-income families).

111 *See* tenBroek, *Part III,* supra note 93, at 676. *See* Carbone & Cahn, *Triple System*, *supra* note 13, at 1228 ("[Family law] effectively [gives] the elite . . . room to negotiate arrangements that adapt the laws to their needs. . . . [Public family law] continues to proceed from the premise that poor men have 'abandoned' their children . . . ."); *id.* at 1227 ("Couples caught in the state aid/child-support enforcement system that denigrates absent fathers remain subject to societal disapproval at odds with their own understandings of the terms of the relationships.").

112 *See, e.g.*, Tonya L. Brito, *Nonmarital Fathers in Family Court: Judges' and Lawyers' Perspectives*, 99 Wash. U. L. Rev. 1869, 1895 (2022) ("[C]ourt proceedings are a contested space for nonmarital fathers who are often unable to consistently pay their support order. They are shamed and penalized for their failure to live up to the classed and raced traditional ideals of economic fatherhood."); Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. Davis L. Rev. 991, 1003 n.70 (2006) (describing "deadbroke" fathers, who are "too poor to pay even minimum child support awards.").

intrusive scrutiny violating the privacy better off families enjoy, all in the name of upholding mainstream norms.[113]

During earlier eras when state benefits were minimal, low-income couples could cohabit, bear children, separate and repartner outside of the formal legal system. With the expansion of state benefits, the benefits became conditioned on compliance with mainstream norms disapproving of nonmarital cohabitation or, in many cases, the circumstances created by poverty itself.[114] During the seventies, public interest advocates challenged the dual system, but the Supreme Court, embracing a neoliberal ideology that would lay the foundation for a new economic era, rejected the premise that public benefits were a matter of right, and effectively ruled that the state could condition benefits on intrusions in family privacy that would be unconstitutional violations of the sanctity of the family home in other circumstances.[115]

In the years since tenBroek wrote, the dual system has changed in any number of ways: the private system is less exclusively tied to divorce proceedings, AFDC has been abolished and replaced with other federal programs, and the stigma associated with non-marital cohabitation is less than it was. Yet, a dual system persists, giving

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113 *See* Carbone & Cahn, *Triple System*, *supra* note 13, at 1228 ("Public welfare law insists on upholding mainstream norms as a condition of public benefits, even when the effort is counterproductive.").

114 More than half of Black children are investigated by the child protective services before they turn eighteen. Hyunil Kim, Christopher Wildeman, Melissa Jonson-Reid & Brett Drake, *Lifetime Prevalence of Investigating Child Maltreatment Among US Children*, 107 Am. J. Pub. Health 274, 278 (2017); *see also* Katharine K. Baker, *Equality and Family Autonomy*, 24 U. Pa. J. Const. L. 412, 443 (2022) (observing that "[s]tate agents tend to define the norm as something that resembles a white, middle-class life, and anything that deviates from that can be monitored because there is potential for harm" (emphasis omitted)); Samantha Bei-wen Lee, *The Equal Right to Parent: Protecting the Rights of Gay and Lesbian, Poor, and Unmarried Parents*, 41 N.Y.U. Rev. L. & Soc. Change 631, 649—50 (2017) (describing the challenges faced by poor families of color in the family regulation system as compared with the relative autonomy of wealthier, white families).

115 Wyman v. James, 400 U.S. 309 (1971) (reinforcing the ability of the state to police welfare recipients by allowing caseworkers to inspect the homes of welfare recipients.) For further discussion, see Naomi Cahn & June Carbone, *The Blue Family Constitution*, 35 J. Am. Acad. Matrim. Law. 505, 523–25 (2023). *See also* Dandridge v. Williams, 397 U.S. 471, 473 (1970) (upholding welfare caps that limited benefit levels irrespective of the size of the family in need).

couples engaged in private litigation even more ability to resolve their own affairs and continuing to subject low-income couples to public judgments about the conduct of their families.

