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HISTORICAL PERSPECTIVES ON FAMILY LAW

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About This Issue

This issue focuses on the history of many family law matters. It includes an excellent recounting of Abrahm Lincoln as a lawyer as well as a look at how economic history has shaped family law. Two fascinating jurisprudential pieces explore family law exceptionalism and what the application of Rawl's theory of the veil of ignorance to family law might tell us. Two articles focus on children, one on the state of child marriage and another on the beginnings of child protection laws in the United States. Fault in divorce is explored both from an historical point of view in one article and how it is being reintroduced in divorce proceedings in another. A longer historical lookback is also featured in an article about minor guardianships in medieval times. Two student comments on the history of guardianship in divorce proceedings and premarital agreements are also included along with an excellent bibliography of works related to the history of family law.

The Issue Editors are Steven Peskind and Gary Debele. Mr. Peskind, who also serves as a Co-Editor in Chief of the Journal, is the principal of Peskind Law Firm, which represents clients throughout the State of Illinois. He is also a Fellow of the International Academy of Family Lawyers and an elected member to the American Law Institute. Gary A. Debele is a shareholder and chair of the Family Law Practice Group of the Minneapolis-based law firm of Messerli & Kramer, P.A. He is also an adjunct professor at the University of Minnesota Law School where he teaches the Family Law Capstone course to second- and third-year law students interested in practicing family law. Gary's practice includes all types of family law matters, with particular expertise in the areas of assisted reproduction, adoption, third-party custody and visitation, appeals, mediation, tribal court practice and the Indian Child Welfare Act.

Our first article is entitled, *Family Law Exceptionalism Revisited, authored by* Katharine Baker. The article begins with a summary of the family law exceptionalism critique, it then briefly tells the story of the last fifty years of the controversy over defining marriage as a status or a contract finding a re-embracing of the status position. The author acknowledges that some women continue to be endangered by family law's status regime, but many of those women, particularly lower income women, have learned not to marry because it is not economically beneficial for them. The final section of the article touches on the benefits of exceptionalism more broadly, particularly.in two family law areas not necessarily related to marriage, domestic violence and the law of children. The article argues that contemporary critiques of family law which assume that family's law decidedly patriarchal, status-based history should make courts more willing to treat marriages as contracts and spouses as fully independent legal actors are misplaced. The article does not dispute the

history, but it argues that rejecting a contract paradigm for marriage and treating spouses as connected in a way that most contracting parties are not does a better job of protecting women than would a law that did not treat family relationships as unique. Katharine Baker is a University Distinguished Professor of Law at IIT Chicago-Kent College of Law. She is an expert in family law, particularly in the modern law of marriage and parenthood. Her work generally focuses on the intersection of women's intimate lives and the law.

India Butler, an associate attorney at Rutkin, Oldham & Griffin, LLC in Westport, CT, contributes an article entitled, *"Fault" in Divorce: Its History and Current Role (and a Recommendation for the Future),* in which she explores this nation's historical views of divorce as they relate to the consideration of marital fault in issuing financial orders. The article takes a historical look at the treatment of marital fault and how it's application in divorce law has evolved over time and across regions. In doing so, the article highlights the benefits and challenges of considering fault in divorce actions, and ultimately, makes a recommendation as to the appropriate implementation in the future. In her role at Rutkin, Oldham & Griffin, LLC, India Butler represents clients in divorce, custody, and various post-judgment cases, in which issues related to asset valuation and division, alimony and child support arise from complicated compensation structures and high net worth families.

In *Economic History and The Remaking of Family Law,* June Carbone & Naomi Cahn argue that all families do not experience the legal system in the same way. They assert that couples with assets tend to drive legal changes ("middle class family law") whereas couples without assets often form families, dissolve them, and form new ones without necessarily interacting with the legal system at all. They then trace the history of family law through three eras, beginning 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 middle class family bargains of the post-industrial age fail to establish a legal foundation for others. They conclude that in each of these eras, those who could not attain the middle-class model were effectively subject to a different set of rules. However, those families without assets have emerged from the shadows of the law, becoming more visible over time and thus posing more of a challenge to mainstream doctrines. June Carbone is the Robina Chair of Law, Science and Technology at the University of Minnesota Law School. Previously she has served as the Edward A. Smith/Missouri Chair of Law, the Constitution and Society at the University of Missouri - Kansas City School of Law and Associate Dean for Professional Development and presidential Professor of Ethics and the Common Good at Santa Clara University School of Law. She received her J.D. from the Yale Law School, and her A.B. from the Woodrow Wilson School of Public and International Affairs at Princeton University. She teaches Property,

Family Law, and Assisted Reproduction and the Family. She has written From Partners To Parents: The Second Revolution in Family Law (Columbia University Press, 2000), the third, fourth and fifth editions of Family Law with Leslie Harris and the late Lee Teitelbaum (Aspen, 2005, 2009, 2014), Red Families v. Blue Families (Oxford University Press, 2010); Marriage Markets: How Inequality Is Remaking the America Family (Oxford University Press, 2014), both with Naomi Cahn and Fair Shake (Simon and Schuster, 2024) with Naomi Cahn & Nancy Levit). Naomi Cahn is the Anthony M. Kennedy Distinguished Professor of Law and co-director of the Family Law Center at the University of Virginia School of Law. Cahn is a co-author of numerous articles and books, including (most recently) Hot Flash: How the Law Ignores Menopause and What We Can Do About It (2024 with Professors Bridget Crawford and Emily Gold Waldman) and Fair Shake: Women and The Fight For A Just Economy (2024 with Professors June Carbone and Nancy Levit). Cahn teaches family law, poverty law, reproductive justice, and trusts and estates. Cahn was an Adviser to the ALI's Restatement of the Law: Children and the Law (2024). In 2017, Cahn received the Harry Krause Lifetime Achievement in Family Law Award from the University of Illinois College of Law, and in 2024, she was inducted into the Clayton Alumni Hall of Fame.

Our next article is entitled, *Toward a More Perfect Dissolution: The History of American Divorce Law and Its Ghosts in Contemporary Practice* by Jane J. Felton and Barbara A. Schweiger. The authors trace the non-linear path of no- fault divorce in the United Sates. In doing so they explore this uneven history from the colonial period to the early republic, with its patchwork of statutes and common law, through the development of fault-based divorce statutes to the no-fault revolution of the late twentieth century and its backlash. They assert that this history mirrors the history of women's rights. because divorce law has largely been guided by societal judgments about women's roles. The authors, while recognizing that all states now have no-faut divorce statutes, point out that there are still barriers to divorce in many states. They assert that the current patchwork of divorce legislation reflects the push and pull between modern-day liberalizers and a growing host of politicians and activists arguing for a return to fault-based regimes arguing that liberal divorce harms families and children. The authors, from their vantage point as legal practitioners conclude with a thoughtful reflection on navigating the future of barriers to ending a marriage for their clients. Jane J. Felton is a partner with Skoloff & Wolfe, P.C., in Livingston, New Jersey. Having spent the first half of her 26-year career as a commercial litigator, she has developed her practice to include complex matrimonial disputes. She has handled a wide range of matters at the trial and appellate levels in both state and federal courts. Her interest in the history of no-fault divorce arises from her recent representation of a client in six-year divorce case, the first four of which involved contentious

litigation leading to a four-day trial on the issue of whether the parties truly had irreconcilable differences sufficient to entitle Ms. Felton's client to the right to divorce. While Ms. Felton's client's right to a so called "no fault" divorce was eventually won after trial and affirmed twice on appeal, the case left her wondering how secure the right actually is. Since joining Skoloff & Wolfe, P.C., in 2008, Barbara Schweiger has focused her practice on sophisticated business litigation and complex financial disputes in matrimonial litigation, bringing with her ten years of experience in representing clients in the financial services, accounting, architecture, medicine, manufacturing, bio-tech, and pharmaceutical industries. At Skoloff & Wolfe, P.C., clients have also received the unique benefit of her distinctive, focused investigation of the seemingly insurmountable volumes of discovery in complex high-stakes litigation matters. In a victory that received national media attention, Ms. Schweiger successfully defended a hedge fund and an individual against multi billion-dollar civil racketeering and conspiracy claims. She is also called upon to work with attorneys in Skoloff & Wolfe's family law group, particularly on complex financial disputes that can arise in the context of high-net worth divorces. Skoloff & Wolfe, P.C. family law clients have had the benefit of Barbara's diverse litigation experience - and her passion for brief writing and legal argument - at both the trial and appellate levels.

The impetus for the United States legal system's protection of children is aptly told by Racheal Mastel in her article entitled, Who *Will Speak for the Children: The Case That Shaped Child Protection in America*. She tells the story of Mary Ellen Wilson, a nineteenth century nine-year-old girl whose plight brought attention to the lack of legal protection for abused and neglected children. The author asserts that from the child's situation there developed a national movement by not just individuals, but organized groups and government systems at both the state and eventually federal levels, towards the investment in the health, safety, and happiness of children. Racheal Mastel is a partner with Kainen Law Group, PLLC. She is a Fellow of the American Academy of Matrimonial Lawyers, a member of the International Academy of Family Law Attorneys, a Nevada Board Certified Specialist in Family Law and has practiced exclusively in the area of Family Law for over fifteen (15) years. Ms. Mastel practices extensively in all areas of family law practice, resolving contested cases, both by litigation through trial and by settlement as well as litigating Family Law Appeals. She is the co-author of many CLE programs and educational materials and has taught nationally for the American Academy of Matrimonial Lawyers and for the Nevada Family Law Section Conference in Bishop, CA. A student of history, especially legal and political history, Ms. Mastel came across the story of Mary Ellen Wilson and the attorney who rescued her, Elbridge T. Gerry, in law school. While mostly lost to time, when the opportunity to celebrate Mr. Gerry's contribution to family law arose, it made complete sense to bring these events back to the spotlight.

Our next article takes us further back in time to medieval history. In *The Legal Guardianship of Minors in Medieval European Law and Culture: An Overview and Brief Note for Modern Family Law Practitioners*, Daniel W. Morgan first provides an introduction to medieval conceptualizations of childhood and legal minority, with attention to the role of the child's place within the medieval family. He then offers an overview of the basic principles of medieval guardianship. He concludes with some considerations regarding how thinking about medieval guardianship can inform the work of modern legal practitioners, particularly those involved in family law. Daniel W. Morgan is an Assistant Teaching Professor in the History Department at North Carolina State University with a specialization in medieval history. He completed his BA at Trinity College in Hartford Connecticut, and his MA and PhD at the University of North Carolina at Chapel Hill. His current research projects focus on the political cultures of eleventh- and twelfth-century Italy as well as the ideologies and discourses of Christian holy war in the High Middle Ages.

Steven Peskind provides a unique perspective on our sixteenth president in *The Ascent of Lawyer Lincoln: How the Practice of Law Created America's Greatest President.* The article describes Lincoln's education and the professional relationships he fostered that facilitated his entry into the legal profession, where he handled a surprising number of family law cases including a famous child custody case before the Illinois Supreme Court. The article then turns to a discussion of Lincoln's attributes as a lawyer. Mr. Peskind asserts that he "successfully balanced passion with logic, aggression with courtesy, kindness with opportunism, and ruthlessness with affability." This section also includes a list of qualities that Lincoln himself described as important for lawyers to possess. Finally, the article highlights how his experience as lawyer informed his leadership of the country during his presidency. Steven N. Peskind is the principal of Peskind Law Firm, which represents clients throughout the State of Illinois. He blogs as The Successful Lawyer on Substack (https://successfullawyer.substack.com/). Mr. Peskind is a fellow of the American Academy of Matrimonial Lawyers and the International Academy of Family Lawyers. He is co-Editor of the Journal of the American Academy of Matrimonial Lawyers. Mr. Peskind is also an elected member to the American Law Institute. In 2015, the American College of Family Trial Lawyers elected him as a Diplomate. Membership in the college is limited to the top 100 family trial lawyers from across the United States. He is the author of five books on family law-related subjects. Most recently, Mr. Peskind authored the Divorce Trial Manual, 2nd Edition, for ABA Publications in 2021. In 2025, the Illinois Chapter of the American Academy of Matrimonial Lawyers gave him the Samuel L. Berger Award, given annually to an Illinois lawyer or judge who "exemplifies the highest standards of integrity, courtesy, knowledge of family law and demonstrates an extraordinary ability to solve human problems."

In *The Veil of Matrimonial Ignorance: Creating Justice as Equity in Family Law,* Josh Raffini provides a jurisprudential piece based on Rawl's theory. He provides both background and commentary about the theory and then utilizes it to conduct a thought experiment to ask how it might aid in understanding, and perfecting, the laws governing families as they form and dissolve. He states that the goal is to better understand what system and law might result from considering justice as fairness as applied to relevant topics in family law, such as marital property division, alimony and child custody. His conclusion provides both suggested resulting principles and specific outcomes consistent with the underlying premise. Joshua B. Raffini is an attorney at Pruitt & Pruitt law firm in Anderson, South Carolina. The majority of his general practice is in family court. He is also a member of the adjunct faculty and Vice-Chair of the Board at a private school in Anderson, South Carolina, working with students in several capacities and teaching Government & Economics at the high school level.

Our final article is entitled, *Child Marriage in The United States: Past, Present, And Future* authored by Sandi S. Varnado. In summary, the article explores how child marriage laws have changed over the years, how they exist currently, and the future of child marriage in the United States. As the author points out, child marriage in the United States has evolved greatly since the country's beginnings. Child marriage went from being perfectly acceptable during the times of English common law to being frowned upon in the early twenty-first century. However, despite much criticism child marriage is currently alive and well in the majority of states. A recently introduced multi-faceted piece of legislation called the Child Marriage Prevention Act of 2024 would fundamentally alter the situation. The author explores the contours of the proposed legislation which provides for the collection and sharing of information on the federal level and incentives for states to study and ban child marriage, bans child marriage on federal property, and amends provisions of U.S. immigration law. Professor Sandi S. Varnado is the Kathryn Venturatos Lorio Professor of Law at Loyola University New Orleans College of Law. There, she teaches and writes in the areas of family law, community property, sales and leases, and successions and donations, obligations. Professor Varnado has been selected as Favorite Professor of the Year on three occasions (2013, 2016, and 2021) and has received the University Senate Award for Excellence in Advising (2015) and the University Senate Award for Excellence in Teaching (2021). She is extremely involved in committees at her institution, as well on those at the Louisiana State Law Institute.

The issue also includes two student comments focusing on the history of the use of guardianships in divorce and on prenuptial agreements. *The Intersectional History of Guardianship in American Divorces* was written by Kirsten Houtz. Jaquelin Veloz authored *From Love to Law: The Evolution of Prenuptial Agreements Through History.*

As usual our issue concludes with an excellent extensive bibliography of articles on family law history by Allen Rostron, Associate Dean for Students and the William R. Jacques Constitutional Law Scholar and Professor of Law, University of Missouri-Kansas City School of Law.

Mary Kay Kisthardt
Executive Editor
Kansas City, Missouri

Family Law Exceptionalism Revisited

by
Katharine K. Baker*

Critiques of modern family law often start by questioning its distinctiveness. These critiques highlight how the history of family law as a separate subject area is steeped in status-based patriarchal doctrines like the law of master and servant, coverture, and the right of chastisement. The history arguably justifies skepticism about the propriety of treating family relationships as different, needing their own body of law. This article pushes back against that skepticism. It argues that family law exceptionalism, as operationalized today, does a better job of protecting many women who enter legal families than would a body of law that did not treat family relationships as unique. If the law were more willing to commodify women's unpaid contributions, less willing to demand marital sharing, and more willing to see spouses as fully autonomous actors, many women who conform, even in minor ways, to traditional gender roles, would be considerably worse off. And women who do not conform to traditional gender roles likely would not be better off.

Part I of this essay summarizes the family law exceptionalism critique, in particular the work of scholars who argue that the continued treatment of marriage as a status and the resulting refusal to enforce contracts for domestic services, hurts women. Part II briefly tells the story of the last fifty years of that status/contract controversy, a story that reveals family law's rejection of, but then re-embrace of status. The re-embrace of status stemmed from a recognition that a more contract-based regime hurt too many married women. Part III acknowledges that some women continue to be endangered by family law's status regime, but many of those women, particularly lower income women, have learned not to marry.[1] They understand that marriage can trap them, not

* University Distinguished Professor of Law, Illinois Institute of Technology, Chicago-Kent College of Law. Thanks to participants at the University of Iowa workshop series for comments and to Matthew Erickson for excellent research assistance.

1 *See infra* notes 116 - 118.

because it prevents them from contracting with a spouse, but because marriage would force them to share with a spouse. Part IV touches on the benefits of exceptionalism more broadly. Scholars assume that family law exceptionalism hurts women because the history of legal marriage is full of patriarchal doctrines, but in two family law areas not necessarily related to marriage, domestic violence and the law of children, most everyone acknowledges that an exceptionalism approach is better for women and children. This recognition supports the idea that it is not the endurance of male supremacy, but the intimacy, unique labor, and vulnerability characteristics of most families that should give rise to rights and responsibilities that are best understood as distinct.

I. The Family Law Exceptionalism Critique

In an ambitious project published in 2011, Professor Janet Halley traced the origins of contemporary family law to the economic and industrial shifts in the nineteenth century which transformed how the law treated labor.[2] Prior to those shifts, the household was where most goods were produced. In that household, wife, child, and servant were all "similarly subordinate."[3] Parent and child and husband and wife were "equally proximate to the law of guardian and ward and . . . the law of master and servant."[4] When production of goods shifted from the home to commercial and industrial jobs in urban areas, servants left that explicitly hierarchal, status-defined household, but wives and children did not.

In leaving the household to work elsewhere, servants became laborers who sold their labor by contracting with those who wanted to buy it. Thus, work for laborers became something that they did because they had willingly contracted to do it, not something they did because their status as servants demanded it. The law of contracts governed servants' relationship to their labor.

Women who continued to work in the home did not become laborers as that term was understood. Home-based work was

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2 *See* Janet Halley, *What Is Family Law?: A Genealogy Part I*, 23 Yale J. L. & Human. 1 (2011) (hereinafter, "Halley I"); Janet Halley, *What Is Family Law?: A Genealogy Part II*, 23 Yale J. L. & Human. 189 (2011) (hereinafter "Halley II").

3 Halley I, *supra* note 2, at 2.

4 *Id.*

perceived as different, outside the market and therefore not subject to contract. The market/household dichotomy was born.

The stark divide between market and household, contract and status, allowed different norms and expectations to develop in the different domains. Contract law extolled free will and autonomy, whereas family law disavowed the importance of individual choice and emphasized the importance of morality and selflessness. Professor Halley, citing Duncan Kennedy's work on contract, notes that "paternalism, community and informality" became the values of family law not contract law.[5] As the nineteenth century progressed, the law of contract assumed ever greater importance as the arbiter of the market, but the family remained outside of it, such that "exchanges into, out of, and especially within the ongoing family"[6] were not subject to contract. In 1899, the U.S. Supreme Court explained that:

> [w]hen the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties and obligation of which rest not upon their agreement, but upon the general law of the state, statutory or common, which defines and prescribes those rights, duties and obligations.[7]

Marriage was a social institution, serving the communal interest in altruism and stability. Individual interests within the family could be discounted in the interest of stabilizing the family community. Power might manifest itself within families, but the law would assume it was a kind of benign power because families were, by definition, altruistic. What happened within families was not exchange or bargaining as those behaviors were understood in the market in general and contract law in particular. They were instead the fulfillment of obligations prescribed by the status of marriage. As Halley describes it, family law imposed "ascriptive statuses saturated with duty."[8] "Domestic Relations/Family Law are what they are by virtue of their categorical distinction from the law of contract and, more broadly, the law of the market."[9]

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5 *Id.* at 86.

6 Halley II, *supra* note 2, at 289 (emphasis in original).

7 Maynard v. Hill, 125 U.S. 190, 211 (1888) (citing Adams v. Palmer, 51 Me. 481, 483 (1863)).

8 Halley II, *supra* note 2, at 190.

9 Halley I, *supra* note 2, at 1.

Professor Reva Siegel's work on wives' claims to the value of their household labor tells a somewhat different story with a comparable conclusion.[10] Siegel argues that in the late nineteenth and early twentieth centuries, the law adopted new doctrines to more subtly maintain a husband's right to his wife's labor, a right that had been explicit with coverture. When wives claimed, under recently passed earnings statutes, that they were owed compensation from their husbands for work performed in the home, courts rejected their claims by creating personal services exceptions to the earnings statutes. Siegel argues that the refusal to enforce marital contracts for domestic services amounted to a kind of "preservation [of coverture] through transformation."[11] Judges interpreted earning statutes to allow women to earn wages for work done outside the home, but not for work done within it.[12] Again, domestic labor was considered distinct, unlike other labor that was performed in the market.

Courts insulated women's domestic labor from any kind of commodification by adopting both contractarian and anti-contractarian arguments. As Siegel explains, the contractarian position involves courts accepting the potential legitimacy of an interspousal contract for domestic services, but finding that the contracts at issue lacked consideration because, as spouses, wives were already obliged to provide their husbands with the services associated with "raising, clothing, feeding, educating, and nurturing her family."[13] In contrast, the anti-contractarian position "deems the interspousal agreement unenforceable because

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10 Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880*, 103 Yale L. J. 1073 (1994) (hereinafter "Siegel, *Home as Work*"); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930*, 82 Georgetown L. J. 2127 (1994) (hereinafter "Siegel, *Modernization*").

11 Siegel, *Modernization*, *supra* note 10, at 2178–87. Siegel had previously argued that the law adopted a doctrine of privacy to implicitly shield domestic abuse from state scrutiny to maintain what had been a husband's explicit prerogative to beat his wife. *See* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 Yale L. J. 2117, 2119 (1996) (hereinafter "Siegel, *Rule of Love*") (illustrating the "preservation through transformation" of status regimes by analyzing the changes that occurred in domestic assault law).

12 Siegel, *Modernization*, *supra* note 10, at 2131 (judges called upon to apply the earnings statues were determined to insulate a 'wife's work' from market exchange).

13 *Id.* at 2130.

paying a wife for her labor will degrade her into a mere servant."[14] The anti-contractarian position "insists *a wife's' labor is not property that husband and wife can barter over like a fungible market commodity.*"[15] Siegel, like Halley, concludes, that "[e]xchange in the market is thus paradigmatically 'interested,' while exchange in the household is paradigmatically 'altruistic.'"[16]

Siegel notes that courts often invoke both contractarian and anti-contractarian positions in the same case. She discusses the relatively modern California case of *Borelli v. Brusseau*,[17] in which a court refused to enforce an oral contract for nursing services between an infirm husband and his wife both because the California Civil Code codified a duty of spouses to care for each other (suggesting the absence of consideration)[18] and because sickbed negotiations were "antithetical to the institution of marriage" (suggesting that marital contracts could not be enforced even if there was consideration).[19] Siegel argues that "courts can invoke both types of justifications without sense of contradiction because the justifications are historically related: two expressions of one body of marital status law [i.e., coverture] as it developed over several centuries."[20] Thus, Siegel concludes that "notwithstanding the putative abolition of coverture, women in the industrial era found themselves economically disempowered in marriage and impoverished at divorce—and still find themselves so today."[21]

Professor Joan Williams also highlights courts' refusal to commodify domestic labor as central to the replication of "traditional gendered allocations and [maintenance of] the [traditional] dichotomy between market and the family."[22] She concedes that "commodification anxiety serves several different purposes and does not

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14 *Id.* at 2204.

15 *Id.* at 2200 (emphasis supplied).

16 *Id.* at 2202.

17 16 Cal. Rptr. 2d 16 (Cal. App. 1993).

18 *Id.* at 20 (California Civil Code §5132 stated that "a married person shall support the person's spouse while they are living together." Code § 242 declared that "every individual shall support his or her spouse.").

19 *Id.* at 13 (sickbed bargaining . . . [is] . . . "antithetical to the institution of marriage as the Legislature has defined it.").

20 Siegel, *Modernization*, *supra* note 10, at 2205.

21 *Id.* at 2131.

22 Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 83 Geo L. J. 2227, 2282 (1994).

always signal the policing of gender boundaries. But it often does."[23] Also citing *Borelli v. Brusseau*, she argues that commodification anxiety becomes particularly pronounced "when family-based entitlements redistribute husbands' wealth to wives."[24]

Professor Jill Hasday argues that these critiques by others are still powerful notwithstanding significant changes to family law in the late twentieth and early twenty-first century. These changes, including no-fault divorce, increased acceptance of prenuptial and postnuptial agreements and decreased reliance on alimony or maintenance, seem to signal a greater acceptance of contract doctrine in family law. Still, Hasday suggests that modern family law as understood "by legal scholars and especially by legal authorities, like legislators and judges"[25] ignores how family law's ongoing reliance on status "continue[s] to sustain . . . the social inequality of women."[26] The modern "family law canon"[27] wrongly assumes that modern family law embodies a status-to-contract story, even though the transition to contract from status is entirely incomplete. Hasday argues that the persistence of status "den[ies] individuals choice about the structure of their relationships,[28] and fails to protect individuals within marriage.[29] She cites not just *Borelli,* but a series of other cases involving unsuccessful claims to payment for marital services between spouses, for proof that modern family law does not "uphold women's equality."[30]

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23 Joan Williams, Unbending Gender: Why Family and Work Conflict and What To Do About It 118 (1999).

24 *Id.* In later work on commodification, Williams suggests that one can ask whether domestic labor has value that should be recognized in law without assuming that it is the market that should put a value on that labor. *See* Joan C. Williams & Viviana A. Zelizer, *To Commodify or not to Commodify: That Is not the Question, in* Rethinking Commodification 362 (Martha M. Ertman & Joan C. Williams eds. 2005). This latter understanding of commodification, one that separates the question of whether something has value from whether the market should value it, is consistent with how the law of marital dissolution has come to value domestic labor. *See infra* Part II.

25 Jill Elaine Hasday, *The Canon of Family Law*, 57 Stan. L. Rev. 825, 825 (2004).

26 *Id.* at 830.

27 *Id.* at 825.

28 *Id.* at 836.

29 *Id.* at 837–38.

30 *Id.* at 830.

The next Section evaluates and concedes many of these arguments. Family law is still permeated with status; it resists enforcing contracts for domestic services and it refuses to commodify most household labor. Family law is still exceptional. But family law's failure to commodify domestic labor and enforce marital service contracts does not inure to most married women's detriment. In fact, quite the opposite is true. Modern family law's embrace of status, anti-contractarianism, and anti-commodification protects most married women who disproportionately engage in domestic work for any significant time. It forces a redistribution of wealth from those who work in the market to those who work more (or extensively) outside the market. And it forces that redistribution by treating domestic labor as distinct and by rejecting market measures of its value. There are women who can be hurt by family law's forced redistribution of wealth, but for the most part, these women, especially lower income women—who earn just as much if not more than any potential spouse and still disproportionately invest in domestic work—no longer marry.[31] They escape the potential harms of status by not entering into status relationships.

II. Status vs. Contract

All the scholars discussed above would likely acknowledge, as Hasday does, that many of the twentieth century changes to family law did involve some casting off of status.[32] The no fault

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31 *See infra* notes 116 - 118.

32 In an important article, Professor Kaipo Matsumura argues that "[a] pervasive narrative in legal scholarship [] that family relationships are treated differently from market relationship" overgeneralizes by failing to see all the different contexts in which contract law is infused with status. Kaipo Matsumura, *Unifying Status and Contract*, 56 U.C. Davis L. Rev. 1571, 1591 (2023). Matsumura suggests that there is much more relationship-specific exceptionalism within contract law than the traditional status/contract dichotomy admits. In other words, family law exceptionalism is but one of many forms of exceptionalism. I agree with Matsumura to the extent he suggests that other areas of contract law are infused with status. I disagree to the extent he argues that family law is no more exceptional than the other areas he discusses. He elides the conundrum posed by unique labor that family members provide, *see infra* text accompanying notes 43-47, and the fact that the plaintiffs in many of the cases he cites were not asking courts to apply contractual notions of breach nor contract remedies, but the very different understandings of liability and remedies that family law exceptionalism provides. See *infra* note 48 and Katharine K. Baker, *The Polyamorous Threat to*

revolution that swept through almost all fifty states in the 1970s and early 80s effectively allowed either spouse to leave a marriage at will. Marital duties became less ascriptive because one could avoid them by leaving a marriage. When one spouse did leave, the law grew increasingly wary of imposing long-term obligations on either spouse because divorce was meant to mark a new beginning for each spouse as an autonomous individual. The 1973 Uniform Marriage and Divorce Act embraced a "clean break" theory of divorce, encouraging courts to distribute marital property in ways that allowed each spouse to go their own way without any future entanglement through mechanisms like alimony.[33] This period also saw growing acceptance of both pre- and post-marital contracts, which allow soon-to-be spouses and people who are already spouses to contract with regard to property division in case of divorce. These contracts, which had been viewed through an anti-contractarian lens because they were seen as antithetical to marriage, became legitimate enough to generate their own Uniform Act.[34]

Critical to family law's willingness to dispense with some vestiges of status was the growing recognition that women were, or at least could be, "laborers" in Professor Haley's nomenclature. Women could enter into contracts in markets and earn wages just as men could. The women's equality movement in the latter half of the twentieth century helps explain family law's willingness to dispense with some of family law's paternalism.

It did not take long for people to realize that this rejection of paternalism left many divorced women significantly worse off after divorce. Women who had disproportionately invested in domestic work found themselves cast into the market, free to sell their

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Nonmarriage, 61 Fam. Ct. Rev 81, 88 (2023) (discussing how cohabitants' contract claims are rarely asking for the market value of their services and usually ask courts to assume that family norms, not commercial norms, should apply).

33 *See* Leslie Joan Harris, June Carbone & Rachel Rebouche, Family Law 272–73 (7th ed. 2023) (discussing the Uniform Marriage and Divorce Act's ideal of the parties going their separate ways after divorce, with minimal financial entanglement). Traditionally, alimony had often been tied to fault, and by dispensing with the relevance of fault, the new understanding of divorce also dispensed with a primary justification for alimony. *Id.*

34 The Uniform Premarital Agreement Act was adopted by approximately half the states by the late 1990s. *See* Harris, Carbone & Rebouche, *supra* note 33, at 500.

labor, but ill-equipped to do so because they had disproportionately invested in non-market work. By the late 1980s, numerous commentators reported that divorce was an economic calamity for many women.[35] Divorce always involves some collective decline in the standard of living for the divorced parties because of the lost economies of scale when one home becomes two, but the unmooring of divorce from a fault-based regime also unmoored property distribution and alimony from their theoretical foundations. If judicial re-adjustments of financial incidents at divorce were not supposed to remedy the harm caused by the destruction of what was supposed to be a permanent institution, who should end up with what? The answers to that question varied widely not just by state but within states. Community property states continued to divide community property evenly at divorce, but the equitable distribution states, which far outnumbered community property states, rendered wildly divergent results. As Professor Mary Ann Glendon commented at the time, the equitable distribution system left divorcing litigants "[in] a lottery whose outcome greatly depend[ed] on the luck of the judicial draw."[36]

The commentary discussed in Part I implicitly suggests that women could have protected themselves from these vagaries through contract. Part II.B will question that conclusion, but regardless of whether women in the nascent no-fault era would have been better off if they had been able to sell their labor to their husbands while married, family law did not embrace contract as the solution. Instead, by the early twenty-first century, it re-embraced status. Contemporary family law is again a domain suspicious of contract doctrine's reification of autonomy and choice and instead willing to embrace assumptions about selflessness and altruism.

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35 James B. McLindon, *Separate but Unequal: The Economic Disaster of Divorce Law for Women and Children*, 21 Fam. L.Q. 351 (1987) (discussing economic consequences); Heather Ruth Wishik, *Economics of Divorce: An Exploratory Study*, 20 Fam. L.Q. 79, 97 (1986) (reporting a study in Vermont showing men's per capita income rising by 120% after divorce while women's decreased by 33%); *See generally* Lenore J. Weitzman, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America (1985) (discussing many of the ways women are economically damaged by divorce).

36 Mary Ann Glendon, *Family Law Reform in the* 1980*'s*, 44 La. L. Rev. 1553, 1556 (1984).

These assumptions provide the foundation for the contemporary formulaic approach to property distribution and maintenance. Borrowing from what the law of parenthood had adopted in the 1980s, the law of marriage in the twenty-first century adopted formulas and guidelines that determine rights and responsibilities based on status. Just as what a parent owes or is entitled to in child support is based not on any agreement, but on one's status as a parent, so what one owes or is entitled to at divorce is based not on any agreement (absent an ante or postnuptial agreement) but on one's status as a spouse.

A. *The Role of Status in Property Division and Maintenance*

1. Property Division

Consider property division. Even as more people have come to accept the inevitably of diverse family forms,[37] the law of property distribution at divorce has become less respectful of individual difference, less contextual, and more status-based. In most states, marital property is split equally at divorce, or at least courts start from that assumption.[38] Comments in the American Law Institute's ("ALI") Principles, published in 2001, suggest "marital property and marital debts [should be] divided at dissolution so that the spouses receive net shares equal in value."[39] The word "equitable" in "equitable distribution" states gives judges some room around the edges, but judges usually need to articulate a solid reason for deviating from the 50/50 presumption.[40] Context and diverse individual preferences, unless memorialized in a written, signed, procedurally sound ante or postnuptial agreement, rarely dislodge the 50/50 presumption.[41]

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37 Justice O'Connor wrote in 2000 that "demographic changes of the past century make it difficult to speak of an average American family." Troxel v. Granville, 530 U.S. 57, 63 (2000).

38 *See* Katharine K. Baker, *Homogenous Rules for Heterogeneous Families: The Standardization of Family Law When There Is No Standard Family*, 2012 U. Ill. L. Rev. 319, 334, n.112 (listing states with a statute and states with a judicial presumption of a 50/50 split).

39 Principles of the Law of Family Dissolution Analysis and Recommendations § 4.09 (2002) (hereinafter "ALI Principles").

40 24 Am. Jur. 2d *Divorce and Separation* § 531 (2010).

41 *See* Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 Cornell L. Rev. 608 625–30 (1998) (default rules establish a status quo bias

In justifying this presumption, the ALI specifically acknowledges the problems with trying to commodify domestic labor. The ALI's commodification anxiety stems not from fear of degrading women by treating them as servants, but from fear of undercompensating them by relying on market measures. Traditional domestic labor, performed disproportionately by women,[42] involves both labor that commands little value on the market (cleaning, child care, etc.) and labor that has no market measure because it is unique. Family labor is often distinctly valuable because of the person performing the labor. One can hire someone else to attend a child's soccer game, but that replacement person simply is not filling the same role as a parent. One can hire a nurse to take care of an ailing spouse, but that nurse is not filling the same role as a spouse. The comments to the ALI Principles acknowledge that "the incommensurability of the spouses' nonfinancial contributions frustrates any effort to attach monetary value to them."[43] Given "this measurement difficulty," the ALI concludes, "it may be sensible for the law to presume irrebuttably that the spouses contributed equally to their entire relationship."[44] In other words, contemporary property distribution law compensates not by valuing women's labor as contract law would, but by valuing domestic

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that makes contracting around them cumbersome). Carolyn J. Frantz, *Should the Rules of Marital Property Be Normative?*, 2004 U. Chi. Legal F. 265, 270 ("legal rules surrounding issues of marital property tend to stick—that is, whether or not spouses would actually choose these rules in a situation of perfect choice, they end up with them"). Although comprehensive empirical studies are rare, those that have been done suggest that most prenuptial agreements do not stray very far from the 50/50 rule for most accumulated property. *See* Elizabeth Carter, *Are Premarital Agreements Really Unfair? An Empirical Study*, 48 Hofstra L. Rev. 487 (2019) (providing a survey of the content of one Louisiana parish's antenuptial agreements and finding that most divided property equally).

42 *See* Katie Newkirk, Maureen Perry-Jenkins, & Aline G. Sayer, *Division of Household and Childcare Labor and Relationship Conflict Among Low-Income New Parents*, 76 Sex Roles 319 (2017) (mothers spend almost twice as much time on unpaid work as fathers); *Raising Kids and Running a Household: How Working Parents Share the Load*, Pew Rsch. Ctr. (Nov 4, 2015), https://www.pewresearch.org/social-trends/2015/11/04/raising-kids-and-running-a-household-how-working-parents-share-the-load/ (in dual-career families, mothers do more childcare work).

43 ALI Principles, *supra* note 39, § 4.09, cmt. c.

44 *Id.* I have previously referred to this explanation of the equal division of property as "a definition of marriage masquerading as a property distribution theory." Baker, *Homogeneous Rules*, *supra* note 38, at 352.

labor usually at a much higher rate than contract law would. It does so to effectuate a significant redistribution of wealth from market workers to those who labor outside the market.

Borelli v. Brusseau, a case that plays a prominent role in Professors Siegel, Williams and Hasday's arguments, highlights this commodification problem. Mr. Borelli was on his fourth hospitalization in five years and had little hope of ever living without nursing care again when he allegedly entered into an oral contract with Mrs. Borelli. He did not want to rely on market labor for his nursing care. So, Mrs. Borelli alleged, he entered into a contract with her for that care. Presumably, Mr. Borelli thought that his comfort level would be qualitatively different if care was being provided by his wife.

Imagine how the law of contract might have responded if Mrs. Borelli had performed inadequately or, contrary to their agreement, contracted out some portion of Mr. Borelli's care before he died. What remedies would be available to Mr. Borelli if he sued? A court might try to order specific performance, but that is highly unlikely because courts are especially wary of specific performance in the context of personal services contracts.[45] A reluctant Mrs. Borelli, nursing Mr. Borelli only because the court was forcing her to do so, would not likely be an adequate substitute for what Mr. Borelli thought he had contracted for, i.e., a loving spouse taking care of him.[46] A court might require Mrs. Borelli to pay Mr. Borelli the market value of her services. This would be an expectation remedy, an attempt to put Mr. Borelli in the position he would have been in had the contract been performed. But it would be an obviously inadequate remedy; he contracted with her in order to avoid market services. Lastly, a court could allow Mr. Borelli to withhold payment. This would be a reliance remedy, trying to put Mr. Borelli in the position he would have been in if he had never entered the contract. But reliance remedies do not really enforce a contract; they minimize the damage caused by breach, returning the breached against party to their ex ante position.

Mr. Borelli simply could not get what he wanted through contract law if Mrs. Borelli breached. Absent some kind of stipulated

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45 Robert Scott & Jody Krause, Contract Law and Theory 122 (6th ed. 2023) (courts are generally reluctant to specifically enforce a contract to perform personal services).

46 *Borelli*, 16 Cal. Rptr. 2d. 16.

damages, contract law cannot provide an adequate remedy for a breached promise for unique services because there is no substitute for unique services. Unique services cannot be objectively valued. Thus, the commodification problem is endemic to contract law as much as it is endemic to family law. Family law has tried to address the commodification problem by incorporating a status-based remedy. Contract law has not.

Family law's rejection of contract and re-embrace of status also prevents courts from having to assess whether a spouse actually performed their marital or contractual obligation. What one is entitled to is a function of being a spouse, not a function of what one has earned as an individual. A spouse's entitlement to 50% of the marital property is not altered even if she outsources the "clothing, feeding and educating" of her family to others and pays for that outsourcing with income earned by the other spouse.[47] It does not matter how good one is at organizing family time, nursing sick family members, taking care of in-laws, or providing emotional support. Entitlement stems from status, not performance.[48]

Comparably, it does not matter whether one earned a great deal of money in the market or comparatively little. One must share half of what one made. Forced sharing, a concept that is antithetical to the autonomy-respecting, market-driven law of contracts is a (mostly) non-negotiable, ubiquity in family law.[49] The law forces one to share – to be selfless – because that is what the status of marriage requires.

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47 Siegel found that courts refused to allow married women to contract with their spouses for this kind of labor. *See* Siegel, *Modernization*, *supra* note 10, at 2130.

48 This is not true in the other contract areas that Professor Matsumura cites as being infused with status, like the law of General and Subcontractor. *See* Matsumura, *supra* note 32, at 1610–16. Failure to perform in the contracting context is breach and excuses reciprocal performance. The transition to no-fault rendered the notion of breach inapposite in marriage.

49 A duty to act in good faith, common in contract law, is not the same as a duty to share. There is no one definition of good faith, *see* U.C.C. § 1-304 (Am. L. Inst. & Unif. L. Comm'n 2022): Restatement (Second) of Contracts § 205 (Am. L. Inst. 1981), but in general the duty forbids dishonesty and or half-hearted performance. *Id.* at § 205. One conforms to a good faith standard by being very clear that one does not want to share. See the discussion of *Carney v. Hansell*, *infra* text at notes 71–72.

2. Maintenance

The modern approach to maintenance (traditionally called "alimony") also increasingly reflects a status-based approach to post-divorce income stream, though maintenance is still considerably more contextual than property division. In general, there are three types of maintenance: reimbursement support, rehabilitative support, and general support.[50] Reimbursement support is particularly common in shorter term marriages in which one spouse financed another's human capital investment (in education or a business, perhaps), but did not stay married long enough to reap the economic advantages of that investment. The spouse who invested in the other is reimbursed for their disproportionate contribution. Rehabilitative support, if granted after a short-term marriage, can serve a comparable function in that it tries to provide a spouse who has forsaken their own career or wage-earning ability with the transitional support needed to make the investments they previously forsook for the marriage.

There are shades of contract law in both restitutionary and rehabilitative awards. Reimbursement maintenance works something like restitution, or unjust enrichment, in contract law. The party who enriched the other (by, for instance, investing in his education) should be entitled to their investment back.[51] Rehabilitative maintenance is akin to reliance damages in contract law. The law tries to put the spouse who disproportionately invested in the family in the position she would have been had the "contract" (i.e., the

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50 J. Thomas Oldham, *The Surprising Continuing Lack of Consensus Under U.S. Law for the Award of Spousal Support After Divorce 1*, *in* International Survey of Family Law 2022, at 1(Intersentia 2022), https://ssrn.com/abstract=4180899). Some states have another category, transitional alimony, meant to help an ex-spouse "adjust[] to the economic consequences of establishing and maintaining a household without the benefit of the other spouse's income." In *re* Marriage of Pazhoor, 971 N.W.2d 530, 541 (Iowa 2022). "The term 'transitional' has been used interchangeably with 'rehabilitative,'" *id.* at 539, and it is somewhat unclear whether courts use transitional alimony as a means of compensating, like restitutionary alimony, or rehabilitating, like rehabilitative alimony, or simply as an equitable means of making the tradition out of marriage less abrupt for the lesser earning spouse.

51 For the paradigmatic explanation of restitution as a contract remedy, see Lon L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages*, 46 Yale L.J. 52, 56 (1936).

marriage) never been entered into.[52] Both of these contract-like remedies may work well enough for short term marriages. But for long-term marriages they strike many as unfair or unrealistic. A spouse who has lived for fifteen years with a spouse whose law school education she helped finance before she left the paid labor force to raise the couple's children is arguably entitled to more than the present value of her previous contribution. Her reliance and foregone opportunities are much more substantial than would be reflected in the present value of the money she invested in his education.[53] And, the longer the marriage, the harder and more nonsensical the rehabilitative inquiry tends to become because the longer the marriage and the greater the number of opportunities she has foregone, the harder it is to answer the question "what should a spouse be rehabilitated to?"[54]

These concerns gave rise to a second wave of alimony reform because the clean break theory of divorce left those who had disproportionately invested in domestic work in long term marriages so little.[55] That re-thinking has led to general maintenance that, like property division, is becoming increasingly status-based and

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52 *Id.* at 54.

53 Consider how much more difficult it can be to re-enter the labor force after being out of it for ten versus two years.

54 Consider the spouse in *Pazhoor*, 971 N.W.2d 530. She was a registered doctor in India and completing her internship when she married. Both she and her husband attempted to pass the medical boards when they moved to the United States. He passed. She did not. She coauthored several medical articles after that, but once her husband secured a position as a hospitalist and their first child was born, she stopped engaging in market work. Her husband filed for divorce 16 years after she had last practiced medicine. At that point, she agreed it made more sense for her to pursue a master's degree than a medical license and the court awarded her maintenance that it thought would allow her to achieve that goal. But what if she had insisted that she wanted to pursue a medical license? Why is she not entitled to be rehabilitated to that standard if that is the standard she was at when she got married? Because her investment in non-market work was too long and too substantial for her to be able to rehabilitate as a doctor? That suggests one's remedy decreases in proportion to the length of one's family investment. That seems backwards.

55 Mary Kay Kisthardt discusses this "second wave" in Mary Kay Kisthardt, *Rethinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance*, 21 J. Am. Acad. Matrim. Law. 61 (2008). For more on how women who engaged in domestic work were hurt by the initial abandonment of alimony, see Cynthia Lee Starnes, *Mothers as Suckers, Pity, Partnership and Divorce Discourse*, 90 Iowa L. Rev. 1513, 1539 (2005).

formulaic. There is still variation in how courts determine whether maintenance is appropriate at all, but there is also consistent movement away from contextual evaluation.

Much of the variation in how states determine the amount of support is due to different categorical rules dictated by statute. Some state statutes place limits on how high an award can be[56] or how long it can last.[57] These categorical rules enforce their own kind of status. Courts are prohibited from ordering alimony even if the labor engaged in, or the roles spouses assumed, or their implied agreement, might indicate it is appropriate. More tellingly, an increasing number of states rely on some kind of formula to set a general maintenance amount.[58] The 2001 ALI Principles endorse this formulaic approach, as does the American Association of Matrimonial Lawyers.[59] For the most part, these formulae incorporate two variables, income differential at the end of the marriage and the length of the marriage. As long as the marriage lasted long enough and the income differential is great enough, the less economically empowered spouse is entitled to maintenance due to the fact – the status – of the marriage. It does not matter how much she contributed or what opportunities she forewent or whether she was a good spouse. And, critically, it does not matter what the parties' intent was with regard to who should do what in the marriage and how each party should be compensated. One is entitled to maintenance, if one is entitled to maintenance, not based on a meeting of the minds with regard to marital obligations or the performance of those obligations, but based on the simple fact of marriage.

Together, contemporary property distribution and maintenance rules force family members to share, not as form of payment for services, nor because the person with whom they are forced to share is particularly deserving, but just because one is a spouse. Professor Halley is completely right: Marriage is "saturated" with its "ascriptive" contents."[60] In other words, marriage is a bundle

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56 Tex. Fam. Code § 8.055 (stating that the award must be the lesser of $5,000/month or 20% of the obligor's income).