III. The Post-Industrial Economy and the Remaking of Family Law

The post-industrial economy remade family law in two stages. First, the post-war era increased the demand for the kind of labor women have traditionally performed and women responded by closing the gap and then exceeding male educational achievements.[116] As a result, starting in the seventies, women, including married women with children, moved into the labor market in wholesale ways, dismantling the rigidly gendered assignment of family roles and creating the possibility of more egalitarian family relationships. Second, over the course of the latter part of the twentieth century, the combination of automation, outsourcing, and deunionization has largely eliminated relatively high paying manufacturing jobs for men without college degrees, hollowing out the middle of the economy. These twin transformations of the economy have changed the way men and women match up and remade family law.[117] Men continue to dominate the highest income ranks and marriage remains relatively neopatriarchal for these couples; the group most likely to combine wage earning husbands with wives outside the paid labor market are households with income above $250,000 per year.[118] Dual income couples dominate the middle income ranks, remaking marital terms on the basis of shared property and custodial rights. At the bottom of the economy, marriage is disappearing, maternal custody is the norm, and relationships inside and outside of marriage have

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116 *See* Carbone & Huntington, *supr*a note 105, at 1015.

117 *See* June Carbone & Naomi Cahn, Marriage Markets: How Inequality Is Remaking American Families 4, 9, 40, 49, 75-76 (2014) [hereinafter Carbone & Cahn, Marriage Markets] (explaining that greater economic inequality has changed the ways that men and women match up, undermining relationship stability).

118 Robert VerBruggen & Wendy Wang, *The Real Housewives of America: Dad's Income and Mom's Work*, Inst. Fam. Stud. (Jan. 23, 2019), https://ifstudies.org/blog/the-real-housewives-ofamerica-dads-income-and-moms-work [https://perma.cc/BP4U-8RBS].

become less stable. We have described this as a triple system of family law.[119] Marriage continues to govern middle class relationships, with increasing reliance on contract and the use of alternative dispute resolution mechanisms to determine not only divorce terms, but parenting relationships after dissolution of the parental relationships. Families who receive public benefits remain subject to tenBroek's second system of family law, imposing government supervision and restricting the possibilities for voluntary settlements. Finally, with less marriage and the abolition of AFDC, a larger group of families has been able to evade the formal system of family law, negotiating custody and support on terms of their own. This section first describes the family law changes that accompanied women's greater workforce participation and then explores the changes accompanying the greater variation in the economic foundations of the family.

A. *The Transformation in Women's Roles, 1969 to 1990*

As women have gained more economic independence, and as antidiscrimination laws have prohibited differential treatment in the workplace, family law has reflected changing gender roles. We have described this transformation as an embrace of "blue family values," and a new upper-middle-class strategy that takes advantages of the opportunities the modern economy offers.[120] We have described this new strategy as:

Invest in men and women's income producing opportunities, which in today's more competitive economy requires greater education and skill acquisition;

Postpone family formation until the couple acquires the emotional maturity necessary to trade off two careers and children and a sufficient financial cushion to support a family;

Embrace the pill and abortion as a necessary fall back; reproductive rights are necessary to make the new system work.[121]

As a practical matter, this means that the college-educated middle class postpones marriage and childbearing into the late twenties or early thirties. As a class strategy, this system has

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119 Carbone & Cahn, *Triple System, supra* note 13.

120 S*ee* Cahn & Carbone, *The Blue Family Constitution, supra* note 115, at 118.

121 *See* Naomi Cahn & June Carbone, Red Families v. Blue Families: Legal Polarization and the Creation of Culture 3, 8, 46-47 (2010).

produced relatively stable marriages; by the mid-nineties, the divorce rates of college graduates had fallen back to the levels of the mid-sixties, before no-fault divorce. And college graduates continue to overwhelmingly raise their children within two parent-married families.[122] Such couples are able to position themselves to take advantage of the employment opportunities that arise for both spouses and marshal the resources sufficient to maintain the middle-class status of their children.

Complementing the new middle-class system has been a remade family law system. The initial change, no-fault divorce, accompanied women's greater economic independence. California adopted the nation's first true "no-fault" divorce law in 1969, abolishing consideration of fault for all purposes at divorce, substituting "irreconcilable differences" for fault-based grounds such as adultery, and allowing one party to secure a divorce even if the other spouse opposed it.[123] By 1985, almost every state adopted some version of no-fault divorce, though the states continued to differ in whether they also retained fault grounds, and in how long a period of separation they required before a spouse could obtain a divorce over the objection of the other.[124]

Quickly following the divorce reform era, the states remade the system of property division. Most states had followed the English common law tradition, which recognized the spouse who held title to property during marriage as the owner at divorce.[125] Eight of the fifty American states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington), which

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122 *See* Elizabeth Wildsmith, Jennifer Manlove, & Elizabeth Cook, *Dramatic Increase in the Proportion of Births Outside of Marriage in the United States from 1990 to 2016*, Research Brief, Child Trends (Aug. 8, 2018), https://www.childtrends.org/publications/dramatic-increase-in-percentage-of-births-outside-marriage-among-whites-hispanics-and-women-with-higher-education-levels (showing that while nonmarital childbearing has increased substantially for all groups, only 10% of births to college graduates are nonmarital compared to 59% of those with only a high school degree). The rates, however, differ considerably by age and race. Looking at those who give birth between the ages of 20-29, 9% of white college graduate whites give birth outside of marriage, compared to 48% of Black college graduates and 28% of Latinas. *Id.*

123 Joanna L. Grossman & Lawrence M. Friedman, Inside The Castle: Law and the Family in 20th Century America 176–77 (2011).

124 Buss & Buss, *supra* note 83, at 117.

125 Leslie Harris et al., Family Law 329 (1996); Brett R. Turner, Equitable Distribution of Property § 1.02, at 4 (2d ed. 1994).

had been colonies of France or Spain, had community property systems recognizing joint ownership of property acquired during the marriage. With the adoption of no-fault divorce, all of the common law states abandoned the title system in favor of either a marital property regime (which awards separate property such as inheritance or gifts to each spouse and then equitably distributes the marital property accumulated through the labor of either party during the marriage) or an equitable distribution system, which gives the courts the power to distribute all property held by either spouse at the time of the divorce.[126] Some states adopted specific statutory regimes while, in other common law states, the courts simply confirmed that divorce courts had the power to divide the property accumulated over the course of the marriage.[127] Mississippi became the last state to abandon the title system in the 1990s.[128] Spousal support – awarded in a minority of divorces – also become, at least rhetorically, gender-neutral.[129]

The new financial determinations at divorce, particularly the presumption of equal division, presumed equal contributions to the marriage, recognizing the contributions of the stay-at-home spouse. Carolyn Franz and Hanoch Dagan have argued that the necessary foundation for relationships that could be dissolved at will was the creation of community, premised on equal respect – and the assumption of joint responsibility for the community's well-being and material assets.[130]

With women's greater ability to initiate divorce and to demand half of the family's assets, child custody became "ground zero in the gender wars,"[131] with father's rights groups challenging the presumption in favor of awarding custody of children of

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126 *See* J. Thomas Oldham, Divorce, Separation and the Distribution of Property § 3.03 (2005). And Wisconsin adopted a community property system.

127 J. Thomas Oldham, *Changes in the Economic Consequences of Divorces, 1958–2008*, 42 Fam. L.Q. 419, 428–29 (2008).

128 Deborah H. Bell, *Equitable Distribution: Implementing the Marital Partnership Theory Through the Dual Classification System*, 67 Miss. L.J. 115, 127–30 (1997).

129 Orr v. Orr, 440 U.S. 268 (1979).

130 Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 Colum. L. Rev. 75,79, 87 (2004).