57 Ind. Code Ann. § 31-15-7-2.

58 Vermont, Colorado, Illinois, Massachusetts, New York, Delaware and Maine all rely on maintenance formulae for general maintenance determinations. *See* Oldham, *supra* note 50, at 11–12.

59 *See* ALI Principles, *supra* note 39, § 504; Kisthardt, *supra* note 55.

60 *See* Halley I, *supra* note 1, at 42.

of rights and duties imposed by law." Those duties include sharing labor and property. The law is not particularly good at forcing people to work, but modern family law consistently forces spouses to share their property and their income at divorce.

Importantly, this status only benefits those in marriages that have the combined human capital to generate a surplus. As Eleanor Brown, Naomi Cahn, and June Carbone point out, "[i]n the bottom 40% of couples, there is no reliable surplus."[61] Status forces a higher earning spouse to share the excess. If there is no surplus, there is nothing to share. As Part III explains, this system leaves spouses who earn as much or close to as much as their spouse, and still invest disproportionately in domestic work, without any kind of compensation for their domestic investment. It also leaves spouses who disproportionately invest in domestic work only to find their marriage collapse quickly vulnerable. Part III discusses these two classes of cases, but before doing so, it is worth taking a closer look at the contract alternative.

B. *The Contract Alternative*

The academic criticism of courts' refusal to enforce contracts for domestic services, whether those alleged contracts were entered into between married couples or cohabitants, routinely assumes that women would have been better off if courts had been more willing to view domestic services as valid consideration in a contract. This Section unpacks that claim, first by questioning whether the cases provided as evidence that women would be better served by contract involve promises that would be enforced as contract, then by highlighting the bargaining power dynamics that undermine the claim that most married women could use contract to their advantage.

1. *Oral and Implied Contracts*

The list of cases usually cited for the idea that women are hurt by the law's failure to enforce marital contracts for domestic services, a list on which *Borelli v. Brousseau* always assumes a

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61 Eleanor Brown, Naomi Cahn & June Carbone, *The Price of Exit*, 99 Wash. U. L. Rev. 1897, 1902 (2022) (citing data from the Federal Reserve Board on household well-being).

prominent place,[62] almost all involve oral or implied contracts.[63] The oral and/or implied nature of these alleged contracts is important because in the vast majority of cases alleging a contract for domestic services, the plaintiff never actually proved the existence of the contract.[64] Some commentators argue that the failure to enforce a contract for domestic services in the *nonmarital* context is also a modern manifestation of coverture, just as Professor Siegel argued that failure to enforce a domestic services contract in marriage was a manifestation of coverture.[65] But criticisms of

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62 All of the authors cited in Part II cite to *Borelli*.

63 Two of the cases cited by Professor Hasday involve a slightly different issue, statutory interpretation. In *Minnesota v. Bachman*, 521 N.W.2d 886 (Minn. Ct. App. 1994), a wife attempting to leave prison for a work release program argued that the domestic services she could provide her family constituted work for purposes of the program. Relying on how other social welfare programs, like workers' compensation, treated domestic services, the court found that the legislature did not intend domestic services provided to one's own family to count as work for purposes of the program. This is not the court refusing to enforce a contract; it is a court interpreting legislative intent. Comparably, in *Department of Human Resources v. Williams*, 202 S.E.2d 504 (Ga. Ct. App. 1973), a disability benefits recipient wanted to be able to collect for the cost of his wife's domestic services. If he had hired someone to come into his home to help him, he could have deducted that cost up to $100. The court held that the statute would allow him to contract for services that his wife provided if they were "above" a wife's normal duty (and remanded to determine whether the duties of the wife met that threshold). Again, this is not a court finding that domestic services can never be contracted for between spouses; it is a court interpreting what a legislature intended as criteria for government programs.

64 *Borelli*, 16 Cal. Rptr. 2d 16 (alleging an oral promise to leave her with more than the antenuptial agreement provided); Dade v. Anderson, 439 S.E.2d 353 (Va. 1994) (finding that an implied contract based on her rendering of domestic services, though this claim would perhaps better be labeled one for unjust enrichment); Estate of Lord, 602 P.2d 1030 (N.M. 1979) (alleging an oral antenuptial agreement between a wealthier older woman and a considerably younger man to leave him more property when she died); Mays v. Wadel, 236 N.E.2d 180 (Ind. 1968) (making a claim for an implied contract for the contributions the wife made to the husband's property and for her care of him while he was ill; the husband's will explicitly provided that she was entitled to $8/day for every day of care she provided while he was ill, but the wife renounced her rights under the will and argued instead under an implied contract claim for considerably more than the $8/day that the will would have given her).

65 Siegel, *Modernization, supra* note 10, at 2198. Albertina Antognini argues that courts' refusal to enforce contract in these contracts is a modern

courts' unwillingness to enforce contracts for domestic services, in both the cohabitation and marital context, fail to acknowledge the weakness of the contract claims in these cases.

a. *Cohabitation Contracts*

The most famous example of contract failure in the cohabitation context is *Marvin v. Marvin*,[66] in which the trial court found no express or implied contract between Michelle Triola and movie star Lee Marvin.[67] Triola could not prove that Marvin, with whom she had lived for several years, intended to share anything with her after they broke up. The court also found that Triola could not receive anything in unjust enrichment because it was Michelle, not Lee, who had been more enriched by the cohabitation.[68]

In *Barron v. Meridith*, decided more than forty years later, another California court ruled comparably. The cohabitant had "received benefits from the relationship, including payment of living expenses and other goods and services,"[69] so as a matter of unjust enrichment she was not entitled to more, and she could not establish that the defendant ever promised her more than what she had already received.[70] Consider also *Carney v. Hansell*, in which a New Jersey court awarded the plaintiff cohabitant an unjust enrichment remedy of minimum wage for the work she had performed at her cohabitant's business.[71] Relying on claims of both implied partnership and implied contract, Ms. Carney alleged that she was entitled to considerably more than the minimum wage. But the court found that the defendant had made it abundantly

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manifestation of coverture, but in making that claim, she assumes that the contracts could be enforced as contracts. Albertina Antognini, *Nonmarital Coverture*, 99 B. U. L. Rev. 2139 (2019).

66 Marvin v. Marvin, 557 P.2d 106 (Cal. 1976), *aff'd and modified*, 176 Cal. Rptr. 555 (Cal. Ct. App. 1981).

67 Marvin v. Marvin, 176 Cal. Rptr. 555, 558–59 (Cal. Ct. App. 1981).

68 *Id.*

69 Barron v. Meridith, No. CGC 13-535537, 2017 WL 772444 at *4 (Cal. Ct. App. Feb. 28, 2017).

70 *Id.* at *3.

71 Carney v. Hansell, 831 A.2d 128 (N.J. Super. Ct. Ch. Div. 2003).

clear that he had no intent to marry or share his business, his property, or his future income with his cohabitant.[72]

Mr. Hansell's testimony, while very effective at defeating the contract and partnership claims because it demonstrated his intent *not* to divide his property, revealed that he had behaved in the ways that family law exceptionalism eschews. He was unwilling to commit, unwilling to share, and entirely un-altruistic. If the parties had married, Ms. Carney would likely have been entitled to 50% of the wealth acquired in the business Hansell had started and appreciation of the homes they lived in together. Family law would have required him to share, regardless of his intent. Contract law does not.[73]

Courts do sometimes award cohabitants marital-like remedies using contract law, but usually only after being convinced that both parties really did intend to share their property. If a court finds that

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[72] The court wrote:

> defendant went to great lengths to be certain that plaintiff was not his legal business partner. All trucks and business accounts were solely in his name. On several occasions she asked him to include her as a named party in the business and he always refused. She says he point blank told her that nothing would ever be in her name. On one occasion defendant told plaintiff that he would burn the business down before she would ever get anything. It was clear he considered it as his sweat and equity alone, which was responsible for the success of the business.

Id. at 132.

[73] Professor Matsumura discusses *Carney* and suggests that the court should have been willing to enforce Ms. Carney's contract because the law allows non-intimates to contract for the kinds of services Ms. Carney provided, like "babysit[ing], houseclean[ing], driv[ing], personal shopp[ing] . . . [and] night nurs[ing]." Matsumura, *supra* note 32, at 1607. Ms. Carney was asking for much more than that. She claimed she was entitled to a share of the property Mr. Hansell acquired during the relationship, which family law would have provided, but that is not the remedy that courts would provide in a contract for babysitting, housecleaning or night nursing services, unless the parties both clearly agreed to such an exchange. As I have detailed elsewhere, cohabitants alleging contracts for their services almost always ask for more than what the babysitters, housecleaners, drivers and night nurses earn in a market. *See* Baker, *Polyamorous Threat*, *supra* note 30. Perhaps Ms. Carney should have gotten more for her babysitting and housecleaning in their home, not just her work at Mr. Hansell's business, but she offered absolutely no proof that the parties agreed that she should be paid a family law remedy.

a couple "intended to . . . live together as a family"[74] or had "an intent to share equally"[75] then they are willing to award a cohabitant half of the acquired property. But many cohabiting plaintiffs cannot prove that their partner intended to share. Without that proof, there is no contract. Often, it is the desire not to commit to sharing post-dissolution that leads cohabitants not to marry.[76] Asking courts to imply a contract in these situations asks a court to find an intent to share notwithstanding a perfectly reasonable assumption that at least one of the parties did not marry because they did not want to share. That assumption that is often validated by the testimony of one of the cohabitants.[77]

b. *Marriage Contracts*

Married plaintiffs claiming they contracted with their spouses for domestic services have to prove a different kind of intent. The equal sharing rules already apply to them because they are married. Thus, married contract claimants must prove both spouses agreed to more than that. Their contract claims rest on proving a mutual intent to enter into a legally binding agreement to commodify their domestic service labor. It is not at all clear they can do so.

As suggested, the evidence of the required intent to contract in these cases is shaky at best. None of the cases cited by the commentators above involve written signed contracts for domestic services and several involve claims against a dead spouse who had no opportunity to deny the existence of the contract.[78] In two of the cases cited by Professor Hasday, not only was the alleged oral promisor dead, the alleged promise was for considerably more than what both spouses had agreed to in a written, signed

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74 Dutton v. Laine, No. 93934, 2006 WL 851389, at *4–5 (Kan. Ct. App. Mar. 31, 2006).

75 Wilbur v. DeLapp, 850 P.2d 1151, 1152–53 (Or. Ct. App. 1993).

76 Katharine K. Baker, *What Is Nonmarriage*, 73 SMU L. Rev. 201, 216 (2020) (discussing common reasons cohabitants give why they cohabit, which include not wanting to commit and not wanting the freedom to leave a relationship or a place with ease).

77 *See supra* text at note 72.

78 *Dade v. Anderson*, *Estate of Lord*, *Mays v. Wadel*, and *Borelli v. Brusseau*, *see supra* discussion in text at note 63, all involved claims against a deceased's estate.

prenuptial agreement.[79] Skepticism surrounding such claims seems well justified.

One might argue that we should not expect spouses to enter into written contracts because such a requirement would undermine the trust that the law wants to foster between spouses. But if the parties had previously entered into a written, signed prenuptial agreement, it is arguably appropriate for the law to require a writing before allowing one party to claim they abandoned their previous formal, signed agreement.

One case, *Mathews v. Mathews*, involved a written promise addressed "to whom it may concern" in which the husband promised "everything I have or will have will be [his wife's] to have and hold for the benefit of our children and herself [if he ever left her.]"[80] The writing was nearly fifteen years old and there was no recitation of consideration from the wife to the husband. The wife maintained that her consideration was her domestic services and/or her not leaving him first.

Implying consideration or reliance (as would be necessary for a promissory estoppel claim) in this case is problematic because it is easy to see why the wife would have stayed and performed domestic services even without the promise. The husband was providing something for her and her children before he left. Her claim depended on her proving that she stayed and performed domestic work in return for or in reliance on her being provided for in the long run not just the short run.[81] It is perfectly possible that, as in the cohabitation cases, a court would find that she stayed because she was considerably better off by staying in the short term, not because she was relying on his promise to give her everything if he left.

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79 *Wadel*, 236 N.E.2d 180, and *Borelli,*16 Cal. Rptr. 2d 16, both involved claims for considerably more than the antenuptial agreement the parties had signed.

80 Matthews v. Matthews, 102 S.E.2d 697, 698 (N.C. 1968).

81 A traditional contract requires consideration from both parties, *see* Restatement (Second) of Contracts § 17 (Am. L. Inst. 1981) ("the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.") Promissory Estoppel requires a promise, reliance on that promise, and avoidance of injustice. *See id.* § 90 ("A promise which the promisor should reasonably expect to induce action or forbearance . . . and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.").

Most lawyers with a passing familiarity of contract law should also realize that the alleged contracts in these cases present Statute of Frauds problems. Statutes of Frauds require contracts of more than a year to be written and signed.[82] Though some of these contracts were completed within a year (because the promisor spouse died), presumably they were meant to last more than a year. The writing requirement in Statutes of Frauds is thought to serve both evidentiary and cautionary functions because the writing forces parties to be clear in their promises, and the formality impresses upon parties the legal significance of what they are doing.[83] Both of those concerns, the precise nature of the promise and an intent to be legally bound by it are paramount in these cases.[84] So before assuming that family law's embrace of status defeats valid claims of contract in ways that work to the detriment of women, it is worth recognizing that contract law itself may not honor these claims.

2. *Bargaining Power*

In addition to relying almost exclusively on oral or implied contracts, the cases in which contract claims arise often involve unequal distributions of bargaining power. The frequency of dead obligors stems from the fact that these promises were often allegedly made by elderly, ill people eager for care or companionship from a younger spouse.[85] As mentioned above, Mr. Borelli was on his fourth hospitalization in five years; he had just had a massive stroke that left him in need of "round-the-clock care" and

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82 Lon L. Fuller, *Consideration and Form*, 41 Colum. L. Rev. 799, 800–03 (1941).

83 *Id.*

84 The marital context in these cases also renders the "partial performance" exception to the Statute of Frauds doctrine problematic. Many courts enforce contracts that would otherwise violate the statute if there has been partial performance. For a discussion, see Schwedes v. Romain, 587 P.2d 388, 391 (Mont. 1978) (discussing the partial performance exception). All of the cases relied on in the critique of family law exceptionalism involved allegations of partial performance, but that performance involved providing services that are routinely provided by spouses even if there is no contract. It will be difficult to prove that the partial performance was rendered pursuant to the contract if it is routinely performed in the absence of contract.

85 *See supra* cases discussed in note 63.

he very much wanted to die at home.[86] Mrs. Borelli was likely the only person in the world who could provide him with what he wanted. It is hard to imagine a weaker bargaining position than Mr. Borelli's. Indeed, if the court had found that a contract had existed, one could argue that Mrs. Borelli took advantage of her extraordinarily greater bargaining power to extract an exceedingly generous compensation package for four months of nursing care. When both parties were of more sound mind and body, Mrs. Borelli had agreed to much less in an antenuptial agreement.[87]

In theory, antenuptial agreements allow parties to enter into an agreement for a potential future division of assets before the parties' assumptions of different roles during the marriage has weakened either party's bargaining position. If, once married, the parties begin to assume different roles, or make complementary investments in market and non-market work, the bargaining power of the spouse who has invested in non-market work is usually compromised. Women are still much more likely than men to disproportionately engage in non-market work, especially if the parties have children or elderly dependents.[88] As Martha Fineman explained, dependency begets dependency and by withdrawing, even if only somewhat, from market work to take care of dependents, caretakers become dependent on others.[89] When the law is more willing to enforce contracts between spouses, the party who has invested more in market work can more easily exploit that dependency.[90]

Both the Uniform Premarital Agreement Act ("UPAA") and the Uniform Premarital and Marital Agreement Act ("UPMMA") address bargaining power concerns by imposing disclosure and representation requirements. Substantively the UPMMA requires an analysis of both whether the agreement was "unconscionable

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86 *See Borelli*, 16 Cal. Rptr. 2d 16.

87 *Id.*

88 Institute for Women's Policy Research, *Providing Unpaid Household and Care Work in the United States: Uncovering Inequality* 6 (Jan. 2020), https://iwpr.org/wp-content/uploads/2020/01/IWPR-Providing-Unpaid-Household-and-Care-Work-in-the-United-States-Uncovering-Inequality.pdf.

89 Martha Fineman, The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies 163 (1995) (building a theory for how taking care of dependents renders caretakers dependent).

90 *See* Rhona Mahoney, Kidding Ourselves: Breadwinning, Babies and Bargaining Power 44–45 (1995).

at the time of signing" and whether it creates a "substantial hardship" at enforcement.[91] The UPAA only includes an analysis of unconscionability at the time of signing, but enforcing the contracts discussed in Part I would mean that courts should not take either Act's procedural requirements—which attempt to address bargaining power asymmetries—seriously.[92] None of the alleged contracts in the cases discussed above were entered into with the procedural protections required by the APAA or UPMAA.

In a provocative and optimistic law review article, Professor Mary Anne Case suggests that courts would not enforce marital contracts if it was clear that a dependent spouse had too little bargaining power,[93] but that courts may be ready to enforce contracts between spouses if they are entered into by financially secure, professional women (Michelle Obama is her example) interested in securing promises from their husbands with regard to household labor.[94] Professor Case credits economist Robert Pollack's work,

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91 Unif. Premarital and Marital Agreements Act § 9(f)(1)&(2) (Unif. L. Comm'n 2012).

92 It is true that wives more often file for divorce than husbands. *See* Michael J. Rosenfeld, *Who Wants the Breakup? Gender and Breakup in Heterosexual Couple*, *in* Social Networks and the Life Courts 221 (Duane F. Alwin, Diane H. Felmlee & Derek A. Kreager, eds. 2018) (finding that wives wanted or initiated break-ups 70% of the time). Many women pursue divorce because they are willing to take an economic hit in order to start another life and, in the short term, post-divorce, husbands report lower levels of post-divorce well-being than wives. Thomas Leopold, *Gender Differences in the Consequences of Divorce*, 55 Demography 769, 771 (2018) (reporting that while men's reported dissatisfaction with divorce was higher than women's immediately after divorce, the negative economic effect of divorce for women in the longer term eventually eliminates any gender gap in dissatisfaction with divorce.). But if husbands are so hurt by divorce, one would expect to see more marital contracts in which the wife tried to monetize to her advantage his desire for stability. One does see some contracts like this, *see*, *e.g.*, *In re* Marriage of Labuz, 54 N.E.3d 886, 898 (Ill. App. Ct. 2016) (the husband claimed duress because the wife threatened to leave with their child unless he signed a postnuptial agreement), but the most common kind of marital contract remains the antenuptial agreement in which the "economic inequality between the spouses" remains "substantial," with the man having a great deal more economic and human capital than the wife.

93 Mary Anne Case, *Enforcing Bargains in an Ongoing Marriage*, 35 Wash. U. J. L. & Pol'y 225, 246–48 (2011) (describing a court refusing to enforce a marital agreement in which the wife agreed to "submit herself completely to her husband Myles and to grant him sole custody and property rights in the event of breach.").

94 *Id.* at 255–60.

which suggests that the law's refusal to interfere in marital relationships hurts those who deviate from traditional sex roles because in the absence of enforcement of non-traditional bargains, couples retreat to a "noncooperative equilibrium within marriage" that reflects traditional gender norms.[95] Case suggests that "exceptional" women who have bargaining power, especially early in a marriage, can use contract law to destabilize the gendered workloads that continue to characterize most marriages and are re-enforced by the law's refusal to enforce contracts for marital services.

I am less optimistic about this proposal for two reasons. First, I am simply less confident that if marital contracts become more accepted, courts will refuse to enforce those entered into by people with less bargaining power. Contract law in general and courts in particular are notoriously bad at policing bargaining power. As indicated above, the UPAA used an unconscionable-when-signed standard to try to police bargaining power in the prenuptial agreement context, but when left to the courts, that standard was watered down or ineffective enough that reformers felt the need to create an additional substantive review at enforcement, not just execution, in order to protect those hurt by pre or post marital agreements.[96] This is typical. In other contractual contexts, those with less bargaining power often resort to legislative fixes, not a sympathetic judiciary, to police the exploitation of bargaining power.[97]

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95 *Id.* at 250.

96 Thus, the UPMAA added the "substantial hardship for a party because of a material change in circumstances arising after the agreement was signed" exception to enforceability, thus requiring judicial review of the substance of the agreement both at signing and at execution. *See* Unif. Premarital and Marital Agreement Act § 9(f)(2).

97 The recent legislative movement around non-compete contracts is an example. Over the past five to ten years, various state legislatures felt the need to adopt bans on non-compete contracts for those with the least bargaining power. *See, e.g.*, 820 Ill. Comp. Stat. Ann. § 90/10 (prohibiting non-compete clauses for those earning less than $75,000 a year). The FTC has proposed rules that would prohibit certain non-compete agreements at all income levels. *See FTC Announces Rule Banning Noncompetes*, Fed. Trade Comm'n (Apr. 23, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-non-competes. Non-judicial bodies are stepping in to render certain bargains unenforceable because judges won't rule them unconscionable. Even the agreements at issue in the case that is so often used to introduce students to the concept of unconscionability, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C.

Second, the willingness of someone like Michelle Obama to force their spouse to live up to their contractual commitments depends on their alternatives. The presence of children completely disrupts many professional women's BATNA ("Best Alternative to a Negotiated Alternative").[98] Children both increase the amount of non-market work needed in the home and increase the likelihood that women will perform it.[99] But children also greatly increase the cost of leaving, not only for the professional woman but also for the children. Perhaps there are more women than I realize who are willing to endure significant family strife in order to make sure their husband calls the dentist and organizes the carpool to get the kids to soccer practice and makes sure that summer camps are lined up, but the far more likely result is that the financially secure professional parent will outsource the work that her husband promised to do.[100] This will decrease the family's overall wealth, but many parents would rather do that than put the marriage at risk by trying to enforce the contract legally.[101]

Significant investment in children tends to lead to a conflation of one's own interests with the child's.[102] If the spouse

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Cir. 1965) (discussing cross-collateralization clauses) are now usually prohibited by statute, not individual determinations of unconscionability. *See, e.g.*, Fla. Stat. § 516.31(4).

98 For a discussion of professional women's BATNAs in the context of negotiating caretaking duties, see generally Rhona Mahony, Kidding Ourselves: Breadwinning, Babies and Bargaining Power 36, 51-56 (1995).

99 Newkirk et al., *supra* note 42, at 3 (mothers spend almost twice as much time on unpaid work as fathers); *Raising Kids and Running a Household, supra* note 42 (in dual-career families, mothers do more childcare work).

100 Newkirk, et al., *supra* note 42, at 10 (discussing the use of outsourcing as a means of dealing with the added demands of family labor).

101 And even if a court did enforce the contract, the likely remedy would be the monetary equivalent of the cost of outsourcing. Unless the parties divorced, this award would be meaningless because a court would only take it into account when determining what was separate and what was marital property for division at divorce. More important, as discussed above, the remedy would likely not reflect what the wife was contracting for, which was for the husband to provide his unique labor so that he could model the gender-norm-transgressing behavior which would teach the children that domestic services did not have to be performed by women.

102 Amartya Sen argued that policies must be concerned with women's individual interests even if they may conflict with a child's interest, Amartya Sen, *Gender and Cooperative Conflicts* 7 (World Inst. For Econ. Rsch. Working Paper, No. 18, 1987), but he documented just how prevalent it was for women

seeking to enforce an agreement thinks the enforcement would hurt the child, enforcement no longer seems to be in her interest. Children do not fare well when their parents engage in antagonistic legal proceedings.[103]

Given the difficulty in proving the existence of a contract in a domain in which explicit bargaining is rare and altruistic behavior is prized, the difficulty in commodifying unique domestic work, the ways in which living out gender roles affects bargaining power, and the economic and non-economic costs of legal enforcement, it is not at all clear that contract law can serve the interests of those who invest disproportionately in domestic work, whether in a cohabiting relationship or a marriage. That is why status and family law exceptionalism persist.

The Role of Contract in Marriage

Contract law, especially the notion of mutual intent, is still relevant in family law. One must consent to be married.[104] One must

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to conflate their interests with their children's. Feminists have noted this for years. *See* Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 Va. L. Rev. 543, 584–85 (1986) ("the feminine perspective views individuals primarily as interconnected members of a community . . . . [w]omen thus tend to see others as extensions of themselves rather than as outsiders or competitors.").

103 *See* Janet R. Johnston, *High-Conflict Divorce*, *in* 4 The Future of the Child 165, 174 (1994) (high conflict after separation significantly impedes children's adjustment); Marsha Kline Pruett & Herbie DiFonzo, *Closing the Gap: Research Policy, Practice and Shard Parenting*, 52 Fam Ct. Rev. 152, 153–54 (2014) (explaining that shared parenting is not always appropriate).

Professor Case acknowledges that, given the financial and emotional cost of contract enforcement, impartial low-cost tribunals might be the best adjudicative bodies for these contracts. She draws on historical accounts of courts in continental Europe (where wives retained at least nominal ownership of marital property) and religious practices in both Judaism and Islam that involve mediators who are supposed to interfere with ongoing marriages, often to women's advantage. *See* Case, *supra* note 93, at 239–43 (discussing alternative forums). These kinds of intermediate courts to enforce marital agreements might make a huge difference in wives' willingness to ask a third party to enforce marital agreements, but note they are a blatant example of family law exceptionalism. Contracts for marital services are not be treated as contracts for other services, but are adjudicated through a forum that is likely to incorporate the family law values of sharing and altruism, not the contract values of autonomy and free will.

104 *See, e.g.*, Iowa Code Ann. § 595.1A (requiring the consent of parties to marry).

intend to, as the Supreme Court wrote, enter into a relation "the rights, duties, and obligation of which rest not upon their agreement"[105] but upon what the law says marriage is. Marriage is forced sharing. If one does not intend to share, as the cohabitating men in the cases discussed above clearly did not, one should not get married or one should very carefully, very openly, and very formally contract around it.

The law's willingness to enforce pre and post nuptial agreements suggests some willingness to let parties define the economic consequences of marriage for themselves, but only some. Courts still resist using contract law to enforce promises for marital services because since the mid-twentieth century, most courts have refused to conduct a serious assessment of whether a party breached their marital vows. The no-fault revolution relieved courts of the obligation to assess marital behavior, but the no-fault revolution just codified what had already been manifest in courts that adjudicated divorce: judges' resistance to evaluating whether someone was supportive enough, or faithful enough, or nice and generous enough to have adequately performed their marital promises.[106]

Trying to reformulate traditional marital vows into promises enforceable in contract does not avoid the problem of judicial resistance to evaluating fault or breach in the context of intimate relationships. And it is not at all clear that any of the potential parties, much less the judges, would actually want courts to return to a time when they engaged in that evaluation. Recall that most of the cases discussed above involve implied promises. There are a multitude of implied promises in most intimate relationships and if some are meant to be legally enforceable then both parties are free to argue that all of those implied promises should be legally enforceable. What if the party accused of failure to share as promised counters with an accusation of inadequate sexual performance or excessive sexual demand[107] by the other party and therefore mutual breach? What if the party accused of failure to

105 Maynard v. Hill, 125 U.S. 190.

106 *See* Katharine K. Baker, *Equality and Family Autonomy*, 24 U. Penn. J. Const. L. 412, 426 (2022) (discussing judges' resistance to taking a fault evaluation seriously).

107 *See* Favrot v. Barnes, 332 So. 2d 873 (La. Ct. App. 1976), *rev'd on other grounds*, 330 So. 2d 843 (La. 1976) (husband alleged that his wife breached an agreement "to limit sexual intercourse to about once a week," claiming that she "sought coitus thrice daily.") *Id.* at 875.

share as promised counters with an accusation of annoying, nagging behavior that is inconsistent with love? The accusations can get ugly and demeaning and all-but-impossible to evaluate very quickly. There are no witnesses or other objective evidence of most of this behavior. That is the nature of intimacy.

Thus, even if parties can prove the existence of a contract, courts will resist rigorous contract enforcement not as a vestige of coverture and not because courts are crippled by commodification anxiety but because intimate relationships almost always involve too many context and couple-dependent implied promises and conditions, especially in relationships of any significant length. Contract law is not equipped to evaluate all of those implied promises and conditions. Neither is family law, so it instead relies on status.

III. Those Hurt by Status

Most of the cases discussed above involve enough marital assets to justify the costs of litigation. For couples who have few to no assets, either because they will never earn enough or they have yet to do so, family law's embrace of status can be dangerous. The former group, low-income women, have already figured this out and, as the discussion below explains, they avoid the danger by not marrying. The latter group, those who divorce early in a marriage, might well benefit from contract, but they could protect themselves adequately with a prenuptial agreement, one that could expire, or not, once either or both of the parties had acquired sufficient marital property.

Lower Income Marriage

The forced sharing that marital status imposes on spouses makes some spouses particularly vulnerable. For those who would be forced to share even though they do not have that much to share, or those who would rather prioritize spending on children or housing as opposed to a partner, or those who might find themselves enmeshed with someone who has accumulated or continues to accumulate significant debt, marriage is a huge risk. Professors Brown, Cahn, and Carbone explore these risks,[108] and suggest that for lower income women, who are overwhelmingly

108 Brown, Cahn & Carbone, *supra* note 61.

likely to be involved with lower income men, "commitment to a partner may be a source of vulnerability rather than strength."[109] Notwithstanding some economies of scale from living together, entwining one's finances with someone who may be a net drain on resources is dangerous. If the prospects of significant advantage from pooling resources are low and the potential for loss is high, then a simple cost benefit analysis suggests that marriage may not be worth the potential cost for lower income women.[110]

Lower income women are more likely to make as much if not more than a male partner. In the bottom economic quintile of marriages, women usually earn more than their spouses.[111] The gender wage gap for Black and Hispanic women is considerably less than it is for Asian and White women.[112] As Brown, Cahn, and Carbone summarize, "Black women are by far the most likely women to be the primary economic support for their families both because a higher percentage are single mothers, and because even when they marry, they are more likely to earn as much as or more than their husbands."[113] These statistics likely reflect the precarious position in which many working class and poor men find themselves. Low wages, sporadic work opportunities, and systemic inequalities render many low-income men particularly vulnerable, and just as dependence breeds dependence, vulnerability breeds vulnerability within an institution in which everything is shared.

Adding to the danger for low income women is the stubborn persistence of a gender gap in the provision of unpaid, domestic work. For those with family income under $30,000 annually, women spend 38% more time on unpaid work than do men.[114] For families in the $30,000–$60,000 range, women spend 41% more time on unpaid work than do men.[115] This means that lower income

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109 *Id.* at 1921.

110 "[I]nterdependence . . . increases the cost of exit as untangling joint undertakings can be complex and contentious." *Id.* at 1919.

111 *Id.*

112 Women's Bureau, U.S. Dept of Labor, Women's Earnings and the Wage Gap, https://www.govinfo.gov/content/pkg/GOVPUB-L36-PURL-gpo117415/pdf/GOVPUB-L36-PURL-gpo117415.pdf (last visited Nov. 4, 2024).

113 Brown, Cahn & Carbone, *supra* note 61, at 1903.

114 Institute for Women's Policy Research, *supra* note 88, at 6.

115 *Id.* Wealthier households are likely the ones most likely to outsource domestic work. In households earning over $100,000 a year, women do 33% more of the unpaid household work. *Id.*

women are likely earning as much if not more than a partner *and* doing more of the unpaid work.

The benefits of status are lost on these women. They will be made worse off if they are forced to share any accumulated wealth. They will not be compensated for their domestic work because the partner who benefits from it does not have the money to compensate them, either because he never had it or because the household has already consumed it. But contract law would not help them much either. Their partners have precious little with which to bargain. And, enforcing promises costs money. If the chances of recovery are small, it is simply not worth it.

Lower income people have figured this out. Starting in the 1960s and 1970s, just as the law of marital dissolution was changing to reflect a less moralistic and more egalitarian approach to marriage, a class-based marriage gap began to emerge. As W. Bradford Wilcox and Wendy Wong report, the drop off in marriage rates began first for those in the lowest 20th percentile of earnings, and then spread to the working class (20th–50th percentile in earnings).[116] Today, for adults between the ages of 18–55, only 26% of the poor and only 39% of the working class are married.[117] In the middle and upper class, 56% of people are married.[118]

Notably, lower income unmarried women are more, not less likely to have children,[119] but the presence of children does little to incentivize low-income women to marry. Children do not ameliorate the dangers of economic interdependence; if a partner cannot provide, he cannot provide, regardless of whether a child is there. And the presence of children significantly increases the costs of exit. For many low-income women, their primary family relationship is with their child or children, not with a partner. They decide to become legal parents even as they decide not to marry.[120] They take primary financial and emotional responsibility for their

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116 W. Bradford Wilcox & Wendy Wong, *The Marriage Divide: How and Why Working-Class Families Are More Fragile Today* (2017), https://www.aei.org/wp-content/uploads/2017/09/The-Marriage-Divide.pdf.

117 *Id.* at 3.

118 *Id.*

119 The average number of children for poor women is 2.4; the average number for working, middle, and upper class women is between 1.7 and 1.8. *Id.* at 4.

120 *See id*. at 6 (showing 61% of poor millennials plan to have a baby first rather than a marriage first, compared to 44% and 19% of working class and middle/upper class millennials respectively).

children and they have more confidence that their relationships with their children will last.[121] This means they may well not want to have to share what they are able to provide, whether modest savings or government benefits, with a spouse.[122] They would rather it go to their children.[123]

Family law exceptionalism fails to meet the needs of low-income women. Accordingly, they do not avail themselves of it. American society could certainly do much more to alleviate the hardships on lower income women and men, but neither family law nor contract law seems able to provide the help that low-income women need. Neither family law nor contract law can generate money when it does not exist and neither area of law is equipped to force people to perform domestic services that they refuse to perform.

Short Term Marriages with Disproportionate Sacrifices

The other group of people who are at risk given family law's continued reliance on status is spouses in short term marriages who sacrifice either to support a spouse or to disproportionately engage in unpaid domestic work or both. The spouses (usually women) most aggrieved are those who make that sacrifice and soon divorce when their ex-spouse may then be positioned to earn much more than he ever did during the marriage. Because not enough marital wealth was generated during the marriage, these

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121 June Carbone & Naomi Cahn, Marriage Markets: How Inequality Is Remaking the American Family 119–21 (2014) Kathryn Edin & Maria Kefalas, Promises I Can Keep: Why Poor Women Put Motherhood Before Marriage 203–04 (2005); (both books discussing how low income parents assume financial responsibility for their children, in part to ensure that they can leave unreliable partners). It is low income men, who contribute less on average to a household than do low income women and who do significantly less unpaid work than do women, who would have the most to gain from marital status.

122 Baker, *supra* note 76, at 226–29 (describing how marriage would allow a spouse to share dependent benefits through social security disability or workers compensation with children even though the insured might rather the children get all of it).

123 In other words, "sharing principles that govern committed relationship make no sense where there is no surplus and where sharing among the adults comes out of the resources on which children depend." Brown, Cahn & Carbone, *supra* note 61, at 1904.

spouses get little marital property at divorce, and in states that prohibit or discourage maintenance after short-term marriages, they may not be entitled to any of their ex-spouse's future income stream.

Rehabilitation and reimbursement maintenance are designed to provide compensation for these spouses but not all states accept these as legitimate forms of post-marital spousal support. In these instances, contract law, in particular a prenuptial agreement, entered into when bargaining power is at its most equal, can help furnish the support that rehabilitative and reimbursement maintenance would otherwise provide. Usually, spousal sacrifices made so that the other spouse can increase their human capital happen relatively early in a marriage. The parties want to get the investment in human capital over with. A spouse who is contemplating such a sacrifice should protect themselves with a prenuptial agreement, negotiating for something like reimbursement or rehabilitative payment in the event of divorce. There is no reason to think that such a prenuptial agreement would be unenforceable, especially if what the parties' bargain for is what the law would impose in those states that award reimbursement or rehabilitative maintenance.[124]

A. *A World Without Family Law?*

This analysis of who family law protects and how it protects them raises legitimate questions about whether it is appropriate for family law to reward the people it rewards. In the last fifty years, wages for those at the top of the economic scale have increased more than they have for any other group.[125] Often, earning at this

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124 A state that refuses to award maintenance in relatively short-term marriages is not necessarily taking the position that an agreement for a comparable kind of award is unconscionable or against public policy, only that it should not be imposed by courts.

125 The gender wage gap for college graduates has been increasing since the 1980s, Elise Gould, *State of Working America Wages 2019*, Econ. Pol'y Inst. (Fed 20, 2020), https://www.epi.org/publication/swa-wages-2019/. Even though it has narrowed considerably among those with less education. Shelly Lundberg, Robert Pollack & Jenna Stearns, *Family Inequality: Diverging Patterns in Marriage, Cohabitation, and Childrearing*, 30 J. Econ. Persps. 79, 98 (2016) (maintaining that the decline in the real earnings of less educated men explains much of the narrowing of the gender wage gap among less educated workers as a whole). Wages for the wealthiest earners have grown four times as much as median wages

level requires working very long hours.[126] It is disproportionately men who work these longer hours.[127] They get paid handsomely for doing so, but longer hours in paid work effectively foreclose these men's ability to do unpaid work in the household. So, their wives do it. Collectively this makes sense as long as the surplus gained by the long work hours is shared. Family law ensures that the surplus is shared even if the parties divorce. In practice, this consistently results in a transfer of wealth from men to women. Thus, contemporary marital dissolution law protects women from higher income households by subsidizing a gendered division of labor. In doing so it arguably increases the gender wage gap and reinforces gender roles in a demographic that is most likely to espouse a belief in gender egalitarianism.[128] Contemporary marital dissolution law also does nothing to protect lower income women who disproportionately invest in family care.

Whether this is an appropriate way for the law to intervene may depend on what one thinks would happen in the absence of this forced sharing. Clearly, as structured now, forced sharing does not help lower income women. This is why *intent to enter* into a legal family should matter. Those who want to avoid forced sharing should be able to do so; otherwise, family law will just exacerbate the vulnerability that lower income woman already experience.

With regard to those at the other end of the economic spectrum, the answer to the question of whether the law should continue to subsidize a gendered division of labor may depend on what one thinks would happen in the absence of forced sharing in this demographic. How confident are we that spouses would make different choices if they did not know that the law was going to force them to share in the event of divorce? If marital roles are

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in the economy. Elise Gould, *Decades of Rising Economic Inequality in the U.S.*, Econ. Pol'y Inst. (Mar. 27, 2019), https://www.epi.org/publication/decades-of-rising-economic-inequality-in-the-u-s-testimony-before-the-u-s-house-of-representatives-ways-and-means-committee/.

126 Youngjoo Cha & Kim A Weeden, *Overwork and the Slow Convergence in the Gender Gap in Wages*, 79 Am. Soc. Rev. 457, 459 (2014).

127 *Id.*

128 *See* Richard J. Harris & Juanita M. Firestone, *Changes in Predictors of Gender Role Ideologies Among Women: A Multivariate Analysis,* 38 Sex Roles 239, 240 (1998) (indicating that education level and participation in the labor force correlate with belief in gender equity for both men and women).

going to persist, even if they grow less gendered, and if enough people are willing to take the risk of disinvesting in the market in return for the chance at long-term wealth with their spouse, then ceasing to treat marriage as a status will simply leave market-earners with more money at divorce. Those who invest disproportionately in the family, regardless of their gender, will have less.[129]

One might also conclude that because the law of marriage is relevant mostly only for those with excess wealth, society should not bother to invest the resources it does in administering the law of marriage – though family law is hardly the only area of law that disproportionately serves the wealthy. Again, whether one thinks this family law intervention is appropriate may depend on what one thinks would take its place. Perhaps the laws with regard to forced sharing, even if they only end up being applied to the wealthy, serve an important expressive function. Perhaps family law dissuades enough people from behaving in the non-altruistic ways that Mr. Hansell, the selfish cohabitant, did. Perhaps Americans would rather have an area of law that assumes, as contract law does not, that people have duties to take care of each other not just themselves. Perhaps if, as Professor Halley observed, "paternalism, community and informality" are values not found elsewhere in law, it is better that they have at least some doctrinal home.[130]

IV. Exceptionalism Defended

There are other reasons to believe that treating the family as distinct, and crafting law that is particular to family relationships, reflects sound policy. The personal dynamics that usually define love and intimacy generate different behavior than does the commercial, market-driven world of contract. That love and intimacy tends to complicate the liberal order's reification of autonomy. Two examples, from the laws pertaining to domestic violence and

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129 Or perhaps higher educated women would have children out of wedlock as lower income women do because if the law is not going to force spouses to share income, then it has less reason to force spouses to share custody. More educated women could decide, like lower income women already have, that if they are not going to be able to benefit financially from marital status, they are better off without it so that their claim to custody is stronger. For a historical discussion of the property/custody tradeoff, see Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 Va. L. Rev. 79 (2016).

130 *See* Halley II, *supra* note 2, at 215.

the laws pertaining to children, suggest that the law is re-embracing a willingness to treat the behavior around love and intimacy as distinct.

A. *Domestic Violence*

In her article on the history of this country's approach to domestic violence, Professor Siegel questioned another form of family law exceptionalism: the marital (or family) privacy doctrine.[131] What the doctrine of family privacy preserved, she argued, was the same kind of immunity from punishment for domestic violence that husbands had been granted when the law gave them the right to physically chastise their wives. An explicit right to chastisement died out in the nineteenth century,[132] but domestic violence still went unpunished as judges refused to interfere in ongoing marriages, in the name of marital privacy. This refusal to intervene helped "preserv[e] relations of altruism."[133] Again, family law was dangerously exceptional because it allowed judges to insist that a "domestic violence situation [is] different from other forms of criminal behavior."[134]

Siegel makes clear that judges were far more concerned with protecting the privacy of propertied white men than poor Black men, so not all men escaped punishment for domestic violence, but privacy played a crucial role in maintaining the power that many husbands could exert over wives. And Siegel was not alone in examining how various notions of privacy have obscured women's injuries and erased women's domestic labor. The critique of privacy doctrine was a staple of second wave feminist theory.[135]

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131 Siegel, *Rule of Love*, *supra* note 11, at 2180.

132 *Id.* at 2129 (by the 1870s, "no judge or treatise writer in the United States [] recognized a husband's prerogative to chastise his wife.").

133 *Id.* at 2169.

134 *Id.* at 2194, citing Siddle v. City of Cambridge, 761 F. Supp. 503, 512 (S.D. Ohio 1991).

135 *See* Elizabeth Pleck, Domestic Tyranny: The Making of Social Policy Against Family Violence from Colonial Times to the Present 7–8 (1987) (suggesting that "[t]he single most consistent barrier to reform against domestic violence has been the Family Ideal" and going on to say that "[o]ne crucial element of the Family Ideal was belief in domestic privacy"). *See also* Catharine A. MacKinnon, Toward a Feminist Theory of the State 193–94 (1989) (critiquing privacy); Elizabeth Schneider, *The Violence of Privacy*, 23 Conn. L. Rev. 973 (1991) (further exploring how privacy doctrine shields abusers from punishment);

In response to this critique and to growing awareness of the dangers posed by intrafamily violence, reformers in the late twentieth century sought to break down official practices that had treated a "domestic dispute" as something other than the violence that it was.[136] But the initial efforts to take domestic violence more seriously floundered. Victims often declined to press charges. Some victims returned to their abusers or let their abusers return to them because the victims still loved their abusers and the abusers promised to stop.[137] Some abused women still wanted a father for their children.[138] Some women just did not trust the police.[139] Frustrated by how difficult it was for the criminal process to punish abuse, scholars argued that the public had an interest in combatting domestic violence and punishing abusers even if a victim did not want to proceed with arrest and prosecution.[140] Numerous communities adopted mandatory arrest policies to ensure that abusers interfaced with the criminal justice system.[141]

Frances E Olsen, *The Myth of State Intervention in the Family*, 18 U. Mich. J. L. Reform 835, 856–57 (1985); Carole Pateman, *Feminist Critiques of the Public/Private Dichotomy*, *in* Public and Private in Social Life 281, 295–97 (S.I. Benn & G. F. Gaus eds., 1983).

136 *See* Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 NYU Rev. L. & Soc. Change 191, 212 (2008) (quoting police manuals that encourage officers to allow a perpetrator to cool off in order to facilitate reconciliation).

137 *See generally* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1, 16–22 (1991) (detailing conversations in battered women's discussion group). *See also* Katharine K. Baker, *Dialects and Domestic Abuse*, 110 Yale L. J. 1459, 1474–75 (exploring women's resistance to giving up on their relationship).

138 Mahoney, *supra* note 137, at 21.

139 Lynora Williams, *Violence Against Women*, Black Scholar, Jan–Feb 1981, at 18, 22 (noting that Black women know that Black men will be dealt with more severely than white men would be).

140 *See* Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges and the Court System*, 11 Yale J. L. & Feminism 3 (1999) (suggesting ways in which the process could go forward without victim cooperation); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 Harv. L. Rev. 1849 (1996) (discussing mandated victim participation).

141 *See* Kimberly D. Bailey, *The Aftermath of* Crawford *and* Davis*: Deconstructing the Sound of Silence*, 2009 BYU L. Rev. 1, 9–10 (discussing mandatory arrest policies).

These policies met with decidedly mixed results. The deterrent effect of arrest worked much more successfully on men with economic and race privilege than on those without such privilege.[142] The Supreme Court made it difficult for prosecutors to proceed without victim participation.[143] And a growing chorus of feminist scholars of color articulated a counter-critique to the (white) feminist critique of privacy. Kimberle Crenshaw,[144] Dorothy Roberts,[145] Anita Allen,[146] Kimberly Bailey,[147] bell hooks[148] and Peggy Cooper Davis,[149] all Black women, argue that marginalized communities need more, not less, privacy. Traditionally, as Siegel noted, privacy did a much better job of protecting white male abusers than men of color who abused, but many Black women suggested that the answer was not to dispense with privacy. Instead, the law should expand it. Black families deserve family privacy too, even if that means they have to rely on community norms to get the violence to stop.

In the last fifteen years, the complicated dynamics between victims and abusers in the context of domestic violence have led most experts to realize that effective policies require state actors

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142 *See id.* (citing studies highlighting raced results in mandatory arrest studies).

143 *Id*. at 14 (discussing Supreme Court evidence rulings requiring victim participation).

144 Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color*, 43 Stan. L. Rev. 1241, 1257 (1991) ("[t]he home is not simply a man's castle in the patriarchal sense, but may also function as a safe haven from the indignities of life in a racist society.").