131 Carbone, *supra* note 52, at 20 (2000).

"tender years" to their mother.[132] Starting in the seventies, some states struck down such presumptions as unconstitutional sex discrimination and by 1990, every state had moved away from the maternal presumption.[133] A family law report concluded in 2014 that "[t]he most significant trend in contemporary child custody law is toward greater active involvement by both parents in postseparation childrearing."[134] More than thirty states had adopted joint custody statutes of some kind by the early nineties.[135] Moreover, even without a presumption in favor of joint custody, a large number of states adopted presumptions in favor of custody awards to the parent most likely to encourage the continuing involvement of the other parent.[136] Today, these presumptions are close to universal.[137]

These changes created a new middle class family law system, tailored to the needs of a new economy that rewards investment in both men and women's earning capacity. As both spouses have become financially independent, with the ability to dissolve marriages at will, the new system has remade marriage based on principles of equality. The new marital property regimes in almost all states have a strong presumption in favor of the equal division of assets at divorce.[138] And custody presumptions strongly favor the continuing involvement of both parents following

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132 *See* Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 Va. L. Rev. 79, 131 (2016) (observing that fathers' rights activists "fought for a legislative presumption that joint custody served the best interest of the child *in all cases*.").

133 Carbone, *supra* note 77, at 1110.

134 Marsha Kline Pruett & J. Herbie DiFonzo, *Closing the Gap: Research, Policy, Practice and Shared Parenting,* 52 Fam. Ct. Rev. 152, 156 (2014).

135 Victoria Mikesell Mather, *Evolution and Revolution in Family Law,* 25 St. Mary's L.J. 405, 413 (1993).

136 See June Carbone & Naomi Cahn, *Parents, Babies, and More Parents*, 92 Chi.-Kent L. Rev. 9, 37 (2017).

137 Dorothy R. Fait et al., *The Merits and Problems with Presumptions for Joint Custody*, 45 Md. Bar J. 12, 14 (Feb. 2012) (observing that by 2012 forty-seven states and the District of Columbia had enacted statutes authorizing joint legal or physical custody awards and the other three did so as a matter of case law). *See also* J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 Fam. Ct. Rev. 214, 217 (2014 (describing the three states that lack such statutes).

138 *See* Bell, *supra* note 128, at 127–30.

a divorce.[139] These changes, in turn, place greater emphasis on the choice of a complementary mate. Assortative mating, in which spouses have become closer to each other in age and education, has increased and as we have argued elsewhere, the dismantling of rigid gender roles set the stage for acceptance of marriage equality.[140] The new marital system, rather than rely on patriarchal values that lock young couples into permanent unions, depends on commitment, responsibility, and trust – and it is increasingly beyond the reach of large sections of the population.

B. *The Triple System of Family Law, 1990 to the Present*

The post-industrial economy began with increased market demand for the types of skills women have traditionally supplied and the remaking of women's roles. It continued with the hollowing out of the middle of the economy, and the wholesale elimination of the high paying union jobs non-college men have traditionally held. The result, as we discussed at length in *Marriage Markets: How Inequality Has Remade the American Family*,[141] is a change in the ways men and women match up with each other and the emergence of what we have termed, "the triple system of family law."

Today's married couples are closer in age and in educational attainment than in generations past.[142] Women have become more likely to graduate from college[143] and to obtain post-secondary degrees,[144] and female-dominated positions in the middle of the economy, such as those in health care and teaching, tend to be relatively

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139 *Id.* at 216 (observing that "[a]s a matter of public policy, the phrase 'frequent and continuing contact with both parents' appears in most state statutes with nearly mechanical regularity.").

140 *See* Carbone & Cahn, Marriage Markets, *supra* note 117, at 93.

141 *See id.*

142 Christine R. Schwartz & Robert D. Mare, *Trends in Educational Assortative Marriage from 1940 to 2003*, 43 Demography 621-46 (2011).

143 *See Table 104.20. Percentage of Persons 25 to 29 Years Old with Selected Levels of Educational Attainment, by Race/Ethnicity and Sex: Selected Years, 1920 Through 2023*, Nat'l Ctr. for Educ. Stat. (Oct. 2023), https://nces.ed.gov/programs/digest/d23/tables/dt23_104.20.asp [https://perma.cc/3DE8-WV8S] [hereinafter Nat'l Ctr. for Educ. Stat., *Table 104.20*] (showing that in 2023, of men between ages twenty-five and twenty-nine, 35.9% and 45.2% of women had earned a bachelor's degree or higher level of education).

144 *See id.* (showing that in 2023, of all individuals aged twenty-five to twenty-nine, 8.3% of men, and 13.0% of women had earned at least a master's degree).

stable with benefits. Men continue to dominate the top jobs in the economy and male-dominated occupations tend to pay more than female- dominated ones.[145] Nonetheless, the male dominant positions in the middle of the economy are typically more cyclical, with greater volatility in income and employment.[146] At the bottom of the economy, everyone is insecure. The bottom 40% of American families would have difficulty paying an unexpected bill of $400 and 30% of American adults have income that varies from month to month.[147] Lower income couples suffer greater income volatility than higher income families; indeed, one study found that "[a]bout 70 percent of low-income families experienced income instability over the 20-month observation period, defined by an arc percentage change reduction of 25 percent or more in a given month from the average of the prior 3 months."[148] Women express reluctance to marry men without stable employment,[149] and income and employment volatility tend to destabilize relationships.[150] This creates

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145 *See* Cahn, Carbone & Levit, *supra* note 12, at 6-7.

146 More men than women work in jobs that do not require a college degree, *See Labor Force Statistics from the Current Population Survey*, U.S. Bureau of Lab. Stat., https://www.bls.gov/cps/cpsaat18.htm [https://perma.cc/MA85-WUJR] (last modified Jan. 26, 2024) (showing that more men worked in construction, wholesale and retail trade, and repair and maintenance than women in 2023). These jobs, however, have more income volatility and more cyclical employment opportunities. *See* Evgeniya A. Duzhak, Fed. Res. Bank of S.F., *How Do Business Cycles Affect Worker Groups Differently?* 3—4 (Sept. 7, 2021), https://www.frbsf.org/wp-content/uploads/el2021-25.pdf. [https://perma.cc/KLD9-EQ8D] (showing that male-dominated fields such as agriculture, construction, and mining are more sensitive to cycle variations, particularly for Black and Hispanic men).

147 Fed. Res. Bd., Report on the Economic Well-Being of U.S. Households in 2018 2, 21 (2019), https://www.federalreserve.gov/publications/files/2018-report-economic-well-being-ushouseholds-201905.pdf [https://perma.cc/VCQ8-FEM6] (indicating that four of ten adults would have trouble covering an unexpected $400 expense and would have to run up credit card debt or borrow from family or friends, if they could cover the debt at all).

148 *See* Yoonsook Ha, Margaret M.C. Thomas, Thomas Byrne & Daniel P. Miller, *Patterns of Multiple Instability Among Low-Income Families with Children*, 94 Soc. Serv. Rev. 129, 130, 158 (2020) ("[L]ow-income families experience the most frequent and largest negative income shocks.").

149 Wendy Wang & Kim Parker, *Record Share of Americans Have Never Married*, Pew Res. Ctr. (Sept. 24, 2014), http://www.pewsocialtrends.org/2014/09/24/record-share-of-americans-havenever-married/ [https://perma.cc/R96C-DY4G].

150 Paul Amato, Alan Booth, David R. Johnson & Stacy J. Rogers, Alone Together: How Marriage in America Is Changing 124 (2007).

dramatically different circumstances – and different patterns of family formation for those across the economy.