145 Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality and the Right of Privacy*, 104 Harv. L. Rev. 1419, 1470–71 (1991) (family life for women of color is a "site of solace and resistance against racial oppression").

146 Anita Allen, *Coercing Privacy*, 40 Wm. & Mary L. Rev. 723, 746 (1999) ("The solution to domestic violence is not to end families and seclusion but to make better use of evidence of chronic violence.").

147 Kimberly Bailey, *It's Complicated: Privacy and Domestic Violence*, 49 Am. Crim. L. Rev. 1777, 1813 (2012) (discussing hesitance of domestic violence victims of color to relinquish their privacy to state authorities).

148 bell hooks, Feminist Theory: From Margin to Center 37 (1984) (family life allows Black women to "experience dignity, self-worth, and a humanization that is not experienced in the outside world").

149 Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 Harv. L. Rev. 1348, 1371 (1994) (families provide an "oppositional enclave" that stands apart from a potentially racist state).

to treat domestic violence as its own issue, that is, exceptional. All states now have instituted civil protective order statutes allowing victims to receive, ex parte, an order restricting an alleged abuser from conduct that may endanger the victim.[150] These orders immediately restrict an alleged abuser from entering his own home, even if he owns the property, and even though the victims often later choose not to go forward with the prosecution.[151] This is an extraordinary amount of state power, exercised with far less notice and process provided to a defendant than is the norm in non-intimate violence cases, but it has become common in the domestic violence context. This recent history suggests that reformers have concluded that treating domestic violence differently does a better job of curtailing it than does treating it like other forms of criminal behavior.

Reflecting similar concerns, some counties now have a special place for victims to report violence to experts trained in this particular kind of violence.[152] Some jurisdictions have successfully instituted programs that facilitate reconciliation between abuser and victim.[153] Several studies indicate that couples can emerge from the protective order process with their relationship intact and the violence stopped, if the parties understand reconciliation and not retribution as their goal.[154]

All of these innovations incorporate the recognition that domestic violence victims often value their relationships and their privacy in ways that make standard criminal law enforcement very unattractive to them. What most victims want is for the relationship to continue and for the violence to stop.[155] In practice, both

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150 American Bar Association Commission on Domestic & Sexual Violence, *Statutory Summary Charts*, American Bar Association (last visited Sep. 21, 2024), https://www.americanbar.org/groups/domsteic_violence/Initiatve/statutory_summary-charts/.

151 *Id.*

152 *See, e.g.*, Cook County Domestic Violence Courthouse, https://www.illinoiscourts.gov/courts-directory/77/Cook-County-Domestic-Violence-Court/court/ (last visited Sep. 21, 2024).

153 *See* Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship*, 29 Cardozo L. Rev. 1487 (2008) (discussing the use of orders forbidding abuse rather than requiring separation in some counties).

154 *Id.* at 1536 (citing studies).

155 *See* Baker, *supra* note 137, at 1474-75.

victims and abusers experience domestic violence as "different from other [] criminal behavior."[156] It is not the doctrine of marital privacy that creates the distinction between what we call domestic violence and other forms of violence; it is the nature of love and relationship.

The women's movement of the latter twentieth century drew attention to just how dangerous domestic violence can be for women. The doctrine of family privacy was identified as an initial culprit for the law's failure to address domestic violence because privacy was the tool used by courts to justify treating domestic violence differently than other violence. But the more the issues surrounding domestic violence came to light, the more it became clear that both the problems and the solutions with regard to domestic violence required treating violence between intimates differently than violence between strangers. Intimate behavior exceptionalism has come to be identified as part of the solution not the problem.

B. *Children*

Finally, and more obviously, children are exceptional also—and not just in the "all children are precious" sense. The state has a *parens patriae* responsibility to ensure children's well-being.[157] Ensuring that well-being usually involves treating them, and the context in which they are raised, as exceptional. If one concedes that children should not just be treated as somewhat littler legal subjects, and one acknowledges that, ideally, children are raised within families, then it follows that families must be treated exceptionally because children are.

Not all families include children, of course, but for those that do, the law must treat the adults involved differently than it would treat them if children were not present. Contract law is of limited utility when it comes to children. Not only are children permitted to void any contract they enter into as minors, adults who are otherwise entitled to contract cannot barter away or acquire through

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156 *See* Siegel, *Rule of Love, supra* note 11, at 2194 (citing Siddle v. City of Cambridge).

157 *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (discussing the state's *parens patriae* authority).

contract the legal rights and responsibilities of parenthood once the child is conceived.[158]

Parenthood is a legal status, just as marriage is. One's rights and obligations as a parent flow from that status. Some scholars have argued that intent and mutual agreement should be more relevant in determining who has status as a parent,[159] just as intent and mutual agreement are relevant in determining who has marital status, but only a few people argue that parents should be left to their own bargains when it comes to custody and child support.[160] There is too much potential for one party to exploit greater emotional attachment to the child and/or lesser economic stability, often to the detriment of the child.[161]

The child support guidelines, which have been in place longer than either the equal sharing principle for marital property or any maintenance formulas, help minimize that bargaining power problem. The guidelines determine parental obligation based completely on status (and earnings), not at all on contract principles like intent or autonomy or mutual agreement. Plenty of people criticize what goes into the guidelines,[162] but, to my knowledge, no one suggests the law should treat child support obligations like contractual obligations.

In practice, parents may rely on private agreements with regard to support and custody, but courts do not enforce those

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158 Katharine K. Baker, *The DNA Default and Its Discontents: Establishing Modern Parenthood*, 96 B.U. L. Rev. 2037, 2050–51 (2016) (discussing difference in enforceability of contracts for parental status depending on how a child was conceived).

159 *Id.* at 2085–88 (suggesting that notions of mutual intent, coupled with formal registration, should determine parental status). Adopting contract paradigms to determine who has family status, whether marital or parental, is very different than relying on contract doctrine to regulate behavior between spouses or parents. Family law exceptionalism suggests that those who have status as family should be governed by a different set of rules, one in which the ability to contract is restricted, but that does not mean that notions of mutual intent should not be used to determine who should have family status.

160 *But see* Sarah Abramowicz, *Contractualizing Custody*, 83 Fordham L. Rev. 67 (2014) (arguing that parents' custody agreements should be enforced as contracts.).

161 For a discussion of how these bargaining power disparities may hurt the child, see *Garska v. McCoy*, 278 S.E.2d 357, 360–62 (W. Va. 1981).

162 *See* Baker, *Homogenous Rules*, *supra* note 38, at 340–42.

agreements as such.[163] A court reviews those agreements in light of the child support guidelines and a best interest of the child standard. Just as the equal sharing provisions create a status quo bias that strongly influence how parties bargain in pre and post nuptial agreements, so the child support guidelines and custody standards create a strong status quo bias that sets parameters on what parties bargain over for child support and custody. But courts do not treat parental bargains over support and custody as contracts the way they treat pre and post nuptial agreements as contracts. No amount of procedural protection, disclosure, and representation would lead a court to adopt an agreement that it did not believe was in the best interest of the child. Courts bless such agreements because they have come to learn that letting parents reach and implement their own bargains leads to better outcomes for children,[164] not because those bargains best reflect the mutual interest of the bargaining parties that contract law honors.

The ALI has recently undertaken a Restatement of the Law with regard to children.[165] It was a controversial project at first because people questioned whether there were coherent legal principles that applied to the law's treatment of children.[166] The ALI concluded that there were. Professor Elizabeth S. Scott explains that "it is a regime in which the goal of advancing child well-being melds the interests of the state, parent, and child."[167] The framework makes clear that honoring parental rights is a way of protecting children.[168] Professor Scott also notes that "protection of strong parental rights is compatible with the traditional constitutional rationale grounded in family privacy."[169]

Adults who invest substantially in the unpaid work of raising children are likely to, first, have the child-specific knowledge

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163 *See* Jana B. Singer, *The Privatization of Family Law*, 1992 Wis. L. Rev. 1443 (discussing how much courts rely on private agreements between divorcing parties even if they do not enforce them as such).

164 *See* Baker, *supra* note 106, at 434 discussing reasons why judges defer to parenting plans).

165 Elizabeth S. Scott, *Restating the Law in a Child Wellbeing Framework*, 91 U. Chi. L. Rev. 279 (2024).

166 *Id.*

167 *Id.* at 282–83.

168 *Id.* at 299.

169 *Id.* at 303.

that is necessary to make sound decisions on behalf the child[170] and, second, adopt their children's interests as their own.[171] Thus, protecting the parent-child relationship is a way of protecting children's interests. As long as the law continues to treat children as something other than little adults, the law will need to treat those adults who care for them as something other than typical autonomous subjects in the context of their family rights. In other words, the law of parenthood must be exceptional because the law of children is exceptional and this means that family law will inevitably be exceptional.

V. Conclusion

The critique of family law exceptionalism rightly identifies how the history of family law is steeped in beliefs that are entirely inconsistent with modern notions of gender equality, sexuality, and children's well-being. During the latter part of the twentieth and early part of the twenty-first century, family law experimented with a variety of ways of incorporating more enlightened understandings of gender, intimacy, and personhood into the doctrine. Reform has not always progressed in a linear fashion, but it has progressed. That progression grapples with the status/contract tension in Family Law, recognizing that neither a wholesale embrace of contract, nor a wholesale embrace of status best serves the interests of those whom traditional Family Law left subordinate. Contemporary Family Law tries to compensate for contract law's frequent inability to address the problems posed by unique family labor, disproportionate (and gendered) divisions of unpaid labor, and the altruistic norms that permeate families by relying on status. Often, treating family as a status, not a network of contracts, does a better job of protecting those left subordinates by tradition than would contract law.

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170 Emily Buss, *"Parental" Rights*, 88 Va. L. Rev. 633 (2002) ("Parents' strong emotional attachment to their children and considerable knowledge of their particular needs make parents the child-specific experts most qualified to assess and pursue their children's best interests in most circumstances.").

171 *See* Sen, *supra* note 102 (observing conflation of caretakers' interests with those of the children for whom they caretake).

"Fault" in Divorce: Its History and Current Role (and a Recommendation for the Future)

by
India A. Butler*

I. Introduction

Throughout U.S. history marital fault has played a distinct role in the determination of divorce judgments in one way or another. In early laws that even permitted a divorce, a finding of marital fault was required for a court to have jurisdiction over two divorcing spouses, and proof of that fault was a prerequisite to a judgment of divorce.[1] The underlying public policy considerations were firmly rooted in the nation's historical views of religion, cultural norms, and societal expectations.[2] That is, marriage was valued and there was a high societal priority placed on the "nuclear family."[3] The issue of fault was technical, in that the presence of fault, largely irrespective of the nature and extent of the fault, was sufficient in and of itself to allow the court to grant a divorce.[4] The jurisdictional nature of the consideration made it such that the court did not need to determine in dollars and cents how the innocent spouse could be compensated, or the at-fault spouse punished, for the wrongdoing in order to grant the divorce.[5] If there was not

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1 Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. Rev. 79, 79.

2 Peter Nash Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 Fam. L.Q. 269, 276-77 (Summer, 1997).

3 *Id.* at 277.

4 *Divorce: Statutory Abolition of Marital Fault*, 35 Cal. L. Rev. 99, 99 (1947).

5 Instead, this analysis took place in the context of alimony and property division. *Id.* at 107.

a "check" in the box indicating a finding of fault, no divorce would occur. This sort of check-the-box nature of fault during the early years of divorce was determinative of the outcome.

As cultural norms and societal expectations have shifted over the years, so too has the treatment of marital fault in divorce actions. Whether and to what extent those trends are connected are explored below. As a general matter, divorce law throughout the nation has trended away from the rigid structure that required a finding of fault in all divorce actions, and in many instances has removed fault as a jurisdictional requirement altogether.[6] This does not mean that divorce actions are completely without inquiry into marital fault. Modern-day fault considerations typically arise in the context of financial orders such as alimony and property division and tend to have an eye towards equity based upon the parties' pre-divorce conduct throughout the marriage.

This article will examine the role of fault in divorce actions across the country, its historical treatment across jurisdictions, its original and changing purpose, whether any historical vestiges remain, and where society has removed or abandoned the idea that fault should be a consideration in divorce judgments. Part II explores the history of divorce law, focusing in large part on its removal from the law as a jurisdictional requirement and the increased influence it has had on the financial components of divorces. Part III compares the modern-day treatment of fault in financial orders across several jurisdictions, while Part IV considers the appropriate application of fault in divorce law, noting the practical consequences of such.

II. A Look Through History

There was a time when marital fault, no matter how impactful or damaging, was insufficient for spouses to get a divorce.[7] In fact, in England pre-1857, there were rarely a set of facts that warranted a divorce.[8] During that time, the government, the church, and society generally, placed great value on the sanctity of marriage

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6 Wardle, *supra* note 1, at 88.

7 J.D. Sumner Jr., *The South Carolina Divorce Act of 1949*, 3 S.C. L. Rev. 254 (1951).

8 *Id.* at 254.

and viewed it as indissoluble.[9] Marriage was viewed as a religious contract between two spouses, and therefore, the exclusive right to grant a divorce was reserved only for ecclesiastical courts.[10] In those instances in which there was certainly post-nuptial marital misconduct, the ecclesiastical courts would allow "judicial separation" which permitted spouses to live separately only upon a showing that the marital misconduct made further cohabitation impossible.[11]

The other alternative available to incompatible spouses was an annulment. As is the case today, an annulment did not dissolve the marriage, and instead declared the marriage null and void as a matter of law.[12] Further, there were factual limitations on who might qualify for an annulment. Parties to a dissolution action were required to demonstrate that an impediment existed which made the marriage invalid.[13]

The underlying belief that marriage was a permanent contract and could not be dissolved, for any reason, was transposed from England to the United States following the American Revolution.[14] Divorces, though technically permitted, were virtually impossible to obtain in most states until nearly the late 1800s.[15]

In South Carolina, as was the case in many of the remaining states, the courts did not have the power or authority to grant a divorce, thereby making it an impossibility.[16] At the time of the state's inception, the legislature provided that the courts would not have the power or authority to grant divorces, given that such authority was reserved for the church.[17] The conundrum that arose was that there were no ecclesiastical courts established in South Carolina, and therefore no process by which spouses could receive a divorce in that state.[18] It was not until the Act of 1872 that two spouses were entitled to a divorce in South Carolina.[19] Even with

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9 *Id.*
10 *Id.* at 253.
11 *Id.*
12 *Id.*
13 *Id.* at 254.
14 *Id.* at 255.
15 *Id.* at 257
16 *Id.* at 255.
17 *Id.* at 254-55.
18 *Id.* at 255.
19 *Id.* at 257.

the grant of authority to the court, there were no divorces granted by the state under the Act of 1872.[20] Though the early divorce laws clearly disfavoring divorce, making it a near-impossibility, loosened over time, they remained structured in a way that placed limitations on the ability to get divorced, thereby favoring and encouraging lasting marital partnerships. Across all jurisdictions, divorce laws placed jurisdictional requirements on the court's ability to grant a divorce. This involved not only age and residency requirements, but also the ability to plead and prove marital fault.

Marital fault as a jurisdictional element to divorce frequently arose in the earliest cases within the context of "matrimonial domicile" seen in the early divorce laws. When two spouses lived in the same state, there was little question whether the judicial authority within that state had the jurisdiction to grant them a divorce.[21] In instances where only one spouse resided in the jurisdiction, the question became less clear. The presence of one spouse in a particular jurisdiction was insufficient to give that state jurisdiction over the non-resident spouse.[22] To solve that tension, the law looked to the "matrimonial domicile," which was the place where the parties last lived as husband and wife.[23] When neither husband nor wife lived in the "matrimonial domicile" at the time of the divorce, often the determining factor was the fault or innocence of the parties.[24] In Texas, the Court of Appeals held that it was the innocent party who was able to establish their new domicile as the "matrimonial domicile" for jurisdictional purposes.[25] The impact of this had tangible consequences – first, on which state's law applied for property division and support.[26] Second, it impacted whether and to what extent neighboring states were required to give "full faith and credit" of a divorce ordered in a different jurisdiction.[27]

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20 *Id.*

21 Henry L. McClintock, *Fault as an Element of Divorce Jurisdiction*, 37 Yale L.J. 564, 564 (1928).

22 *Id*.

23 *Id.* at 568.

24 *Id.*

25 Montmorency v. Montmorency, 139 S.W. 1168, 1172 (Tex. Civ. App. 1911); McClintock, *supra* note 21, at 586.

26 Herbert F. Goodrich, *Matrimonial Domicile*, 27 Yale L.J. 49, 50 (1917).

27 *Id*. at 62.

A. *Fault as a Jurisdictional Requirement*

Before the "no fault" reform, courts would deny spouses a divorce, even if both of them wanted one, unless one of them proved, or they conspired to prove, that one spouse was guilty of wrongful conduct during the marriage sufficient enough to warrant a divorce.[28] All jurisdictions spelled out exactly what conduct would rise to that level.[29] The most common grounds for divorce were adultery, cruelty, abandonment, and mental illness or incarceration.[30] Plaintiffs to a divorce action were required to plead which ground applied and later prove all the necessary statutory elements to prevail in obtaining a divorce similar to the way prosecuting authorities are required to prove all elements of a crime to obtain a conviction.[31]

The concept that a court must find some marital misconduct to grant a divorce mirrors the sentiment reflected in the early annulment statutes.[32] That is, a marriage should only be dissolved in instances where some significant flaw exists, and without such a defect, the state lacks authority to grant a divorce or an annulment.[33] Anyone who has been a party to a divorce, or represented either side, knows how challenging it is, and usually impossible, to pin down exactly when the marriage broke down and who is to blame for it.[34] Further, the statutory framework requiring a finding of fault ignored the reality that marriages break down for a variety of different reasons, and typically do not fit squarely within the fault-based grounds for divorce.[35]

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28 Robert Raphael, Frederick N. Frank & Joanne R. Wilder, *Divorce in America: The Erosion of Fault*, 81 Dick. L. Rev. 719, 719 (1977).

29 *Id.* at 720.

30 *Id.* at 729.

31 *See id.* at 721.

32 *Id.*

33 *Id.*

34 An Act Concerning the Dissolution of Marriage, Bill #8235 (1973) (Statement of Samuel Schoonmaker at Connecticut Joint Standing Committee, Feb. 20, 1973); McClintock, *supra* note 21, at 572.

35 Connecticut Joint Standing Committee Hearings, Judiciary Part 1, *supra* note 34, at 212-13.

B. *The Erosion of Fault as a Jurisdictional Requirement*

Opponents of the jurisdictional fault requirement often argued that such a change would make it easier for people to get divorced, and therefore result in an increase in divorce rates.[36] Though there are regional differences in divorce rates,[37] the United States generally experienced a steady increase in divorce rates for nearly one hundred years between 1860 and 1960.[38] Thereafter, for about nineteen years, there was a dramatic spike in divorce rates, before they began to level out and, at times, decline.[39] Researchers have yet to find a causal connection between no fault divorce and the increase in divorce rates.[40]

On the other side, proponents of eliminating the fault requirement disputed any causal link between removal of fault considerations and ease of divorce and argued that the shift away from the traditional grounds for divorce and towards a more progressive approach was a result of the already increasing divorce rates.[41] This side maintained that the no fault reform was implemented in part as a reaction to the increasing divorce rates. A reasonable conclusion to draw is that people were getting divorced if and when they wanted, regardless of the jurisdictional and evidentiary hurdles presented by the traditional fault-based grounds and irrespective of whether the specific facts of their case actually satisfied those jurisdictional requirements. Though it can be said that no fault reform theoretically made it "easier" for people to divorce by removing a jurisdictional requirement and eliminating the need to plead certain facts and later prove them with evidence, it did not necessarily follow that this "ease" in process translated into more divorces than otherwise would have occurred.

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36 *See id.* at 218-19.

37 Norval D. Glenn & Beth Ann Shelton, *Regional Differences in Divorce in the United States*, 47 J. Marriage & Fam., 641 (1985).

38 Donna S. Hershkowitz & Drew R. Liebert, *The Direction of Divorce Reform in California: From Fault to No-Fault…And Back Again?*, Assembly Judiciary Committee, California State Legislature 3 (1997).

39 Connecticut Joint Standing Committee Hearings, *supra* note 34, at 221-22.

40 *Id.* at 222.

41 *Id.* at 221-22.

The Uniform Marriage and Divorce Act of 1970 (the "UMDA"),[42] though not explicitly adopted in its entirety in all jurisdictions, reflected two modern trends in divorce law. The first was recognition of the concept of no-fault divorce, and the second was the idea that the division of property at divorce should no longer prioritize form over substance, birthing the idea of "equitable division" of property without regard for how the property is formally titled.[43] Arriving on the heels of several women's movements and soon after the passage of important anti-sex discrimination laws, the UMDA was aimed at not only creating harmony across states, but also toward reducing the perceived disparate impact that divorce historically appeared to have on women.[44]

While the disparity of impact is empirically supported, the UMDA's approach to alimony and maintenance awards could be said to accomplish the opposite.[45] The UMDA eliminated the consideration of marital misconduct in determining alimony awards, even in instances where misconduct undoubtedly impacted the financial and economic aspects of the marriage and the divorce. Instead, under the UMDA scheme, courts were limited to considering a series of factors, all of which focused largely on the financial resources of the parties, and the recipient's employment prospects.[46] Similarly, the UMDA preferred the phraseology "maintenance" over "alimony," arguably in an attempt to highlight the temporary and rehabilitative nature of financial support.[47]

California became the trailblazer for the shift in trend from fault-based divorce to what today is commonly referred to as "no fault" divorce, which came after years of unsuccessful attempts to replace fault grounds with no-fault grounds. In 1970, the Family Law Act of 1969 became effective in California and provided

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42 Unif. Marriage & Divorce Act (Unif. L. Comm'n 1970).

43 Robert J. Levy, *A Reminiscence About The Uniform Marriage and Divorce Act – and Some Reflections About Its Critics and Its Policies*, 1991 BYU L. Rev. 43, 44 (1991).

44 President John F. Kennedy signed the Equal Pay Act into law on June 10, 1963. President Lyndon B. Johnson signed the Civil Rights Act into law on July 2, 1964.

45 Levy, *supra* note 43, at 52-53.

46 Suzanne Reynolds, *The Relationship of Property Division and Alimony: The Division of Property to Address Need*, 56 Fordham L. Rev. 827, 839-40, n. 62 (1988).

47 *See* Unif. Marriage & Divorce Act (Unif. L. Comm'n 1970).

couples the ability to obtain a divorce based upon the ground of "irreconcilable differences, which have caused the irremediable breakdown of the marriage."[48] In doing so, the law eliminated the traditional fault grounds and deemed evidence of marital misconduct to be "improper" and "inadmissible."[49] Before this, the closest that any of the states got to no-fault divorce was New York in 1966 with the passage of legislation that permitted divorce for spouses living separate and apart for a period of two or more years pursuant to a decree of separation or a written separation agreement.[50] The practical effect of this lengthy waiting period was that parties were forced to choose a fault ground that did not fit the facts of their circumstances, or that spouses who elected the no-fault route were unable to untangle their lives as quickly as they could in true no-fault states.[51] Prior to 1966, New York's sole ground for divorce for nearly two centuries was proof of adultery.[52]

Almost immediately following California in removing fault from consideration was Texas, which adopted the state's first no-fault ground for divorce in 1970. The new statute required either the agreement of the parties or a showing that the marriage had become insupportable.[53] The concept of "insupportability" was derived directly from the prior fault-based statutory framework which remained intact and required not only "excesses, cruel treatment, or outrages," but also a showing that living together was untenable as a result.[54]

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48 Cal. Fam. Code § 2310.

49 Wardle, *supra* note 1, at 83 n.13.

50 *Id.* at 86 n.25. This statute, which became effective on September 1, 1967, also added cruel and inhumane treatment that threatened the physical or mental well-being of the plaintiff. Earl Phillips, *Divorce Law Reform in New York*, 43 Catholic Law. 52 (1967); N.Y. Sess. Laws 1966 ch. 254 § 15.

51 *See* Rhona Bork, *Taking Fault with New York's Fault-Based Divorce: Is the Law Unconstitutional?*, St. John's J. Legal Commentary 189, 189-91(Winter 2002); *See also* Delmar David Steinbock, Jr., *The Case for No-Fault Divorce*, 10 Tulsa L. J. 427, 429 (1975); *See also* Wardle, *supra* note 1, at 86.

52 From 1787 through 1966 proof of adultery was the only ground permitted for divorce. The law remained unchanged from the time of Alexander Hamilton. New York adopted no-fault grounds for divorce in 1970 when it reduced the term of separation from two years to one year, making it much more practical and reflective of the way in which people lived.

53 Tex. Fam. Code § 6.001; Austin v. Austin, 586 S.W.2d 937 (Tex. Civ. App. 1979).

54 Bippus v. Bippus, 246 S.W.2d 502, 503 (Tex. Civ. App. 1952).

While permitting some evidence of marital fault, the new statute significantly lowered the burden, and allowed the possibility of a divorce where general unhappiness and incompatibly were to blame.[55] The divorce ground of "insupportability," which differs from the later widely adopted ideas of "irreconcilable differences" and "irretrievable breakdown," stood for the very same idea – that was, spouses could divorce without needing to prove, or fabricate, fault.[56]

Given that the dissolution opinions in the years leading up to the adoption of the no-fault ground placed a clear emphasis on the permanency of marriage, it was somewhat unexpected that Texas was among the early adopters of no-fault grounds in the United States. The historical emphasis on the permanency of marriages seemed to favor the denial of divorce petitions, and required litigants to remain married despite their joint desire not to. It was well-established, and commonly referenced in court opinions that incompatibility or generally unhappiness alone was insufficient to meet the statutory requirements of a divorce pre-1970.[57] In a 1969 opinion, just one year prior to the adoption of no-fault grounds in Texas, the court in *Shankles v. Shankles* commented on the wife's failure to call upon her husband to change his actions to preserve the marriage and the decision provides invaluable insight into the social mores of that time.[58]

Despite the widespread dissatisfaction with the fault-based jurisdictional requirements, it took nearly thirty years for every jurisdiction in the United States to implement some form of no-fault divorce. By 2010, the state of New York stood as the sole remaining jurisdiction without an easy unilateral fault-less option for divorcing spouses. The closest that New York had come in the preceding years was in the year 2000 when the state allowed divorcing spouses to sidestep the fault requirement so long as they mutually agreed upon the terms of a separation agreement, lived separate and apart for an entire year, and exhibited substantial performance under the agreement for the period of separation.[59]

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55 Matter of Marriage of Glaze, 605 S.W.2d 721, 725 (Tex. Civ. App. 1980).

56 Tex. Fam. Code § 6.001.

57 Shankles v. Shankles, 445 S.W.2d 803, 807 (Tex. Civ. App. 1969).

58 *Id.*

59 Bork, *supra* note 51, at 165-66; N.Y. Dom. Rel. Law § 170(6).

Thereafter, the court would be permitted to grant the parties' divorce without requiring a finding of fault.[60] At that time, the newly introduced ground for divorce presented somewhat of a false sense that the state was offering litigants a no-fault option. This was simply not the case. Instead, it failed to solve for instances in which one spouse contested the divorce and the two were not in agreement on the terms of their separation, nor did it appreciate the reality that prolonging the finalization of a divorce over the required extended period of time could have adverse mental and emotional effects on the parties.

Despite New York's reluctance to remove marital fault as a jurisdictional requirement, the state had long since lessened the impact that marital fault would have on financial orders in matrimonial actions. In 1980, the New York legislature reworked the spousal maintenance statutory framework to no longer expressly provide for the punishment of adultery in issuing spousal maintenance, and instead gave the court discretion to do so when it found that egregious conduct had occurred in connection with the adultery.[61] Before then, divorce laws in New York penalized adulterous conduct in a similar way that the penal code in New York criminalized adultery, and still does.[62] The penalty usually was in the form of denying the receipt of spousal maintenance to the adulterer spouse.[63]

The post-1980 spousal maintenance framework in New York is similar to child support guidelines implemented in most jurisdictions, in that it provides parties with clear calculations, expectations, and guidelines. Despite this framework, courts have the freedom, in certain circumstances, to deviate from these guidelines based on certain statutory factors. The statutory framework and supporting case law in New York seem to draw a distinction between traditional forms of marital misconduct, such as adultery,

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60 Bork, *supra* note 51, at 165-66 N.Y. Dom. Rel. Law § 170(6).

61 *See, e.g.,* O'Brien v. O'Brien, 66 N.Y.2d 576 (N.Y. 1985); Blickstein v. Blickstein, 99 A.D.2d 287 (N.Y. App. Div. 1984). Both of these cases held that marital fault may be considered in egregious cases which shock the conscience of the court. This exception is to be applied only in extreme cases. Compare these cases with *Pagan v. Pagan*, 138 A.D.2d 685 (N.Y. App. Div. 1988) (declining to consider the unintentional shooting of one spouse by the other as an equitable distribution factor).

62 N.Y. Penal Code § 255.17; N.Y. Dom. Rel. Law § 236(A)(1).

63 N.Y. Dom. Rel. Law § 236 practice comment. (McKinney 1999).

and forms of marital misconduct that are economic in nature. The spousal maintenance statute specifically allows the court to consider the wasteful dissipation of assets by one spouse, as well as marital misconduct that has inhibited the other spouse's earning capacity, which is mirrored by the case law.[64] While there also remained a catchall provision that provided the court with discretion to consider "any other fact which the court shall expressly find to be just and proper," the relevant case law reflects a trend away from considering traditional marital fault, such as adultery, in issuing financial awards.[65]

New York took a similar approach with the equitable division statute, which does not expressly permit the court to consider marital fault in dividing the marital estate.[66] Instead, the court is permitted to consider a series of factors, which included those related peripherally to marital fault, such as wasteful dissipation of assets and acts of domestic violence.[67]

III. Fault in the Modern World

A. *Instances in Which the Legislature Is Silent on the Issue of Fault*

Even as fault disappeared from the jurisdictional landscape, in certain instances, state legislatures chose to be silent on the issue of whether fault would or should be considered in determining financial orders, such as property division or alimony.[68] Where there is no clear directive from the legislature, the courts are left to decide.[69]

The judiciary in Nevada struggled to balance this in the matter of *Rodriquez v. Rodriguez*.[70] In *Rodriguez*, the trial court

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64 N.Y. Dom. Rel. Law §§ 236(B)(5)(d), 236(B)(6)(e), (g).

65 N.Y. Dom. Rel. Law. § 236.

66 N.Y. Dom. Rel. Law § 236(B).

67 N.Y. Dom. Rel. Law § 236(B)(5)(d)(12); N.Y. Dom. Rel. Law § 236(B)(5)(d)(14).

68 *See* Nev. Rev. Stat. § 125.150(1) (1991); *See also* N.M. Stat. Ann. § 40-47(E) (Michie 1999).

69 *See* Kristine Cordier Karnezis, Annotation, *Fault as Consideration in Alimony, Spousal Support, or Property Division Awards Pursuant to No-Fault Divorce,* 86 A.L.R.3d 116, 119-20 (2002).

70 13 P.3d 415 (Nev. 2000).

denied alimony to Ms. Rodriguez based upon her extramarital affair, despite the fact that her husband of twenty-one years earned five times more than she did.[71] There, the court determined that it was proper to consider marital misconduct in entering financial orders.[72] At that time, the law provided that alimony awards may be ordered "having regard to the respective merits of the parties."[73] Prior to *Rodriguez*, in the case of *Heim v. Heim*,[74] the Nevada Supreme Court had determined that inquiry into the "merits of the parties'" was akin to considering "the parties' good actions or good behavior or lack thereof" in determining financial outcomes in a divorce.[75]

The wife appealed. Ultimately, the Nevada Supreme Court in *Rodriguez* determined that courts were not permitted to consider marital fault in assessing the merits of the parties in issuing financial orders, absent a clear directive from the legislature to the contrary.[76]

A similar structure exists in New Mexico. There, the dissolution statutes list the specific factors a court must consider in issuing financial orders in a divorce action.[77] The factors include those that are seen across many states that utilize individual and specific factors, such as the income and expenses of each party, each party's employment history and educational background, the material contributions of each party during the marriage, each party's respective access to other financial resources, as well as the age, health, and station of the parties.[78] The dissolution statutes in New Mexico do not include any factors that implicate marital misconduct.[79] The case law in New Mexico appears to support this idea and has not created a loophole for litigants to insinuate the consideration of fault into divorce proceedings.[80]

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71 *Id.* at 416.

72 *Id.*

73 Nev. Rev. Stat. § 125.150(1) (1991).

74 763 P.2d 678 (Nev. 1988).

75 *Id.* at 681.

76 *See Rodriguez*, 13 P.3d at 420.

77 *See* N.M. Stat. Ann. § 40-4-7(E) (1999).

78 *See* Conn. Gen. Stat. § 46b-82; Colo. Rev. Stat. § 14-10-114; Mass. Gen. Laws 208, § 34; 19-A Me. Rev. Stat. Ann. § 951-A.

79 N.M. Stat. Ann. § 40-4-7(E) (Michie 1999).

80 *See* Ira Mark Ellman, *The Place of Fault in Modern Divorce Law*, 28 Ariz. St. L.J. 773, 814 (1996); Lauderdale v. Hyord Conduit Corp., 555 P.2d 700, 705 (N.M. Ct. App. 1976).

Many other states provide a series of factors which include fault considerations that must be weighed by the court in issuing financial orders, in one way or another.[81]

B. *Instances in Which Fault Is an Improper Consideration in Divorce*

While not universally adopted, the UMDA takes a clear stance on fault, providing that property division and alimony shall be determined "without regard to marital misconduct."[82] Similarly, California dictates that "evidence of specific acts of misconduct is improper and inadmissible" in any pleading or proceeding for dissolution of marriage or legal separation.[83] Further, California courts are bound by an equal property division regime that does not allow for judicial discretion.[84] Consequently, fault is neither a consideration for alimony nor property division, also resulting in a limitation precluding it as a proper and permissible area of inquiry in discovery.[85] An equal division property regime which affords zero judicial discretion further limits the ability of litigants to pursue claims of marital fault.[86]

Louisiana too employs an equal property division mandate, therefore not allowing fault to factor into the division of property.[87] However, fault-based determinations are not prohibited in the context of final alimony orders in Louisiana.[88] There, the statutory language states that a court "may award final periodic support to a party free from fault," which largely mirrors South Carolina's statutory prohibition on awarding alimony to a spouse who has engaged in an extramarital affair.[89]

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81 19-A Me. Rev. Stat. Ann. § 951-A; Conn. Gen. Stat. § 46b-82.

82 Unif. Marriage and Divorce Act § 307.

83 Cal. Fam. Code § 2335 (West 1995).

84 *See* Catherine Mazzeo, Rodriguez v. Rodriguez: *Fault as a Determinative Factor in Alimony Awards in Nevada and Other Community Property Jurisdictions*, 2 Nev. L.J. 177, 184 (2002).

85 Cal. Fam. Code § 2335; *See also* Ellman, *supra* note 80, at 810.

86 *See* Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 Calif. L. Rev. 291, 301 (1987).

87 *See* La. Civ. Code. Ann. Art. 112(A) (West 1996).

88 *See id.*

89 *Id.*

C. *Instances Permitting a Limited Consideration of Fault*

Some states have tried to resolve the tension between equity, fairness, and the cost-benefit challenge that litigants experience by narrowly tailoring the consideration of fault to specific instances.[90] The state of Washington mirrors the UMDA's property division and alimony language, with the exception that the physical and emotional condition of the potential alimony recipient may be considered, as may be their financial obligations, which tends to implicate marital fault.[91] A typical example of how the Washington alimony statute provides a loophole for some fault consideration is seen in the matter of *In re Foran*.[92] There, a husband's physically abusive behavior towards the wife during the marriage and her resulting post-traumatic stress disorder directly implicated the wife's employability and future earning capacity and therefore was considered by the court in making an alimony determination.[93]

D. *Fault and the Division of Property*

In Texas, the legislature has decided that fault is not a ground upon which a court may base property division awards in the context of no-fault divorce.[94] Instead, the court need only determine that the property division is "just and right" under the circumstances, and is barred from making punitive property division awards.[95] An exception exists for cases in which divorce is sought on one of the fault-based grounds when evidence of fault may be considered in making a disproportionate distribution of

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90 *See* 19-A Me. Rev. Stat. Ann. § 951-A(5). "The court shall consider the following factors when determining an aware of spousal support…(M) Economic misconduct by either party resulting in the diminution of marital property or income; (M-1) Economic abuse by a spouse." *Id.; See also* S.C. Code. § 20-3-130 (2022).

91 Wash. Rev. Code Ann. §§ 26.09.080, 26.09.090, 26.09.080(1)(e) (West 1999).

92 834 P.2d 1081 (Wash. Ct. App. 1992).

93 *See id.* at 1083.

94 *See* Tex Fam. Code § 7.001 (providing special circumstances for the court to consider in the division of property, none of which relate to marital fault or misconduct).

95 *See* Matter of Marriage of Collinsworth, 598 S.W.3d 357, 365 (Tex. App. 2020).

the marital estate.[96] In instances where the basis for the divorce is insupportability (no-fault) alone, the court need not hear evidence relating to fault beyond that which is required to make a finding of insupportably, which is a surprisingly low burden in the contemporary world.[97] The result was that the wronged spouse often lost the bargaining power to argue for a disproportionate share of the marital estate in the context of insupportability.[98]

E. *Child Support and Custodial Determinations*

Almost universally, child support is a math question.[99] States have implemented guidelines or some other formula that considers the financial resources of the parents, the financial resources of the child, and the needs of the child in determining child support obligations.[100] Many states, like Connecticut, allow parents to deviate from the presumptive child support amount based upon certain deviation criteria.[101] In Connecticut, those include: (1) additional financial resources available to a parent; (2) extraordinary expenses for the care and maintenance of the child; (3) extraordinary expenses for either of the parents; (4) the needs of the parent's other dependents not subject to the child support order; (5) coordination of total family support; and (6) special circumstances such as shared physical custody, extraordinary disparity in parental income, best interests of the child, and other equitable

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96 Lynch v. Lynch, 540 S.W.3d 107, 128 (Tex. App. 2017).

97 *See* Joanna L. Grossman & Elicia Grilley Green, *No-Fault Divorce: The Case Against Repeal*, SMU Scholar 2 (2018).

98 Joseph W. McKnight, *Texas Community Property Law: Conservative Attitudes, Reluctant Change*, 56 Law & Contemp. Probs. 72, 93 n. 144 (Spring 1993).

99 *See* Robert G. Williams, *Guidelines for Setting Levels of Child Support Orders*, 21 Fam. L.Q. 281 (1987-1988).

100 *Id.*

101 Reasons for deviating from the Alabama child support guidelines include, without limitation, an order of shared physical custody, extraordinary transportation costs, college education expenses, assets or income received by or on behalf of the child or children, and childcare costs incurred on behalf of the children as a result of the parent's employment. Ala. R. Jud. Admin. 32(A)(1). Georgia permits deviation from the presumptive child support amount for, *inter alia*, high income families, health related insurance costs, life insurance costs, travel expenses, alimony obligations, mortgage expenses, and extraordinary expenses. Ga. Code Ann. § 19-6-15.

factors.[102] Nowhere in Connecticut's child support guidelines, or statutes pertaining to child support, is there an exception that allows parents to deviate one way or another from the presumptive child support award based upon the misconduct of either party.[103] Of course, it is possible that the fault of one spouse impacts the consideration of the factors set forth above. For example, if a spouse's repeated domestic violence and abuse of another spouse has substantially reduced the victim's ability to be gainfully employed, the factors considered in child support are inherently impacted. That said, marital misconduct as a separate and distinct consideration is improper in the determination of child support.[104]

This is consistent with the policy underpinnings that child support awards serve, which include: (1) protecting the well-being of the children; (2) ensuring that both parents have a financial responsibility to their children, regardless of the custodial arrangement; and (3) reducing the disparity in financial resources available to the child support payor compared to their child.[105]

IV. Conclusion and a Recommendation for the Future

Fault no longer plays the role it did in England and during the early years of the United States. As the nation gained its independence and developed its own legal framework, it distanced itself from the "what God has joined, let no man put asunder" biblical thinking that had been prevalent for many years. As the trend in the United States has been to move away from the traditional fault-based jurisdictional requirements, and each state has adopted its own specifically tailored and unique statutory framework for issuing financial orders in divorce matters and courts have interpreted and applied those statutes, the line demarcating when, how, and the degree to which fault factors into divorce outcomes has become blurred.

The question becomes – *should* fault be considered at all? As this article documents, a finding of fault is no longer required for

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102 Conn. Gen. Stat. § 46b-215a-5c.

103 *See id.*

104 *See* Conn. Gen. Stat. §§ 46b-215a-2b, 46b-215a-5c.

105 Ira Mark Ellman & Tara O'Toole Ellman, *The Theory of Child Support*, 45 Harv. J. Legis. 107, 129 (2008).

a court to have subject matter jurisdiction in a dissolution action. There is certainly a trend away from considering fault in the division of property, even in instances where fault remains a proper consideration on the question of alimony or spousal support.[106] Alimony statutes across the country continue to maintain at least a tenuous grasp on the historical concept that there should be fairness and equity in the financial outcomes of a divorce, and fairness and equity dictate that positive behavior should be rewarded (and bad behavior punished).[107]

A. *Intended Goal of Financial Outcomes in a Divorce*

The first and most logical place to look for answers to the question of whether fault should be removed entirely from divorce cases is to examine the intended goal of divorce laws. The second consideration is whether other laws better serve those goals, or unintentionally undermine them.

Traditionally, divorce laws were intended to reflect societal expectations and enforce the moral underpinnings relative to marriage. With the erosion of fault as a jurisdictional requirement, some scholars argue that the intent behind our divorce laws shifted.[108] That is, rather than reflecting how spouses should conduct themselves in a marriage, or the value that society should place on marriage, laws should instead promote fairness, equity, expediency, and autonomy in the dissolution of marriage.[109]

Comparing those goals with those of criminal laws, which are inherently punitive in nature, there is no question that criminal laws are intended to discourage bad behavior, which is based upon societal expectations of acceptable behavior.[110] In the context of criminal law, society frames what is and is not acceptable and therefore theoretically forces conformity therewith.[111]

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106 *See* Ar. Code 9-12-315 (2023); La. Rev. Stat. 9:281 (2023); Id. Code 32-712 (2023).

107 *See* Ira Mark Ellman, *The Theory of Alimony*, 77 Cal. L. Rev. 1, 5-7 (1989).

108 *See* Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 Mich. L. Rev. 1803, 1809 (1985).

109 *See id.*

110 Swisher, *supra* note 2, at 298.

111 *Id.*

The questions remain whether divorce laws should be engaged in social tinkering by encouraging and discouraging behaviors based on what is socially acceptable or repugnant, or whether spouses should be entitled to conduct themselves in their private lives as they jointly deem appropriate, and financial outcomes of dissolutions should simply be need-based?

To remove fault considerations entirely, without providing some other equitable remedy, would undermine the personal importance to litigants and the emotional impact that marital fault has on the wronged spouse. One possible solution to this dilemma is to remove fault as a consideration from dissolution actions, including in the determination of property division and alimony, and replacing it with equitable remedies in another area of the law, such as a tort action.[112] Tort law blends the concepts of equity and punishment, which allows aggrieved parties to seek monetary compensation for wrongs inflicted upon them.[113] The concept is that a person wronged should be made whole for suffering some loss that they did not cause (equity) and that there should be some accountability for socially unacceptable behavior (punitive).[114]

Though imperfect, and utilized infrequently in recent years, Mississippi, for example, attempted such a structure by implementing the common law tort of alienation of affection.[115] A successful claim for alienation of affection in Mississippi requires proof of: (1) wrongful conduct by the defendant; (2) loss of affection or consortium; and (3) the causal connection between the wrongful conduct and the loss.[116] While the common law tort action is wide-reaching and covers any set of facts that fit the elements, the traditional scenario is seen in instances where a divorcing spouse sues their soon-to-be ex-partner's paramour for contributing to the breakdown of the marriage.[117] It cannot be said, though, that the Mississippi legislature provided alienation of affection as a means to remove fault as a consideration in divorce actions.[118]

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112 *Id.*

113 *Id.* at 298-99.

114 *Id.*

115 David Neil McCarty, *Love in Vain: The Societal Value of Mississippi's Alienation of Affection*, 31 Miss. C. L. Rev. 107, 107 (2013).

116 *Id.* at 113-14.

117 *See id.*

118 *See id.* at 107.

Quite the opposite is true.[119] In fact, Mississippi provides litigants with twelve fault-based grounds to choose from and only allows a divorce to be granted on the basis of no-fault if the two divorcing spouses agree to it.[120] Practically speaking, this means that fault-based grounds are necessary in Mississippi where one party contests the divorce entirely.[121]

Though Mississippi, and five other U.S. jurisdictions[122] continue to allow the "heart balm" tort, its utilization has declined over the years. Some argue that tort law is not properly suited to handle the intimate, private, and emotional issues that were often raised in the context of alienation of affection claims.[123] Instead, personal family matters appear to be best reserved for the area of family law, where all such claims, many of which will overlap, can be addressed together.[124]

B. *Practical Considerations*

Absent a clear formula, as in child support, where proof of certain behaviors results in clear and identifiable consequences, it becomes extremely challenging to know the extent to which fault will factor into the overall outcome of a case. Connecticut, for example, provides that the court "shall" consider the reasons for the breakdown of the marriage in dividing property and awarding alimony, but provides no guidance on the degree to which that consideration should influence financial outcomes.[125] Most of the case law also fails to provide clear guidance on the issue.[126] The trend is

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119 *See id.*

120 *Id.* at 108.

121 *Id.*

122 Hawaii, New Mexico, North Carolina, South Dakota, and Utah allow lawsuits for alienation of affection. Illinois previously recognized claims for alienation of affection, which was banned in or about 2016. 740 Ill. Comp. Stat. § 5/1.

123 Fernanda G. Nicola, *Intimate Liability: Emotional Harm, Family Law, and Stereotyped Narratives in Interspousal Torts*, 19 Wm. & Mary J. Women & L. 445, 472 (2013.

124 *Id.* at 448.

125 Conn. Gen. Stat. §§ 46b-81, 46b-82.

126 *See* Ingles v. Ingles, 216 Conn. App. 782, 803 (2022) (holding: "While the trial court must consider the delineated statutory criteria [when allocating property], no single criterion is preferred over others, and the court is accorded wide latitude in varying the weight placed upon each item under the particular circumstances of each case. . . .In dividing up property, the court must take many

for judges to simply indicate that all of the factors have been considered, without breaking down the weight given to each.[127] Clearly, fault must be considered according to the statute, but there is no real sense of the degree to which it is considered. This creates a practical challenge in advising clients about potential outcomes, as well as the degree to which they should expend resources pursuing discovery on the issue of fault.