We have termed these differences the "triple system of family law."[151] College graduates remain overwhelmingly part of the first system, which applies to economically self-sufficient families and gives them considerable autonomy in the management of their relationships.[152] With the shift to shared property and custody principles described in Section III.A above, family courts shifted to a new paradigm emphasizing the use of alternative dispute resolution techniques to provide voluntary settlements and to create a foundation for post-divorce families.[153] Today, many states have moved from "custody awards" to "parenting plans" (terminology that emphasizes the focus on cooperation rather than winners and losers), and every state either mandates custody mediation as an initial step before going to court or makes it available on a voluntary basis.[154] In addition, many custody agreements include parenting coordinators to help resolve later disputes, with some couples voluntarily adding such provisions to divorce settlements and courts in other cases making such coordinators available if the couple fails to provide for them on their own.[155] The result

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151 Carbone & Cahn, *Triple System*, *supra* note 13, at 1185.

152 tenBroek, *supra* note 105, at 257-58; *see also* Allison Tait, Family Wealth (forthcoming 2025).

153 *See* Andrew Schepard et al., *If We Build It, They Might Come: Bridging the Implementation Gap Between ADR Services and Separating and Divorcing Families*, 24 Harv. Negot. L. Rev. 25, 30 (2018) (describing the supportive and conciliatory processes available in family court but observing that they are unavailable for those who do not go to court or are not in a position to access court services); Jana Singer, *Dispute Resolution and the Postdivorce Family: Implications of a Paradigm Shift*, 47 Fam. Ct. Rev. 363, 363 (2009) (describing the paradigm shift designed to support a post-divorce family, with reforms that "replaced the law-oriented and judge-focused adversary model with a more collaborative, interdisciplinary, and forward-looking family dispute resolution regime" and "fundamentally altered the way in which disputing families interact with the legal system").

154 Connie J.A. Beck et al., Intimate Partner Abuse in Divorce Mediation: Outcomes from a Long-Term Multi-cultural Study 11 (2011), https://www.ojp.gov/pdffiles1/nij/grants/236868.pdf.

155 AFCC Task Force on Parenting Coordination, *Guidelines for Parenting Coordination*, 44 Fam. Ct. Rev. 164, 165 (2006); *see also* Christine A. Coates, *The Parenting Coordinator as Peacemaker and Peacebuilder*, 22 Fam. Ct. Rev. 398 (2018) (explaining how parents with financial means often include a provision for a parenting coordinator in their parenting plans, allowing the parents

further increases the ability of couples with resources to manage their own resolutions.[156]

The second system tenBroek described continues to apply to families who seek means-based benefits, providing public surveillance and monitoring rather than deferral to private arrangements.[157] Federal legislation, starting in the seventies but becoming much more pervasive in the nineties, made state child support compliance efforts a condition of state eligibility to participate in various federal benefit programs.[158] Child support enforcement continues to be punitive and designed to punish fathers seen as abandoning their children and responsible for the children's poverty and state dependence.[159] Today, however,

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to select the coordinator jointly and using the coordinator to avoid costly court visits); *Guidelines for the Practice of Parenting Coordination*, Am. Psychol. Ass'n (2011), https://www.apa.org/practice/guidelines/parenting-coordination (describing the role of parenting coordinators, which can be ordered by the judge or used voluntarily by the parties); Sophie B. Mashburn, *"Throwing the Baby Out with the Bathwater": Parenting Coordination and Pennsylvania's Decision to Eliminate Its Use,* 2015 J. Disp. Resol. 191, 201 (describing the function of a parenting coordinator and the criticism that some courts have been seen as delegating judicial determinations to the coordinator).

156 The system, however, which presumes that children's interests lie with the continuing involvement of both parents has been criticized as failing to protect women paired with violent or abusive men. *See, e.g.,* Joan S. Meier, *Denial of Family Violence in Court: An Empirical Analysis and Path Forward for Family Law*, 110 Geo. L.J. 835 (2022) (documenting courts' punitive responses to parental allegations of intimate partner violence). *See also* Milfred Dale, "*Still the One": Defending the Individualized Best Interests of the Child Standard Against Equal Parenting Time Presumptions*, 34 J. Am. Acad. Matrim. Law. 307, 316–17 (2022) (describing how in cases that fail to settle courts often adopt "progressively more intrusive and coercive interventions that wed mental health and psycholegal interventions—such as court-ordered therapeutic processes, custody evaluations, ongoing co-parent counseling, arbitration, parent coordination, special masters, and various kinds of supervised access and visitation programs—to the social control mechanisms of the court.").

157 Tollestrup, *supra* note 107, at 3 tbl. 3. Parents applying not only for cash grants and Medicaid, but in many states, food stamps or a childcare subsidy, are subject to requirements to cooperate with these enforcement efforts. *Id.* at 2.

158 *See* Ann L. Estin, *Sharing Governance: Family Law in Congress and the States*, 18 Cornell J.L. & Pub. Pol'y 267, 283, 293 (2009) (describing legislation and concluding that nineties reforms increased its effectiveness).

159 *See, e.g.,* Serena Mayeri, *Foundling Fathers: (Non-)marriage and Parental Rights in the Age of Equality*, 125 Yale L.J. 2292, 2305 (2016) 2305 ("Unmarried

the norms of fatherhood have changed; unmarried fathers are much more likely to be involved with their children than in tenBroek's time.[160] Yet, state-initiated enforcement affects 20% of American children,[161] the child support amounts imposed do not realistically reflect the fluctuating incomes of those at the bottom of the American economy,[162] and the counterproductive measures undercut fathers' continuing involvement with their children.[163] Moreover, the child support regulations are at odds with today's first system, which prizes father involvement to a greater degree than in tenBroek's time and reduces child support obligations for parents with greater custodial rights.[164] The state-initiated structure, in contrast, does not typically permit those subject to child support enforcement efforts to counterclaim for custodial rights, and unmarried men are much less likely than divorced fathers to

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fathers [were] long typecast as sexual exploiters of vulnerable, young women who abandoned their children.").

160 *See* Sara S. McLanahan & Irwin Garfinkel, *Fragile Families: Debates, Facts, and Solutions*, *in* Marriage at the Crossroads: Law, Policy, and the Brave New World of Twenty-First-Century Families 145 fig.8.2 (Marsha Garrison & Elizabeth S. Scott eds., 2012) (reporting that of the children born to nonmarital parents in the FFCWB study, 82% were born to parents in a romantic relationship: 50% of the unmarried parents were cohabiting, and 32% were in a "visiting union").

161 Hatcher, *supra* note 107, at 157 (further observing that the rate is double for Black children).

162 Tonya L. Brito, *The Child Support Debt Bubble,* 9 U.C. Irvine L. Rev. 953, 954 (2019).

163 Hatcher, *supra* note 107, at 54–55 (concluding that child support enforcement policies push fathers out of legitimate jobs, tear fragile families apart, and increase economic instability and crime rates as debtor parents are driven into the underground economy.)

164 The federal government has taken some measures to make it easier for nonresidential parents to have custodial rights and some states have adopted their own reforms, but comprehensive changes have yet to occur. "Also, the federal government has made funding available to states for developing model programs to ensure that children will be able to have the continuing care and emotional support of both parents." Administration for Children & Families, Dept. Health & Hum. Servs., Office of Child Support Enforcement, *Noncustodial Parents' Rights and Responsibilities*, Child Support Handbook ch. 8, https://www.acf.hhs.gov/sites/default/files/documents/ocse/chapter8_0.pdf (last visited Oct. 18, 2024).

benefit from custodial orders.[165] In short, the second system remains focused on surveillance, conformity, and punishment.