Completely removing fault from the statute does not necessarily solve these issues. Instead, the practical concern in that instance would be attempting to balance the strong and justified desire on the part of wronged spouses for justice, vindication, and equity in the dissolution of their marriage.

Finally, modern social science has properly begun to focus on the impacts of both domestic violence and coercive control in relationships – marital and otherwise. Claims that are grounded in these concepts are appearing with far greater frequency on court dockets, many of which maintain separate "domestic violence" procedural pathways for processing such claims, protecting victims and punishing perpetrators. Should these important considerations be more overtly brought into the realm of divorce, custody and financial orders? For example, should a party who has engaged in highly-controlling financial coercive control, or in a pattern of threatening and abuse, be subjected to consequences as a court enters custodial or financial orders? The answers to these questions may become more apparent over the next several years as societal expectations change and continue to influence the legal framework, in both the legislature and the courtroom.

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factors into account. . . . A trial court, however, need not give each factor equal weight . . .or recite the statutory criteria that is considered in making its decision or make express findings as to each statutory factor.")

127 *See* Marshall v. Marshall, 224 Conn. App. 45, 54-55 (2024) (stating "the trial court does not need to give each factor equal weight or make express findings as to each factor, but it must consider each fact").

Economic History and the Remaking of Family Law

June Carbone & Naomi Cahn*

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.

Toward a More Perfect Dissolution: The History of American Divorce Law and Its Ghosts in Contemporary Practice

by
Jane J. Felton and Barbara A. Schweiger*

No-fault divorce isn't all it's cracked up to be. It is generally understood to mean that, regardless of what disputes exist regarding the *mechanics* of divorce (such as property distribution and custody), a court will not question a married person's *right* to divorce. A court will not require that a person prove that his or her spouse was at "fault" during the marriage to convince a judge or jury of the marriage's objective lack of viability.

This conventional understanding is wrong. The authors came to learn as much several years ago when our client's right to a no-fault divorce was subjected to a four-day trial in which the sole issue was whether she had irreconcilable differences with her husband and there was no reasonable prospect of reconciliation. The court would not accept her verified pleading at face value. Rather, over a four-day trial, she was forced to testify to her innermost perceptions and intimate details of her marriage before the court would grant her divorce. When her (by then, ex-) husband appealed—essentially asking the appellate court to force her back into the marriage—the appellate court affirmed the divorce, but also affirmed that the trial was a proper one and reversed the trial court's award of attorneys' fees to our client for the husband's bad faith position.[1] Thus, even in no-fault divorce, litigants in New Jersey can subject their divorce-seeking spouses to withering trials where they are effectively forced to prove the fault-infused reasons they want a divorce.

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1 Steiner v. Steiner, 269 A.3d 454 (N.J. Super. Ct. App. Div. 2021).

It turns out this case was unusual but not unique. Indeed, while all U.S. jurisdictions have so-called no-fault divorce statutes,[2] similar cases have played out in other jurisdictions, and this exact scenario could happen under the governing statutes and case law in almost all of them.

What seemed to these authors to be the anachronism of this reality is what prompted this article's dive into the history of divorce, and particularly into the evolution of no-fault divorce. "You have to know the past to understand the present," Carl Sagan advised.[3] Knowing the history preceding the present era of liberalized divorce helps explain extant burdens on that right lurking behind nearly all U.S. "no-fault" divorce regimes.

Historically, barriers to divorce have fallen as women's rights have advanced. Both men and women have equally strong interests in the freedom to move on from their unhappy marriages. Forcing parties to establish fault causes delay, drives up legal costs, and imposes anguish on those who are fighting for the freedom to end what are undoubtedly unhappy marriages. It has historically been, most notably, powerful *men*—Henry VIII and Ronald Reagan—who have liberalized the right to divorce.[4] Yet, it is *women* who have historically borne disproportionate burdens from legal barriers to divorce. Restrictions on divorce ensured women's economic and social dependency on men, if not men's control over women. This is the reason no-fault divorce was the foundational principle for women's equality advocated at the first Women's Rights Convention in Seneca Falls in 1848.

And, just as women's rights have advanced on a non-linear and often ill-defined path throughout history, so too has no-fault divorce. Part I of this article explores this uneven history in the United States from the colonial period to the early republic, with its patchwork of statutes and common law, through the development of fault-based divorce statutes to the no-fault revolution of the late twentieth century and its backlash. To a large extent, this history, with its advances and retreats, mirrors the history of women's rights

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2 *See infra* Part II, generally, for citations to no-fault provisions in all fifty states.

3 Carl Sagan, *The Earth as a Planet*, The Royal Institution Christmas Lecture (1977), https://www.youtube.com/watch?v=aAxvxIOwnWM.

4 *See infra* discussion in text in Part I.

because divorce law has largely been guided by societal judgments about women's roles and women's power to decide for themselves whether to end a marriage.

Part II delineates how the ghosts of the past continue to shape divorce in America, such that the barriers to divorce exist even in the no-fault world. As of November 2024, when this article was written, all fifty states and the District of Columbia have no-fault divorce statutes, yet significant variations exist and there is no settled right to divorce without proving at least some fault in all but four United States jurisdictions. Jurisdictions are categorized into four clusters: 1) "Hybrid Jurisdictions" that retained their fault grounds alongside no-fault grounds for divorce; 2) supposedly pure "No-Fault Jurisdictions," most of which actually involve some fault because they permit trials on the cause of action like that described above; 3) "Pre-Divorce Separation States," which do not scrutinize parties' reasons for divorce but may still impose significant barriers to exit; and 4) jurisdictions that may actually require findings of fault, which include those states that have covenant marriages and those that require both parties to consent before a court can grant a divorce without a finding of fault. The current patchwork of divorce legislation reflects the push and pull between modern-day liberalizers and a growing host of politicians and activists arguing for a return to fault-based regimes out of concern that liberal divorce harms families and children.

From the vantage point of family law practitioners, no-fault divorce is a generally better policy for clients who are seeking to free themselves from their marriages as painlessly as possible. But this article does not set out to argue that cause. The proposition that individuals have rights to exit their marriages without proving fault (even if fault is considered in custody or economic considerations) is the premise—and the promise—behind every state's no-fault divorce statute. It is the current state of matrimonial practice and, generally, it serves clients best not to question whether, at the end of their proceeding, they will remain in a marriage that at least one spouse believes is dead enough to have merited a divorce complaint.[5]

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[5] This, of course, assumes lawyers are not representing parties who seek to keep their spouses trapped in marriages from which they want to exit.

Ultimately, no-fault divorce has always been about people's lives—the lives of those who are chained to troubled marriages, their children, and all those touched by their divorce litigation. Legal restrictions on the right to divorce implicate many of the same concerns as forced marriage. Both invite abuse. After separation, litigation is one of the few remaining ways a divorce-seeking spouse remains trapped in the marital relationship, and no litigation speaks to such entrapment more than forcing the divorce-seeking spouse to fight for his or her right to leave what would be a forced marriage if divorce is not granted.[6] While the American no-fault divorce revolution has brought significant progress, there is still much room for improvement.

I. The History of American Divorce

What do Henry VIII and Ronald Reagan have in common? They both ushered in new laws because of their own experiences in the abrogation of their first marriages. Henry VIII, of course, famously broke with the Roman Catholic Church when the Pope refused to annul his marriage to Catherine of Aragon, which resulted in Parliament's Act of Supremacy in 1534 and ushered in the Protestant reformation of England.[7] As significant as this was for Henry VIII and his five subsequent wives, it did not liberalize divorce laws for anyone else at the time.[8]

For centuries before and after that time, divorce was essentially a legal chastity belt fastened most tightly on women. While men could divorce on the grounds of their spouses' adultery, women could not do the same.[9] Restrictions on divorce ensured women's economic and social dependency on men. Historically, such restrictions fulfilled two gendered objectives: reinforcing

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6 *See, e.g.*, Emmaline Campbell, *How Domestic Violence Batterers Use Custody Proceedings in Family Courts to Abuse Victims, and How Courts Can Put a Stop to It*, 24 UCLA Women's L.J. 41, 42 (2017); Lisa Aronson Fontes, *It's Post-Separation Legal Abuse, Not High Conflict Divorce*, Psych. Today (Jan. 18, 2022).

7 *See generally* Antonia Fraser, The Wives of Henry VIII (1993); *The Reformation Parliament*, The History of Parliament, https://www.historyofparliamentonline.org/schools/content/parliament/ks3-reformation-parliaments-reformation-parliament.

8 *See generally The Reformation Parliament, supra* note 7.

9 *See infra* discussion in text at notes 27 & 40.

wives' subordination to their husbands and protecting women from "the most harmful implications of their inferior status."[10]

In the United States, until California enacted America's first no-fault divorce legislation in 1969, divorce had in America always required the would-be exiting party to prove the other's fault. Fault-based regimes were generally applied with a double standard, even though most were facially gender-neutral, where "women were subject to much stricter standards of purity than men."[11] A single act of infidelity by a man was often insufficient to set a wife free; not so the other way around.[12] One New Jersey court in 1876 held that a husband's forcing himself sexually on his wife, whose medical condition had rendered it extremely painful for her, was not sufficiently "grave and weighty" to warrant her marital freedom.[13]

Some writers have speculated that California Governor Ronald Reagan signed the nation's first no-fault divorce law in 1969, ostensibly eliminating the need for parties to fabricate spousal wrongdoing to pursue a divorce and instead permit parties to merely cite irreconcilable differences, because he was angry that his first wife, actress Jane Wyman, had sued him for divorce in 1948 on the ground of "mental cruelty."[14] Eleven years after signing that

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10 Roderick Phillips, Putting Asunder: A History of Divorce in Western Society 172, 179 (1988) (arguing that fault divorce envisioned that women needed not equality, only paternalistic protection from the worst physical and moral effects of their marital subordination); Karin C. Yefet, *Divorce as a Formal Gender-Equality Right,* 22 U. Pa. J. Const. L. 793, 807 (2020); *see also* Joanna Alexandra Norland, *When the Vow Breaks: Why the History of French Divorce Law Sounds a Warning About the Implications for Women of the Contemporary American Marriage Movement*, 17 Wis. Women's L.J. 321, 332, 346 (2002) (observing that while opponents of divorce "contended that they aimed to protect women from abandonment, the focus of their concerns was the potential of the wife to disrupt the social order by abandoning the nest.").

11 Yefet, *supra* note 10, at 809-10.

12 *Id*.

13 English v. English, 27 N.J. Eq. 71 (N.J. Super. Ct. 1876). Upon appeal, the court ruled: "Our action is founded on the history of the married life of these parties, the affection this husband has always manifested for his wife, and his repentance for his misconduct; so far as we can judge of human conduct he is sincere, and looking at the entire case, with its own peculiar circumstances, we are of the opinion that this divorce should now be refused." English v. English, 27 N.J. Eq. 579 (1876).

14 *See, e.g.*, W. Bradford Wilcox, *The Evolution of Divorce*, 1 Nat'l Aff. (Fall 2009), https://www.nationalaffairs.com/publications/detail/the-evolution-of-divorce; Patt Morrison, *California Settled the No-Fault Divorce Question*

no-fault divorce legislation, Ronald Reagan was elected the first divorced President of the United States. By 1979, forty-seven states had adopted some form of no-fault divorce, and by 1985, all but one state—New York—had done so.[15] New York joined the other forty-nine states in 2010.[16]

There has been regressive movement as well, including calls by political leaders and commentators, including the Speaker of the U.S. House of Representatives, to end no-fault laws, and consideration by various state legislative bodies of doing so.[17] This section reviews the history of American divorce to put into context today's "some fault" divorce landscape, which will be discussed in Part II.

A. *The Roots of American Divorce Law*

At the time of English colonists' arrival in Viriginia and Massachusetts Bay Colony in the early seventeenth century, virtually no mechanism in England existed to dissolve the bonds of matrimony; it was a rare privilege granted primarily to the upper classes and was generally accessible only to men. In England, ecclesiastical courts, not judicial courts, had granted annulments and divorces "*a mensa et thoro*" (*i.e.*, from table and bed), but neither severed the marital tie, thereby prohibiting remarriage.[18] It was merely a separation that was available only on the gross misconduct of the other spouse, and it put women

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Decades Ago. Why Is It Back in the News?, L.A. Times, May 24, 2024, https://www.latimes.com/california/story/2024-05-24/california-settled-the-no-fault-divorce-question-decades-ago-why-is-it-back-in-the-news.

15 New York was the last state to adopt a no-fault regime—in 2010. *See, e.g.*, Lauren Guidice, Note, *New York & Divorce: Finding Fault in a No-Fault System*, 19 J. L. & Pol'y 787, 788-89 (2011) (noting that New York's no-fault legislation "comes twenty-five years after South Dakota, the most recent state to pass a no-fault divorce law, did so in 1985"); *Paterson Signs No-Fault Divorce Bill*, N.Y. Times, Aug. 16, 2010, at A14.

16 *Id*.

17 Morrison, *supra* note 14; AJ Willingham, *What Is No-Fault Divorce, and Why Do Some Conservatives Want To Get Rid of It?*, CNN.com, Nov. 27, 2023, https://www.cnn.com/2023/11/27/us/no-fault-divorce-explained-history-wellness-cec/index.html.

18 K. Kelly Weisberg, *"Under Greet Temptations Heer": Women & Divorce in Puritan Massachusetts*, 2 Feminist Stud. 183, 185 (1975).

at a disadvantage courtesy of coverture laws that did not allow them to hold any assets, whether earned or inherited, in their own name. Only parliamentary divorces, which were rarely granted,[19] terminated a marriage.[20]

Puritans who settled the Massachusetts Bay Colony adopted the Reformation view that marriage was a civil contract based on the mutual consent of the parties, and accordingly, divorce should be under the jurisdiction of civil courts rather than ecclesiastical ones.[21] By the mid-seventeenth century, in what would become the Commonwealth of Massachusetts, courts were empowered to hear and determine all causes of divorce.[22] The most prevalent

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19 *Id.* The most notorious request for a divorce by act of Parliament concerned Henry VIII's divorce from Catherine of Aragon, after the Pope refused to annul the union. Eventually, it was the Archbishop of Canterbury, an appointee of Henry, who granted an annulment in 1534—after Parliament, at Henry's behest, declared the Church of England the official religion, and named Henry as its Supreme Head, thereby severing ties with the Catholic Church. Notwithstanding Henry's five subsequent marriages, it was not until 1688 that remarriage was permitted following a parliamentary divorce. These divorces remained rare because of the exorbitant costs involved, rendering them available to only the upper classes—and generally only to men. *Id.* at 184.

20 *Id.*

21 Judith Areen, *Uncovering the Reformation Roots of American Marriage & Divorce Law*, 26 Yale J.L. & Feminism 29, 30 (2014) ("[C]olonists were persuaded to rely for the time being on judicial rather than legislative oversight of family matters; not only did magistrates continue to perform marriages in Massachusetts Bay without explicit legislative authorization, but colonial courts, in clear violation of the ecclesiastical laws of the Church of England, began granting divorces in 1643."). Areen points out that while Martin Luther was originally against divorce, "by 1522, he changed his mind and declared that there is a scriptural support for divorce on the grounds of either adultery or desertion." *Id.* at 35 (citing Martin Luther, *The Estate of Marriage*, *in* 45 Luther's Works: II The Christian in Society 17, 30-33 (Walter I. Brandt ed., trans., Fortress Press 1962) (1522)). Unlike prevailing Catholic dogma, Luther's view also proclaimed that marriage should be for companionship and love, not merely for purposes of procreation, *id.* at 40, and that marriage is a contract, rather than a sacrament, that should be controlled by secular, rather than "greedy" religious, authorities, *id.* at 40-41 (citing Martin Luther, *The Babylonian Captivity of the Church*, *in* 36 Luther's Works: II Word and Sacrament 3, 97 (Abdel Ross Wentz ed., A.T.W. Steinhauser trans., F. Ahrens & A. Wentz revs., Fortress Press 1959) (1520)).

22 A Biographical Sketch of the Laws of Massachusetts Colony from 1630 to 1686 in Which Are Included the Body of Liberties of 1641 and the Records of the Court of Assistants 1641-44, at 14 (William H. Whitmore, ed., Rockwell & Churchill, City Printers, 1890) [hereinafter A Biographical Sketch].

grounds for divorce were desertion, adultery, incest, and extreme cruelty; the most prevalent causes for voiding a marriage (annulment) were bigamy, affinity,[23] and husband's impotence.[24] In the 1600s, the Massachusetts and Connecticut colonies each approved about one divorce per year.[25]

Although some argue that the first divorce in America was granted to Elizabeth Luxford in 1639,[26] that was an annulment and the first true divorce was granted to Anne Clarke in 1643 in Boston, on the grounds of adultery and desertion, but only because the adultery was accompanied by the ground of desertion *and* her husband's statement under oath that he had no plans to return to her.[27] In Massachusetts between 1639 and 1692, it appears that 31 of the 40 petitions for divorce or annulment were granted, and of the 143 divorce petitioners who filed for divorce between 1692 and 1774, 82 petitions were granted either a divorce, annulment, or separation.[28]

The first codified provision for something like equitable distribution appears to have been a 1641 Massachusetts law stating

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23 "Affinity" is typified in modern consanguinity laws, which every state and territory in the United States has adopted in some form. Most states confine the restriction to blood relatives of varying degrees, but some states still prohibit marriages between in-laws and other non-blood relatives.

24 George Elliot Howard, 2 A History of Marital Institutions 333 (Table) (U. of Chicago Press 1904). This table was gleaned, in part from A Biographical Sketch, *supra* note 22, which was published by Order of the City Council of Boston.

25 Morrison, *supra* note 14.

26 *See, e.g.*, *Colonial Divorce Was Not an Unheard-of Act*, Flag Family Law Blog (Oct. 15, 2017), https://www.flagfamilylaw.com/blog/2017/october/colonial-divorce-was-not-an-unheard-of-act. ("However, no divorces were granted until 1638 [sic], when Mrs. James Luxford sued on account of her husband's bigamy."); Cristina Egana, *The Luxford Legacy: The First Divorce in American History*, Levey Law Group Blog (Sept. 14, 2023), https://theleveylawgroup.com/the-luxford-legacy-the-first-divorce-in-american-history/ ("While some sources erroneously credit Denis and Anne Clarke with the first recorded divorce in 1643, it was actually a couple by the names of James and Elizabeth Luxford who hold this dubious honor. Their divorce proceedings began on December 3, 1639, in the Massachusetts Bay Colony Court of Assistants.").

27 Egana, *supra* note 26 (noting "women were required to prove multiple grounds while men needed only one").

28 Glenda Riley, Divorce: An American Tradition 16-17 (Oxford U. Press 1991).

that a wife, assuming she was an "innocent party," would retain her dower rights if her husband died and did not leave her "a competent portion of his estate."[29] Note, however, that adultery was a capital offense punishable by death.[30] The Massachusetts legislature adopted legislation in 1692 affirming the principle of civil, as opposed to ecclesiastical, marriage and divorce.[31] Connecticut had done so in 1665 when it united with New Haven to become a single colony, authorizing its Court of Assistants, later known as Superior Court, to grant divorces on the basis of fraudulent contract, adultery, absence of seven years' duration, or willful desertion for a period of three years.[32] Rhode Island passed its divorce statute in 1650, authorizing the General Assembly to grant divorces on a single cause of action: adultery.[33]

Divorce records during the colonial period in the middle colonies are fragmentary and divorce statutes were largely non-existent.[34] New York's legal system evolved from its initial Dutch system to a hybrid of Dutch and English common law.[35] Throughout the middle colonies, attitudes toward divorce were more akin to the Southern Colonies' conservatism than to New England's broader liberalism.[36] New Jersey's statute book was silent on divorce, but Pennsylvania appears to have authorized bills for complete dissolution.[37]

The Southern Colonies' conservatism, practically, meant no true divorces. Virginians, unlike their New England counterparts,

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29 A Biographical Sketch, *supra* note 22, at 51. Interesting to note: the only other provision pertaining to women was: "Everie marryed woeman shall be free from bodilie correction or stripes by her husband, unlesse it be in his owne defence upon her assalt. If there be any just cause of correction complaint shall be made to Authoritie assembled in some Court, from which onely she shall receive it." *Id.*

30 *Id.* at 55 ("94. Capital Laws. 9. If any person committeth Adultery with a married or espoused wife, the Adulterer and Adulteress shall surely be put to death.").

31 Riley, *supra* note 28, at 13-14.

32 *Id.* at 19.

33 *Id.* at 22.

34 *Id.* at 23.

35 *See* Joan R. Gunderson & Gwen V. Gampel, *Married Women's Legal Status in Eighteenth-Century New York & Virginia*, 39 Wm. & Mary Q. 1, 115 (Jan. 1982); *see also* Howard, *supra* note 24, at 383-85.

36 Howard, *supra* note 24, at 376.

37 *Id.* at 385-86.

clung to traditional Anglican notions about the sanctity of marriage and the resolution of problems in the marriage.[38] Only consensual separation and a form of separate maintenance were available.[39] Ecclesiastical courts allowed "divorce from bed and board," which did not permanently sever the bonds of matrimony and provided limited grounds, such as female adultery or male cruelty accompanied by some other cause.[40] Shortly before America declared her independence from England, around 1772, Thomas Jefferson began preparing to file a case before the Virginia General Assembly for a permanent divorce (*a vinculo matrimonii*) on behalf of Dr. James Blair, not on traditional ecclesiastical grounds like adultery, because that was not an issue, but because his 19-month marriage was turbulent. Perhaps this would have ushered permanent divorce into the southern colonies, but Blair died before the petition was submitted. The document apparently contained many of the same concepts Jefferson would utilize in his draft of the Declaration of Independence a few years later, based on independence and the pursuit of happiness.[41]

Other southern colonies also adopted the English way of looking at divorce, including predominately Roman Catholic Maryland, as opposed to New England's Reformation approach to marriage as a civil contract. During the colonial period, the Maryland legislature considered and rejected adopting divorce legislation, although it did order separate maintenance for aggrieved wives.[42] Because of a lack of legislation concerning divorce throughout the southern colonies, separation, both formal and informal, appears to have been widespread.[43]

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38 *E.g.*, Jan Lewis, *Domestic Tranquility and the Management of Emotion Among the Gentry of Pre-Revolutionary Virginia*, 39 Wm. & Mary Q. 1, 135 (Jan. 1982).

39 George E. Howard, 3 A History of Matrimonial Institutions 31 (U. Chicago Press 1904), available online through Project Gutenberg at https://www.gutenberg.org/cache/epub/49276/pg49276-images.html.

40 Glenda Riley, *Legislative Divorce in Virginia*, 1803 - 1850, J. Early Republic 51, 52 (Spring 1991).

41 *Id*. at 53-54.

42 James S. Van Ness, *On Untieing the Knot: The Maryland Legislature and Divorce Petitions*, 67 Md. Hist. Mag. 2, 171-73 (Summer 1972).

43 Riley, *supra* note 28, at 28.

B. *The Development of Divorce Law in the United States from 1776 to the 1960s*

Although the Supreme Court has established the right to marry as fundamental in all states,[44] marriage is and has been considered a contractual relationship subject to state regulation under states' police powers reserved by the Tenth Amendment.[45]

Following independence, states continued to apply the English common law doctrine of coverture, pursuant to which once a woman married, she was treated as non-existent legally and her rights were "suspended" or "consolidated" into those of her husband's.[46] In other words, it was a status designed by men to give them absolute authority over all aspects of the marital-familial relationship: make all decisions for the family, physically chastise wives if they disagreed with or "disobeyed" husbands, supervise wives' actions, dominate wives' bodies, determine whether wives could bear children, and control wives' domestic labor.[47] Attitudes in the southern colonies—with the notable exception of South Carolina, which had no divorce statute even into the late nineteenth century—began to change to be more in line with the New England approach, although it was more likely influenced by liberalization

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44 *See, e.g.,* Obergefell v. Hodges, 576 U.S. 644, 646 (2015) (same-sex couples have the right to marry); *see also* Loving v. Virginia, 388 U.S. 1, 12 (1967) (interracial couples have the right to marry); Turner v. Safley, 482 U.S. 78, 96 (1987) (prisoners have a right to marry); Skinner v. Okla. *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (forced sterilization of criminals is unconstitutional because "marriage and procreation are fundamental to the very existence and survival of the race").

45 *Loving*, 388 U.S. at 7 (holding that while the lower court found that "marriage has traditionally been subject to state regulation without federal intervention, and, consequently, the regulation of marriage should be left to exclusive state control by the Tenth Amendment," such state regulation is not unlimited and must not interfere with the equal protection and due process requirements of the Fourteenth Amendment).

46 Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude, and the Thirteenth Amendment*, 4 Yale J. L. & Feminism, 207, 207, 208 n.9 (1991).

47 Yefet, *supra* note 10, at 480-81; *see also* Nancy F. Cott, *Divorce and the Changing Status of Women in Eighteenth-Century Massachusetts*, 22 Wm. & Mary Q. 586, 611-12 (1976) (noting that wives owed husbands strict obedience in all matters); Reva B. Siegel, *Valuing Housework: Nineteenth-Century Anxieties About the Commodification of Domestic Labor*, 41 Am. Behav. Scientist 1437, 1462-65 (1992) (noting that a wife's duty at common law was to submit to and serve her husband).

of divorce happening in England than by the practices of the northern colonies.[48]

States in the post-revolutionary period came to legislate and regularly, even if not frequently, grant divorces. New York adopted a general divorce law in 1787. The only ground was adultery, but it did provide for complete dissolution by an innocent spouse "in like manner as if the party convicted was actually dead," and it authorized the chancellor to order an award for the care and maintenance of children and for an innocent wife's alimony.[49] While New Jersey's divorce history before Independence paralleled New York's, following the adoption of the Constitution, the state liberalized its divorce law to provide for divorce on the grounds of consanguinity, adultery, desertion for a term of seven years, or bigamy, and for divorce from bed and board only on the ground of extreme cruelty by either spouse.[50]

Pennsylvania enacted its divorce statute in 1785, providing for complete divorce from the bonds of matrimony only where, at the time of marriage, a party was impotent or otherwise physically incompetent; a party knowingly entered into a bigamous marriage; a spouse committed adultery; or a spouse willfully and maliciously abandoned the other spouse for four years without just cause.[51] Those four causes of action only remained in force throughout the nineteenth century; for other causes—namely, a husband's abandonment of his family, turning his wife out of the house, extreme cruelty that endangered a wife's life, or visiting "such indignities on her person as to render her condition intolerable and life burdensome, thereby forcing her to withdraw from his house and family"—only separation was available.[52] Delaware did not authorize absolute divorce until 1832, when its superior court was authorized to grant such in its discretion, or partial divorce or merely alimony, in cases of bigamy, willful abandonment for three

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48 *See generally* Howard, *supra* note 39, at 31-39.

49 *Id.* at 102.

50 *Id.* at 106 (citing Act of Dec. 2, 1794: Paterson, Laws of N.J., 133, 134 (1800)).

51 *Id.* at 108 (citing Act of Sept. 19, 1785: Laws of the Com. of Pa., 102-106 (1803)).

52 *Id*.

years, male impotency at the time of marriage; adultery, and extreme cruelty.[53]

Maryland was the first southern state to grant a divorce and, in 1790, freed John Sewell from the bonds of matrimony after his wife, Eve, had borne a mulatto child from an adulterous relationship.[54] By the 1830s, the Maryland legislature was granting about thirty divorces a year.[55] Virginia did not have a divorce law until 1803;[56] by 1841, the grounds for absolute divorce in Virginia included desertion, cruelty, adultery, abandonment, "just cause for bodily fear," and "any other cause for which a limited divorce is authorized by the principles of ecclesiastical law," which likely meant coercion of a minor and consanguinity/affinity.[57]

In the late nineteenth into the twentieth century, several enterprising states, mostly western ones, capitalized on the barriers imposed on divorce in the rest of the country and revised their residency requirements to shorten the length of time a person must reside in the state to satisfy the residency requirement for a divorce. This development allowed for migratory divorce, by which people would move to the state temporarily for the express purpose of obtaining a quick divorce.[58] Before Nevada became known as the place to go after it allowed quick divorces with short residency periods in 1931, South Dakota had been known as the Divorce Colony, particularly during the late nineteenth and early twentieth centuries, when most other states had onerous divorce laws.[59] Even before it became a state in 1889, the Dakota Territory had the country's biggest increase in divorces in a four-year period between 1882 and 1886, a rate of 6,691%, and Sioux Falls became a top divorce destination, with women filing twice as often as

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53 *Id.* at 112 (citing Laws of Del. 148-50 (1832)).

54 Van Ness, *supra* note 42, at 174-75. Eve's punishment: "his wife and her child were condemned to servitude, and sold." *Id.* at 175.

55 *See generally id.* at 171-75.

56 Riley, *supra* note 28, at 36.

57 *Id.* at 41.

58 *See* David F. Cavers, *Migratory Divorce*, 16 Soc. Forces 96-107 (1937).

59 Dave Kindy, *When Divorce Was Widely Banned, Desperate Women Went to South Dakota*, Wash. Post (July 2, 2022), https://www.washingtonpost.com/history/2022/07/03/south-dakota-divorce-capital/.

men.[60] Accordingly, the divorce rate rose considerably faster in the American West than it did elsewhere in the United States.[61]

Widespread concern about these rising divorce rates led to demands for restrictive measures and uniform laws that would limit divorce throughout the nation.[62] In 1906, President Theodore Roosevelt proposed a constitutional amendment to enable Congress to set national marriage and divorce standards, but the effort failed. After World War I and in the interwar years, the divorce rate rose, notwithstanding a temporary pause in that rise during the Great Depression in the 1930s.[63] Meanwhile, during this same period, American jurisdictions had vastly different disparate divorce laws. Forty-seven states and the District of Columbia granted divorces for adultery; South Carolina banned absolute divorce in its constitution; forty-six states permitted desertion or abandonment grounds; forty-two permitted cruelty; thirty-eight permitted drunkenness or addiction to drugs; and forty-two permitted imprisonment for a felony.[64] The disparities extended to migratory divorce. In Nevada, one could file a petition for divorce after only six weeks of residency; in Massachusetts, one had to wait five years.[65]

These disparities along with the rising divorce rates explain the extant social pressures that were alleviated by the Supreme Court's 1942 decision in *Williams v. North Carolina*, which relaxed the minimum contacts standard in divorce cases and held that any decree obtained in a state in which only the plaintiff is domiciled is entitled to the protection afforded by the Fourteenth Amendment's full faith and credit clause.[66] Under this new constitutional

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60 *Id.*

61 *See generally* Henry Pang & Sue Mary Hanson, *Highest Divorce Rates in Western United States*, 52 Socio. & Soc. Rsch. 2, 228-36 (Jan. 1968); *see also generally* Riley, *supra* note 28, at 85-107.

62 Laura Oren, *No-Fault Divorce Reform in the* 1950*s: The Lost History of the "Greatest Project" of the National Association of Women Lawyers*, 36 Law & Hist. Rev. 4, 847, 857-58 (Nov. 2018).

63 *Id.* at 861.

64 *Id*.

65 *Id.*

66 "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. Const. amend. XIV, art. IV, § 1.

standard, a divorce that was afforded full faith and credit in other jurisdictions made it possible for one spouse to obtain a divorce without the other spouse's consent or even presence at the proceedings.[67] Before *Williams*, a party could be considered married in one state, but not married in another, or, worse yet, children of a union might be legitimate in one state but not in another if one of the divorced parties remarried and had other children.[68]

C. *The "No-Fault" Revolution*

The pressures created by changes in societal expectations about marriage and divorce, and concomitant rising divorce rates, together with the vast disparities between the different divorce laws in different states, made the country receptive to both more uniform and more liberalized divorce laws.[69] As Professor Laura Oren writes, "the law on the books was growing ever more out of sync with the practice of law as well as with popular expectations about marriage and divorce."[70]

In 1947, the National Association of Women Lawyers ("NAWL") undertook to draft the first model bill for a no-fault divorce that would no longer require a "wronged person" for a divorce to be granted.[71] It was not alone. In 1948, President Harry Truman convened a Family Life Conference,[72] for which the American Bar Association (ABA) accepted the invitation to submit a report on American divorce laws.[73] The committee that authored the report concluded that the laws were a "mess" and that "society, by and large, has practically made up its mind to ignore the law."[74] The final report of the ABA's delegation to

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67 *See* Williams v. North Carolina, 317 U.S. 287, 299 (1942) ("[I]t is plain that each state, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its own border the marriage status of the spouse domiciled there, even though the other spouse is absent.").

68 *See* James D. Sumner, Jr., *Full Faith & Credit for Divorce Decrees—Present Doctrine and Possible Changes*, 9 VAND. L. REV. 1, 1-5 (1955).

69 *See* Oren, *supra* note 62, at 863.

70 *Id*.

71 Ashawnta Jackson, *The Lost History of No-Fault Divorces*, JSTOR DAILY (Dec. 5, 2022), https://daily.jstor.org/the-lost-history-of-no-fault-divorce/.

72 Oren, *supra* note 62, at 865.

73 *Divorce Laws: Remedies for Abuses and Scandals Are Sought*, 34 AM. BAR ASS'N J. 195, 196 (Mar. 1948).

74 *Id*.

the conference explained that a dissolving family was already broken before divorce, rather than by that legal remedy, and it was therefore necessary to change from a focus on punishment to one based on treatment.[75] By 1952, the NAWL published in its *Women Lawyers Journal* its "Proposed Uniform Divorce Bill" that did not incorporate genuine no-fault grounds, but sought to supplant fault with a "therapeutic approach" that encouraged spouses "to collaborate in rebuilding for the future welfare of the family."[76] Versions of the NAWL's model bill were introduced in a handful of states between 1953 and 1958 without success.[77]

Although NAWL's model was not the basis for California's no-fault Family Law Act in 1969 or the Uniform Marriage and Divorce Act (UMDA) adopted by the National Conference of Commissioners of Uniform State Laws (NCCUSL) the year after,[78] it is no coincidence that a women's organization spearheaded the effort to enact no-fault divorce legislation and, at the same time, was not ultimately successful in having their version enacted. No-fault divorce had long been a complicated woman's rights issue. One of the early vocal champions of more liberal divorce laws was nineteenth-century women's rights advocate Elizabeth Cady Stanton, who proclaimed that "there is no other human slavery that knows such depths of degradation as a wife chained to a man whom she neither loves nor respects, no other slavery so disastrous in its consequences on the race, or to individual respect, growth and development."[79]

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75 *Id.* (concluding that that "the premise of our divorce laws is punishment," which "[u]nder modern conditions . . . leads to abuses and downright injustice, and "[t]heir collateral product is to force normally decent people to commit perjury or adultery"); *see also* Oren, *supra* note 62, at 869 (*citing* Paul W. Alexander, *Family Life Conference Suggest New Judicial Procedures and Attitudes toward Marriage and Divorce*, 32 J. Am. Judicature Soc'y 38 (1948)).

76 Oren, *supra* note 62, at 877 (citing *Toward Uniform Divorce Laws*, Women Law. J. 16 ("Introduction") (1952)).

77 *Id.* at 878.

78 *Id.* at 849 (describing how the NCCUSL first refused to consider the NAWL's proposal because the NAWL was not a section of the American Bar Association, and even after it surpassed that hurdle by establishing the Family Law Section, the NCCUSL "continued to bypass the women lawyers and their bill").

79 Elizabeth Cady Stanton, *Home Life* (1875), *in* The Elizabeth Cady Stanton-Susan B. Anthony Reader 133 (Ellen Carol DuBois, ed., rev. ed. 1992).

Stanton and other liberal thinkers believed that the key tenets of emancipation and freedom for women were "self-ownership within marriage and a right to divorce if the marriage became degrading."[80] When Stanton and approximately 300 other individuals interested in women's rights gathered at Seneca Falls, New York in 1848, that body identified "marital bondage" and restrictions on escape therefrom as the major sources of women's subordination.[81] By 1860, at the Tenth National Women's Rights Convention, Stanton advocated no-fault divorce, which she felt would eliminate "legalized prostitution of coerced marital intercourse and unwilling maternity."[82] Yet, Stanton ultimately was unable to gain support among other women's rights activists for her proposal to liberalize divorce law.[83]

The reason no-fault divorce was a woman's rights issue is because at-fault divorce regimes were understood to reinforce sex-role stereotypes that created separate spheres of influence for men and women.[84] Even proving fault had two standards: for example, where adultery was the cause of action, a woman was usually required to demonstrate her husband had multiple infidelities plus some other wrong, while a man often needed to show only one adulterous encounter to obtain a divorce.[85] Moreover, judges frequently applied gender-neutral legal authority in ways that reflected their own biases regarding gender and class roles. Some of them, for example, in the context of divorce proceedings, assumed a woman was obliged to endure physical violence as a normal part of marriage. On the other hand, criminal prosecutions of physical violence were more intense for poor men, but the same violence by poor men against poor women was seen

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80 Yefet, *supra* note 47, at 485 (quoting Elizabeth B. Clark, *Matrimonial Bonds: Slavery and Divorce in Nineteenth-Century America*, 8 Law & Hist. Rev. 25, 34 (1990)).

81 *Id.* at 486 (citing Joan Hoff, Law, Gender, and Injustice: A Legal History of U.S. Women 139 (1991)).

82 *Id.* (quoting Ellen Carol DuBois, *Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution* 1820 – 1878, *in* A Less Than Perfect Union: Alternative Perspectives on the U.S. Constitution 104, 111 (Jules Lobel, ed., 1988)).

83 *See generally* Clark, *supra* note 80, at 38-43.

84 Yefet, *supra* note 10, at 807-09.

85 *Id.* at 810.

as a reason to limit women's entitlement to marital freedom.[86] Another example of this mindset, was allowing the defense of condonation to block a battered woman's divorce petition in New York State. Even though the court found that the husband had "choked [his wife]; committed severe personal violence upon her, and struck her a blow with his fist upon the left temple; severing the temporal artery, and endangering [her] life," it nevertheless found that because the wife had stayed in the marital home, she had "implie[d] a forgiveness of such treatment."[87]

Such double standards in New York divorce cases continued into the twenty-first century, at least until New York finally adopted a no-fault provision in 2010. For example, an appellate court in New York reversed a trial court's grant of divorce to a poor, battered wife on the ground of cruel and inhuman treatment despite her having proved that her husband verbally and physically abused her, holding her continued cohabitation with her abuser against her despite the poverty that kept her tied to him.[88] Similarly, a wife subjected to physical abuse and marital rape from her long-time husband, who slammed her up against walls repeatedly, was granted a divorce by the trial court, but the appellate court reversed, ruling that "[r]eprehensible and highly offensive behavior . . . is not necessarily sufficient to establish the cruel-and-inhuman-treatment ground for divorce."[89]

In addition to what often amounted to a higher burden for women, at-fault divorce also encouraged perjury, often with the assistance of legal counsel, by couples who wanted to end their marriages despite the fact that neither spouse had engaged in the required misconduct.[90] One legal scholar concluded that this widespread practice of testifying to fabricated acts of cruelty, desertion, or adultery in a fault-based system "endanger[ed] the

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86 Siegel, *supra* note 47, at 2134.

87 Davies v. Davies, 37 N.Y. 45, 46, 48 (N.Y. Sup. Ct. 1869).

88 Palin v. Palin, 624 N.Y.S.2d 630, 632 (N.Y. App. Div. 1995).

89 Gross v. Gross, 836 N.Y.S.2d 166, 167 (N.Y. App. Div. 2007) (holding that "in a marriage of long duration a 'high degree' of proof of cruel and inhuman treatment is required").

90 *See* Peter N. Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 Fam. L.Q. 269, 270-71 (1997); *see also* Max Rheinstein, *The Law of Divorce and the Problem of Marriage Stability,* 9 Vand. L. Rev. 633 (1956); Walter Wadlington, *Divorce Without Fault Without Perjury*, 52 Va. L. Rev. 32, 32 (1966) (arguing that a fault-based divorce regime is inherently dishonest).

integrity and reputation of the bar, [brought] into disrespect the law and its administrators, and create[d] an undemocratic discrimination between those who can, and those who cannot, pay for the services of a divorce specialist."[91]

Law professor Julia Simon-Kerr believes that judges who heard divorce cases in a fault-based system were aware that perjury was routine.[92] She opined that there were a number of factors that made it obvious that perjury, collusion, and fraud were involved in divorce proceedings, including the large number of uncontested cases, large percentage of unnamed co-respondents, large numbers of defendants and hotel room women who opened the door while scantily clothed, the common occurrence of a defendant's friend testifying against him, and the period between the alleged act of adultery and service of process was unusually short.[93] As one New York Supreme Court judge described a typical divorce case: "She is always in a sheer pink robe. It's never blue—always pink. And he is always in his shorts when they catch them."[94] Given these blatant lies that were used to satisfy legal standards, it is hardly surprising that practitioners called for reforms to save the integrity of the legal process and to allow "humane and dignified divorce to couples who were certain that their marriage was dead."[95]

California's Family Law Act arose from the state legislature's inquiry into divorce reform in 1963, the same year Betty Friedan first published her landmark feminist work, *The Feminine Mystique,* as well as from the Governor's Commission on the Family established by Governor Jerry Brown in 1966, which proposed the

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91 Rheinstein, *supra* note 90, at 634. Professor Rheinstein noted that many in the legal profession at the time were concerned about the widespread use of collusive practices in divorce cases, the fabricated evidence presented as true, material evidence withheld, and perjured witness oaths.

92 Julia Simon-Kerr, *Systemic Lying*, 56 Wm. & Mary L. Rev. 2175, 2192 (2015).

93 *Id.* (quoting Note, *Collusive and Consensual Divorce and the New York Anomaly*, 36 Colum. L. Rev. 1121, 1130 & n.65 (1936) (citing statistics showing that in a sample of around 485 divorce cases, witnesses testified that the male appeared nude in 21 cases and the female appeared nude in 55 cases; the male appeared in underwear in 119 cases and the female appeared in a negligee in 67 cases)).

94 *Id.* (citing John G. Rogers, *Divorce Court: "Nothing but Perjury and Collusion*," N.Y. Herald Trib., at 19 (Oct. 1, 1965)).

95 Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 Va. L. Rev. 9, 17 (1990).

elimination of fault grounds for divorce, property division, and issues of support.[96] With the NCCUSL's UMDA promulgated the following year, "the no-fault divorce revolution had begun in earnest."[97] Within a decade of the passage of California's no-fault divorce provision, forty-seven states had already adopted some version of no-fault divorce, and by 1985, that number increased to forty nine.[98] In the four decades since, even while New York became the fiftieth state to offer no-fault divorce in 2010, there has been regressive movement as well, discussed more fully in Part II.

II. History's Ghost's in Present Day Divorce

Divorce today can be a lengthy and arduous process regardless of any challenges one spouse might bring to the other's very right to get a divorce in the first place. Disputes regarding distribution of property, spousal support, and custody take significant time and expense to resolve.[99] Undoubtedly, where the grounds for divorce are disputed as well, the divorce takes an even greater toll—it will take longer, cost more, intrude more into parties' private lives, and, where abuse is involved in the parties' relationship, keep more victims tethered to their abusers.[100] As discussed above,

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96 Donna S. Hershkowitz & Drew R. Liebert, Assembly Judiciary Comm., Cal. St. Legis., *The Direction of Divorce Reform in California: From Fault to No-Fault . . . And Back Again?,* https://ajud.assembly.ca.gov/sites/ajud.assembly.ca.gov/files/reports/1197%20divorcereform97.pdf.

97 Oren, *supra* note 62, at 879.

98 New York was the last state to adopt a no-fault regime—in 2010. *See, e.g.*, Guidice, *supra* note 15, at 788-89 (noting that New York's no-fault legislation "comes twenty-five years after South Dakota, the most recent state to pass a no-fault divorce law, did so in 1985"); *Paterson Signs No-Fault Divorce Bill*, *supra* note 15.

99 *See* Christy Bieber, *The Average Cost of Divorce in* 2020, Ascent (Nov. 16, 2020), https://www.fool.com/the-ascent/research/average-cost-of-divorce/; Geoff Williams, *Cost Breakdown of a Divorce*, U.S. News & World Report (Dec. 21, 2020 11:24 AM), https://money.usnews.com/money/personal-finance/family-finance/articles/cost-breakdown-of-a-divorce -; *see also* Olga Khazan, *The High Cost of Divorce*, Atlantic (June 23, 2021), https://www.theatlantic.com/politics/archive/2021/06/why-divorce-so-expensive/619041/ (saying attorneys' fees alone to help with a divorce can cost $10,000 to $20,000).

100 New York, for example, adopted no-fault divorce with the intention of addressing "[s]ubstantial evidence, derived from the public hearings . . . and professional experience . . . conclud[ing] that fault allegations and *fault trials* add significantly to the cost, delay, and trauma of matrimonial litigation and are, in

reducing these burdens has been held out as a purpose of no-fault divorce.

Yet, although every state and the District of Columbia now claim to have no-fault divorce, all but two jurisdictions—the District of Columbia and Maryland, thanks to amendments they enacted in late 2023 and early 2024—permit an objecting spouse to delay, if not completely veto, his or her spouse's bid for freedom by inserting considerations of fault into even no-fault divorce proceedings. To reflect how this plays out, we divide the legislative landscape into the four regions discussed in the introduction to this article: 1) "Hybrid" jurisdictions; 2) supposedly pure "No-Fault Jurisdictions," all but a few of which are more aptly characterized as "Some Fault States"; 3) "Pre-Divorce Separation States"; and 4) jurisdictions in which fault may be required.

A. *Hybrid Jurisdictions*

Thirty states provide all divorcing parties the option of proceeding on either fault grounds (such as adultery, extreme cruelty) or no-fault grounds (such as irreconcilable differences, incompatibility, or irretrievable breakdown of the marriage).[101] In these jurisdictions, the inquiry into the grounds for divorce is

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many cases, used by litigants to achieve a tactical advantage." *Miller Commission Report to the Chief Judge of the State of New York* 18 (Feb. 2006), https://ww2.nycourts.gov/sites/default/files/document/files/2018-06/matrimonialcommission-report.pdf (emphasis added).

[101] These states include: Alabama (Ala. Code § 30-2-1); Alaska (Alaska Stat. § 25.24.050); Connecticut (Conn. Gen. Stat. Ann. § 46B-40); Delaware (Del. Code Ann. tit. 13, §§ 1503-1505); Georgia (Ga. Code Ann. § 19-5-3); Idaho (Idaho Code Ann. §§ 32-603, 616); Indiana (Ind. Code § 31-15-2-3); Kansas (Kan. Stat. Ann. § 23-2701); Maine (Me. Rev. Stat. Ann. tit. 19-A, § 902); Massachusetts (Mass. Gen. Laws Ann. ch. 208 §§ 1, 1A); Mississippi (Miss. Code Ann. §§ 93-5-1, 93-5-2); Missouri (Mo. Rev. Stat. §§ 452.305, 452.320); New Hampshire (N.H. Rev. Stat. Ann. §§ 458:7, 458:7-a); New Jersey (N.J. Stat. Ann. § 2A:34-2); New Mexico (N.M. Stat. Ann. § 40-4-2); New York (N.Y. Dom. Rel. Law § 170); North Carolina (N.C. Gen. Stat. Ann. § 50-6); North Dakota (N.D. Cent. Code § 14-05-03); Ohio (Ohio Rev. Code Ann. § 3105.01); Oklahoma (Okla. Stat. Ann. tit. 43, § 101); Pennsylvania (23 Pa. Cons. Stat. Ann. § 3301); Rhode Island (R.I. Gen. Laws §§ 15-5-2, 15-5-3.1); South Carolina (S.C. Code Ann. § 20-3-10); South Dakota (S.D. Codified Laws § 25-4-2); Tennessee (Tenn. Code Ann. § 36-4-101); Texas (Tex. Fam. Code Ann. §§ 6.001-007); Utah (Utah Code Ann. § 81-4-405); Vermont (Vt. Stat. Ann. tit. 15, § 551); Virginia (Va. Code Ann. § 20-91); and West Virginia (W. Va. Code §§ 48-5-201-202).

cursory if both parties agree that they are incompatible or that a similar no-fault ground exists. If they do not agree on that point, however, the divorce-resistant spouse can potentially force a trial on the existence of a fault ground.[102]

Given the nature of such a system, it inevitably happens that courts find themselves mired in the details of an inefficient (to say the least) fault proceeding because one party asserts fault even though the other wishes to proceed on no-fault grounds and there is no question a divorce will be granted. Because the legislatures in Hybrid Jurisdictions have chosen to retain fault grounds for divorce, courts cannot do anything to avoid allowing parties to plead and proceed on fault grounds if they so desire.[103]

To be sure, asserting fault may serve a strategic purpose in states where fault is a factor in property distribution, but even then it is not necessary to plead fault as a cause of action.[104] Further, in many Hybrid Jurisdictions, fault is not a factor in property distribution or alimony, so there is no conceivable purpose other than for the fault-asserting parties to have the emotional satisfaction of airing their grievances in court or the strategic benefits from delaying their spouses' freedom, their spouses' receipt of their share of the marital assets, or both.

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102 Not included in this category are those states whose statutes provide a no-fault option, but allow both parties to waive it or one party to veto it because (1) the state requires the consent of both parties before no-fault divorce can be granted, or (2) it permits parties to at the time of marriage waive their future right to no-fault divorce by entering into a covenant marriage. Those states are discussed in Part D below.

103 *See*, *e.g.*, Sadeeshkumar v. Venugopal, 310 A.3d 689, 694 (N.J. Super. Ct. App. Div. 2024) (holding that, where the wife had pled irreconcilable differences, it was error to deny the husband's motion to amend to assert a counterclaim based on extreme cruelty and irreconcilable differences); *see also* Palermo v. Palermo, No. 2010/15824, 2011 WL 7711557, at *12, 950 N.Y.S.2d 724 (Table) (N.Y. Sup. Ct. Oct. 20, 2011) ("In deciding the grounds for divorce …, the legislature can do what it wishes . . . . The legislature can proceed at its own speed"); Perlberger v. Perlberger, 626 A.2d 1186, 1193-95 (Pa. Super. Ct. 1993) (affirming the denial of divorce on fault grounds but granting the divorce on no-fault grounds).

104 *See* Mick-Skaggs v. Skaggs, 766 S.E.2d 870 (S.C. Ct. App. 2014) (both parties sought divorce on the grounds of adultery where it acted as a bar to alimony, but the court granted the divorce on the no-fault ground of separation and the appellate division affirmed, holding "because the granting of a divorce to Wife on the ground of adultery would not have dissolved the marriage any more completely, we need not alter the family court's decision on this issue").

In *Rich v. Acrivos*,[105] a Pennsylvania court confronted that exact situation. A wife filed a complaint and the required affidavit "stating that the parties had lived separate and apart for at least two years, and that the marriage was irretrievably broken."[106] The husband alleged fault-based grounds for divorce, including adultery and desertion, and appealed when the court, following a hearing, granted the divorce.[107] As the court commented,

> [i]t is apparent . . . that Mr. Acrivos is consumed by the perceived injustice of his former wife's actions and distressed by her ability to obtain a no-fault divorce. As difficult as it may be, Mr. Acrivos needs to accept the fact that his marriage ended in divorce, stop his relentless pursuit of his ex-wife and move forward with his life.[108]

The appellate court further advised that the trial court could have proceeded without a hearing, under Pennsylvania's statute that expressly permits it to do so if grounds for divorce are established under the law's no-fault provisions.[109]

Courts may be understandably frustrated with the inefficiency of having to try an at-fault divorce when an asserted no-fault ground is already satisfied. *Mahar v. Clark*[110] exemplifies that. There, during a six-day trial, the court tried the cause of action where the husband had pled irreconcilable differences, and the wife had pled extreme cruelty. Given that New Jersey precludes fault from being considered in equitable distribution, it was proposed that the wife dismiss her claim for extreme cruelty to "save the time," but she refused.[111] After the close of the husband's case, the trial court limited the wife's testimony on her counterclaim, such as by asking her to summarize instead of read each alleged act of cruelty and denying the wife's request to call witnesses to establish each act of extreme cruelty.[112] Clearly frustrated, the judge told the wife some of her testimony was "unnecessary" and "delaying the trial," and that he "wouldn't allow [her] to bring[] lay witnesses on

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105 815 A.2d 1106 (Pa. Super. Ct. 2003).

106 *Id.* at 1107.

107 *Id.*

108 *Id.* at 1109.

109 *Id.* (citing 23 Pa. Cons. Stat. § 3301(e)).

110 Docket No. A-2212-20, 2022 WL 1397373 (N.J. Super. Ct. App. Div. May 4, 2022)

111 *Id.* at *1, *3.

112 *Id.* at *8.

a cause of action."[113] The court ultimately granted a dual judgment of divorce on the grounds of irreconcilable differences, holding that the wife had "failed to produce any 'legitimate' or 'substantial proofs' supporting the claim" of extreme cruelty.[114] The appellate court affirmed. Notwithstanding the wife's complaint that she had been denied the opportunity to put on her proofs, the court reasoned: "The trial court . . . used its authority . . . to expedite the proceedings. . . . The court afforded defendant the opportunity to present evidence of the alleged extreme cruelty, about which defendant herself testified and gave examples."[115]

B. *The "No Fault" (but Mostly "Some Fault") States*

As of September 2024, the only grounds for divorce in eighteen states and the District of Columbia are no-fault grounds like incompatibility, irreconcilable differences, and, in the case of North Carolina, separation.[116] Yet only two of these jurisdiction—Maryland and the District of Columbia—preclude a court from delaying no-fault divorce or scrutinizing and ruling on the sufficiency of a party's reason to seek a divorce.[117] That is, when a party in the District of Columbia or Maryland verifies that he or she seeks to end a marriage because it is broken, the court must conclude it is broken, without further delay or inquiry into whether the marriage should be maintained against the petitioning party's wishes.[118] This development is recent.

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113 *Id.* at *7-*8.

114 *Id.* at *8.

115 *Id.* at *9.

116 These states are: California (Cal. Fam. Code § 2310); Colorado (Col. Rev. Stat. § 14-10-106); District of Columbia (D.C. Code § 16-904); Florida (Fla. Stat. Ann. § 61.052); Hawaii (Haw. Rev. Stat. §§ 580-41, 580-42); Illinois (750 Ill. Comp. Stat. Ann. 5/401); Iowa (Iowa Code Ann. § 598.17); Kentucky (Ky. Rev. Stat. Ann. § 403.170); Maryland (Md. Code Ann., Fam. Law § 7-103); Michigan (Mich. Comp. Laws Ann. § 552.6); Minnesota (Minn. Stat. Ann. § 518.06); Montana (Mont. Code Ann. § 40-4-104); Nebraska (Neb. Rev. Stat. § 42-361); Nevada (Nev. Rev. Stat. § 125.010); North Carolina (N.C. Gen. Stat. Ann. § 50-6); Oregon (Or. Rev. Stat. § 107.025(1)); Washington (Wash. Rev. Code Ann. § 26.09.030); Wisconsin (Wis. Stat. Ann. § 767.315); and Wyoming (Wyo. Stat. Ann. § 20-2-104). In some of these states, such as California and Wyoming, insanity or incapacity are additional grounds, but these are not categorized as fault grounds for purposes of this article.

117 D.C. Code § 16-904; Md. Code Ann., Fam. Law § 7-103.

118 *Id.*

Maryland amended its divorce statute to eliminate fault grounds and empower one spouse to obtain a divorce in this manner in October 2023; the District of Columbia did so effective January 2024.[119]

The other jurisdictions that lack fault grounds for divorce, as well as fifteen of the Hybrid jurisdictions—*i.e.* a total of thirty states—allow a court to inquire into the cause of action for divorce when one party objects to a no-fault divorce, *even when fault is not asserted*.[120] None of them are "pure no-fault" states; at best, they are "some fault" states because their citizens may find their right to divorce subject to a trial in which the court will determine whether they have met their burden of showing that the facts of

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119 *Id*.

120 Those states are: Alabama (Ala. Code § 30-2-1(9); Arizona (Ariz. Rev. Stat. Ann. § 25-312); California (Cal. Fam. Code § 2311); Colorado (Colo. Rev. Stat. Ann. § 14-10-110); Connecticut (Conn. Gen. Stat. Ann. § 46b-40(c)); Delaware (Del. Code Ann. tit. 13, § 1503); Florida (Fla. Stat. Ann. § 61.052; Ryan v. Ryan, 277 So.2d 266 (Fla. 1973) ("We do not view the matter of dissolution as being such a simple, unilateral matter of one mate simply saying 'I want out.' All of the surrounding facts and circumstances are to be inquired into"); Hawaii (Haw. Rev. Stat. §§ 580-41, 42); Idaho (Idaho Code ann. § 32-611*)*; Indiana (Ind. Code § 31-15-2-15); Iowa (Iowa Code Ann. § 598.17); Kansas (*see* Gordon v. Gordon, 545 P.3d 328 (Kan. 1976) (courts will try the issue of whether parties are incompatible if they do not agree on the issue)); Kentucky (Ky. Rev. Stat. Ann. § 403.170); Massachusetts (Mass. Gen. Laws ch. 208, § 1A); Michigan (Mich. Comp. Laws Ann. § 552.6); Minnesota (Minn. Stat. § 518.13); Missouri (Mo. Rev. Stat. § 452.305, 452.320); Nebraska (Neb. Rev. Stat. § 42-361); New Hampshire (N.H. Rev. Stat. Ann. §§ 458:7, 458:7-a); New Jersey (*see Steiner*, 269 A.3d at 459); New Mexico (*see* Joy v. Joy, 734 P.2d 811, 814 (N.M. 1987) ("a party alleging incompatibility as a basis for dissolution of marriage must present evidence to establish the fact of incompatibility"); North Dakota (N.D. Cent. Code § 14-05-09.1; Larson v. Larson, 234 N.W.2d 861, 865 (N.D. 1975) (finding evidence before the court, including the parties' testimony, supported trial court's finding of irreconcilable differences sufficient to dissolve the marriage); Oklahoma (Okla. Stat. Ann. tit. 43, §101; Vandervort v. Vandervort, 134 P.3d 892, 894 (Okla. Civ. App. 2005) ("Incompatibility must be established 'by proof, objective in its character'"); Oregon (*see In re* Dunn, 511 P.2d 427, 429 (Or. Ct. App. 1973) (establishing a test for courts to use to evaluate incompatibility)); Pennsylvania (23 Pa. Cons. Stat. Ann. § 3301); Rhode Island (R.I. Gen. Laws §§ 15-5-2, 15-5-3.1(b)); Utah (*see* Haumont v. Haumont, 793 P.2d 421, 427 (Utah Ct. App. 1990) (one must show proof of irreconcilable differences); Vermont (Vt. Stat. Ann. tit. 15, § 551(7)); Washington (Wash. Rev. Code Ann. § 26.09.030); and Wyoming (Wyo. Stat. Ann. § 20-2-104; Grosskopf v. Grosskopf, 677 P.2d 814, 817 (Wyo. 1984) (courts consider fault in determining who is the "aggrieved party on the grounds of irreconcilable differences").

their marital relationship justify its dissolution, proofs that necessarily incorporate considerations of fault.

"Some fault" divorce is the phrase Justice Richard A. Dollinger used to describe such schemes in the 2011 New York case of *Palermo v. Palermo*.[121] There, the plaintiff wife had separated and filed for divorce from her husband in 2000, ten years before New York adopted no-fault divorce, and she endured—and lost—a jury trial in which she claimed that her husband's treatment of her was cruel and inhuman.[122] In 2011, shortly after New York adopted no-fault divorce, she filed for divorce again, this time on no-fault grounds.[123] Her husband asserted he had the right to a trial on that issue because, although New York's no-fault divorce law provides that divorce may be grounded on one party's sworn declaration that their relationship had "broken down irretrievably for a period of at least six months," another statute provides for "a right to trial by jury of the issues of the grounds for granting divorce."[124]

Justice Dollinger recognized the "apparent collision of the no-fault entitlement . . . and the trial right" under these statutes and concluded that the legislature intended to provide estranged couples with an easy, "incontestable basis" for dissolution to avoid the issues that arise from fault-based grounds, where couples are often "forced to invent false justifications" to obtain a divorce.[125] "False accusations and the necessity to hold one partner at fault often result in conflict within the family. The conflict is harmful to the partners and destructive to the emotional wellbeing of children. Prolonging the divorce process adds additional stress to an already difficult situation."[126]

To construe the statute to permit the husband's trial right outweighed the wife's right to divorce based solely on her sworn declaration would require a trial in which the "parties describe their intensely personal lives in public, before their families and the courts."[127] The court recognized that this would become

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121 2011 WL 7711557, at *7.

122 *Id*.

123 *Id.*; N.Y. Dom. Rel. Law § 170(7).

124 2011 WL 7711557, at *7; N.Y. Dom. Rel. Law § 173.

125 *Id.*

126 *Id.*

127 *Id.* at *6.

essentially a fault trial that "leads to a counterproductive, if not absurd result: a jury trial on the question of whether the party has properly sworn to the irretrievable breakdown, a fact which is readily apparent to the court upon a review of the face of the pleadings."[128]

Justice Dollinger went on to illustrate what he viewed as the absurdity of a trial on the cause of action for a divorce based on no-fault grounds, as it would inquire into the following intrusive fault-centered factors antithetical to the intent behind no-fault divorce:

> How far "broken" does the marriage have to be to be irretrievable? What proof is necessary? Is the court empowered to decide that a marriage can be repaired even if one party states, under oath, that it is their "view" that the marriage cannot be repaired? Does the court, in deciding whether a marriage is irretrievable, decide the sincerity—or veracity—of a spouse who states, under oath, that he or she no longer wants to be married? Is any court prepared to state: "the court finds that even though one party says that they want to be divorced, I find that the marriage is not broken?" How will the court determine whether a spouse's belief that marriage is broken is justified? What facts are necessary to establish that a spouse has a good faith belief that the marriage is broken? Is reconciliation a factor? What proof is required to show some possibility of reconciliation? How significant does the "possibility of reconciliation" have to be for the court to conclude that it is significant enough to decline to grant the divorce? Is the court required to find that one spouse is telling the truth about the "possibility of reconciliation" while making the corollary decision that the other is not being truthful when he or she says that reconciliation is not possible?[129]

The court held that "the evil that [no-fault] legislation was designed to eliminate—public trials on fault—will continue into future divorce cases"[130] if one party were permitted to examine the other spouse's "'belief' about their marriage or their 'views' of the possibility of reconciliation."[131] It would result in "New York courts [being] plunged into an endless evaluation of people's beliefs and inner most perceptions of their marriages because . . . there are no objective specific standards for evaluating the 'possibility of reconciliation.'"[132] Justice Dollinger would not do it. Although *Palermo*

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128 *Id.*
129 *Id.* at *7-*8.
130 *Id.* at *7.
131 *Id.*
132 *Id.*

is an unreported trial court decision, and other equal courts in New York had held differently prior to *Palermo*, New York courts since *Palermo* have followed its conclusion that a party's sworn certification that a marriage is irretrievably broken is not an issue to be tried.[133]

That is not the case in the thirty "some fault" states. Many of those states' statues are silent as to whether a court must make findings to establish no-fault grounds are met, but courts have held that is the case.[134] Other states' statutes expressly provide that no-fault divorce may be granted upon a court making "findings" that the no-fault ground exists.[135] And still others more explicitly

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133 *See, e.g.*, Stancil v. Stancil, 1 N.Y.S.3d 917 (N.Y. Sup. Ct. 2015).

134 In New Jersey, for example, N.J. Stat. Ann. § 2A:34-2(i) does not say court findings are needed to establish irreconcilable differences, but the Appellate Division in *Steiner*, 269 A.3d at 459, held that "whatever ground [for divorce] asserted must be proven by the party seeking divorce." Likewise, Oklahoma's statute does not require court findings to establish "incompatibility," yet the appellate court in *Vandervort*, 134 P.3d at 894, held that "[i]ncompatibility must be established 'by proof, objective in its character, of causes to which marital disharmony is attributed [and cannot be] bottomed on a mere subterfuge or afterthought [without] a substantial foundation.'") (citation omitted). The courts have taken similar approaches in Oregon and Utah, whose statutes also do not require court findings. *See Dunn*, 511 P.2d at 429 (stating that the Oregon test for irreconcilable differences is "(1) whether or not such difference is one that reasonably appears to the court to be in the mind of the petitioner an irreconcilable one, and (2) whether or not the court concludes that the breakdown of that particular marriage is irremediable."); *Haumont*, 793 P.2d at 427 (holding that while fault is not a required showing to establish irreconcilable differences in Utah, one must show proof of irreconcilable differences).

135 *See, e.g.,* Ala. Code § 30-2-1(9) (ruling that courts must find an "irretrievable breakdown of the marriage"); Ariz. Rev. Stat. Ann. § 25-312 (divorce shall be granted if the court makes findings that a ground exists, including that the marriage is irretrievably broken); Conn. Gen. Stat. Ann. § 46b-40(c) (requiring a court "finding" of irretrievable breakdown, incompatibility, adultery, or one of a number of other grounds); Del. Code tit. 13, § 1503 (requiring a court finding of grounds for divorce and providing that failure to establish that a marriage is irretrievably broken is a defense to a divorce action); Vt. Stat. Ann. tit. 15, § 551(7) (stating that a divorce may be entered on no-fault grounds if a "court finds that the resumption of marital relations is not reasonably probable"); Wash. Rev. Code Ann. § 26.09.030 (providing for proceedings in the event a party's claim that the marriage is irretrievably broken is contested). In *Eversman v. Eversman*, 496 A.2d 210 (Conn. App. Ct. 1985), the Connecticut appellate court described the detailed testimony regarding extramarital affairs and reconciliation attempts on which the court relied in "finding" that a marriage had broken down irretrievably.

require courts to consider "all relevant factors" or hold hearings whenever there is a dispute about irreconcilable differences or similar no fault grounds.[136]

The liberalizing approach *Palermo* effectively established for New York, the last state to adopt no-fault divorce, stands in stark contrast to the approach taken by California, the first state to adopt no-fault divorce.

Not long after California gave its citizens the right to no-fault divorce, its Supreme Court took away the promise of easier divorce, at least for many divorcing couples, in *In re Marriage of McKim*.[137] There, the California Supreme Court held that "the court, not the parties, must decide whether the evidence adduced supports findings that irreconcilable differences do exist and that the marriage has broken down irremediably and should be dissolved," and rely on the "subjective state of mind of the parties" in making that decision.[138] The determination is "not a ministerial one," a California appellate court held very soon after.[139] The way this approach can lead to fault-infused trials on supposedly no-fault divorce is demonstrated in *In re Marriage of Greenway*, where an appellate court affirmed a divorce being granted, but only because the husband's claim about irreconcilable differences was justified by "substantial evidence."[140] At trial, the husband said repeatedly that he was trying "to stop [his wife] from further interfering with his medical care. He explained his relationship with [her] had been bad 'for the last thirty years' . . . he did not like

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136 *See, e.g.*, Colo. Rev. Stat. Ann. § 14-10-110 (requiring a court finding of irretrievable breakdown and, if contested, to "consider all relevant factors, including the circumstances that gave rise to the filing of the petition and prospect of reconciliation"); Haw. Rev. Stat. §§ 580-41, 42 (requiring findings and stating that if either party contests that the marriage is irretrievably broken, the court shall have hearing to "consider all relevant factors, including the circumstances that gave rise to the filing of the complaint and the prospect of reconciliation"); Ky. Rev. Stat. Ann. § 403.170 (providing that if either party denies that marriage is irretrievably broken, the court shall make findings after considering "all relevant factors, including the circumstances that gave rise to filing the petition and the prospect of reconciliation"); Me. Rev. Stat. Ann. tit. 19-A, § 902(2) (stating that if one party opposes a divorce, the court may "may require both parties to receive counseling").

137 493 P.2d 868, 872 (Cal. 1972).

138 *Id.*

139 *In re* Marriage of Walton, 104 Cal. Rptr. 472, 480 (Cal. Ct. App. 1972).

140 158 Cal. Rptr. 3d 364, 383 (Cal. Ct. App. 2013).

when she visited him . . . he did not think their relationship could be restored." [141]

Other recent cases in "some fault" jurisdictions have at trial delved even farther into the inner workings of parties' marriages and their mutual grievances in order to adjudicate whether no-fault grounds have been proven. For example, in 2022, the Idaho court in *Bettwieser v. Bettwieser* found the following "substantial reasons to discontinue the marriage" on the ground of irreconcilable differences: the parties' "different religious beliefs," the husband's exclusion of the wife from household decisions or family rulemaking, the husband's "very controlling nature," providing as an example that he would not let his wife play mixed-doubles tennis with other men and noting that his controlling nature "interfered in [the wife's] ability to interact with her own family."[142]

The year prior, New Jersey's Appellate Division in *Steiner* effectively endorsed courts considering fault-laden inquiries in trials about no-fault divorce. There, it affirmed the trial court's authority to conduct a probing four-day trial into irreconcilable differences—and reversed the trial court's award of counsel fees to the wife for the husband's bad faith—where the wife had filed for divorce based on irreconcilable differences; the husband had counterclaimed for the same relief in a verified complaint; in the interim, he had sought restraining orders against the wife; and then withdrawn his counterclaim and demanded a trial on the cause of action.[143] Despite these facts, the court held, the four-day trial had been appropriate because "divorce isn't available on mere request or demand."[144]

To prove that "divorce isn't available on mere request or demand," the appellate court devoted four pages of its opinion to the evidence adduced at trial about the parties' grievances against one another.[145] These included: the wife "felt controlled by [her husband]"; and that she had "never been treated as a partner"; she did not like how her husband treated their children and "unfairly favored their son . . . over their three daughters"; she objected

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141 *Id.*

142 Docket No. 48656, 2022 WL 17174960 (Idaho Ct. App. Nov. 23, 2022).

143 269 A.3d at 457-61.

144 *Id*. at 459.

145 *Id.*

to how he made "financial decisions without her knowledge or input," and gave examples of specific loans he gave and what the wife believed were the unfair provisions in the husband's will; he "treated her as if she were 'not important'"; "he was never willing to 'share control' over money"; he refused marriage counseling; he spoke to her in a way that "disturbed" her, citing specific comments he made; she felt "mistreated" and that the husband had a "lack of respect" for her; "there's no affection . . . anymore . . . [n]o touching"; and, the wife testified, there had been a physical altercation early in the marriage where the husband "twisted [her] arm behind [her] back."[146] She defended against charges that her complaints were not sufficient grounds for divorce because, for example, three years earlier she and her husband had hosted a "family dinner for their grandson . . . and a breakfast after Yom Kippur the following month," explaining it was not because the parties were happily married but rather for the sake of appearances in front of the grandchildren.[147] For his part, the husband admitted on the stand that—notwithstanding his forcing this four-day trial—the parties did, indeed, "now have irreconcilable differences"; they had "significant disagreements"; and their marriage was "not harmonious."[148] He even testified that he felt his wife "harasses him on a regular basis" and "disagree[d] with him 'morning, noon, and night."[149]

Similar examples of fault-infused no-fault divorce trials abound. For example, in *John v. Fritz-Klaus*, a Wisconsin case, where the wife believed the marriage was salvageable, the husband had to testify to the nature of the parties' problems and the "'thousands of hours of introspection . . . talking to family and friends, and attending the counseling sessions'" that led him to the conclusion that the marriage was irretrievably broken and could not be saved by any amount of counseling.[150] In *Gordon v. Gordon*, the wife challenged irreconcilable differences at trial, and the Kansas Supreme Court's opinion reflects consideration of evidence showing "over eight years" of "strife and serious disagreements

146 *Id*. at 459-60.
147 *Id*. at 461.
148 *Id*. at 123-24.
149 *Id*. at 124.
150 917 N.W.2d 232, at *3 (Wis. Ct. App. 2018).

between the parties."[151] In *Szramkowski v. Szramkowski*, a Missouri case in which a husband had denied his wife's claim that their marriage was irretrievably broken, the court's conclusion to the contrary reads like findings of fault, including such findings as that the husband had "verbally abused" the wife and physically assaulted her during the marriage.[152]

C. *Pre-Divorce Separation States*

In several states, a specified period of separation is either the only no-fault ground for divorce or the only ground for divorce.[153] This can be a double-edged sword for the party seeking a divorce. Although the exit may be easier if the court is not inquiring into the grounds for divorce, the length of the waiting period and concomitant ramifications can be onerous.

For example, in South Carolina, a Hybrid Jurisdiction, the only no-fault ground for divorce is that the parties have lived apart without cohabitation for a period of one year prior to the filing of a divorce complaint.[154] Across the border in North Carolina, a "Pure No-Fault Jurisdiction," the only ground for divorce is a continuous separation for one year prior to instituting suit.[155] The Hybrid Jurisdictions of Virginia and West Virginia also require one year separation "without interruption" prior to a no-fault divorce,

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151 545 P.2d at 330.

152 No. ED 93149, 2010 WL 2284222, *6 (Mo. Ct. App. June 8, 2020).

153 These states include: Arkansas, providing fault-based grounds and no-fault ground other than insanity such as being eighteen continuous months without cohabitation (Ark. Code Ann. § 9-12-301(5)); Louisiana, providing for fault based grounds, with the only no-fault ground being continuous separation of between 180 and 365 days, depending on whether there are minor children of the marriage (La. Civ. Code art. 103, 103.1); North Carolina, providing for no fault-based grounds, and that the only grounds for divorce are insanity or separation of one consecutive year on the application of either party (N.C. Gen. Stat. Ann. § 50-6); South Carolina, providing fault-based grounds and no no-fault ground other than continuous separation for one year (S.C. Code Ann. § 20-3-10); Virgina, creating fault-based grounds and no no-fault ground other than continuous separation for one year (Va. Code Ann. § 20-91); and West Virginia, providing for no fault-based grounds, and stating that the only grounds for divorce is separation for one year without interruption (W. Va. Code Ann. § 48-5-202).

154 S.C. Code Ann. § 20-3-10.

155 N.C. Gen. Stat. Ann. § 50-6; Bruce v. Bruce, 339 S.E.2d 855, 856 (N.C. Ct. App. 1986) (one year period applies to the time prior to filing suit).

while Arkansas requires a pre-complaint separation of eighteen months, and Louisiana requires between six months and one year, depending on whether there are children of the marriage.[156]

In these Pre-Divorce Separation States, therefore, one can still be sentenced to remain married for years before the right to be unmarried vests. The burden this waiting period places on the divorcing spouse can be significant. In South Carolina and Virginia, for example: no alimony may be awarded if a spouse commits adultery before the signing of a written settlement agreement or entry of a permanent order for maintenance, support, and/or property settlement;[157] and the offense of adultery includes sex with another after physically separating from one's spouse.[158] Thus, South Carolina and Virginia may deny a spouse who is seeking to exit a marriage on no fault grounds the ability to date (and have sex, or date in a manner that a court could conclude involved sexual activity) during the length of the statutory separation period; the right to alimony; or both.[159] In *McElveen v. McElveen,* for example, the South Carolina Court of Appeals held that a divorcing husband had not proven by a clear preponderance of the evidence that his wife's post-separation relationship with another man was adulterous, but based on an exhaustive review of the evidence adduced, it was an "extremely close case."[160] This prospect may drive divorcing parties in these states to allege fault-based grounds, which do not have such waiting periods.[161]

Separation as grounds for divorce is more liberalizing in other states, giving parties an alternative to pleading irreconcilable

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156 *See supra* notes 101, 153.

157 S.C. Code Ann. § 20-3-130(A); Va. Code. Ann. § 20-107.1(B).

158 S.C. Code Ann. § 16-15-70; Va. Code Ann. § 18.2-365.

159 *See* Krause v. Krause, No. CH90-19, 1990 WL 751283, *3 (Va. Cir. Ct. Sept. 14, 1990) (explaining that although ordinarily "fault bars spousal support," pursuant to Va. Code Ann. § 20-107.1, the court may still award spousal support notwithstanding the existence of a fault ground "if the court determines from clear and convincing evidence that a denial of support … would consistent a manifest injustice, based on the respective degrees of fault … and the relative economic circumstances of the parties."). Adultery is also a bar to alimony in North Carolina, but North Carolina defines adultery as sex outside the marriage before separation, meaning there is no penalty for *pendente lite* sex. N.C. Gen. Stat. Ann. § 50-16.1A(3).

160 506 S.E.2d 1, 9 (S.C. Ct. App.1998), *disapproved on other grounds,* Wooten v. Wooten, 615 S.E.2d 98, 108 (S.C. 2005).

161 *See* S.C. Code Ann. § 20-3-10; Va. Code Ann. § 20-91(A).

differences and a way to avoid the scrutiny of the grounds for divorce reflected in the cases discussed above. For example, Illinois requires a court to find that "reconciliation ha[s] failed or future attempts at reconciliation would be impracticable and not in the best interests of the family" in order to grant divorce on the ground of irreconcilable differences, but holds that if parties have been separated for six months prior to the entry of judgment, "there is an irrebuttable presumption that the requirement of irreconcilable differences has been met."[162] Ohio only permits divorce based on incompatibility with consent; otherwise divorce may be granted without judicial inquiry into the parties' relationship upon a showing of a one year separation without interruption.[163] Wisconsin, a "Some Fault Jurisdiction," is similar, but more onerous in that the separation period must have begun twelve months prior to commencement of the action, whereas Ohio permits it to be twelve months prior to the judgment of divorce.[164]

Of course, requiring a person to vacate his or her home, in many states long before even filing, is a barrier to divorce. A person may not be able to afford to leave. If the separation period begins before filing suit, it means that one must leave the marital home to trigger the separation period before having the ability to file suit for divorce and give rise to a claim for *pendente lite* support. Alternatively, where children are involved, separating before filing for divorce implicates custody as well as the children's wellbeing. And, of course, a person may not want to leave because she or he is attached to the home and wants to keep it after divorce.

Many courts hold that the separation period does not necessarily require either spouse to vacate the marital home; rather, the inquiry turns on whether they were living substantively separate lives. For example, in *Scott v. Scott*, the Vermont Supreme Court held that "'[c]ontinued residence in the same dwelling is but one factor to be considered with others in determining the nature of the relationship between the parties.'"[165] While the court acknowledged

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162 750 Ill. Comp. Stat. Ann. 5/401.

163 Ohio Rev. Code Ann. § 3105.01(J), (K).

164 Wis. Stat. Ann. § 767.315; Harding v. Harding, No. 85022, 2005 WL 1406293, *3 (Ohio App. June 16, 2005) (holding one year period refers to that amount of time "prior to the granting of a divorce").

165 586 A.2d 1140, 1142 (Vt. 1990) (quoting Buxton v. Buxton, 527 A.2d 660, 663 (Vt. 1987)).

that some other states had "concluded that the fact that the parties have continued to live under the same roof precludes a finding that they have lived apart,"[166] the court instead looked to cases from D.C. and Delaware holding that "the 'essential thing' is not separate roofs, but separate lives," and "'a couple may live separate and apart even under the same roof.'"[167] Thus, in *Scott*, the Vermont Supreme Court reversed a judgment granting a divorce to the wife, finding that she had not carried her burden of showing that the parties had lived separate and apart for six months, as her own evidence showed that at relevant times, she and her husband had slept in the same bed, watched television together, and held themselves out as husband and wife.[168]

D. *Jurisdictions That May Require Fault*

Some states provide mechanisms that negate no-fault provisions entirely.

Mississippi and Tennessee permit no-fault divorce only if both parties consent, thereby empowering the objecting party to veto his spouse's bid to end the marriage without scrutinizing fault.[169] In West Virginia, one only has a unilateral right to a no-fault divorce (i.e., without first obtaining the other party's consent) after a year's separation; pursuing a no-fault divorce earlier than that requires both parties' consent as in Mississippi or Tennessee.[170] South Dakota's statute is not quite so onerous in its consent requirement. There, a court may not grant a no-fault divorce without consent or unless one party has not made a general appearance, but even where there is no consent, a court may decree the parties divorced if they have not reconciled after a thirty-day waiting period.[171]

Courts often apply the consent requirement strictly. For example, the Mississippi Supreme Court has held:

> [t]he parties must do more . . . than implicitly consent to a divorce on the grounds of irreconcilable differences and raise issues in their pleadings.

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166 *Id.* (citing Oxford v. Oxford, 373 S.W.2d 707, 708 (Ark. 1963); Lillis v. Lillis, 201 A.2d 794, 796-97 (Md. 1964)).

167 *Id.* (quoting Boyce v. Boyce, 153 F.2d 229, 230 (D.C. Cir. 1946); Heckman v. Heckman, 245 A.2d 550, 551 (Del. 1968)).

168 *Id.*

169 Tenn. Code Ann. § 36-4-103.

170 W. Va. Code §§ 48-5-201, 202.

171 S.D. Codified Laws § 25-4-17.2.

> The additional statutory requirements for a valid mutual consent are: (1) The consent must be in writing and signed personally by both parties (2) the consent must state that the parties voluntarily consent to permit the court to decide the issues upon which the parties are unable to agreement; (3) the consent must specifically set forth the issues upon which the parties are unable to agree; and (4) the consent must state that the parties understand that the decision of the court shall be a binding and lawful judgment.[172]

That means that, as the Court of Appeals of Mississippi held in *Reno v. Reno*, mere verbal consent, not reduced to a writing satisfying the statutory requirements, is insufficient and precludes the grant of a divorce on the grounds of irreconcilable differences.[173]

Finally, Arizona, Arkansas, and Louisiana enacted covenant marriage statutes[174] that allow couples to waive their future rights to no-fault divorce before they even say, "I do." As one scholar put it, they can "live to regret it when Dr. Jekyll turns into Mr. Hyde."[175] Those who choose covenant marriages in these states are required to undergo pre-marital counseling and commit to having available only limited grounds if a divorce is sought.[176] All three states require a two-year separation to obtain a divorce in a covenant marriage unless certain conditions are met (for example, allowing for immediate divorce where there is domestic violence).[177] This two-year separation period is longer than that applicable to non-covenant marriages in these states.[178]

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172 Cassibry v. Cassibry, 742 So. 2d 1121, 1124 (Miss. 1999) (citing Cook v. Cook, 725 So. 2d 205, 206 (Miss. 1998); Massingill v. Massingill, 594 So. 2d 1173, 1177 (Miss. 1992)).

173 Reno v. Reno, 119 So. 3d 1154, 1155-56 (Miss. Ct. App. 2013); *see also*, *e.g.*, Perkins v. Perkins, 787 So. 2d 1256, 1264 (Miss. 2001) (holding "that the statutory requirements . . . were not met in this case and that the chancellor exceeded his authority in granting a divorce on the ground of irreconcilable differences").

174 Ariz. Rev. Stat. Ann. § 25-901; Ark. Code Ann. § 9-11-803; La. Rev. Stat. Ann. § 9:272.

175 *Marriage Options, Louisiana Style*, Cedar Rapids Gazette, Aug. 13, 1997, at 2A.

176 Ariz. Rev. Stat. Ann. §§ 25-901(B)(2), 903; Ark. Code Ann. § 9-11-803(a)(1); La. Rev. Stat. Ann. §§ 9:272(C), 273(A)(2)(a).

177 Ariz Rev. Stat. Ann. § 25-903(5); Ark. Code Ann. § 9-11-808(a)(4); La. Rev. Stat. Ann. § 9:307(a)(5).

178 Ariz. Rev. Stat. Ann. § 25-312(B) (no required separation period where marriage is irretrievably broken); Ark. Code Ann. § 9-12-301 (18-month separation period); La. Civ. Code Ann. art.103.1 (180-day separation period where there are no minor children, 365-day separation period where there are minor children).

Courts strictly apply the requirements for a covenant marriage.[179] In the Arizona case of *Phillips v. Schwartz*,[180] the wife petitioned for dissolution of the parties' covenant marriage, alleging that the husband "had been emotionally and physically abusive toward her and the child, and he 'consistently abused alcohol' during the marriage,"[181] both of which are grounds for divorce under Arizona's covenant marriage statute.[182] After a hearing on *pendente lite* issues, the trial court found that the wife's evidence did not satisfy any of the grounds for divorce set forth in the statute.[183] However, the court stayed the matter under the provision of the statute allowing for a divorce after two years of separation, since the requisite two years had not yet elapsed.[184] The appellate court reversed, holding that the trial court had exceeded its authority in considering the two-year separation ground because it was not pled in the wife's complaint.[185] The appellate court also held that the trial court erred in essentially deciding the case on the merits at an initial temporary-order hearing: "there is no requirement that the court must decide whether any of those grounds alleged in the petition have been proven at the *outset* of a proceeding. And because a finding on at least one ground is necessary for a final decree the parties are entitled to engage in the litigation process, including disclosure and discovery, before a final determination."[186]

The jurisdictions in this last category are the furthest from pure no-fault divorce. Whereas, as discussed above, other jurisdictions provide litigants opportunities to insert fault into

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179 *See*, *e.g.*, Thomas v. Thomas, 263 So.2d 515, 516 n.2 (La. Ct. App. 2018) (noting, in a child support case that "[t]he record reflects no divorce has been granted because neither party has filed pleadings under the proper provisions for a covenant marriage"); Dickson v. Cook, 2021 Ark. App. 196, 196 (Ark. Ct. App. 2021) (noting that trial court had granted the husband's motion to dismiss because the parties had not been separated a sufficient length of time to satisfy the covenant marriage statute, though noting that an independent divorce had been granted on other grounds in the interim).

180 530 P.3d 627 (Ariz. Ct. App. 2023).

181 *Id.* at 629.

182 Ariz. Rev. Stat. Ann. § 25-903(4), (7).

183 *Phillips*, 530 P.3d at 629.

184 *Id.*

185 *Id.* at 630.

186 *Id.* at 631 (emphasis in original).

their purportedly "no fault" claims, many would-be divorcees in these states will find themselves without the ability to even assert claims for no-fault divorce, and instead be forced to proceed on fault grounds.

III. Final Reflections

No-fault divorce is not all it's promised to be given that nearly all states' no-fault divorce laws give divorce-resistant spouses the opportunity to demand a trial on the grounds for divorce, which, first, threatens the divorce-seeking spouse with the prospect of being forced to remain in a marriage if she or he does not prevail, and second, opens the door to the fault-laden scrutiny of the grounds for divorce that no-fault divorce was intended to eliminate. Yet, the history also reveals how very far America has come—from nearly all unhappy marriages being *de facto* prisons because divorce was so rarely granted, to the relative freedoms people now have to follow their hearts either into marriage, or out of it.

Studies have shown how no-fault divorce can play a positive role. A 2019 study shows that, rather than encouraging divorce, laws that make divorce easier and quicker result in an *increase* in the number of marriages by at least 9%.[187] Professors Justin Wolfers and Betsey Stevenson famously studied the impact of no-fault divorce laws and in 2006 published research finding an 8 to 16% decrease in female suicide rates after states enacted no-fault divorce laws, as well as an approximately 30% decrease in intimate partner violence among both men and women, and a 10% reduction in women murdered by their partners.[188] Reducing barriers to divorce has also been found to reduce the dangers and costs associated with leaving an abusive marriage, thus enhancing the welfare of all family members by reducing the conflicts that lead to stress and violence when a couple is fighting frequently.[189]

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187 Misty L. Heggeness, *The Upside of Divorce? When Laws Make Divorce Easier, Research Shows Women Benefit, Outcomes Improve*, U.S. Census Bureau (Dec. 18, 2019), https://www.census.gov/library/stories/2019/12/the-upside-of-divorce.html.

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

189 *Id*.

This is not to ignore the criticisms. Beginning in the 1980s and increasing in the 1990s, numerous articles criticizing the no-fault regime began appearing in books, law journals, newspapers, and social science publications. One study concluded that about 70% of divorces occur in low-conflict marriages, and only the remaining roughly 30% of divorces end up benefiting the children of those marriages.[190] And, of course, even if there were no dispute that "easier divorce" is a good thing, these authors agree that the no-fault divorce laws today, as implemented, hardly make divorce easier for many litigants.

While the pushback against no-fault divorce began decades ago, it has ramped up in the past several years. Conservative politicians and policymakers have begun a counter-revolution, trying to make it harder to end marriages by calling for restrictions on or even eliminating no-fault divorce laws. Indeed, some of these individuals have argued that no-fault divorce has "harmed men and even destroyed the fabric of society."[191] In addition to the three states that passed covenant marriages, discussed above, some states are discussing repealing or restricting no-fault divorce laws. For example, in its 2022 party platform, the Texas Republican party asked the state legislature to, among other things, "rescind unilateral no-fault divorce laws [and] to support covenant marriage."[192] In early 2023, Louisiana's Republican Party debated whether to recommend to the state legislature eliminating no-fault divorce, although that initial draft was sent

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190 Paul R. Amato & Alan Booth, A Generation at Risk: Growing Up in an Era of Family Upheaval 220 (Harvard U. Press 1997). This book is based on information contained in Alan Booth et al., Marital Instability over the Life Course (1993), https://web.stanford.edu/group/ssds/dewidocs/icpsr3812/cb3812.y00.pdf, and presents the results of longitudinal data examining how changes in the family over time influence the psychological and social well-being of children as they enter young adulthood. It also relies on the results of other studies about intimate relationships, social integration, psychological well-being, socioeconomic attainment, etc.

191 Anna North, *The Christian Right Is Coming for Divorce Next*, Vox (June 13, 2024), https://www.vox.com/today-explained-newsletter/354635/divorce-no-fault-states-marriage-republicans..

192 Tessa Stuart, *The Next Front in the GOP's War on Women: No-Fault Divorce*, Rolling Stone (May 2, 2023), https://www.rollingstone.com/politics/politics-features/stephen-crowder-divorce-1234727777/.

back to committee for more work[193] and has apparently not yet been submitted. In January 2024, a bill was introduced to eliminate no-fault divorce in Oklahoma.[194] Nebraska's Republican Party platform proposes that no-fault divorce be limited to couples who have no children.[195] The push and pull between more and less restrictive approaches to divorce is hardly new, as the history shows, and it largely explains the current landscape. That the United States has a patchwork of supposedly "no-fault" divorce laws, and nearly all of them permit fault considerations to be put to trial as a potential barrier to divorce, reflects the fact that divorce laws mirror this country's competing values—including women's rights, human freedoms, family values, and judicial efficiency, to name only a few. Practitioners must continue to do their best to navigate their clients through these changing social tides while courts and legislatures continue to grapple with the elusiveness of a perfect dissolution.

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193 Julie O'Donoghue, *Louisiana Republican Party Considers Backing Elimination of No-Fault Divorce*, Louisiana Illuminator (Jan. 11, 2023), https://lailluminator.com/2023/01/11/louisiana-republican-party-considers-backing-elimination-of-no-fault-divorce/.

194 Arwa Mahdawi, *Far-Right Republicans' Latest Target? No-Fault Divorce*, The Guardian (June 15, 2024), https://www.theguardian.com/commentisfree/article/2024/jun/15/republicans-no-fault-divorce.

195 Nebraska GOP website, *Family*, https://ne.gop/family/ (last visited Jan. 20, 2025).

Who Will Speak for the Children: The Case That Shaped Child Protection in America

by
Racheal Mastel*

Once, the protection of children from abuse was almost inconceivable. Certainly, it resembled nothing like what society expects today. Just as "the course of true love never did run smooth,"[1] so too the path through western history for the children has been a bumpy road. But, in the United States, there was a moment in time where the "perfect storm" developed to create a national movement by not just individuals, but organized groups and government systems at both the state and eventually federal levels, towards the investment in the health, safety, and happiness of children. That moment came in the nineteenth century, in New York, in the form of a nine-year-old girl named Mary Ellen Wilson. While history has largely forgotten her name, her story is, in many ways, the bedrock on which modern child protection stands.

The history of children in Western society cannot be judged by modern standards. The sentimentality towards childhood and innocence and the accompanying protective impulses are, for the most part, an invention of the last 175 years. Prior to the middle of the nineteenth century, the law did not seek to protect children from what society currently considers harm.[2] Children were considered chattel, the property of their fathers, and an economic asset.[3] Morally, since the Church became the epicenter of ethics in

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1 William Shakespeare, A Midsummer Night's Dream, Act 1, Scene 1.

2 *See, e.g.,* Holly Brewer, By Birth or Consent: Children, Law, and the Anglo-American Revolution in Authority 1 (2005) ("In sixteenth-century England, children over the age seven were of 'ripe age' to marry. . . . Four-year-olds could make wills to give away their goods and chattels. Children of any age could bind themselves into apprenticeships.").

3 Herbert C. Covey, The Smallest Victims, A History of Child Maltreatment and Child Protection in America 5, 71, 179 (2018).