The changes in the family, however, have given rise to a third group: a group that does not marry, does not necessarily receive means-tested state benefits, and retains a much greater degree of autonomy than the second group by staying out of court.[166] For families who marry and divorce, the imposition of child support obligations and custodial orders is a routine part of family dissolution. For couples who do not marry, the relationship typically ends when the father leaves. Maternal custody is then the default norm; fathers need to stay on the mothers' good side to see the children.[167] Since 2007, the involvement of nonresident fathers with the children has remained roughly the same even though the number of support orders has declined.[168] The majority of custodial parents who do not have formal child support orders did not seek them either because the other parent had no money or was already contributing.[169] Another 16–17% did not want contact with the other parent and a smaller percentage did not know where the other parent was.[170] In short, this third system allows parents

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165 Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 Stan. L. Rev. 167, 183 (2015) (describing restrictions on the ability to seek custody).

166 Carbone & Cahn, *Triple System*, *supra* note 13, at 1189.

167 Huntington, *supra* note 165, at 166.

168 Nicholas Zill, *The New Fatherhood Is Not Benefiting Children Who Need It Most,* Inst. for Fam. Stud. (Dec. 4, 2019), https://ifstudies.org/blog/the-new-fatherhood-is-not-benefiting-children-who-need-it-most. *See also* Marcia J. Carlson, Sara S. McLanahan, & Jeanne Brooks-Gunn, *Coparenting and Nonresident Fathers' Involvement with Young Children After a Nonmarital Birth*, 45 Demography 461, 479 (2008) (noting that contact, however, declines as children age).

169 Timothy Grall, *Custodial Mothers and Fathers and Their Child Support: 2017, Current Population Reports*, U.S. Census Bureau, at 8 fig.4 (2020) (listing the reasons a custodial parent did not seek a child support order: the top two reasons included 39% of custodial parents reported that they "[d]id not feel need to make legal"; 38% reported the "[o]ther parent provides what she or he can"); Annie E. Casey Foundation, *Child Support Statistics in the United States* (Mar. 16, 2023, updated June 29, 2024), https://www.aecf.org/blog/child-support-statistics (listing the same reasons, and citing Grall report) And more than 70% of non-custodial fathers report that they provide child support regularly. Wendy Wang, *American Dads Are More Involved Than Ever – Especially College-Educated or Married Dads* (Oct. 24, 2023), https://ifstudies.org/blog/american-dads-are-more-involved-than-everespecially-college-educated-or-married-dads.

170 *See* Grall, *supra* note 169.

a greater degree of autonomy to negotiate their relationships by staying away from legal formalities and staying out of court. The couples in this third system are those who lack the resources to effectively navigate the first system, which they may find expensive, cumbersome, and insensitive to their needs.[171] As we have explained, these "families (and often their bargains) operate in the "shadows" of the law, neither receiving official ratification nor being subject to explicit disapproval."[172]

The third system, however, also differs from the first system in that it gives mothers, who in low-income families are typically the primary caretaker *and* the more reliable breadwinners, greater power over children.[173] As a practical matter, it also allows these parents to trade paternal contributions and custody in ways that are at odds with formal family law doctrines.[174]

In short, the triple system of family law reflects the realities of a new, more unequal economy in which men and women match up in different ways.

Conclusion

Recognizing that family law develops in response to the economy leads to a new understanding of how and why family law changes. Family law sets out rules for who has access to, and control of, sources of wealth, decision-making power, and responsibility for dependents, but those rules reflect family organization designed to meet changing economic needs. As the basis of the economy has changed from land to wage labor to information technology, roles within the family have adjusted accordingly. In this sense, economic change, cultural change, and family law change are deeply integrated.

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171 *See, e.g.*, Jane Murphy & Jana Singer, Divorced from Reality ch. 3 (2015) (describing limitations of family courts, particularly for low income families).

172 *Id.*

173 For a critique of mothers as "gatekeepers," see Sarah M. Allen & Alan J. Hawkins, *Maternal Gatekeeping: Mothers' Beliefs and Behaviors That Inhibit Greater Father Involvement in Family Wor*k, 61 J. Marriage & Fam. 199 (1999); Naomi Cahn, *The Power of Caretaking,* 12 Yale J.L. & Feminism 177 (2000); Huntington, *supra* note 165.

174 *See* Carbone & Huntington, *supra* note 105, at 2228.