Western society, children were considered inherently evil, easily led astray, or a *tabula rasa*.[4] The result of those views were moral and legal expectations and rights of parents that included "hardening" children to the world, breaking their wills, beating them into upstanding, obedient citizens, and sending them out to work (taking advantage of their economic value and minimizing their economic drain) at ages that would "shock the conscious" of modern society.[5]

Throughout the seventeenth and eighteenth centuries in America, the law allowed parents, or apprentice/indentured service masters, to use severe corporal punishment to ensure children grew up morally correct.[6] While the law cautioned against being overly severe in beatings, other laws in the colonies allowed adults with charge of children to seek the death penalty for older children who did not respect their parents.[7]

It was not until the nineteenth century, with the rise of the middle class and the progressive movement, that the view of children as innocent and worthy of protection became more commonplace.[8] Even then, this view arose and resonated mostly with the growing middle and upper classes. In the lower socioeconomic strata and among the immigrant communities, children as an economic asset, and the chattel of their parents, had not changed. There was an entire world between the lower and upper classes and for much of the nineteenth century, the struggles of the lower classes were unknown. But Progressives in the nineteenth century, such as Jane Addams, Henry Bergh, and others began to consider morality in a different sense.[9] How people treated others, the relationship between poverty and crime, immigrant assimilation, and similar concerns turned the attention of the middle class to the situation of the lower class.

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4 *Id.* at 38, 180.

5 *Id.* at 10-12, 40-47, 178-80.

6 *See generally* Myra C. Glenn, Campaigns Against Corporal Punishment: Prisoners, Sailors, Women, and Children in Antebellum American (1984).

7 Covey, *supra* note 3, at 183-87.

8 *Id.* at 92, 138.

9 *See* Graham Culbertson, *Jane Addams's Progressive Democracy: Hull-House and the Ethics of Reform*, 95 Soundings: Interdisciplinary J. (2012), https://muse.jhu.edu/pub/2/article/467443.

In the middle of this period, the issue of child maltreatment suddenly drew national attention. While there had been lesser-known individual cases addressing maltreatment by guardians throughout the nineteenth century, it was a young, poor girl named Mary Ellen, and her saviors, the nationally famous Henry Bergh and his attorney Elbridge T. Gerry, who began the changes that led to modern child protection.

It is a tragedy that Mary Ellen, without whom child protection would not be what it is, has been largely forgotten to time. Her story is imperfect, and questions must remain about whether the right persons were brought to justice and what really happened, but of the abuse she suffered there can be no doubt. Although this article presents more questions than it answers about the evidence and testimony given in Mary Ellen's case, its aim is to again make Mary Ellen known to a world shaped in large part by what she endured, and the lessons learned from her rescue.

Long before Mary Ellen, Henry Bergh, the aimless son of a shipping magnate found his calling in protecting animals from cruelty and abuse.[10] He started the American Society for the Prevention of Cruelty to Animals (ASPCA), and pushed legislation in New York to protect trolley horses, stop dog fights, and ensure better treatment for livestock being driven to market. Bergh became known for citizens arrests and dragging offenders to court, where his success rate was mixed, but his name became well known in the press.[11] As time went on, Bergh met Elbridge T. Gerry, a local attorney who volunteered to assist the ASPCA with its legal efforts.[12] While these men were making a name for themselves in New York and the world beyond, a few mere miles away a little girl who would change the world was born.

The story of Mary Ellen Wilson has mostly been pieced together principally from the testimony in her dependency case. Given when the case occurred (including fires that destroyed many municipal court records), the lower socioeconomic status of the participants, and the clear-cut visual evidence of abuse, the record

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10 Ernest Freeberg, A Traitor to His Species: Henry Bergh and the Birth of the Animal Rights Movement 22-23 (2020).

11 *Id.* at 26-27.

12 *See* Janet M. Davis, *The History of Animal Protection in the United States*, Organization of American Historians, https://www.oah.org/tah/november-2/the-history-of-animal-protection-in-the-united-states/ (last visited Dec. 23, 2024).

is full of contradictions as to the first nine years of Mary Ellen's life. Testimony was given by many people, including Martha Score, a woman who cared for Mary Ellen for approximately the first year of her life; John Conner, Mary Ellen's second cousin; Mary Connelly née McCormick, Mary Ellen's adoptive mother and abuser; George Kellock, the administrator of the orphanage from which Mary Ellen was adopted; Etta Wheeler, the aid worker who ensured that Mary Ellen was rescued; and Mary Ellen herself.

The records show that Mary Ellen was born to Frances Wilson, née Connor, in about 1864.[13] Her father is supposedly one Thomas Wilson. Thomas Wilson was Frances's husband and a soldier in the Civil War according to both the testimony of Martha Score, Mary Ellen's first "foster mother," and an affidavit given by John Connor, Frances's cousin.[14] Conversely, testimony offered by Mary Connolly, Mary Ellen's foster mother, states that her first husband, Thomas McCormick, prompted her to adopt Mary Ellen. According to Mrs. Connolly her husband often told her that Mary Ellen and at least two other children in the almshouse from which they adopted Mary Ellen were his children by a mistress.[15]

There is not enough information to confirm who Mary Ellen's biological father was. Neither John Connor nor Martha Score appear to have had any acquaintance or particular knowledge of Thomas Wilson beyond what Frances told them. He was dead before Martha took charge of Mary Ellen.[16] John Connor's testimony indicates that he met Thomas Wilson at least once, enough to testify to what he looked like.[17] But John Connor's only testimony regarding Thomas was to his appearance and where he had served. There is no testimony that John attended the wedding or had, on any occasion, spoken with Thomas. Additionally, research has revealed inconsistencies in what happened to Thomas. John Connor's testimony as to the units Thomas Wilson served in during the civil war

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13 Eric A. Shelman & Stephen Lazoritz, The Mary Ellen Wilson Child Abuse Case and the Beginning of Children's Rights in 19th Century America 213-14 (2005).

14 Affadavit of John Connor, June 8, 1874, reprinted in Shelman & Lazoritz, *supra* note 13, at 106-10; *see also* Testimony of Martha Score, April 21, 1874, reprinted in *id.* at 179-86.

15 Testimony of Mary Connolly, April 10, 1874, reprinted Eric A. Shelman & Stephen Lazoritz, Case #1: The Mary Ellen Wilson Files at 180-83 (2012).

16 Testimony of Martha Score, *supra* note 14, at 181.

17 Affidavit of John Connor, *supra* note 14, at 106.

do not match up with the records of those units.[18] The testimony would also put Mary Ellen at approximately three weeks old at some indeterminate time around 1863 while other research has put her birth date much closer to March 1864.[19]

Regardless, both Martha Score's testimony and John Connor's state that Frances told them that Thomas had died fighting in the war.[20] Martha Score's testimony further corroborates this story, since at one point Frances paid her for the upkeep of Mary Ellen by giving her a widow's relief ticket given to soldier's wives, known as a soldier's relief ticket, during the war.[21]

There seems to be no doubt that Thomas and Fanny knew each other. They met, according to the testimony, while they both worked at the St. Nicholas Hotel.[22] Thomas was an oyster shucker and Frances a laundress there.[23] The soldier's relief ticket certainly seems to indicate that they were married. But some portion of their marriage was spent with Thomas fighting in the South. Frances had worked, and went back to work at one point, at a hotel. There is no record, one way or the other to suggest that Frances Wilson knew Thomas McCormack. But there is a possibility that Frances did know Thomas McCormack, and that he, and not Thomas Wilson, was Mary Ellen's father.

Once Thomas Wilson had died, Frances was forced to go back to work as a laundress. Mary Ellen was still very young at the time, and in need of regular care. Frances could not take her to work; and she could not stay home with her and afford to keep her. She put her into the care of Martha Score.[24] Martha appears to be part of a group of women in the nineteenth century who, for pay, fostered infants from lower socioeconomic class parents. That said, there is no evidence that Martha was one of the foster mothers known as "baby farmers," who took in poor infants, and then

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18 Shelman & Lazoritz, *supra* note 13, at 20-21.

19 *Id.* at 21.

20 Affidavit of John Connor, *supra* note 14, at 106-07; *see also* Testimony of Martha Score, *supra* note 14, at 181.

21 Testimony of Martha Score, *supra* note 14, at 182-83.

22 Shelman & Lazoritz, *supra* note 13, at 20.

23 *Id.*

24 *Id.* at 21-22.

committed infanticide, whether with or without the understanding of the parents themselves.[25]

Martha testified that she was introduced to Frances Wilson through a neighbor who also worked as a laundress at the St. Nicholas.[26] Frances paid her two dollars a week to take care of Mary Ellen.[27] For some time, Frances visited Mary Ellen regularly and showed her affection on her visits.[28] At some point, however, Frances stopped visiting and stopped paying.[29] Martha approached the neighbor and together they managed to track down Frances. Frances gave Martha the relief ticket to cover further payment.[30] There is no account of Frances visiting Mary Ellen after that point. It seems that the relief ticket may have run out thereafter or Martha could no longer afford to keep the child.[31] She took the child to George Kellock, the superintendent of Outdoor Poor.[32]

Sometime after Frances gave Martha the relief ticket, according to John Connor's affidavit, Martha told Frances that Mary Ellen had died.[33] Martha's testimony does not directly address that accusation, but does state that at some indeterminate point, possibly after Martha had given up the child, she met Frances on the street and told her "about the child and she told me [Martha] the child was alright."[34] The language could be read to say that Martha told Frances she had given the child up to an orphanage and Frances told her that Mary Ellen was doing well at the orphanage. If that is true, then it is possible, despite later testimony to the contrary, Frances Wilson did visit Mary Ellen after she had been placed in the almshouse that served as an orphanage.

Records produced during George Kellock's testimony at trial give the date Mary Ellen was placed with the state as July 7, 1865, and listed her age at eighteen months.[35] They corroborate Martha's testimony regarding her care of Mary Ellen and that Frances

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25 Shelman & Lazoritz, *supra* note 13, at 34.
26 Testimony of Martha Score, *supra* note 14, at 179-81.
27 *Id.* at 179.
28 *Id.* at 183-84.
29 *Id.* at 185.
30 *Id.* at 182-83.
31 Shelman & Lazoritz, *supra* note 13, at 23.
32 *Id*.
33 Affidavit of John Connor, *supra* note 14, at 106-07.
34 Testimony of Martha Score, *supra* note 14, at 183.
35 Shelman, Case #1 at 35.

had disappeared. However, the notation indicates an affidavit of Martha that was never found.[36] Mary Ellen was placed in an almshouse where she resided for six months.[37]

At the end of that six months, Thomas and Mary McCormack, who would later remarry after her husband's death and become Mary Connolly, came and adopted Mary Ellen.[38] According to her testimony, Thomas McCormack told his wife that Mary Ellen was one of three children he had by a mistress.[39] Ironically, Mrs. Connolly's testimony regarding her husband's children stated him as having two girls and one boy; this is the same number and genders of the children she, herself bore to him, all of whom had died.[40]

Mary Connolly's testimony was full of strange and suspicious contradictions. She told the court that there were three children, all belonging to her husband, by the same woman, and that the woman's name was Wilson.[41] Then she went on to say that she only knew the woman's name was Wilson because that was Mary Ellen's last name.[42] She told the court that she picked Mary Ellen out of the three. But when questioned about the names of the other children, she didn't know them. She could not even tell the court if their names were all Wilson, only that she assumed they must have been.[43]

George Kellock's testimony stated that every child in the almshouse had a facsimile of their name, age, and entrance record on file in the individual houses.[44] Presumably, if Mary Connolly had seen all three children and picked Mary Ellen out of the three, she would have had to know at the very least the last name before she went to the almshouse. Otherwise, there would have been no way to know whether the child she was looking at was her husband's. The last two obvious flaws in Mrs. Connolly's testimony are that she stated she had first heard of Mary Ellen in 1855, nearly

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36 Testimony of George Kellock, April 13, 1874, *reprinted in* Shelman & Lazoritz, *supra* note 13, at 171.

37 *Id.* at 172.

38 Testimony of Mary Connolly, April 10, 1874, *reprinted in* Shelman & Lazoritz, *supra* note 13, at 115-30.

39 *Id.* at 123.

40 *Id.* at 115, 123.

41 *Id.* at 121-22.

42 *Id.* at 122.

43 *Id.* at 123.

44 Testimony of George Kellock, *supra* note 36, at 173.

ten years before Mary Ellen was born; also, she testified that she wanted a little girl and picked out Mary Ellen herself when, earlier in the her testimony, she very specifically told the court that she asked her husband if there was a boy and he told her that it would make no difference and that they would get "that one."[45] Regardless of the flaws and the lies, one thing is clear: on January 2, 1866, Thomas and Mary McCormack, later to be Mary Connolly, took Mary Ellen Wilson home as their own.[46]

From that point on there is little concrete information regarding Mary Ellen's life until her rescue. Seven years after Mary Ellen was adopted, Etta Wheeler learned of Mary Ellen.

Etta Wheeler was one of many "proto" social workers who became common in the mid-nineteenth century in America. Building on the examples of Jane Adams and even Henry Bergh, middle class women, through churches and aid societies, began going into the tenements and poor areas of urban centers like New York, to provide "aid" to the poor.[47] Their philosophy was that delinquency, crime, and other undesirable attributes, were directly tied to poverty and a lack of education.[48]

In the winter of 1873, Mrs. Wheeler, who worked as a missionary for St Luke's, was approached by a woman regarding a child for whom she and the other members of her tenement housing were concerned.[49] The woman told Mrs. Wheeler the story of a family who lived in the rear tenement with a child who appeared to be five or six years old.[50] Testimony would show that despite her appearance, Mary Ellen was nine years old at the time.[51] At the time that Etta Wheeler was told about Mary Ellen, the Connollys had lived in that tenement house for the prior two years but had moved to another tenement recently. According to the neighbor, the child had been imprisoned in the house and often whipped; no one seemed to know what to do.[52]

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45 Testimony of Mary Connolly, *supra* note 38, at 119, 123.

46 *Id.* at 119.

47 Covey, *supra* note 3, at 17, 169.

48 *Id.* at 139-40.

49 Etta Angell Wheeler, *The Story of Mary Ellen: The Beginnings of a Worldwide Child-Saving Crusade, reprinted in* Shelman & Lazoritz, *supra* note 15, at 21.

50 *Id.*

51 Shelman & Lazoritz, *supra* note 15, at 14.

52 Wheeler, *supra* note 49, at 21.

Mrs. Wheeler first investigated the house in which the family had lived for two years and heard very similar stories from the other tenants.[53] She then went to the family's new tenement building.[54] She confirmed that the Connollys did live in the building and went to the apartment that shared the floor with theirs.[55] Inside she found Mrs. Smitt, an immigrant woman who was dying.[56] Giving aid and comfort to the ill and infirm was within the normal social services provided by community workers like Mrs. Wheeler, and she used the opportunity to her advantage. Mrs. Wheeler visited with Mary Smitt that day and at other times during Smitt's dying months.[57] During those visits they spoke of Mary Ellen. Mary Smitt had never talked to Mary Ellen and only seen her twice.[58] However, she had heard the beatings. According to Mrs. Wheeler, Mary Smitt told her that Mary Ellen was beaten nearly every morning and often more times during the day.[59] During the beatings she could be heard screaming up and down the apartment by Mrs. Smitt.[60]

Etta Wheeler took this information and then used Mrs. Smitt's illness to further her investigation. She left her first meeting with the dying woman and went next door to Mary Connolly.[61] She entered the apartment without invitation and proceeded to ask Mrs. Connolly to look in on Mrs. Smitt from time to time.[62] She used the opportunity to observe Mary Ellen surreptitiously.[63] Mary Ellen ignored their guest and their guest appeared to ignore her.[64] At the time Mary Ellen was washing dishes, some nearly twice

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53 *Id.*

54 *Id.*

55 Testimonies of Etta Wheeler, Mary Smitt and Mary Webb, April 10, 1874, *reprinted in* Shelman & Lazoritz, *supra* note 13, at 160-61.

56 *Id.* at 161.

57 *Id.* at 160-61.

58 Testimony of Mary Smith, April 10, 1874, *reprinted in* Shelman & Lazoritz, *supra* note 13, at 164.

59 *Id.*

60 *Id* at 164-65.

61 Wheeler et al., *supra* note 55, at 161.

62 *Id.* at 161-62.

63 Etta Angell Wheeler, *The Story of Mary Ellen: The Beginnings of a Worldwide Child-Saving Crusade*, *reprinted in* Shelman & Lazoritz, *supra* note 15, at 14.

64 Wheeler et al., *supra* note 55, at 161-62.

her size, and there was a rawhide whip lying across the table.[65] Mrs. Wheeler visited other times before Mary Ellen's rescue and observed Mary Ellen doing chores and the whip sitting near her wherever she was.[66]

Etta Wheeler spoke with many people regarding what to do about the little abused girl.[67] Unfortunately, no one was willing to intervene.[68] Finally one of Etta Wheeler's nieces suggested that she asked Mr. Henry Bergh, the animal rights activist, to help.[69]

Henry Bergh heard Mrs. Wheeler's information and admitted to being interested in the case.[70] He requested that Mrs. Wheeler send him an affidavit regarding her information so that he could peruse it in his own time.[71] Bergh then sent his own man to investigate.[72] Apparently satisfied that the allegations of child abuse were justified, on April 8, 1874, Bergh sent a petition to the court alleging abuse and requesting a proceeding on the custody of Mary Ellen.[73] The interesting thing about the petition is that it evidently invoked an obscure section of the Habeas Corpus Act of 1679 in order to get Mary Ellen taken out of the home before Francis and Mary Connolly could escape the jurisdiction with Mary Ellen or injure her further.[74] The act states in part:

> Whenever it shall appear by satisfactory proof that any one is held in illegal confinement or custody, and that there is good reason to believe that he will…suffer some irreparable injury before he can be relieved by the issuing of a *habeas corpus* or *certiorari*, any court or officer authorized to issue such writs, may issue a warrant. . . [and] bring him before such court or office to be dealt with according to the law.[75]

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65 *Id.*

66 *Id.* at 162-63.

67 Wheeler, *supra* note 63, at 24; *see also* Jacob Riis, Children of the Poor ch. IX (1892), *reprinted in* Shelman & Lazoritz, *supra* note 13, at 191-92.

68 Wheeler, *supra* note 63, at 24.

69 *Id.* at 25.

70 *Id.*

71 *Id.*

72 *Id.*

73 In the Matter of the Custody of a Child Called Mary Ellen [*Bergh's Petition and Judge Lawrence's Response*], April 8, 1874, *reprinted in* Shelman & Lazoritz, *supra* note 13, at 112-13.

74 Peter Stevens & Marian Eide, *The First Chapter of Children's Rights*, Shelman & Lazoritz, *supra* note 13, at 217; Shelman & Lazoritz, *supra* note 15, at 48.

75 *See* Shelman & Lazoritz, *supra* note 15, at 48, edited for brevity and emphasis added.

Other sources have indicated that the provision used was a *writ de homine replegiando*.[76]

The *writ de homine replegiando* dates back to the English courts of the eleventh century where it was used as a remedy to imprisonment, either private or public.[77] In fact, the only notable difference between the *writ of habeas corpus* and the *writ de homine replegiando* is that the latter can grant a jury trial.[78] Both writs are used to liberate illegally held individuals, although initially *de homine replegiando* required the detainee to post bail.[79] The writ transferred with the rest of English Common Law to the states.[80] It was used often in slavery cases prior to the Civil War, especially in dealing with the Fugitive Slave Act.[81]

It is possible that the writ was incorporated legislatively into the Habeas Corpus Act at some point in U.S. history, given their similarity. However, as a case from South Carolina indicates, it is more likely the writ was used concurrently by the states for the same purpose as *habeas corpus,* because the Judiciary Act of 1789 reserved use of *habeas corpus* for prisoners "where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into some court to testify."[82] The judge in the case noted that given that provision of the act, he could not use of a *writ of habeas corpus*) to free a black sailor captured under a law passed in South Carolina detaining free blacks who entered South Carolina as crewmembers on board ships.[83] The act detained them in jail until the ship was ready to leave again and required the captains to pay for their detention.[84] If the captain did not then set

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76 Marvin Ventrell, *The Practice of Law for Children*, 66 Mont. L. Rev. 1, 9 (2005).

77 William F. Duker, A Constitutional History of Habeas Corpus 16 (1980).

78 Steven M. Wise, *The Entitlement of Chimpanzees to the Common Law Writs of Habeas Corpus and De Homine Replegiando*, 37 Golden Gate U. L. Rev. 219, 248 (2007).

79 *Id.* at 245.

80 *Id.* at 249-52.

81 *Id.*

82 Elkison v. Deliesseline, 8 F. Cas. 493, 496 (C.C.S.C. 1823), quoting the Judiciary Act of 1789.

83 *Id.* at 493.

84 *Id.*

the captive free, blacks were sold into slavery.[85] The judge, in hearing the case for illegal detention, noted that while *habeas corpus* had been reserved for use by the federal government, the *writ de homine replegiando* was still available to him, having been incorporated into South Carolina's laws.[86] The judge further cited use of the writ in other states, including New York.[87] It is likely the writ was used in similar manner in other states, given the fact that the *writ of habeas corpus* was confined to use by the federal courts.[88] What was reported in Mary Ellen's case was merely that "Judge Lawrence issued, not an ordinary writ of habeas corpus, but a special warrant, provided for by section 65 of the Habeas Corpus act, whereby the child was at once taken possession of and brought within the control of the court."[89]

Either way, the use of the writ to rescue a child from captivity by her parents was considered novel and Elbridge T. Gerry, the ASPCA general counsel and board member who actually tried the case, was heralded for his ingenuity.[90]

On April 10, 1874, Mary Ellen's case began in the Supreme Court of New York. Several newspapers covered the trial, which lasted nearly three weeks. On the first day that Mary Ellen was brought in, she wore a threadbare dress and was covered in a coach blanket. The scratch down the side of her face was a fresh cut.[91] Mary Ellen gave her statement to the judge in chambers[92]:

> My name is Mary Ellen McCormack. I don't know how old I am; My mother and father are both dead; I have no recollection of a time when I did not live with the Connollys; I call Mrs. Connolly mama; I have never had but one pair of shoes, but can't recollect when that was. I have had no shoes or stockings on this winter; I have never been allowed to

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85 *Id.*

86 *Id.* at 497.

87 *Id*.

88 *Id.* at 496.

89 *Mr Bergh Enlarging His Sphere of Usefulness: Inhuman Treatment of a Little Waif – Her Treatment – A Mystery To Be Cleared Up,* N.Y. Times, April 10, 1874, *reprinted in* Shelman & Lazortiz, *supra* note 15, at 102.

90 Paul J. Buser, *Habeas Corpus Litigation in Child Custody Matters: An Historical Minefield,* 11 J. Am. Acad. Matrim. Law. 1, 2-3 (Winter 1993); *see also* Stevens & Eide, *supra* note 74, at 217.

91 *A Case for Charitable Interference—Henry Bergh Rescues a Little Girl from Her Inhuman Parents-Proceedings in the Supreme Court*, N.Y. Daily Trib., April 10, 1874, *reprinted in* Shelman & Lazoritz, *supra* note 13, at 75.

92 Shelman & Lazoritz, *supra* note 15, at 19.

> go out of the rooms where the Connollys live except in the nighttime, and then only in the yard; I have never had on a particle of flannel. My bed at night is only a piece of carpet, stretched on the floor underneath a window, and I sleep in my little undergarment, with a quilt over me. I am never allowed to play with any children or have any company whatever. Mama has been in the habit of whipping and beating me almost every day. She used to whip me with a twisted whip, a raw hide. The whip always left black and blue marks on my body. I have now on my head two black and blue marks which were made by mama with the whip, and a cut on the left side of my forehead which was made by a pair of scissors in mama's hand. She struck me with the scissors and cut me. I have no recollection of ever having been kissed, and have never been kissed by mama. I have never been taken on my Mama's lap, or caressed or petted. I never dared to speak to anybody, because if I did I would get whipped; I never had, to my recollection, any more clothing than I have on at present, a calico dress and skirt; I have seen stockings and other clothes in our room, but I am not allowed to put them on; whenever mama went out I was locked up in the bedroom; the scissors with which mama struck me are those now shown by Mr. Evans; I don't know for what I was whipped; mama never said anything to me when she whipped me; I do not want to go back to live with mama, because she beats me so; I have no recollection of ever being in the street in my life.[93]

Although it is possible the statement she gave to the judge was in response to questions, there does not appear to be a transcript of her testimony and the newspapers that printed her comments printed them as an independent statement. It has been reprinted that way ever since. It is interesting to note how well-spoken Mary Ellen is. By her foster mother's testimony, Mary Ellen had only really been taught her letters, simple words, and the Lord's Prayer.[94] Yet her statement to the judge, reprinted so often, is articulate and verbose. It can no longer be determined if her statement was "cleaned up" by the press or even coached. But the physical abuse was too clear to ignore. The picture from her rescue showed legs covered in welts and a cut down the side of her face that ran dangerously close to her eye.[95] It showed a thin dress which historical accounts agreed was far too threadbare to provide any warmth and

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93 Shelman & Lazoritz, *supra* note 13 at 75-76.

94 Testimony of Mary Connolly, *supra* note 38, at 126-27.

95 Shelman & Lazoritz, *supra* note 15, at 22 (photo of Mary Ellen Wilson dated April 9, 1874, reprinted courtesy of the George Sim Johnston archives of the New York Society for the Prevention of Cruelty to Children).

protection.[96] As the famous journalist, Jacob Riis (who attended the trial), recalled, "I was in a court-room full of men with pale, stern looks. I saw a child brought in, carried in a horse blanket, at the sight of which men wept aloud. I saw it laid at the feet of the judge, who turned his face away."[97]

Two separate cases led from Mary Ellen's first statement. There was a custody case in front of the judge who had issued the writ, Judge Abraham R. Lawrence, and a criminal case against Mary Connolly, which was heard before Recorder Hackett.[98] Mary Ellen's foster/step-father was never charged criminally, nor does he appear to have been involved at all in the case.[99] That said, the testimony in the two cases appears to have been predominately repetitious.[100]

The two police officers who executed the warrant to rescue Mary Ellen and an officer in the ASPCA who went with them, Mrs. Wheeler, and the police matron who cared for Mary Ellen during the trial all testified about the cuts and bruises and general appearance of Mary Ellen.[101] Additionally, the neighbors from the first tenement house and Mrs. Smitt testified to hearing crying and beatings and that how Mary Ellen was barred and locked in, even during the hot days, and often for several hours at a time.[102]

Despite testimony by Mrs. Wheeler and others describing the raw hide whip, when the officers returned to the house after removing Mary Ellen and searched later that same day the whip was never found.[103] The first neighbor to testify admitted she had never seen Mrs. Connolly harm Mary Ellen, only that she had heard Mary Ellen crying very loudly when she would pass by the door.[104]

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96 *Id.*

97 *Id.* at 16.

98 *Trial of Mary Connolly for a Cruel Assault upon 'Little Mary Ellen' – She Is Convicted of Assault and Battery and Sent to the Penitentiary for One Year*, N.Y. Herald, April 28, 1874, reprinted in Shelman & Lazoritz, *supra* note 13, at 98-99.

99 Stevens & Eide, *supra* note 74, at 217.

100 *Trial of Mary Connolly*, *supra* note 98, at 98-99.

101 Transcripts of testimony *reprinted in* Shelman & Lazoritz, *supra* note 13, at 131-86.

102 *Id.*

103 Testimony of Christian B. McDougal, April 10, 1874, *reprinted in* Shelman & Lazoritz, *supra* note 13, at 138.

104 Testimony of Charlotte Feihling, April 10, 1874, *reprinted in* Shelman & Lazoritz, *supra* note 13, at 144.

Additionally, she related an incident where she saw Mary Ellen out in the yard one day going to the outhouse without stockings or shoes on and that Mary Ellen, on that day, was black and blue.[105]

The next neighbor to testify, Catherine Kemp, lived on the same floor as the Connollys.[106] Mrs. Kemp claimed that the child was locked in all the time, except when she was allowed to go to the outhouse, or when Mrs. Connolly was out and only Mr. Connolly was home.[107] During those times she was allowed to run out into the hall.[108] Mrs. Kemp never heard any beatings or noticed any marks in the few times she saw the child.[109] On the other hand, the neighbor in the adjoining building never saw anything, but unlike Mrs. Kemp, Mrs. Studer heard sounds of a child crying and being beaten.[110]

The landlady, Margaret Bingham, testified that the house was kept locked up with the blinds down and that the very rare times someone saw Mary Ellen she always ran to the back room of the apartment.[111] She admitted to hearing the crying but not the beating and made the assumption that Mrs. Connolly must have taken her to the back rooms to beat her.[112]

Margaret Bingham's daughter, Jane Slater, testified that Mary Ellen was always locked in and after the one time she managed to open the window and Mrs. Connolly found out about it, Mrs. Connolly had latches put on the window, despite the heat, so Mary Ellen could not open them again.[113] It was never clarified how Jane Slater knew that Mrs. Connolly had the latches put on the window. Furthermore, Jane admitted that she had once seen Mary Ellen properly dressed and playing in the yard, and that her mother claimed Mary Ellen was taken out of the apartments by

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105 *Id.*

106 Testimony of Catherine Kemp, April 10, 1874, reprinted in Shelman & Lazoritz, *supra* note 13, at 146.

107 *Id.* at 145-46.

108 *Id.*

109 *Id.*

110 Testimony of Mary Studer, April 10, 1874, *reprinted in* Shelman & Lazoritz, *supra* note 13, at 148-49.

111 Testimony of Margaret Bingham, April 10, 1874, *reprinted in* Shelman & Lazoritz, *supra* note 13, at 150.

112 *Id.* at 151.

113 Testimony of Jane Slater, April 10, 1874, *reprinted in* Shelman & Lazoritz, *supra* note 13, at 157.

a woman who may have been Mrs. Connolly's sister, and on that day she was well dressed.[114] Only Mrs. Wheeler and Mrs. Smitt ever testified to seeing the cowhide and Mrs. Smitt only saw it once.[115] Some witnesses heard the crying and the beatings, while others who should have been able to, did not. All the witnesses from the first tenement house testified that the child was locked in and never let out, yet several witnesses saw her out on one occasion or another and the only information they had as to how the child had gotten out or why she was ill dressed or bruised came from Mary Ellen herself.[116]

Perhaps most intriguing is what the newspapers reported about the disposition of Mary Ellen. According to the articles surrounding the trials, after her rescue Mary Ellen exhibited a sunny disposition and showed little to no fear of Mrs. Connolly when she met with her in the courthouse.[117] Later recollections from Mary Ellen's daughters cast that dichotomy between the Mary Ellen's behavior and her abuse in more confusion. Articles have stated that Mary Ellen told her daughters little of her life before her rescue.[118] Her youngest daughter did recall her mother mentioning an incident involving Mrs. Connolly burning Mary Ellen with a hot iron.[119] However, another article attributes the same daughter recalling that when Mary Ellen spoke in later years about her abuse, however rarely, she mentioned a man inflicting the injuries, not a woman.[120]

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114 *Id.* at 158.

115 Wheeler et al., *supra* note 55, at 161-62; Smith, *supra* note 58, at 165.

116 Transcripts of testimony, *supra* note 101, at 131-86.

117 *A Child's Sufferings: Mr. Bergh's Protégé in Court Again – The Story of Mary Ellen's Step-Mother*, N.Y. Daily Trib., April 11 1874, *reprinted in* Shelman & Lazoritz, *supra* note 13, at 83; *The Courts: Little Mary Ellen McCormack: A Bevy of Ladies Attend Her in Court – New Clothes for the Waif and New Joy in Her Heart – Her Condition When Taken to Police Headquarters – The Indenture from the Commissioners of Charities and Correction – Arrest of Mrs. Connolly*, N.Y. Herald, April 14, 1874, *reprinted in* Shelman & Lazoritz, *supra* note 13, at 89-90.

118 Stephen Lazoritz, *Whatever Happened to Mary Ellen?,* 14 Child Abuse & Neglect 143 (1989).

119 *Id.*

120 Stevens & Eide, *supra* note 74, at 220.

This leaves a number of questions. Despite the fact that Francis Connolly was never charged or even seemingly tried, could he have been more involved? Why was he not indicted as well? Was Mary Connolly less the abuser than perhaps an equally abused party, put upon to take the fall for her husband's activities? Unfortunately, there are no answers to those questions and history says that although many of the witnesses contradicted each other and the rawhide whip described by Mrs. Wheeler was never found, the bruising and general obvious maltreatment of Mary Ellen seemed to speak enough to damn her foster mother.[121]

Mary Connolly was indicted on twelve counts of felonious assault.[122] She was tried on two counts, one count of felonious assault with a pair of scissors (the incident that caused the cut over Mary Ellen's eye), and another for the series of assaults committed over the prior year.[123] On April 28, 1874, Mary Connolly was found guilty of the lesser offense of assault and battery from her treatment of Mary Ellen and sentenced to a year in the Tombs.[124]

Mary Ellen was removed from her foster mother's care. A number of supposed relatives came forward claiming to be related to Frances Connor, Mary Ellen's mother.[125] The judge who had overheard the case, Judge Lawrence, looked through the letters from these supposed relatives and ascertained that they were generally false claims of relation, and that any known relatives able to take Mary Ellen were not capable of being found.[126] Mary Ellen was eventually taken to Etta Wheeler's family home in Upstate New York and there she thrived.[127] She grew up, lived a quiet life

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121 Transcripts of testimony, *supra* note 101, at 131-86.

122 *The Counts Against Mary Connolly*, *reprinted in* Shelman & Lazoritz, *supra* note 13, at 235-40.

123 *Mary Ellen Wilson: Mrs. Connolly, the Guardian, Found Guilty and Sentenced to One Year's Imprisonment at Hard Labor*, N.Y. Times, April 22, 1874, *reprinted in* Shelman & Lazoritz, *supra* note 13, at 94.

124 *Trial of Mary Connolly for a Cruel Assault*, *supra* note 98, at 98-101.

125 *Letters and Affidavits*, *reprinted in* Shelman & Lazoritz, *supra* note 13, at 102-11.

126 Stevens & Eide, *supra* note 74, at 219; *see also Little Mary Ellen Finally Disposed Of*, N.Y. Times, December 27, 1875, *reprinted in* Shelman & Lazoritz, *supra* note 13, at 101.

127 *Letter to Mr. Henry Bergh from Etta Wheeler June 24, 1875*, *reprinted in* Shelman & Lazoritz, *supra* note 13, at 189-90.

in Upstate New York, and had two daughters and a foster daughter that she raised.[128]

Because of Mary Ellen, her attorney Elbridge T. Gerry and Henry Bergh founded the New York Society for the Prevention of Cruelty to Children.[129] Other cities followed New York's lead: "There were thirty-seven SPCCs by 1880, and 161 by 1902."[130] While the early societies were nonprofits that focused primarily on the conviction of offenders, it is from them and the work of progressives like Etta Wheeler that America's modern system of child protection was formed.[131]

For all its potential flaws, the case of Mary Ellen was a perfect storm. The existence in New York of such progressives as reporter Jacob Riis who covered the trial, Henry Bergh, and Elbridge T. Gerry, the rising tide of progressive reform, and sentimentality towards children from the middle and upper classes, a seemingly articulate little girl so severely treated (with physical evidence that could not be denied), and a case worker determined not to see such a child go back to her abuser, made Mary Ellen the model for child protection.[132] Unlike earlier children who had been returned to convicted guardians when no other relative stepped forward, Mary Ellen was put in the care of a non-relative third party. Unlike earlier cases, the judicial officers and law enforcement personnel were motivated to do more. Perhaps they were roused by the roughly decade long history of Henry

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128 Lazoritz, *supra* note 118. Mary Ellen Wilson's later story is uplifting:

> At 24, Mary Ellen married Louis Schutt. The couple had two children of their own, along with three children of Schutt's from a previous marriage, and Mary Ellen passed on her good fortune by adopting an orphan girl. By all accounts, she was a superb and caring mother. She died in 1956, at 92.

Howard Markel, *Case Shined First Light on Abuse of Children*, N.Y. Times (Dec. 14, 2009), https://www.nytimes.com/2009/12/15/health/15abus.html.

129 Covey, *supra* note 3, at 135.

130 Elizabeth D. Katz, *Fostering Faith: Religion and Inequality in the History of Child Welfare Placements*, 92 Fordham L. Rev. 2077, 2123 (2024).

131 Covey, *supra* note 3 at 142-43.

132 A newspaper article offered this description of Mary Ellen and analysis of one facet of the impulse toward child protection: She was "a self-possessed 10-year-old . . . who finally put a human face on child abuse and prompted a reformers' crusade to prevent it and to protect its victims, an effort that continues to this day." Markel, *supra* note 128.

Bergh pushing a sentimentality towards the defenseless into the minds of New Yorkers. Perhaps it was simply that the physical evidence was too overwhelming. Whatever the reason, the rescue of Mary Ellen was novel enough to start a national movement,[133] which continues today as it seeks to protect children by all the means at its disposal.

133 This is a movement that has had numerous landmark steps forward:

> By 1935, issues regarding child welfare were included in the Social Security Act. In 1962, Drs. C. Henry Kempe, Frederic N. Silverman, Brandt F. Steele, William Droegemueller, and Henry K. Silver published an article called *The Battered-Child Syndrome*, an analysis of the clinical condition found in young children who experienced serious physical abuse, resulting in permanent injury or death. In response to this article and others like it, the Children's Bureau of the Department of Health and Human Services pushed for the passage of child abuse reporting laws. By 1967, all states had similar laws on the books. In 1974, Congress passed the federal Child Abuse Prevention and Treatment Act (CAPTA).

Anabelle Tolgyesi, *Examining* DeShaney*: Child Abuse, Due Process, and State-Sanctioned Violence*, 14 U. Miami Race & Soc. Just. L. Rev. 226, 228 (2024).

The Legal Guardianship of Minors in Medieval European Law and Culture: An Overview and Brief Note for Modern Family Law Practitioners

by
Daniel W. Morgan*

I. Introduction

Without due caution, attorneys and scholars may reach for argumentatively useful but inaccurate or incomplete historical narratives. Faulty narratives which evoke the medieval past can be attractive, particularly given the persistence of associations between the idea of the "medieval" and violence, irrationality, or amorality,[1] and the Middle Ages have remained a useful—arguably even an essential—foil for discussing and defining modernity.[2] Moreover, the invention of childhood and care for children is perhaps a constituent part of modernity and the assumption may be made that medieval people did not think or care about children. Medievalists have, however, in the past twenty years refuted the notion that medieval people either did not have a concept of childhood in any way commensurate with modern ideas about children or—at the very least—that medieval people did not regard childhood as a meaningful social and legal category.[3] Additionally, medievalists have demonstrated that medieval law was concerned with the relationship between individuals who had

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1 *See* Marcus Bull, Thinking Medieval: An Introduction to the Study of the Middle Ages 11-18 (2005).

2 *See* Kathleen Davis, Periodization and Sovereignty: How Ideas of Feudalism and Secularization Govern the Politics of Time 1-17 (2008).

3 *See* Barbara A. Hanawalt, *Medievalists and the Study of Childhood*, 77 Speculum 440 (2002).

not yet attained the age of majority and their rights to property. Medieval society recognized many statuses that could impede one's ability to exercise full control over one's person or property, including incompetence and disability,[4] but the focus of this article is the guardianship of minors and, necessarily for the medieval jurist, guardianship over the property of minors. Modern family law attorneys may benefit from an increased familiarity with this aspect of the medieval history of family law, if only in thumbnail sketch, and also from a reconsideration of the relevance of the medieval past when thinking creatively and deeply about first order questions in family law.

Accordingly, the principal goals of the following discussion are threefold: This article aims to provide an introduction to medieval conceptualizations of childhood and legal minority, with attention to the role of the child's place within the medieval family; subsequently, this article offers an overview of the basic principles of medieval guardianship; and finally, this article concludes with some considerations regarding how thinking about medieval guardianship can inform the work of modern legal practitioners, particularly those involved in family law.

Before beginning, however, the matter of chronological and geographic scope must be addressed. The terms "Middle Ages" and "medieval" used here refer to the period between approximately the years 500 CE and 1500 CE (a definition uncontroversial among most medieval historians).[5] Medieval historians tend to subdivide the Middle Ages further into three periods: The Early Middle Ages (c. 500–1000), the High or Central Middle Ages (c. 1000–1300), and the Late Middle Ages (c. 1300–1500). Meanwhile, the terms "medieval society" and "medieval culture" are used here to refer to the societies of Latin Christian Europe in these years, roughly corresponding to modern Europe, especially Western and Central Europe. However, this is not the limit of "medieval society" or those historical communities that historians have described as experiencing their own medieval eras. Nevertheless, the geographic reduction in scope is useful because it confines the discussion to those European societies that, in light of

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4 *See* Wendy J. Turner, Care and Custody of the Mentally Ill, Incompetent, and Disabled in Medieval England (2013).

5 For a definition of the medieval period with attention to the diachronic within the Middle Ages, see Chris Wickham, Medieval Europe 1-21 (2016).

the distinctive differences in European society before 500 CE and after 1500 CE, later served as the basis for the term "medieval."

Considering these chronological and geographic parameters, and the multiplicity of historical societies that existed within them, this article provides only a survey, with attention to broad themes rather than the particulars of specific cases or laws. That said, special attention is given here to medieval English history and law due to its common law tradition and the relevance this holds for the genealogy of law in most of the United States.

Section II of this article explains medieval definitions of childhood, the place of the child in the medieval family as the primary unit of economic production, and the relationship between the medieval notion of childhood and the salient medieval legal category of minority. As this section makes clear, children were considered to be both workers and a part of the father's property holdings. The definitive exit from both childhood and minority was the ability to establish an independent estate, often through inheritance or marriage.

Section III offers a summary of guardianship assignment schemes in the medieval English context. These guardianship schemes are based on a necessarily simplified set of guidelines related to the inheritance stakes of the potential ward. Starting with heirs to feudal land holdings, this summary then descends the social ladder to individuals with less landed wealth and less political significance adhering in their property claims. To simplify the discussion, the complicating issues of wills, deathbed testaments, and other means of circumventing common and manorial inheritance laws have been set aside.[6] The common law practices of guardianship and standard canon laws of marriage are instead emphasized. From this simplified summary, it is clear that high and late medieval preferences for assigning widows guardianship of their own children increased in inverse proportion to the significance of the ward's property claims and marriageability.

Section IV concludes with a brief note on the potential relevance of the foregoing sections to modern family law practitioners. Given the Supreme Court's recent interpretations of the "history and tradition" test, it is potentially useful to think

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[6] For an introduction to these issues, particularly in the Late Middle Ages, see Peter Fleming, Family and Household in Medieval England 113-17 (2001).

through medieval legal concerns in light of the Court's emphasis on history and its evocation of medieval history. However, this article concludes with an argument for the relevance of medieval history not as a site from which to mine analogous precedent and argument, but as a fundamentally different socio-cultural context that can help the modern jurist to expand the realm of legal imagination.

II. The Issue of Minority in the Middle Ages: Defining Medieval Childhood and the Child's Place in the Medieval Family

It is necessary to first address the issue of minority and its relationship to medieval conceptualizations of childhood and the family before turning to the particulars of guardianship and, more specifically, the guardianship of minors in the Middle Ages. Medieval minority was linked to, but not coextensive with, medieval ideas of childhood. This section will describe the medieval definition of childhood and the place of the child within the family as a property-holding system and then conclude with a description of the gradual accrual of legal rights and obligations medieval individuals experienced between the ages of roughly twelve and twenty-one.

Medieval people used a variety of technical Latin terms to refer to the period of human life between birth (or even earlier, starting with the "quickening" in the womb) and the late teenage years or even early adulthood.[7] This was based on a common means of schematizing and taxonomizing the different periods of the human lifespan. In this article, the terms "child" and "minor" are used, for convenience, interchangeably when discussing medieval law, and therefore with less sophistication than medieval people themselves. Children and adolescents were distinct, though not necessarily rigorously defined, categories and minority captured all of the former and at least a portion of the latter in the intersection between medieval law and culture. Following classical writers, medieval thinkers often considered childhood as one of a number of distinct life stages as expressed in the various schemata of the

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7 Nicholas Orme, Medieval Children 6-7 (2001).

"ages of man."[8] Depending on whether one divided human life into three, four, five, six, seven, or twelve periods, the segments of infancy, childhood, and adolescence could even be given their own distinct categories (though the schemata on the lower end omitted childhood altogether).[9] Although one of the intellectual touchstones for much of the Middle Ages was the early medieval writer Isidore of Seville's *Etymologiae* (Etymologies), and it is in this work that various gradations of childhood appear,[10] these ideas were not confined to the world of the Latinate literati. "Ages of man" motifs were part of the visual vocabularies of medieval artists as well and even adorned the walls of churches.[11] Similar to their modern counterparts, medieval people also recognized that a child's level of dependency, autonomy, and ability depended in some significant way on their age.[12]

Moreover, while the economy of medieval Europe was agrarian, with subsistence agriculture as one of the principal forms of production, medieval children were not generally expected to labor to the same extent as the adults in their lives. Nor were they expected to frequently perform dangerous tasks similar to adults.[13] The relative poverty of the medieval economy and the closeness of many medieval communities to starvation, combined perhaps with a common anachronistic conflation of modern industrial era child labor in factories and extractive industries with the Middle Ages, may lead one to assume the harsh exploitation of children within the medieval household.[14] However, while accepting that the necessity of relying on older children for work varied by class, there seems to have been the general expectation in medieval society that children younger than seven would spend their time at play or under the supervision of laboring adults or older children.[15] Then, from age seven until approximately age

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8 *Id.* at 6; Hanawalt, *supra* note 3, at 443. For additional discussion on the "ages of man," see J. A. Burrow, The Ages of Man: A Study in Medieval Writing and Thought (1988).

9 Orme, *supra* note 7, at 6.

10 *Id*.

11 Hanawalt, *supra* note 3, at 443.

12 Orme, *supra* note 7, at 8-9; Hanawalt, *supra* note 3, at 449-450.

13 Hanawalt, *supra* note 3, at 449-450. For information on child labor, see Orme, *supra* note 7, at 306-17.

14 Hanawalt, *supra* note 3, at 457.

15 Orme, *supra* note 7, at 307.

fourteen, families could impose labor expectations on their children.[16] The labor demanded would gradually increase in amount and difficulty, and, on occasion, culminate in guardians sending the child away for either servant wage labor or apprenticeship in their teenage years.[17] However, for elites, boys could be sent away earlier into the care of other members of this class or to Church schools in preparation for either lordship or a career in knightly or pious service.[18] This definition of medieval childhood, beginning with basic definitions before proceeding directly into a consideration of the medieval child's—limited—ability to provide labor, is intentional: The medieval family, from fairly early in the medieval period, was conceived of as both a kin-structure and an economic unit.

Before the medieval period, for those living under Roman Law in the Late Republic and Early Empire, the *patria potestas* (power of the father) was the central pillar of the Roman conceptualization of the family.[19] The Roman father was master over his household, defined as the sum total of his property and dependents. He possessed the sole prerogative to determine membership in this social and legal entity. Indeed, the totality of the father's control over the property of the household was so great that even adult children were technically not able to hold property in their own rights; generally speaking, only the death of the father or the emancipation of the child ended the father's ownership claims.[20] However, over the course of the imperial period, adult sons were often able to acquire property far from the *de facto* oversight of their fathers.[21] Crucially, by the end of Roman antiquity, marriage became an accepted means of acquiring independent legal rights to property.[22] The result, at the beginning of the medieval period proper, was the gradual deterioration of the

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16 *Id.* at 307-09.

17 *Id.* at 308-09.

18 *Id.* at 317.

19 Manuel Vial-Dumas, *Parents, Children, and Law:* Patria Potestas *and Emancipation in the Christian Mediterranean During Late Antiquity and the Early Middle Ages*, 39 J. Fam. Hist. 308 (2014).

20 *Id*.

21 *Id.* at 308-10.

22 *Id.* at 312.

patria potestas as a definitional element of the family.[23] However, the conceptualization of the family as a property-holding system endured, and this was the notion of the family that persisted into the Middle Ages.[24] Simply put, the default assumption in medieval culture and law was that children were part of the property held by their fathers.[25] Thus, from the Early Middle Ages, the ability to independently hold the legal right to property, as the underpinning of the ability to secure an independent, and often male-led, household, marked the inarguable end to both an individual's childhood and legal minority in medieval society. The ability to formally enter into marriage (again, due to the close association of this contract with the acquisition of property) was another powerful signal of adulthood, particularly if it was paired with independent cohabitation.

However, well before marriage or the ability to control property without third-party oversight, children in the Middle Ages gradually acquired greater legal autonomies and obligations. For example, in late medieval England, children were considered subject to criminal, canon, and tax laws alike.[26] That said, London court records from this period reveal "appeals for clemency" on account of the age of the defendants.[27] The ability, or responsibility, to bear arms was another marker of adulthood or even (depending on the region and legal regime) majority. In point of contrast, in early medieval Italy, the age of majority for males corresponded to the ability to bear arms, and (under the Edict of Rothari) the age for this was decreed as twelve.[28] However, again in late medieval England, males were only subject to the king's military summons starting at age sixteen.[29] Earlier, in high medieval England, where frankpledge was observed, males were expected from age twelve to join a "tithing," a collective wherein individuals swore to apprehend one of their members if accused of a crime and would submit

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23 *Id.* at 316, 320-21.

24 *Id.* at 320.

25 Sara M. Butler, Divorce in Medieval England: From One to Two Persons in Law 112 (2013).

26 Barbara A. Hanawalt, Growing Up in Medieval London: The Experience of Childhood in History 202 (1993).

27 Hanawalt, *supra* note 3, at 444.

28 Vial-Dumas, *supra* note 19, at 317.

29 Hanawalt, *supra* note 26, at 202.

to a financial liability if they failed to do so.[30] In the courts, boys and girls could make a testament at age fourteen and age twelve, respectively, and one could serve as an executor starting at age seventeen.[31] As for marriage, from the thirteenth century onwards, the minimum age for marriage was fourteen for boys and twelve for girls, but the promise to wed could be made on behalf of a child as early as seven.[32]

Finally, the age associated with the right to inheritance, and the definitive end of any minority, could vary depending on sex and marital status. For example, the laws of the city of London in the Late Middle Ages fixed the age of inheritance at twenty-one for men (wed or not) and unmarried women.[33] Married girls and women, provided that their husband was at least twenty-one, could inherit starting at age sixteen to eighteen.[34] In this case, her property would essentially be entering into the overall estate of her husband. Yet, the age for the inheritance of estates with military tenures in particular had crept ever higher over the course of the Late Middle Ages, and the effective age of inheritance could go up to twenty-four.[35] The significance of these types of estates is discussed in greater length in section III. The other form of free tenure under the common law after the twelfth century was socage (which carried no military obligations), and inheritance of these properties could be quite a bit lower, with heirs gaining full control over their properties at age fifteen or sixteen.[36]

Thus, the medieval conceptualization of childhood, and its implications for the concept of minority, operated on something of a sliding scale dependent on context and class, with children gaining greater social and legal autonomies and liabilities over the course of their development. Nevertheless, at the heart of childhood and minority was the issue of property and an individual's right to possess it without encumberment.

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30 Kenneth Duggan, *The Limits of Strong Government: Attempts to Control Criminality in Thirteenth-Century England*, 93 Hist. Res. 402-03 (2020).

31 Fleming, *supra* note 6, at 60.

32 Orme, *supra* note 7, at 336.

33 Hanawalt, *supra* note 26, at 202.

34 *Id.*

35 Fleming, *supra* note 6, at 60; Hanawalt, *supra* note 26, at 203.

36 Fleming, *supra* note 6, at 60.

III. Medieval Guardianship: Guardianship of Bodies and Properties

As noted at the outset of this article, the practice of guardianship existed for many classes of people in medieval society, but the situation of a child with inheritance rights to landed property drew the most attention from medieval jurists, and it presented a set of easily discernible legal issues. One of the core issues was that minority guardianship was assumed to have an ending due to the natural progression of time, whereas mental incompetence or disability, for example, were more likely permanent states.[37] This section discusses the forms and concerns of guardianship over minors and their property in greater detail, particularly as they were practiced under the English common law from roughly the thirteenth century onwards. In this period, a legal guardian could be responsible for both or either the protection of the body or the property of their ward.[38] However, the guardian's interests and the behavior of the guardian towards the ward depended upon the property claims of the minor.[39]

In the core regions of high and late medieval Latin Christian Europe, including the kingdom of England, patrilineal primogeniture was the default scheme of inheritance.[40] Under this scheme, unless other legal instruments were employed or conflicting claims of inheritance or sovereignty were invoked, on the death of the propertied patriarch in the medieval family, all properties would pass to the eldest child, with preference given to male heirs. This

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37 For a nuanced discussion of how "idiocy" was assessed and questions involving competency as they were understood in medieval English law and culture, see Eliza Buhrer, *Law and Mental Competency in Late Medieval England*, XL Reading Medieval Stud. 82 (2014).

38 For a historically informed discussion of these distinctions in medieval and early modern European society, see Ann Ighe, *Replacing the Father – Representing the Child. A Few Notes of the European History of Guardianship*, 44 Fund Og Forskning, Oct. 2005, at 1.

39 This article sets aside the extraordinarily more complex issues involving royal guardianship, but for an introduction to that subject, see Emily Joan Ward, *Child Kings and Guardianship in North-Western Europe, c. 1050–c. 1250*, *in* The Routledge History of Monarchy 551 (Elena Woodacre, Lucinda H. S. Dean, Chris Jones, Zita Rohr, & Russel Martin eds., 2019).

40 Andrej Kokkonen et al., The Politics of Succession: Forging Stable Monarchies in Europe, AD 1000-1800 60, 81-82 (2022).

prevented the fragmentation of the family patrimony, which was common under older early medieval schemes of partible inheritance. Moreover, primogeniture proved an acceptable alternative kinship structure according to the doctrines and interests of the Church, based more tightly around the nuclear family and with weaker bonds of lateral association to extended kin networks.[41] For a society in which private and public authorities were entangled and family cohesion ran parallel to political cohesion, these differences in inheritance strategies could matter a great deal. A particularly notable example, operating on the highest level of medieval politics towards the end of the Early Middle Ages, involved the sons of the Carolingian emperor Louis the Pious, grandsons of Charlemagne, whose territories stretched to cover what is now modern-day France, Belgium and the Low Countries, Northern Italy, and much of Germany and other pieces of Central Europe. Louis' sons fought a series of civil wars before finally dividing the empire somewhat equitably between them as part of the Treaty of Verdun in 843, splitting Carolingian territory between western, central, and eastern realms. These divisions would prove enduring, and two of the territories bequeathed to these descendants of Louis became polities roughly corresponding to the modern states of France and Germany.[42] Although traditions of partible inheritance endured at the margins, the predominance of primogeniture in medieval custom and law, especially for the landholding aristocracy, in the High and Late Middle Ages defines the terms of the discussion in this article: An "heir" is almost certainly the oldest legitimate child and is, by preference in medieval law and culture, male if possible.

The heirs of greatest political and legal significance for medieval society were those who stood to inherit lands that were held "in fee," that is, as part of the feudal system. Here, the problems with the term "feudalism" as a shorthand for understanding the sum of medieval political, social, and economic systems should be acknowledged but bracketed.[43] In this article, the use of the term "feudal" and its variations is meant only to refer specifically to those lands conditionally held from a lord in recognition of

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41 *See id.* at 60-87.

42 For a more detailed summary, see Wickham, *supra* note 5, at 63-64.

43 *See* Susan Reynolds, Fiefs and Vassals: The Medieval Evidence Reinterpreted (1994).

either past personal or family service with continued obligations to perform military service with the threat of revocation for disloyalty—lands held in this way would be called *feoda*, from which the modern term "feudal" is derived etymologically.[44] In light of this, the legal questions surrounding inheritance and guardianship for the small portion of the medieval population involved in feudal landholding could easily impinge on questions of political economy. It is not too great an exaggeration to say that in every guardianship situation involving feudal lands at stake was a lord's or even king's ability to marshal military resources or build loyalty and legitimacy.

Accordingly, for the heirs to properties with military obligations, the distinctions between guardianship of the body and guardianship of property could be particularly stark. According to the common law of the late twelfth century onwards, the guardianship of minors who stood to inherit properties with military tenures, also often referred to as feudal properties or estates, was broadly assumed to fall to the lord to whom said military service was owed,[45] although this depended on the context surrounding the feudal properties. The great thirteenth-century common law treatise known as *Bracton*[46] lays out the complexities of the matter:

> Now we must discuss those who are minors and within age, who must of necessity be under the tutelage and care of others since they are unable to govern themselves. Of these some must be in the wardship of lords, with the lands and tenements that belong to their fee, and some in the wardship of relatives and near kinsmen, as was said above. To such minors guardians sometimes are given by [law by] right of ancient feoffment, curators sometimes by man, [as] where one enfeoffs an infant under age, since [the feoffor] himself cannot be curator; nor can he be guardian. Sometimes the chief lord is entitled only to the wardship of the land that belongs to his fee and not the wardship of the heir or his marriage, if the heir is to be married, sometimes to the wardship of both.[47]

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44 This is essentially the compressed definition offered in Wickham, *supra* note 5, at 10.

45 Sue Sheridan Walker, *Widow and Ward: The Feudal Law of Child Custody in Medieval England*, *in* Women in Medieval Society 159, 159 (Susan Mosher Stuard ed., 1976).

46 The common name for this text comes from the jurist Henry of Bracton, one of its principal authors, though the treatise is also known as *De Legibus et Consuetudines Angliæ* (On the Laws and Customs of England).

47 2 Henry de Bracton, De Legibus et Consuetudinibus Angliæ: Libri Quinque in Varios Tractatus Distincti [On the Laws and Customs of

As succinctly explained by Sue Sheridan Walker in her seminal essay on medieval wardship, a feudal guardian was assumed to have control over both an heir's land and person, but wardship of the land could be separated from wardship of the body.[48] Feudal lords had wide latitude in the assignment of guardianship over an heir's property (or properties) or an heir's body. Moreover, guardianship over a ward's properties was divisible, especially if the child's father was in vassalage relationships with multiple lords, but, in contrast to modern child custody, the guardianship over the person of the heir was indivisible and simply no joint custody arrangements existed.[49] Guardianship over either property or person could be quite profitable depending on the minor and the property interest in question.

In the case of guardianship over wards who stood to inherit property freely held of a lord owed service obligations, the guardian's obligations regarding this property were nonfiduciary, and the guardian had the right of usufruct[50] (excepting only the cost of maintaining the life of the heir).[51] At the highest level of the socio-political hierarchy in medieval English society, that is when considering the greatest lords in England whose lands were held of the king, royal prerogative allowed English monarchs to auction guardianships or to otherwise assign them as rewards to other tenants-in-chief.[52] What amounted to essentially the sale of these guardianships could be immensely profitable, both for the king (who often obtained an immediate infusion of cash) and for the buyer (who gained some number of years in which they could

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England] 250 (George Woodbine & Samuel E. Thorne eds., 1968-1977), https://amesfoundation.law.harvard.edu/Bracton/. All additional notes as well as color coding and bracket schemes used to distinguish various textual interpolations and collations have been omitted in this quotation and the subsequent quotation for the sake of legibility.

48 Walker, *supra* note 45, at 159.

49 *Id.* at 159.

50 The right to use and profit from the property of another without an ownership interest in it.

51 Butler, *supra* note 25, at 113; Walker, *supra* note 45, at 159.

52 Butler, *supra* note 25, at 113. For a fuller discussion of royal involvement in and profit from wardship in medieval English law, see especially S. F. C. Milsom, *The Origin of Prerogative Wardship*, *in* Law and Government in Medieval England and Normandy: Essays in Honour of Sir James Holt 223 (George Garnett & John Hudson eds., 1994).

reliably draw profits). Similarly, at lower levels of political influence, parties reliably sought to enrich themselves from a potential ward's lands and persons in these ways.[53]

Guardianship also came with the ability to contract a marriage on the feudal ward's behalf, and guardians could sell this prerogative. This was, indeed, the primary benefit to guardianship over the person of the heir. Immense potential profit could be realized in these transactions, depending on the minor's familial prestige and property claims. However, from the thirteenth century, guardians were limited in the sorts of marriages that they were able to contract. First, the Magna Carta protected heirs from being joined in marriage to an individual of a lower rank, and second, the Church imposed a variety of strictures relating to child marriage.[54] For the Church, which from the early thirteenth century asserted sole jurisdiction over determining valid and invalid marriages, betrothal and engagement could occur no younger than age seven and the marriage itself would not be valid for girls younger than twelve or boys younger than fourteen.[55] The common law added further protections, in that a minor could refuse their guardian's marriage arrangement, and could, at least for boys at age fourteen, contract a marriage against their guardian's wishes; that said, in both cases, the ward had to indemnify their erstwhile guardian for the losses incurred.[56]

Given the fundamentally usufructuary nature of the guardianship arrangement over these minors, competition over guardianship rights could be fierce. Additionally, because the individuals involved were members of a hereditary military aristocracy, claims to these rights could be pressed through violent self-help.[57] Throughout the medieval period, with the potential exception of certain times and places in the High and Late Middle Ages, state institutions in Latin Christian Europe were not sufficiently developed to be able to reliably impose their laws within their territories. Moreover, they often had to contend with other, parallel juridical structures. The Church provided in essence alternative fora for the redress of grievances and dispute resolution.

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53 This observation is what underpins much of Walker's analysis. *See* Walker, *supra* note 45.

54 Orme, *supra* note 7, at 335-36.

55 *Id.* at 336.

56 *Id.* at 337.

57 Walker, *supra* note 45, at 163.

Moreover, the terms of the discussion here should be kept in mind: Landholders with military tenure were part of a small military aristocracy, and the vast majority of people in medieval society were agrarian laborers. For much of the High Middle Ages, the common person's experiences of the law were far more likely to be in laws essentially enforced by landlords in manorial courts. The multiplicity and complexity of these (sometimes competing) legal systems in a context of comparably weak states should be kept in mind when considering claims to guardianship in medieval society more broadly.

Most cases of guardianship would begin with the death of the father. In cases where the mother was still living, mothers could seek to retain custody over both their children's persons and at least some portion of the inherited feudal property, especially when that property was related to the widow's share of her late husband's estate.[58] While mothers could press for, and indeed sometimes win, guardianship over the person of an heir to feudal property in court, motherhood alone was not necessarily persuasive when assigning guardianship.[59] Regardless of legal guardianship, however, mothers could attempt to retain *de facto* control over the ward's person, or they could resolve the matter by seeking to purchase guardianship of the child's person from their lord.[60] In these legal disputes, mothers were aided by an early medieval preference for assigning the guardianship of a ward's person to the mother; subsequently, in later high medieval royal lawmaking and dispute resolution, kings expressed a preference for assigning the guardianship of persons (especially young persons) to mothers.[61] Yet, it seems that more often in practice feudal lords secured guardianship over the person of the heir due to their overriding interest in the right to sell the ward's marriage.[62]

Thus far, the discussion has revolved around the guardianship of minors who stood to inherit properties held from a lord for military obligations. This is because these wardships involved the highest degree of complexity and demanded the most of medieval jurisprudence. In these situations, property and political networks

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58 *Id.* at 160-61.
59 *Id.* at 160-64.
60 *Id.* at 161.
61 Butler, *supra* note 25, at 112-13.
62 Walker, *supra* note 45, at 165-66.

were at stake. However, in high and late medieval England, another important type of free landholding existed: socage landholding. Socage lands did not require any military duty to the lord from whom they were held. Instead, these lands were held and passed with usually only monetary obligations owed to the lord.[63] Guardianship of wards for these lands also differed from feudal guardianship in a significant way, since socage guardianship was fiduciary.[64] This greatly impeded the ability of guardians to profit from guardianship, either over the property or person, and so the two forms of guardianship were less often separated, and widows were seen as the default guardian.[65] Widows were also likely seen as preferable guardians in this context because they were barred from the inheritance of socage lands in the event of the heir's untimely death.[66] However, there existed an interesting caveat regarding these preferences of guardianship assignment: Remarried widows could have the guardianship of their child assigned to the child's new stepfather.[67] As *Bracton* outlines regarding socage guardianship:

> On the death of his ancestors the heir of a sokeman will not be in the wardship of his chief lords but in that of his nearer kinsmen, that is, of those related by right of blood not by right of succession, that is, [not] in the wardships of nearer heirs to whom any right could descend, whether they are nearer, near or remote, from whose side the inheritance does not descend: if it descends from the father's side the wardship belongs to the mother, since she is the nearer relative because of proximity of blood; failing her, her father or mother is called, and failing these, her brother or sister, and failing these, her uncle or aunt. And let the converse be done if the inheritance descends from the mother's side. It is regularly true that no one shall ever remain in the wardship of a person who may be suspected of wishing to claim a right in that inheritance.[68]

Yet, this does not explain the situation of the guardianship of minors who did not stand to inherit any free lands (either feudal or socage). To be clear, this was a potentially quite broad category indeed and included all other children in the family of a deceased property holder who did not possess any inheritance claims

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63 1 Frederick Pollock & Frederic Maitland, The History of English Law Before the Time of Edward I 308-10 (2d ed. 2010).

64 Butler, *supra* note 25, at 114; Walker, *supra* note 45, at 164.

65 Butler, *supra* note 25, at 114; Walker, *supra* note 45, at 164.

66 Butler, *supra* note 25, at 114; Walker, *supra* note 45, at 164.

67 Butler, *supra* note 25, at 114; Hanawalt, *supra* note 26, at 96.

68 Bracton, *supra* note 47, at 254.

either by primogeniture or will. In these cases, it is likely that such minors remained in the custody of their widowed mothers or, if their mothers remarried, their new stepfathers.[69] Although, interestingly, for children whose families were connected to the guild system that dominated the crafts and commerce of urban Europe, guardianship could fall to guild brothers or guild masters, as in late medieval London.[70] As is perhaps evident at this point, but nevertheless bears repeating, medieval jurisprudence in family law was primarily oriented around issues concerning property. The law was less interested when property was not at stake in guardianship arrangements.[71] The implications of this fact are significant for how most medieval mothers and children experienced guardianship and, more specifically, custody. Medieval society from around the twelfth and thirteenth centuries onward was generally conditioned by both patrilineal kin structures and agnatic inheritance preferences,[72] while also, nevertheless, holding the strong cultural assumption that mothers were principally responsible for the care of young children.[73] At first blush, this is unsurprising in that it accords with what may be the perhaps anticipated norms associated with patriarchal societies across time and space, but it is worth pointing out that the custody rights assumed to fall to a mother in medieval society were also rights implicitly denied to other male kin. These considerations, however, set aside a number of what may be described as the *de facto* custody arrangements experienced by children and especially adolescents in fosterage, apprenticeship, and servant relationships outside their parental home.[74]

The status of "orphan" in medieval law referred not to an individual who had lost both parents but rather to one who had lost their father (again, the operative framework was the patriarchal property system).[75] Modern family law practitioners would not

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69 Walker, *supra* note 45, at 160, 164.

70 Hanawalt, *supra* note 26, at 96.

71 Butler, *supra* note 25, at 112.

72 David Herlihy, *The Making of the Medieval Family: Symmetry, Structure, and Sentiment*, *in* Medieval Families: Perspectives on Marriage, Household, and Children 192, 198-99 (Carol Neel ed., 2004).

73 Butler, *supra* note 25, at 115, 117.

74 For additional information on apprenticeship and servant employment, see Hanawalt, *supra* note 26, at 129-98.

75 Hanawalt, *supra* note 26, at 91; Ighe, *supra* note 38, at 1-2.

regard most orphans in medieval society as orphans at all. The fate of minors without mothers able to claim guardianship (likely due to her death) was more precarious.[76] For this class of children that can be called orphans in a modern sense, much would depend on the inheritance rights of the child. In the case of parentless children who stood to inherit feudal property or properties, guardianship and the ability to alienate it of course defaulted to a child's feudal lord, just as if the mother was still present; the difference in the case of a deceased mother, however, was the removal of the party with potentially the strongest case and most interest in contesting any guardianship assignment. Children not entangled in the questions of feudal inheritance would most likely default to the custody of near kin.[77] Indeed, for children in late medieval London, it appears that the mother's family was given preference over the father's in this regard.[78] Also, from the London context, there was an interesting exception to this rule: In the case of orphans without relatives available, rather than seeking out ever more distant ties of kinship, a government official, such as the chamberlain of the city, could step in to take up custody.[79] Readers may notice that this is the first time in the discussion that the medieval state has intervened to provision care directly to children.

Finally, this section closes with the issue of guardianship in the case of divorce, or more technically in medieval Church law, separation and annulment. As previously mentioned, in the High and Late Middle Ages, legal questions concerning marriage validity were the sole preserve of the Church courts.[80] The circumstances in which the medieval Church granted divorce were limited in comparison to contemporary law, since theologically the Church held the position that marriages were indissoluble; however, the Church also maintained an interest in defining licit and illicit

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76 Outside the scope of this article is the class of children forfeited by living parents, but for more on the transition from the abandonment of children to exposure to the elements to the formal surrender of children to monastic institutions, see John Eastburn Boswell, Expositio *and* Oblatio*: The Abandonment of Children and the Ancient and Medieval Family*, *in* Medieval Families: Perspectives on Marriage, Household, and Children, *supra* note 72, at 234.

77 Orme, *supra* note 7, at 317.

78 Hanawalt, *supra* note 26, at 97.

79 *Id.*

80 *See supra* discussion in text at note 55.

marriages, with illicit marriages being dissoluble.[81] In the English context, Church courts would permit separation on the grounds of heresy, adultery, and cruelty; meanwhile, annulment could be secured on the grounds that one or both spouses were not of age when the marriage was finalized, that force and fear rendered the marriage nonconsensual, or on the grounds of impotence, bigamy, or incest (with degrees of consanguinity being a common concern for ruling classes).[82] In these cases, as succinctly put by historian Sara Butler, who wrote the core text on the normative history of divorce in medieval England, "the over-riding assumption [when both parents are *compos mentis*] is that there is no evidence of custody award in the event of a divorce, because custody automatically went to the father."[83] Yet, Butler also presents a compelling case that in the event that divorced men fled from their custody obligations or even denied paternity, the preference of the ecclesiastical courts was to grant guardianship to the mother, particularly in situations in which the minor in question was below the acceptable age for being sent out of the home, as in the case of fosterage, apprenticeship, or domestic service.[84] If the divorce took the form of annulment, the legal status of the child could be affected in profound ways: Since the marriage was considered void from the start, the children arising from it could be considered legally bastards, in the common law understanding of bastard status, and therefore potentially barred from inheritance and ecclesiastical orders.[85] A change in legitimacy for the children of dissolved marriages may have influenced guardianship considerations regarding those children, as, for example, a minor feudal heir could become at once entirely ineligible for inheritance.

From these considerations of different guardianship circumstances in high and late medieval English society, a set of general principles can be discerned. Medieval jurisprudence regarding the guardianship of minors was shaped by considerations of property, custom, and Church law, as well as the unique circumstances, and

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81 For a survey of the relevant medieval Church law for this discussion, see especially Chapters 5 through 10 of James A. Brundage, Law, Sex, and Christian Society in Medieval Europe (1987).

82 Butler, *supra* note 25, at 2.

83 *Id.* at 116.

84 *Id.* at 116-17.

85 *Id.* at 120.

general weakness, of high medieval state institutions out of which medieval law developed. Medieval conceptualizations of childhood that defined minority and its relationship to the patriarchal property systems of medieval society also provided the essential backdrop for these influences. In sum, the medieval guardianship of minors was defined principally by class-oriented property concerns and not primarily concerns about the welfare of the child. Child welfare was at best only a parallel consideration, and, more likely, not a factor at all when any meaningful amount of property or political influence was at stake. Nevertheless, the medieval family, and the mother as second parent, retained a normative interest and even a slight preference in claiming guardianship over related children. Significantly, these claims were not made based on rights, and other legal arguments (or even violent self-help) would be employed. The picture that emerges is a cultural legal landscape in some ways reminiscent of modern legal practice yet different in key ways that challenge some of the underlying assumptions of modern custody concerns.

IV. A Brief Note for Modern Family Law Practitioners

To what extent can the specifics of medieval family law regarding the guardianship of minors have application for resolving, say, modern custody or child support disputes? This concluding section seeks to answer that question and argues for a number of advantages to engaging with the medieval history of guardianship and to otherwise historicizing present day legal institutions through the distant, rather than immediate past. The primary advantage comes from a potential perspectival shift from searching for traditions and genealogies and instead to paying attention to the alterity of the past. Ultimately, awareness of the medieval past can help to broaden and nuance the modern practitioner's sense of what is, or has been, practicable in family law.

Engagement with the past is essential to the practice of law. The foundations of common law are precedents, and one need not necessarily adopt the conservative interpretative philosophies of originalism or textualism to acknowledge that historically contextualized readings of cases and statutes are essential to U.S. jurisprudence. Yet, to the extent that constitutional law establishes the

epistemological terms of legal analysis, the Supreme Court's embrace of the "history and tradition"[86] test seems to call for a deeper engagement with the past, if not necessarily the strict application of the tools of the historian's craft. As noted by Linda C. McClain and James E. Fleming, "*Dobbs* conceives 'our nation's history and tradition' as historical practices."[87] And "historical practices" can stretch far back indeed. This author was delighted to find, given his research interests, direct discussion in the opinion of the Court regarding the medieval institution of the frankpledge in *United States v. Rahimi*.[88] There seems to be growing force behind the notion that persuasive legal argumentation is based, in part, on tracing deep legal genealogies or identifying compelling examples in the early modern and medieval worlds.

Yet it seems unlikely and unnecessary that legal trends and a new emphasis on "history and tradition" will make medievalists of all family law attorneys. While a targeted application of *Bracton* or a reference to Hanawalt's body of scholarship may be relevant to the specifics of a family law case, a familiarity with some topics in medieval family law and the medieval context more generally underscores the relative novelty and centrality of child welfare in modern guardianship arrangements. Contrary to Hanawalt's general assessment for medieval London,[89] medieval jurists did not prioritize the welfare of children in this aspect of jurisprudence. This is not to say that medieval people did not care deeply for or about children. As established above, medieval people viewed children as a unique class of dependents, deserving of special consideration and care. Moreover, in the case of "orphans" (in the medieval sense of the term) a cultural predisposition favored mothers among potential guardians, even if mothers could not necessarily claim

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86 *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022); City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464 (2022). *See generally* Cary Franklin, *History and Tradition's Equality Problem*, 133 Yale L.J. Forum 946 (2024); R. George Wright, *On the Logic of History and Tradition in Constitutional Rights Cases*, 32 S. Cal. Interdisc. L.J. 1 (2022).

87 Linda C. McClain & James E. Fleming, *Ordered Liberty After* Dobbs, 35 J. Am. Acad. Matrim. Law. 630 (2023).

88 United States v. Rahimi, 144 S. Ct. 1889, 1899-1900 (2024).

89 Hanawalt, *supra* note 26, at 90 ("London's law granted medieval orphans more protection than our own courts give today's children.").

guardianship by right. Again, whenever property concerns of political significance impinged on inheritance and thus guardianship, law and custom favored other parties. Thus, current-day family law practitioners may find some parallels with the medieval past, but many more differences.

The profound differences between the medieval past and the present can expand the practitioner's sense of the contingencies and limits of U.S. family law jurisprudence. While it is not advisable for the modern family law attorney to argue in court that a feudal lord should be able to claim guardianship over a fatherless minor, medieval jurisprudence would council consideration of other familial and close quasi-familial relationships when taking up the question of assigning guardianship.[90] With the deaths or absences of both parents, medieval people would entrust their children to not only blood relations but fellow guild members as well.[91] Even the feudal lord and his family were joined to his vassals and their families through intense and emotionally significant bonds. The medieval conceptualization of the family was also broader than the present understanding, with blended families, cohabitants, and dependents all considered part of the household.[92] It bears repeating that medieval state institutions and their officers were often unable or unwilling to step in and assert guardianship. This is in striking contrast to modern family law where the state is often considered as a default guardian outside of close family.[93] The argument here is not that medieval legal and social norms should be reconstructed or revived in the present. Rather, engagement with the medieval world as connected to but nevertheless outside of modernity offers ways of reexamining the present and widening the sense of possibility within the practice of the law.

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90 *See, e.g.*, Tonya L. Brito, *Complex Kinship Networks in Fragile Families*, 85 Fordham L. Rev. 2567 (2017).

91 *See supra* discussion in text at note 70.

92 Butler, *supra* note 25, at 125. For the fluidity of child fosterage and guardianship arrangements outside the nuclear family, see Philippa Maddern, *Between Households: Children in Blended and Transitional Households in Late-Medieval England*, 3 J. Hist. Childhood & Youth 65 (2010).

93 "The state is the guardian of society's basic values. Under the doctrine of parens patriae, the state has a right, indeed a duty, to protect children. . . . State officials may interfere in family matters to safeguard the child's health, educational development, and emotional well-being." *In re* Phillip B., 92 Cal. App. 3d 796, 156 Cal. Rptr. 48 (1979), citing Prince v. Massachusetts, 64 S. Ct. 438, 442 (1944).

The Ascent of Lawyer Lincoln: How the Practice of Law Created America's Greatest President

by
Steven N. Peskind*

Before becoming the sixteenth American President, Abraham Lincoln practiced law in central Illinois for twenty-four years.[1] His practice anchored him throughout his turbulent personal and political life. As historian Brian Dirck observed, "Lincoln's up-and-down political career offered a contrast to his rock-solid law practice."[2] The practice not only provided respectability and income for his growing family, but also gave him extraordinary insights into human relations. According to Lincoln scholar (and Central Illinois lawyer) Guy Fraker, "his lengthy travels on the circuit and time with its residents from all walks of life enhanced his understanding of human nature, and he developed an extraordinary ability to listen and understand, without rancor, opposing viewpoints."[3] His circuit riding also helped him develop a fraternal relationship with a group of his fellow eighth judicial circuit practitioners, who helped him secure his nomination for president at the 1859 Republican convention.[4] And as this article will develop, President Lincoln largely applied the skills he nurtured as Lawyer Lincoln.

Lincoln had little training to assume the responsibilities of a wartime commander in chief, struggling with massive constitutional and political challenges that would vex King Solomon.[5] But in a vastly smaller way, those problems resembled the problems he confronted as a workaday lawyer in central Illinois. All the little

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1 Brian R. Dirck, Lincoln the Lawyer 21 (2007).

2 *Id*. at 2.

3 Guy C. Fraker, Lincoln's Ladder to the Presidency: The Eighth Judicial Circuit 3 (2012).

4 *See* Edward Achorn, The Lincoln Miracle: Inside the Republican Convention that Changed History (2023).

5 *See, e.g.,* Albert A. Woldman, Lawyer Lincoln 3-5 (1936).

problems he solved for his clients prepared him for the immense ones awaiting him when he led the nation. His training for the White House literally took place in the courthouses throughout Illinois. Surprisingly, considering the era, Lincoln's practice included a substantial amount of divorce and family law work. And within that realm, Lincoln received a profound education on family conflict. It is thought-provoking to speculate how the prairie "civil wars" that he managed prepared him for the national civil war.

In part I, the article will discuss Lincoln's law practice, including his education, professional relationships and Lincoln's divorce practice. Part II will explore his personal attributes as a lawyer including how he was assessed by his contemporaries. The article will conclude in part III by exploring how his experience as a lawyer informed his leadership of the country during his presidency.

I. Lincoln's Law Practice

A. *The Evolution of Lawyer Lincoln*

As a young man, Lincoln chose the law after sampling a variety of odd jobs in New Salem, Illinois.[6] Despite his humble roots, Lincoln's ambition was inexhaustible, and he saw the practice of law as a springboard to social acceptance and political opportunity.[7] Historian, Michael Burlingame suggests that his ambition compensated for low self-esteem, which would not be surprising considering his hardscrabble and insecure childhood. Whatever the reason, Lincoln's drive for achievement and success remained unwavering.[8]

Unlike the custom and practice of studying under a lawyer, Lincoln was proudly self-taught in law.[9] In a campaign biography (which Lincoln approved), William Dean Howells described Lincoln's "peculiar" method of studying:

> His favorite place of study was a wooded knoll near New Salem, where he threw himself under a wide-spreading oak and expansively made a reading desk of the hillside. Here he would pore over Blackstone day

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6 Michael Burlingame, Abraham Lincoln: A Life 32-35 (Jonathan W. White ed. 2023) (2008).

7 *See* Mark E. Steiner, An Honest Calling: The Law Practice of Abraham Lincoln 27 (2006).

8 Burlingame, *supra* note 6, at 91.

9 Steiner, *supra* note 7, at 31.

> after day shifting his position as the sun rose and sank, so as to keep in the shade, and utterly unconscious of everything but the principles of common law.[10]

Lincoln read well-known treatises in addition to the Illinois statutes.[11] He laboriously studied these sources for four years.[12] As it turns out, the practice of law was a good fit for Lincoln, an empathetic man with a huge intellect who was a natural communicator.

The law did not come easily for Lincoln.[13] Four years was longer than most law students took to learn the basic texts, and Lincoln acknowledged himself as a slow learner: "I am slow to learn and slow to forget that which I have learned. My mind is like a piece of steel, very hard to scratch anything on it and almost impossible after you get it there to rub it out."[14] As historian and biographer David Herbert Donald observed, "he did not come to conclusions quickly, and he was temperamentally averse to making bold moves."[15] Lincoln was slow to absorb information and decide, but once he did, his resolve was unshakeable. One can see this deliberativeness during Lincoln's wartime leadership.[16]

In 1836, Lincoln applied for membership in the Illinois bar.[17] At that time, Illinois did not require any formal test on substantive law or procedure.[18] The only requirements for admission were a license from two Supreme Court Justices, a rudimentary examination (probably oral), and certification by a county clerk that the applicant embodied "moral character."[19] On March 24, 1836, the Sangamon County clerk certified Mr. Lincoln as "a man of good moral character," thus paving the way for him to practice.[20]

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10 *Id*. at 33, citing Howells Life of Abraham Lincoln at 31. William Dean Howells, Life of Abraham Lincoln: The Story of His Administration 31 (Follet, Foster & Co. 1860).

11 *See, e.g.*, Dirck, *supra* note 1, at 16-19.

12 *Id*. at 19.

13 *Id*. at 20.

14 William H. Herndon & Jesse W. Weik, Herndon's Lincoln 312 (Douglas L. Wilson & Rodney O. Davis eds. 2006) (1889).

15 David Herbert Donald, Lincoln 285-86 (1995).

16 John P. Frank, Lincoln as a Lawyer 144-48 (1961) (Lincoln wrestling with the legal justification of the Emancipation Proclamation).

17 Dirck, *supra* note 1, at 21.

18 *Id*.

19 Steiner, *supra* note 7, at 37.

20 Dirck, *supra* note 1, at 21.

Like most lawyers, it was in the trenches of the practice where Mr. Lincoln *really* learned the law.[21]

Getting licensed was only the first step in his upward mobility. To develop his career, Lincoln needed to affiliate. His first law partner was John Stuart, an acquaintance from the Blackhawk War, where they both served.[22] While studying, Lincoln rode twenty-one miles from New Salem to Springfield to borrow Stuart's law books.[23] Stuart eventually sponsored him for the bar as well.[24] Stuart proved to be an ideal partner for the newly licensed lawyer.[25] When Lincoln joined him, Stuart had an established book of business and common political connections with Lincoln in the Whig political party.[26] Lincoln worked with Stuart for three years but, according to attorney Guy Fraker, Stuart taught him little about the practice of law.[27] Stuart was away in Washington as a U.S. Representative during most of their partnership and had little time to train Lincoln.[28] After three years, Lincoln and Stuart parted ways amicably and continued to associate during the balance of Lincoln's career.[29]

Lincoln was not untethered for long; Stephen Logan, a former judge before whom Lincoln tried his first case, offered him a position.[30] Scholar and lawyer Arthur Woldman described Logan as "perhaps the most constructive influence on Lincoln's life.[31] Logan was well regarded for his research and reasoning skills, but he was not an accomplished orator or jury lawyer.[32] He chose Lincoln largely to complement this deficiency.[33] Dirck describes Lincoln at the time he joined Logan as "competent but not spectacular."[34] Under Logan's tutelage, Lincoln gained better working knowledge

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21 Frank, *supra* note 16 at 10.
22 Dirck, *supra* note 1, at 24.
23 Steiner, *supra* note 8, at 31.
24 *Id*. at 39-40.
25 Dirck, *supra* note 1, at 25.
26 *Id*.
27 Fraker, *supra* note 3, at 24.
28 *Id*.
29 *Id.*
30 Woldman, *supr*a note 5, at 39.
31 *Id.* at 40.
32 Dirck, *supra* note 1, at 28.
33 *Id*.
34 *Id*. at 27.

of substantive and procedural law, which he lacked due to his self-administered training.[35] Under Logan's mentorship, Lincoln became formidable.[36] "Logan taught Lincoln that the law required hard work and careful preparation. He made Lincoln more methodical and more dedicated in his preparation."[37] Lincoln learned from Logan how to marshal the facts, apply reason and precedent, and frame arguments.[38] Logan also helped cure Lincoln of some of the careless habits he developed while working with Stuart.[39] This partnership was the beginning of Lincoln's evolution from "natural" communicator to skilled legal advocate.[40] Lincoln stayed with Logan for four years, but they separated because Logan wanted to form a new partnership with his son.[41] According to Woldman, the real reasons for the breakup were more organic, "Logan and Lincoln had but little in common. Two such conflicting, ambitious, and independent personalities could not exist together indefinitely in one small office, and the partnership came to an end."[42]

Despite any conflicts, Lincoln owed Logan a debt of gratitude, "The years spent as Logan's associate were indeed constructive years. They were years of education, training, and discipline. The benefits were to last Lincoln all his days."[43] It was here that Lincoln became a "dangerous adversary," plying his trade with acumen and skill.[44]

Lincoln's next and last law partner was William Herndon, who clerked at Lincoln and Logan's office before becoming licensed to practice.[45] Again, Lincoln found a complement for his courtroom prowess. "Billy," as Lincoln called him, was a skilled legal

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35 Fraker, *supra* note 3, at 26.

36 Dirck, *supra* note 1, at 28.

37 *Id*.

38 Woldman, *supra* note 5, at 41.

39 *Id.* at 40-41.

40 *Id*.

41 *Id.* at 45.

42 *Id.*

43 Woldman, *supra* note 5, at 46-47. Lincoln continued to professionally associate with Logan until the end of his career. The two were co-counsel in Lincoln's last trial involving the successful defense of murder charges against Peachy Quinn Harrison in 1859. Abraham Lincoln 4 The Papers of Abraham Lincoln: Legal Documents and Cases 137 (Daniel W. Sowell ed., 2008).

44 Woldman, *supra* note 5, at 46-47.

45 Fraker, *supra* note 3, at 27.

researcher, and Lincoln relied on him for that purpose, as well as to handle the practice's business.[46] Herndon described Lincoln as not being an assiduous reader of the law. Instead, Herndon claims that Lincoln trusted Herndon to secure for him the authorities to support his arguments.[47] Regardless of the truth of this claim, the practice thrived with the partners litigating cases in more than a dozen counties in Illinois, the Illinois Supreme Court, and the state's federal courts.[48] They were also involved in four cases that ultimately reached the U.S. Supreme Court.[49] Although they were temperamentally dissimilar, this successful partnership thrived for about sixteen years until Lincoln left for the White House in 1861. Herndon's insights into Lincoln have provided Lincoln scholars (including the author) with an intimate view of lawyer Lincoln.[50]

Lincoln was first and foremost a trial and appellate lawyer.[51] According to Illinois Supreme Court records, a significant portion of his cases involved real and personal property disputes, debt-or-creditor issues, and a significant number of divorce cases.[52] As his experience and reputation developed, he was retained on more complex cases involving corporate and railroad litigation in the federal courts.[53] But because of his clientele in Sangamon County and the adjacent rural communities, he continued to work on small cases throughout his career.[54]

B. *Circuit Rider*

Lincoln, along with his fellow lawyers, rode the eighth judicial circuit throughout central Illinois. Dirck refers to this "as the 'mud circuit' because of its awful roads and rural conditions."[55] Typically,

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46 *Id*.

47 Steiner, *supra* note 7, at 41.

48 Brian Dirck, *A. Lincoln: Respectable "Prairie Lawyer," in* Abraham Lincoln, Esq.: The Legal Career of America's Greatest President 67-68 (Roger Billings & Frank J. Williams eds., 2010).

49 *Id.*

50 *See* Herndon & Weik, *supra*, note 14, at xxxv.

51 Frank, *supra* note 16, at 6.

52 *Id.* at 6.

53 *Id.* at 7-8.

54 *Id*. at 9.

55 Dirck, *supra* note 1, at 45.

Lincoln was "on the road" for many months each year.[56] Lincoln's friend Judge David Davis argued Lincoln's perpetual wandering was an attempt to escape Mary.[57] But it is equally likely that the companionship of his fellow travelers nourished him. Fraker describes the circuit riding experience as having "the ambiance of men at a later time on a long fishing trip."[58] It is also likely that Lincoln recognized that the bonds he was forging would pay political dividends, which they ultimately did.[59] While Lincoln enjoyed the camaraderie of his coterie, he would find quiet time for contemplation or study after the others went to sleep.[60]

Lincoln was happiest when on the circuit. A Chicago firm offered him a lucrative partnership in 1852. He turned it down, declaring "that the confinement in the office. . . would soon kill him."[61] Herndon later added, "He preferred going around the circuit, and even though he earned smaller fees he felt much happier."[62] Each spring and fall, various members of the traveling bar, along with one judge for the entire circuit, went from county to county for consecutive sessions of the circuit courts of the eighth judicial circuit.[63] Between 1848 and 1860, David Davis from Bloomington accompanied Lincoln as the itinerant judge.[64] Their friendship resulted in Davis becoming Lincoln's campaign manager for president.[65] Ultimately, President Lincoln appointed Judge Davis to the U.S. Supreme Court.[66]

When they arrived at a county seat, the circuit riders would meet with clients and prepare their cases for trial. Local lawyers would frequently refer cases, and the riders would confer with them. Fraker describes the challenges facing these legal wayfarers:

> The work itself was intense, difficult, and demanding because of the rushed nature of the proceedings and the limited opportunity to

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56 *Id*. at 47.
57 *Id*.
58 Fraker, *supra* note 3, at 43.
59 Frank, *supra* note 16, at 22.
60 Herndon & Weik, *supra* note 14, at 193-94.
61 Dirck, *supra* note 1, at 53.
62 *Id.*
63 *See, e.g.,* Fraker, *supra* note 3, at 37.
64 *Id*.
65 Burlingame, *supra* note 6, at 253-56.
66 *Id*. at 331.

> prepare. Each day brought new cases involving a wide range of subject matter and people. The hurried drafting of pleadings, interviewing of witnesses, and development of trial strategy were challenges. The work required flexibility under fire, sharp wits, and innovative quick thinking. There was no pretrial discovery as there is today, so generally the lawyers had little advance knowledge of the opponent's case. The hearing, with its spontaneous presentation of evidence and cross-examination, demanded focus and concentration. Competition for business and the desire and need to have a satisfied client and referring attorney put a premium on success and substantial pressure on the attorneys.[67]

These lawyers necessarily practiced the fine art of improvisation and depended on their ingenuity to ply their trade.[68] Despite all the challenges and discomfort of this nomadic lifestyle, Lincoln thrived here. And the opportunities to challenge himself ultimately provided great training for his later career as a wartime leader.

C. *Lincoln: Divorce Lawyer*

Like virtually all lawyers of the time, Lincoln had a general law practice.[69] In his 24-years at the bar, records show that he appeared of record in approximately 5,100 cases.[70] The bulk of Lincoln's practice involved mundane debtor-creditor matters, along with land and livestock disputes.[71] Defamation cases were also ever-present, as nineteenth-century rural citizens were particularly protective of their reputations.[72] While Lincoln handled criminal cases (his Almanac trial was legendary),[73] criminal cases were few and far between for Lincoln.[74] As he developed his reputation and skills, Lincoln's practice involved railroad litigation and other large commercial disputes.[75]

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67 Fraker, *supra* note 3, at 42.

68 Dirck, *supra* note 1, at 45.

69 Dirck, *supra* note 48, at 68.

70 *Historical Introduction*, *in* The Papers of Abraham Lincoln: Legal Documents and Cases xxix (Daniel W. Stowell, ed., University of Virginia Press 2008).

71 *Id.* at xxxv-xxvi.

72 *See, e.g.,* Mark E. Steiner, *Does Lawyer Lincoln Matter?, in* Abraham Lincoln, Esq., *supra* note 48, at 52.

73 *See, e.g.,* Lincoln, *supra* note 43, at 1-48.

74 Dirck, *supra* note 48, at 73.

75 *See, e.g.,* Steiner, *supra* note 7, at 137-59.

According to Stacy Pratt McDermott, the Assistant Director and Associate Editor of the Papers of Abraham Lincoln in Springfield, Illinois,[76] divorce cases were commonplace in Sangamon County at the time of Lincoln's practice. During this period, Illinois liberalized divorce. By 1860, Illinois led the nation in divorces.[77]

The researchers and editors of the Lincoln Legal Papers,[78] offer insights into Lincoln's family law practice. During Lincoln's career (between 1837 and 1860), 220 divorce petitions were filed in Sangamon, Lincoln's home county. Of these, Lincoln's firms appeared in 40% of them, 63% were filed by women and 37% by men, and 76% of those petitions were granted.[79] During this time, Lincoln and his successive partners appeared on 145 divorce cases throughout central Illinois.[80] According to McDermott, Lincoln, "as a respected man in the community and a capable lawyer, was a popular choice as counsel in legal issues regarding families, including divorce cases."[81] McDermott further observes:

> That Lincoln and his partners handled such a high percentage of the divorce cases appearing on the Sangamon County Circuit Court docket may suggest the eagerness with which Lincoln's law firms sought to gain business. It may also reflect Lincoln's reputation as a compassionate person when dealing with clients' personal and family problems. It could mean that fewer lawyers in Sangamon County were engaged in divorce practice or family related litigation. Whatever the reason, Lincoln took many divorce cases, and his contemporaries may have considered him a divorce lawyer.[82]

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76 Stacy Pratt McDermott was also the co-editor of "The Papers of Abraham Lincoln: Legal Documents and Cases and The Law Practice of Abraham Lincoln," Papers of AbrahamLincoln.org (last visited Mar. 18, 2025).

77 Stacy Pratt McDermott, *Dissolving the Bonds of Matrimony: Women and Divorce in Sangamon County, Illinois 1837-60, in* In Tender Consideration: Women, Families, and the Law in Abraham Lincoln's Illinois 71 (Daniel Stowell ed., 2002).

78 Starting in 1988, the Lincoln Legal Project compiled all extant papers related to his practice and collated and transcribed them. *See The Law Practice of Abraham Lincoln,* https://lawpracticeofabrahamlincoln.org (last visited Nov. 19, 2024).

79 McDermott, *supra* note 77, at 71.

80 *Id.* at 94.

81 *Id.* at 95.

82 *Id*. at 94.

Lincoln was on the losing side of one of the first Illinois cases addressing the question of the best interest of children standard in determining child custody disputes. In the 1846 case of *Cowls v. Cowls*,[83] the Illinois Supreme Court relied on the best interest standard to resolve a child custody case, and according to Dennis Suttles, one of the assistant editors of the Lincoln Papers, this case "served as a precedent in future Illinois cases involving the welfare of children."[84] Prior to this, custody disputes were settled by the English common law doctrine of parens patriae, which favored fathers as child custodians.[85]

In *Cowls*, Ann and Thomas Cowls divorced without allocating custody of their children, who remained with their father. Later, Thomas took up with and allegedly cohabitated with another woman. Ann filed suit, alleging he was living "in a state of fornication" with an unchaste woman, and she sought child custody and support. Thomas married his paramour, apparently seeking to defeat Ann's case. Undeterred, Ann made various allegations at trial about the woman's notoriety and Thomas' intemperance and bad character. Ultimately, the trial court ruled in her favor and awarded Ann the children.[86]

Thomas hired Mr. Lincoln to appeal to the Illinois Supreme Court. Lincoln relied on a precedent that granted custody to a mother who similarly cohabited with another unmarried person. The high court distinguished this authority, holding that it was the "tender years" doctrine underlying that custody award. While not clear, it appears Lincoln also argued deference to the father should be the rule under the *parens patrie* doctrine. The Illinois high court again rejected the argument, finding that Thomas is character rendered him unworthy of maintaining custody of the children. Writing for the court, Chief Justice Caton reflected that, "Grouped together into one disgusting and revolting picture, those features of a father's character who has become unworthy of the charge of his own offspring."[87]

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83 8 Ill. 435, 439 (1846).

84 Dennis. E. Suttles, *"For the Well-Being of the Child:" The Law and Childhood, in* In Tender Consideration: Women, Families, and the Law, *supra* note 77, at 54.

85 *Id*.

86 *Id*. at 54-55.

87 *Id.*

This case confirms that Lincoln, despite his saintly reputation, was a working lawyer who took cases for money, and not always based upon principles with which he agreed. Unquestionably, Lincoln was a kind and compassionate person. Lincoln's empathy, intellect, and patience made him a natural family lawyer. But, according to Herndon, Lincoln hated the divorce practice.[88] Considering the number of cases Lincoln handled, it would suggest more ambivalence than outright hatred of family law.

McDermott cites the case of Samuel and Polly Rogers as an illustration of Lincoln's ambivalence. In 1838, Samuel hired Lincoln and Stuart's firm to represent him in his divorce suit against Polly. Samuel complained that Polly deserted him and was an adulteress. Since grounds existed based upon desertion, Lincoln talked him out of pursuing the adultery grounds to save her the embarrassment, "through tender consideration to the said defendant's character."[89] His kindness backfired, however, when the court granted the divorce, and levied a large amount of alimony against Samuel. Lincoln and his then partner Stuart scrambled to do damage control by filing an amended bill for divorce, which included a count for adultery, supported by an affidavit from Lincoln attesting that the client had previously disclosed the adultery, and his lawyers instructed him not to proceed with the allegation. Following a jury trial that found the defendant wife guilty of adultery, the court significantly reduced the award.[90] While the incident could reflect the poor judgment of a young lawyer (he had only been in practice a couple of years at the time), it also reveals his kindness and respect for women. According to McDermott:

> [E]xamination of the case documentation of Lincoln's divorce practice over time reveals Lincoln's gentle nature regarding women. Lincoln's personal relationship with Mary Lincoln, particularly Lincoln's gentle acceptance of his wife's temper tantrums and other childlike behavior, reflected his deep paternal streak. Lincoln showed concern about the economic and social dangers that divorce women faced, and his respect for the women who entered into his personal and professional life reflected that tenderness.[91]

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88 McDermott, *supra* note 77, at 95.

89 *Id*.

90 *Id* at 96.

91 *Id.*

Virtually all family lawyers have mixed feelings about the practice. One can certainly imagine how Lincoln would struggle dealing with unreasonable or avaricious divorce clients, given his temperament. Lincoln was also a clear thinker who considered the world analytically.[92] However, as any divorce lawyer can attest, logic is rarely the driving force of divorce litigation. According to McDermott, "on the one hand, Lincoln appreciated that divorce was necessary for some couples; yet he felt sadness about the dissolution of the marriages of his clients."[93]

Even though divorce procedures in the nineteenth century were very different from those in the modern era, family law practice has remained largely unchanged because human nature has not changed. Greed, avarice, kindness, and cruelty remain intrinsic to human beings, and those traits abundantly manifest in family court. Now as then, exposure to those aspects of human nature undoubtedly provides enhanced insights into human affairs. Professor Brian Dirck elegantly describes how Lincoln's law practice helped him understand the world:

> [Lincoln] "got up" every morning, went to work and learned—in ways quiet yet profound—about how people interact with one another in a community, about the realities of their conflicts and abrasions, and about what he should and should not expect from the bumptious sea of humanity that crossed his path. By themselves, the cases mean little in terms of Lincoln's overall development; as a whole, they add up to a quarter century's worth of lessons at the Illinois bar; lessons about the limits and feelings of human behavior, the impossibility of truly plumbing the depths of other peoples' souls, and the need to find ways for communities to function without the perceived necessity of such knowledge.[94]

Regular exposure to these abrasions helped Lincoln cultivate a form of wisdom unavailable in textbooks.

II. Lincoln's Attributes as a Lawyer

As a lawyer, Lincoln successfully balanced passion with logic, aggression with courtesy, kindness with opportunism, and ruthlessness with affability.[95] Lincoln excelled before a jury.[96]

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92 Herndon & Weik, *supra* note 14, at 354.
93 McDermott, *supra* note 77, at 95.
94 Dirck, *supra* note 1, at 7.
95 *Id.* at 43.
96 Steiner, *supra* note 72, at 48-49.

His extraordinary emotional intelligence helped him persuade juries with his intuitive understanding of human nature. According to Lincoln contemporary, Isaac Arnold, in a paper presented to the Illinois State Bar Association in 1881, he recounted his personal observations of Lincoln's skill, "On the whole, I always thought him relatively stronger before a jury than with the Court. He was a quick and accurate reader of character and understood, almost intuitively, the jury, witnesses, parties, and judges and how best to address, convince, and influence them."[97]

Lincoln cultivated the art of communicating in a way that common people could relate to. According to Lincoln scholar and retired Illinois trial judge Ronald Speers, Lincoln also possessed skills universal to all great trial lawyers: the intelligence to understand difficult subjects and the ability to communicate those difficult subjects clearly.[98] According to lawyer and professor John Frank, simplicity was Lincoln's superpower.[99] Deconstructing adversaries' arguments and refuting them simply and clearly was the key to Lincoln's success, both in the law and in politics.[100] In his article "Lincoln, Explainer of Things," Speers cites Lincoln's remarks to Herndon about simplifying arguments.

> [D]on't shoot too high, aim lower and the common people will understand you. They are the ones you want to reach. The educated and refined people will understand you anyway. If you aim too high, your idea will go over the head of the masses and hit only those who need no hitting.[101]

One can see this trait in the simple eloquence of many of his speeches and public pronouncements.[102]

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97 Isaac. N. Arnold, in a paper read to the Illinois State Bar Association at Springfield, Illinois, *Reminiscences of the Illinois Bar, Forty Years Ago: Lincoln and Douglas as Orators and Lawyers* (Jan. 7, 1881) (transcript available from the Illinois State Bar Association and on file with author).

98 Ron Speers, *Lincoln, Explainer of Things*, Ill. B.J. 44 (Aug. 2020).

99 Frank, *supra* note 16, at 24.

100 Herndon & Weik, *supra* note 14, at 321.

101 Speers, *supra* note 98.

102 *See, e.g.*, 1. Gettysburg Address (1863), https://en.wikipedia.org/wiki/Gettysburg_Address: "Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal." 2. House Divided Speech (1858), https://www.nps.gov/liho/learn/historyculture/housedivided.htm: "A house divided against itself cannot stand. 3. Second Inaugural Address (1865), https://www.nps.

According to Speers, Lincoln did not seek to impress people with his considerable intellect, but rather he sought to humbly explain things in a way they could understand. Lincoln relied on common language to do this, along with anecdotes, stories, and humor.[103] His wit and humor and inexhaustible store of anecdotes, always to the point, added immensely to his powers as a jury advocate."[104]

While more comfortable in the land of logic, Lincoln also knew how to manipulate emotions to achieve his goals.[105] He recognized that jurors decide cases with their hearts *as well as* their heads, and he knew how to play to those jurors' emotions. He used his frumpy appearance to create a connection with his farmer jurors.[106] At other times, when the situation called for it, Lincoln dressed like a gentleman.[107] He firmly kept his eyes on the goal he sought to achieve and how to best execute it for the specific case.

According to Professor Dirck, "Lincoln had a reputation as a tenacious litigator, one who knew how to employ a technicality or pitch an argument to get what he needed. People underestimated him at their peril."[108] As Lincoln's contemporary, Leonard Swett observed: He was white as a serpent in the trial of a cause. "I've got too many scars from his blows to certify that he was harmless as a dove. . . Any man who took Lincoln for a simple minded man would very soon wake [up] with his back in a ditch."[109] But Lincoln tempered his competitive drive with a genial demeanor and professional courtesy.[110] He fought hard but fought fair. As another

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gov/linc/learn/historyculture/lincoln-second-inaugural.htm: "With malice toward none, with charity for all. . ." 4. First Inaugural Address (1861), https://housedivided.dickinson.edu/sites/teagle/texts/lincolns-first-inaugural-1861: "We are not enemies, but friends. We must not be enemies." 5. Cooper Union Address (1860), https://www.abrahamlincolnonline.org/lincoln/speeches/cooper.htm: "Let us have faith that right makes might, and in that faith, let us, to the end, dare to do our duty as we understand it."

103 Speers, *supra* note 98.

104 *Id*.

105 Dirck, *supra* note 1, at 102-03.

106 *Id.* at 102-05.

107 *Id.* at 118.

108 *Id.* at 43.

109 *Id.*

110 *Id.*

colleague observed, "He never misstated evidence, but stated clearly and fairly, and squarely his opponent's case.[111]

While clearly gifted as an advocate, Lincoln was not recognized as a legal innovator.[112] He worked within the law's confines, using it as effectively as possible. While creative, his creativity extended to the clever use of existing resources rather than revolutionary jurisprudence, "The great demand on the top lawyers of the mid-nineteenth century was the development of new legal structures for expanding capitalism. Lincoln was uninvolved in this movement, but instead he focused on refining established methods in the fields of litigation and procedure."[113] Lincoln, ever the traditionalist, worked within the confines of existing law rather than carving uncharted paths.

A. *Lincoln's Notes on the Practice of Law*

Lincoln himself gave clues as to what the practice taught him. Lincoln's personal papers included a fragment of notes containing his thoughts on the practice of law, which his secretaries John Hay and John Nicolay found in the deceased president's belongings.[114] Historian Ronald C. White believes these notes were written sometime in the 1850s, after he returned from his one term in the U.S. Congress.[115] The notes reveal Lincoln's thoughts on the practice of law after many years working in the profession.

White speculates that Lincoln's growing reputation in the 1850s drew many young lawyers seeking to train with him.[116] Because of his long absences practicing on the circuit, he was unable to accommodate their requests. White also speculates that Lincoln was writing these notes for a lecture at some undetermined time, to indirectly mentor some of these young lawyers in the habits and skills contributing to his success. White suggests that these notes provide a more accurate portrayal of Lincoln's legal

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111 *Id.*

112 Frank, *supra* note 16, at 96

113 *Id.*

114 Ronald C. White, Lincoln in Private: What His Most Personal Reflections Tell Us About Our Greatest President 5 (2021).

115 *Id*. at 34.

116 *Id*.

thinking than any public documents related to his extensive legal career.[117]

It is interesting—and perhaps telling of his future plans—that he kept these fragmentary notes written ten years earlier, through his move to Washington and throughout all of the turmoil of his presidency. It also confirms the importance he placed on the practice of law and perhaps anticipates his plan to return to it after his presidency. After Lincoln's death, Herndon told a poignant story of the last time the two men met.

On February 10, 1861, before leaving for Washington, Lincoln paid one final visit to Herndon at their law office. They reminisced about past clients and exchanged a few war stories. They also discussed some unfinished legal work. Before leaving, Lincoln requested that Herndon keep the sign of Lincoln and Herndon up. "Let it hang there undisturbed. Give our clients to understand that the election of a president makes no change in the firm of Lincoln and Herndon. If I live I'm coming back some time, and then we'll go right on practicing law as if nothing had ever happened."[118] Sadly, he never had that opportunity.

Lincoln's notes encapsulated the principles and skills he embraced during his quarter century at the bar. Those principles included the following:

1. Humility
2. Diligence
3. Excellence in communication
4. Be a problem solver rather than a problem creator
5. Fair billing practices (for both the lawyer and the client)
6. Honesty[119]

They also reveal what he learned from the practice of law, and how they manifested in the traits he employed as president. Taken as a whole, these notes teach an abundance about Lincoln's values and his notions about the practice of law.

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117 *Id.* at 5.

118 Herndon & Weik, *supra* note 14, at 289-90.

119 *Notes for a Law Lecture*, Abraham Lincoln Online, https://www.abrahamlincolnonline.org/lincoln/speeches/lawlect.htm (Last visited Feb. 26, 2025).

1. *Humility*

"I am not an accomplished lawyer. I find quite as much material for a lecture in those points wherein I have failed, as in those wherein I have been moderately successful."[120]

Here, Lincoln (by example) emphasizes the importance of humility as a lawyer. Lincoln was always ambitious, both as a lawyer and a politician.[121] White observed, however, that as he matured in the practice, Lincoln learned to temper his ambition with humility, "Lincoln never shied away from his ambition. Through the years he learned to balance it with humility."[122] Burlingame, citing a judge before whom Lincoln practiced, observed how Lincoln's lack of egotism endeared him to juries, "No lawyer on the circuit was more unassuming than was Mr. Lincoln. He arrogated to himself no superiority over any one—not even the most obscure member of the bar. He treated every one with the simplicity and kindness that friendly neighbors manifest in the relation to others."[123] Lincoln the lawyer, perhaps humbled by a childhood of poverty and deprivation, treated everyone with respect.

Herndon sums up Mr. Lincoln's modesty,

> He was a very sensitive man—modest to the point of diffidence—and often hid himself in the masses to prevent the discovery of his identity. . . He had no disgusting egotism and no pompous pride, no aristocracy, no haughtiness, no vanity. Merging together the qualities of his nature he was a meek, quiet, unobtrusive gentleman.[124]

Mr. Lincoln's modest character and likeability were one of the foundations of his success.

The second part of this note, reveals the source of that humility, "*I find quite as much material for a lecture in those points wherein I have failed, as in those wherein I have been moderately successful.*"[125] Throughout his life, Lincoln regularly encountered failure and loss: the early death of his mother, early economic deprivation, the loss of the love of his life Anne Rutledge, the death of his children, lost elections, and the less compelling, but regular, losses that all lawyers face in the courtroom. While all this

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120 *Id*.

121 White, *supra* note 114, at 35.

122 *Id.*

123 Michael Burlingame, *Foreward*, *in* Fraker, *supra* note 3, at xiv.

124 Herndon & Weik, *supra* note 14, at 357.

125 *Notes for a Law Lecture, supra* note 119.

loss and failure was daunting, it forged his character. The result was a humble man who recognized his imperfection as well as the imperfections of human nature.[126]

2. *Diligence*

"*The leading rule for the lawyer, as for the man of every other calling, is diligence. Leave nothing for to-morrow which can be done to-day.*"[127]

In large part due to Herndon's depiction of his late partner, Lincoln was considered somewhat careless in his approach to case management. But White questions this. He points to Lincoln's admiration for Benjamin Franklin, who turned time management into an art and science during his life.[128] Also, according to Dirck,

> Lincoln believed the work habits a lawyer displayed when he walked into his office every morning were at least as important as the more exalted matters of ethics and the national perception of the profession. For him there was a subtle ethical content in the ordinary nuts-and-bolts features of a law practice. A good lawyer forthrightly faces drudgery without frill or complaint.[129]

Mr. Lincoln's hard work sustained him throughout his life, from his early days in New Salem through his days riding the circuit, and ultimately through his tumultuous presidency. According to Donald, "Lincoln worked harder than almost any American president."[130]

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126 Out of the crucible of midlife introspection can emerge an awareness of one's own identity and uniqueness that breeds self-confidence and inspires confidence in others. Hallmark of such psychological progress is an ability to overcome egotism, to avoid taking things personally, to accept one's shortcomings and those of others with equanimity, to let go of things appropriate for youth and accept gladly the advantages and disadvantages of age. People able to meet these challenges successfully radiate a kind of psychological wholeness and rootedness. Lincoln was such a person…

Burlingame, *supra* note 6, at 166.

127 *Notes for a Law Lecture, supra* note 119.

128 White, *supra* note 114, at 35-36. *See also* Benjamin Franklin, The Autobiography of Benjamin Franklin (Yale Univ. Press 1964).

129 Dirck, *supra* note 1, at 5.

130 Donald, *supra* note 15, at 310.

Lincoln's own writing confirms his beliefs about the importance of diligence in the practice of law. In a letter to a young lawyer seeking to study with him, dated November 5, 1855, Lincoln wrote:

> My dear Sir:
>
> I have just reached home, and found your letter of the 23rd. ult. I am [away] from home too much of my time, for a young man to read law with me advantageously. If you are resolutely determined to make a lawyer of yourself, the thing is more than half done already. It is but a small matter whether you read *with* any body or not. I did not read with any one. Get the books, and read and study them till, you understand them in their principal features; and that is the main thing. It is of no consequence to be in a large town while you are reading. I read at New-Salem, which never had three hundred people living in it. The *books*, and your *capacity* for understanding them, are just the same in all places. Mr. Dummer is a very clever man and an excellent lawyer (much better than I, in law-learning[131]); and I have no doubt he will cheerfully tell you what books to read, and also loan you the books.
>
> Always bear in mind that your own resolution to succeed, is more important than any other one thing. Very truly Your friend,
>
> A. Lincoln[132]

In a similar letter to John M. Brockman dated September 25, 1860, Lincoln even suggests a reading list for the novice lawyer:

> Dear Sir: Yours of the 24th. asking "the best mode of obtaining a thorough knowledge of the law" is received. The mode is very simple, though laborious, and tedious. It is only to get the books, and read, and study them carefully. Begin with Blackstone's Commentaries, and after reading it carefully through, say twice, take up Chitty's Pleadings, Greenleaf's Evidence, & Story's Equity &c. in succession. Work, work, work, is the main thing. Yours very truly,
>
> A. Lincoln[133]

The fact that Lincoln took the time to respond to these legal aspirants is further proof of his humility and dedication to hard work. The results were evident as young lawyers appealed to him for his insights into practicing excellence. There are no shortcuts in the practice of law, and this was even true a century and a half ago. "Work, work, work, is the main thing," then as it is now.

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131 Again note the humility.

132 *See Lincoln's Advice to Lawyers*, Abraham Lincoln Online, https://www.abrahamlincolnonline.org/lincoln/speeches/law.htm (last visited Nov. 20, 2024).

133 *Id.*

3. *Excellence in Communication*

"*Extemporaneous speaking should be practised and cultivated. It is the lawyer's avenue to the public. However able and faithful he may be in other respects, people are slow to bring him business if he cannot make a speech.*"[134]

But as Lincoln continues in his notes, circling back to his earlier comments about diligence, speechmaking alone, without the drudgery of preparation and the grind of hard work, will result in failure for the advocate. And the hard work that Lincoln continued to emphasize in these notes, included the hard work of learning oral and written communication skills.

Lincoln, while naturally gifted as a communicator, worked at self-improvement. He studied rhetoric assiduously.[135] As a child, he studied William Scott's "Lessons in Elocution" and memorized speeches of Henry Clay, giving them as stump speeches to entertain his playmates.[136] As a young man, he was a regular at the Springfield young men's lyceum, an organization that helped men on the rise improve their speaking and debating skills.[137]

Lincoln also read voraciously, not only rhetorical texts but poetry and other literature, to internalize the beauty of the English language (which he employed in some of the most magnificent writing and speeches in this nation's history). He loved Shakespeare and would find comfort reading the bard during difficult personal and professional times.[138] As his secretary and later biographer John Nicolay observed about Lincoln the writer:

> The remarkable thing . . . was that while nature and opportunity gave him talent and great success at story-telling and extemporaneous talking, he learned to write–learned to appreciate the value of the pen as an instrument to formulate and record his thought, and the more clearly, forcibly, and elegantly to express it.[139]

Like all other aspects of his education, Lincoln identified what he needed to achieve success, rolled up his sleeves, and with hard work and focus, accomplished it.

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134 *Notes for a Law Lecture*, *supra* note 119.

135 *See, e.g.,* Douglas L. Wilson, Lincoln's Sword: The Presidency and the Power of Words (2006).

136 Fred Kaplan, The Biography of a Writer 24 (2008).

137 Donald, *supra* note 15, at 80-81.

138 Kaplan, *supra* note 136, at 346-49.

139 Wilson, *supra* note 135, at 4.

4. *Problem Solving*

"Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser–in fees, expenses, and waste of time."[140]

Lincoln learned from his second partner and mentor, Stephen Logan, to prefer compromises to litigation.[141] And that is consistent with his personality, which looked for solutions to problems rather than fixating on their causes. Lincoln's intelligence allowed him to look at the entire chessboard rather than just the next move. He recognized that most people benefit from resolving matters (amicably, if possible) rather than scorched earth litigation. He understood that the litigants would remain neighbors, and reducing animosity would benefit the community.[142]

The practice of law fosters this type of practicality. Solutions to legal problems are rarely clear, and the ability to proceed through thickets of competing facts and law inculcates a practical way of seeing the world. Effective lawyering requires the discernment and evaluation of options, some imperfect, to advance the client's interests. Lincoln repeatedly called on those skills throughout his presidency, when his de facto client was the Union.

5. *Honesty*

"[R]esolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave."[143]

Lincoln concludes his notes on the importance of honesty in the practice, and more broadly, in life at large. And honesty was hardwired into him. The moniker "Honest Abe" was not the creation of a campaign manager—he wore it like his dusty suits. Stories abound about how, as a young merchant, Mr. Lincoln scrupulously adhered to a code of honor with his customers.[144] His contemporaries, with whom he practiced law (and lived on the circuit),

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140 *Notes for a Law Lecture*, *supra* note 119.

141 White, *supra* note 114, at 38.

142 Dirck, *supra* note 1, at 161.

143 *Notes for a Law Lecture*, *supra* note 119.

144 Burlingame, *supra* note 6, at 34. When he discovered he overcharged a customer 6 ¼ cents, he later that day promptly returned the money.

universally described his fairness and honesty in practice. As biographer David Herbert Donald observed:

> In handling hundreds of cases in the circuit courts, Lincoln firmly reestablished his reputation as a lawyer. It was a reputation that rested, first, on the universal belief in his absolute honesty. He became known as "Honest Abe" – or, often, "Honest Old Abe–the lawyer who was never known to lie. He held himself to the highest standards of truthfulness."[145]

As one of his contemporaries, Isaac Arnold specifically observed, Lincoln "never misstated evidence but stated clearly and fairly and squarely his opponent's case."[146]

As further evidence of his personal honesty, Lincoln was temperamentally uncomfortable advocating for guilty litigants.[147] As Samuel Parks, a contemporary of Lincoln's, wrote in a letter to William Herndon a year after Lincoln's death, "at the bar when he thought he was wrong he was the weakest lawyer I ever saw."[148] Parks goes on to describe several instances where Lincoln refused to act on behalf of clients that he considered wrong or immoral.[149] Herndon echoed that observation, "He never made a sophistical argument in his life, and never could make one. I think he was less real aid in trying a thoroughly bad case than any man I was ever associated with. If he could not grasp the whole case and believe in it, he was never inclined to touch it."[150] But the reality is that he did accept cases he did not believe in as evidenced by his representation of a slave owner in the case known as the Matson slave case.[151] But as Woldman observed about his performance: "Lincoln was pitiably weak. His arguments in behalf of a cause his conscience detested were spiritless, half-hearted, and devoid of his usual wit, logic, and invective. He lost the case."[152]

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145 Donald, *supra* note 15, at 149.

146 Arnold, *supra* note 97.

147 Although he represented a slave owner seeking an order to remove his slave from the State of Illinois. Lincoln as a lawyer sometimes represented those with whom he did not necessarily agree. *See, e.g.* Woldman, *supra* note 5, at 60-81.

148 Samuel C. Parks Letter to Herndon (1866), *reprinted in* Herndon's Informants: Letters, Interviews, and Statements About Abraham Lincoln 238 (Douglas L. Wilson & Rodney O. Davis, eds., 1998).

149 *Id*.

150 Herndon & Weik, *supra* note 14, at 321.

151 Woldman, *supra* note 5, at 65-69.

152 *Id*. at 68.

But the word "honesty" transcends one's dealings with others; it includes honesty with oneself. He recognized his own weaknesses and even mocked them. He was often self-deprecatory about his appearance.[153] His strength was in his genuineness.[154] It was his genuineness—warts and all—that endeared him to the fellow bar practitioners, the majority of Americans during his presidency, and history thereafter.

III. The Ascent of Lawyer Lincoln

According to the great man of history theory, individuals with exceptional qualities or characteristics drive historical events through their actions, decisions, and influence; it is the "great men" who create historical events, and their personal attributes—such as charisma, intelligence, wisdom, or courage—enable them to shape the course of history in significant ways.[155] If this theory holds true, Lincoln was a man of destiny, ordained to lead the country during unprecedented times. This particular "great man" was the product of his character and life experiences. The courtrooms around central Illinois largely shaped those experiences. There was perhaps no better preparation for the responsibilities that awaited him. And his law practice assisted him in fulfilling that destiny.

Throughout his legal career, Lincoln was beholden to the rule of law. But as he became more proficient, he learned that the law was more than its words and that the real law resided underneath the text. As Herndon observed, "his mind, apparently with an automatic movement, ran behind facts, principles and all things to their origin and first cause."[156] Using that power of analysis, Lincoln excavated the first principles of our national purpose from the Declaration of Independence, which provided that "*All* men are created equal." Only someone immersed in the law understands jurisprudence from this perspective. Working within the legal system for more than two decades taught him that the law was a tool to help create a better world for its residents rather than an end in

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153 David S. Reynolds, Abe: Abraham Lincoln in His Times 480 (2020).

154 *See* Herndon & Weik, *supra* note 14, at 313 ("Unlike all other men, there was entire harmony between his public and private life.").

155 *See*, *e.g.*, Will Durant & Ariel Durant, The Lessons of History 34-36 (1968).

156 Herndon & Weik, *supra* note 14, at 354.

and of itself. He pragmatically applied this principle when arguing for emancipation, despite the law's legal endorsement of slavery.

Beyond abstract wisdom, the practice of law also provided a vehicle for him to manage the tempest he encountered as president. The skills he developed as Lawyer Lincoln—which included reacting to challenging situations and challenging personalities—groomed President Lincoln to manage all the trials of the presidency. As Lincoln historian Harold Holzer observed, "Lincoln's life as a lawyer informed nearly every aspect of his future, a future that became inseparable from the nation's future."[157] His practice was a fertile training ground that molded a wily prairie lawyer into a wise wartime president a few years later.

While there have been many lawyer presidents, few, if any, had the high volume and fast pace of the circuit rider for such an extended period.[158] Facing daily challenges with little time to prepare cultivated a nimble mind, capable of extemporaneous thought and the development of creative and practical solutions. He frequently called upon these skills to manage the competing (and continuing) challenges he faced in the White House.[159] Fraker summarizes the experience of riding the circuit:

> Dealing with the variety of people and problems of the circuit taught him to listen and schooled him as a quick study, able to assimilate a wide range of information, opinions, and advice from a variety of sources and to respond quickly and correctly. Facing new issues with minimal time to digest and resolve them shaped him into a persuader and cajoler of people in different and somewhat unfamiliar venues and improved his ability to improvise and create. The bar of the Eighth Judicial Circuit included some of the best lawyers in the state. Constantly matching wits with these capable lawyers likewise prepared him for the challenging relationships of the White House.[160]

For decades, Lincoln engaged in daily clashes with these ambitious improvisers. That is also what he did when fighting an internal rebellion as commander in chief. Fort Sumter occurred within a month of his inauguration, and the war ended within days of

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157 Harold Holzer, *Reassessing Lincoln's Legal Career*, *in* Abraham Lincoln, Esq., *supra* note 48, at 8.

158 There have been 27 lawyer presidents. *The Long History of America's Lawyer Presidents*, Lawline (Mar. 2, 2023), https://blog.lawline.com/the-long-history-of-americas-lawyer-presidents.

159 *See, e.g.*, Doris Kearns Goodwin, Team of Rivals (2005).

160 Fraker, *supra* note 3, at 64.

his assassination. Conflict was ever-present during his presidency. Every day, he faced unprecedented challenges, politically, legally, and militarily. His decisions to suspend habeas corpus and emancipate slaves in the rebel states were certainly without precedent.[161] He was forced to improvise and adapt to the circumstances as they arose. And he undertook these tasks with no historical yardsticks or playbook to reference. Decades of improvisations in the courthouses of Illinois were his only tutor. And arguably, there was no better teacher.

In his notes on the practice, Lincoln urged lawyers to settle disputes, pointing out that the nominal winner is often the loser due to the costs of pursuing the conflict. A pragmatic approach to problem solving underlies that observation. Despite this pragmatism, Lincoln understood that there are exceptions.[162] Lincoln undoubtedly learned from his practice that compromise is not always appropriate or possible. His mind was bent towards achieving a *just* result, which sometimes was not the most expedient one.[163] As a working trial lawyer, one understands that there are some wars that *need* to be fought. And while one should strive to resolve disputes amicably, some principles and circumstances warrant a more combative approach. Lincoln himself observed the necessity to fight the impending war to preserve the union, "Both parties deprecated war, but one of them would make war rather than let the nation survive, and the other would accept war rather than let it perish."[164]

While sometimes handling large corporate interests, Lincoln primarily represented average people collecting and defending debts, arguing over livestock and real estate, and defending their reputations using defamation lawsuits.[165] He saw the good, the bad, and the ugly of humanity daily. The practice taught him to see the world in shades of gray rather than the black and white of a zealot. Representing debtors on Monday and creditors on Tuesday taught him to view issues from different perspectives and

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161 Burlingame, *supra*, note 6 at 362-64; 439-42.

162 Donald, *supra* note 15, at 557.

163 Dirck, *supra* note 1, at 168 ("The same man whom some saw moved to tears by the sight of a soldiers suffering could with grim enthusiasm countenance the harsh measures advocated by William Tecumseh Sherman and the dogged, bloody persistence of Ulysses S. Grant.").

164 Burlingame, citing Lincoln, *supra* note 6, at 353.

165 *See, e.g.,* Dirck, *supra* note 1.

helped give him a 360-degree view of legal problems. In Lincoln's world, there were sometimes villains, but ordinarily just two good litigants who disagreed. The objectivity required to analyze challenges from multiple perspectives was also a crucial factor in his success as president. He slowly and deliberately analyzed all issues before acting.[166] He did not act rashly. Nor did he fixate on problems. He looked for practical ways to overcome them. As Herndon observed, "As a politician and as President, he arrived at all his conclusions from his own reflections, and when his opinion was once formed, he never doubted but what it was right."[167]

As a practicing lawyer, Lincoln learned the necessity of hard work to achieve success.[168] His presidency reflected that work ethic:

> Despite his outwardly laid-back and friendly manner, he gave his all during his tenure in office. While never well organized or systematic, he was in fact an energetic, hands on, detail oriented administrator. If any president's performance in office deserved the overused epithet "indefatigable," it was his.[169]

As wartime leader, he was a micromanager, overseeing all the war's details.[170] Despite being absorbed in fighting a war, he nevertheless took time to regularly meet with citizens and those seeking patronage positions.[171] The expression "open door policy" defined his presidency. Hard work was ingrained in him at the bar.

The law practice also schooled Lincoln in the art and science of persuasion. And with years of experience, he understood how to craft the message for the people he was trying to persuade. As Herndon recalled about his late partner's oratorical skills, "The great secret of his power as an orator, in my judgment, lay in the clearness and perspicuity of his statements. When Mr. Lincoln had stated a case it was always more than half argued and the point more than half won."[172] Herndon also described how Lincoln used logic to craft his own arguments, "The force of his logic was in

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166 Herndon & Weik, *supra* note 14, at 352-54.

167 *Id.* at 322 (citing contemporary Leonard Swett).

168 Donald, *supra* note 15, at 149.

169 Wilson, *supra* note 135, at 5.

170 *See, e.g.,* Jeffrey D. Wert, The Sword of Lincoln: The Army of the Potomac 312-15 (2005).

171 Kearns Goodwin, *supra* note 159, at 333-34.

172 Herndon & Weik, *supra* note 14, at 321.

conveying to the minds of others the same clear and thorough analysis he had in his own . . . mind."[173]

As president, trained largely by the practice of law, Lincoln developed a rhetorical trope to convey the immensity of his mission. While practicing law, Lincoln drafted countless pleadings. He learned not to allege facts that one need not prove and how to state his cause of action with precision.[174] His public papers during his presidency consisted of the same lawyerly attention to detail and clarity. Again, his wrestling with the necessity of suspending habeas corpus, for example, is a lawyerly balancing test of his constitutional powers. As he observed, "Are all the laws, but one, to go unexecuted, and the government itself go to pieces lest that one be violated?"[175]

Apart from Generals Sherman and Grant, one could plausibly claim that Lincoln's pen, which again, he honed as a trial lawyer, was the most important factor in winning the war. One only needs to look at the emotionally compelling Gettysburg address and the Second Inaugural address to understand the power of his words. These two speeches, written by Lincoln himself (rather than speechwriters),[176] have become part of the canon of American wisdom literature. Speaking with common people during his regular travels on the circuit helped him find simple words to communicate complex thoughts. He later used that talent to provide a vision of his country's soul.

As a family law attorney, his concern for women and children later manifested toward an entire people. Lincoln must have gained wisdom while working with dissolving families. And his patience must also have been tested working with unreasonable and often irrational people driven by emotion. But his kindness had a forum here as well. As Herndon observed about his late partner, "he had a great kindness of heart. His mind was full of tender sensibilities, and he was extremely humane."[177] One can see this attitude at play when healing the country at the end of the

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173 *Id*.

174 As he advised his lawyer friend Usher Linder in a letter, "It is good policy to never plead what you need not, lest you oblige yourself to prove what you can not." Lincoln, *supra* note 43, at 1-48.

175 Burlingame, *supra* note 6, at 362-64.

176 Wilson, *supra* note 135, at 4.

177 Herndon & Weik, *supra* note 14, at 320.

war. Lincoln urged his commanders to treat the traitorous rebels respectfully and without malice, understanding that these citizens would be reintegrated into the country. As Lincoln's Secretary of War recounted, "Lincoln expressed hope that 'there would be no persecution, no bloodywork, after the war was over. None need expect he would take any part in hanging or killing those men, even the worst of them.'"[178] Likewise, regarding his own military deserters, Lincoln's mercy and clemency was legendary.[179]

What he learned from divorcing couples likely gave him insight into the dynamics of the fight before him as president. Though it is counter-factual, it is possible that he retained the lessons he learned from the bitter enmity resulting from family breakups: when love turns into hate. Perhaps witnessing those who could not forgive gave him a greater understanding of the importance of doing so. And like the dissolution of a marriage, the attempted dissolution of a country carried many of the same attributes: bitter passion, anger, and recalcitrance. His experience as a divorce lawyer, as much as any other personal or professional experience, prepared Lincoln for the war ahead. Managing that bitterness for a quarter century on the Illinois prairie taught him unique lessons on division and healing that were unavailable to most people.

Lincoln was improbably elected president of the United States in 1860.[180] His only prior experience as an elected officer of government was one term in the United States Congress[181] and judge pro tem in Judge Davis's absence on the circuit.[182] Prior to becoming president, his only experience with war was his brief term as a captain in the Blackhawk War.[183] While his political and war experience was limited, his life experience groomed him for the trials ahead. Once elected, he faced a political storm unlike any other president in history. Undoubtedly, Lincoln's character and intelligence contributed to his success as a wartime leader. But his experiences managing community conflicts for over two decades

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178 Burlingame, *supra* note 6, at 617.

179 Frank J. Williams, *Lincoln's Lessons for Lawyers*, *in* Abraham Lincoln Esq., *supra* note 48, at 34.

180 *See supra* discussion in text at note 4.

181 Burlingame, *supra* note 6, at 128-46.

182 Dirck, *supra* note 1, at 51.

183 Burlingame, *supra* note 6, at 37-40.

were just as critical to his success. As British statesman Edmund Burke observed:

> The study of law renders men acute, inquisitive, dextrous, prompt in attack, ready in defense, full of resources. No other profession is more closely connected with actual life than law. It concerns the highest of all temporal interests of man—property, reputation, the peace of all families, the arbitrations and pace of nations, liberty, life even, and the very foundations of society.[184]

It is perhaps comforting to know that, despite the frequent indignities and difficulties inherent in the practice of law, Abraham Lincoln's professional life provides meaning today. After all, he experienced many of the same difficulties and challenges that modern lawyers face. And he learned from them; despite the difficulties of practicing law, he applied those lessons to achieve great things. Michael Burlingame beautifully sums up why Lincoln matters:

> Few people will achieve his world historical importance, but many can profit from his personal example, encouraged by the knowledge that despite a childhood of emotional malnutrition and grinding poverty, despite a lack of formal education, despite a series of career failures, despite a miserable marriage, despite a tendency to depression, despite a painful midlife crisis, despite the early death of his mother and his siblings as well of his sweetheart and two of his four children, he became a model of psychological maturity, moral clarity, and unimpeachable integrity. His presence and his leadership inspired his contemporaries; his life story can do the same for generations to come.[185]

One could describe his life and ascent as fateful if not miraculous. As he trudged up and down the dusty trails for over two decades, little did he know that he would exchange his horse's reins for the fate of a people. The Lincoln miracle was activated in the courthouses along the Illinois prairie.

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184 Woldman, *supra* note 5, at 3.

185 Michael Burlingame, Abraham Lincoln Traveled This Way: The America Lincoln Knew 259 (2011).

The Veil of Matrimonial Ignorance: Creating Justice as Equity in Family Law

by
Joshua B. Raffini*

In modern society, marriage remains the dominant form of familial relations and a pillar of social structures. The evolving status of marriage, from who may enter a marriage to considerations upon dissolution of that status, has done little to erode its enduring character. Despite such ubiquity, laws pertaining to marriage remain perplexing to the general public. Important decisions can be, and certainly often are, reached without full understanding of the consequences. But when it comes to marriage, lack of foresight can portend particularly devastating consequences. Ignoring the conventional wit and wisdom of Richard Saunders, it would appear many marriages begin with eyes half shut only to later open.[1] The observations of Benjamin Franklin under his *nom de plume* notwithstanding, careful research of divorce law is not likely to appear on many wedding preparation checklists. Better understanding of how laws impact marriages would lead to both better laws and better marriages.

In addressing separate aspects of social formation, Professor John Rawls provided an eminent contribution to the philosophical underpinning of political systems. In *A Theory of Justice*, Rawls detailed how an extended thought experiment might produce more enlightened decision-making.[2] Constructing metaphorical blinders, Rawls proceeded to open eyes to resulting principles designed to maximize, yet balance, liberty and equality in pursuit of just ends. As he explained, properly understanding the social

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1 To accurately quote the memorable admonition, "Keep your eyes wide open before marriage, half shut afterwards." *See Poor Richard, 1738*, Founders Online, National Archives, https://founders.archives.gov/documents/Franklin/01-02-02-0035 [Original source: 2 The Papers of Benjamin Franklin 190-98 (Leonard W. Labaree ed. 1961)].

2 John Rawls, A Theory of Justice (1971).

contract – the theoretical antecedent to civil society which he branded the "original position" – required creating an imagined veil of ignorance about the decisionmakers' positions in society. He argued that if people were to architect a just society without knowing whether the governing rules they were creating would benefit themselves individually, principled decisions would follow.[3] More than a generation of commentary later, his original work and subsequent enlargement remain required reading for many students of multiple disciplines.

These two seemingly unrelated currents of thought converge. In considering the formation of individual marriages, the question necessarily involves how those collective choices influence social structures. In evaluating how a thought experiment might suggest better, and more just, legal systems, inquiry demands subsequent application to end results. Combining the two, questions emerge: how might a similar thought experiment aid in understanding, and perfecting, the laws governing families as they form and dissolve? How might the thought experiment allow application of a hypothetically blinding veil of ignorance to overcome difficulties attendant to partially blinded decisions to wed? To answer these questions, due consideration involves re-framing the experiment, considering the law as it exists, and suggesting how better results may emerge. The end goal of the inquiry is to create similar principles for application in service of yielding greater equity in the body of law dedicated to families.

This article will explore the underpinnings of how decisionmakers should consider these questions before assessing how they are applied. Part I provides a background of Rawls' theory. Understanding his theory, and his later restatement of it, also requires understanding relevant commentary. These considerations of background source materials also delve into framing their use for this experiment. Part II focuses attention on the contemporary structure of matrimonial law. The goal of this section is not a full overview of relevant law, but rather a more limited attempt to assess the common principles of current systems. Finally, Part III will turn to application of Rawlsian theory to relevant principles to develop proposed outcomes of this applied experiment. The goal here is to better understand what system and law might result

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3 *Id*. at 136-42.

from considering justice as fairness as applied to relevant topics in family law. To that end, the final section includes both suggested resulting principles and specific outcomes consistent with the underlying premise.

I. Setting Up the Thought Experiment: Rawls' Theory and Criticism

Before consideration of hypothetical applications, or even the philosophical bases for such an experiment, history compels attention. Modern political philosophy, like its antecedents, often resorts to hypotheticals to understand the actual. Social contract theory traces its lineage through the Greeks, past the Enlightenment, and into modern forms.[4] Construction of this well-known yet entirely artificial contract involves recognition that government exists as the result of, first, a series of contracts between would-be citizens to form society and, second, the as-formed society evolving to form a further contract of government identifying and binding subjects with their rulers.[5] Through many iterations, constructing explanations for extant institutions involved both defenses of social structures and arguments for their perfection. Moving beyond the pre-social, the contract may involve the self-governing compact of Rousseau, the delegation of authority that permeates Locke's contract, or still other iterations to better explain the justification for structure.[6] By the mid-twentieth century the fertile fields of social contract theory had already produced abundance.

A. *A Theory of Justice as Fairness*

Justice as fairness built on this tradition. One would imagine that great works which later enter the popular consciousness are first conceived in fruitful minds before gestating in small conference rooms. In 1971, Rawls formally introduced a full explication of a theory that previously percolated as journal presentations

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4 *See generally* Douglas Barker, Social Contract Introduction (Oxford University Press Paperback, 1960).

5 *Id*. at xii-xiii.

6 *Id.*

and circulated drafts.[7] Rawls introduced a modern take to classical theory in a way that one contemporary noted as "describing the theories in the field in a fresh way, in light of developments in economics and the social sciences, and thus providing a new vocabulary that will no doubt be used even in criticism of its own arguments."[8] Rawls' work drew praise for a "plot that is readily grasped in its broad outlines" as well as for a conceit that harnessed the "sophisticated apparatus and techniques of the professional philosopher."[9] The "theory" praised as philosophy found a broader audience that spanned additional disciplines and reached popular attention.[10]

Theory begins by looking backward to traditional concepts and forward to new results.[11] As Rawls explains the state of nature, which he christens the original position, it corresponds to parallels in traditional notions of social contract. Acknowledging the obvious, Rawls' theory does not depend on actual history but rather a "purely hypothetical situation."[12] Here, theory departs from its predecessors' explanations of how principles of justice might be achieved to construct instead an appropriate environment for their creation. In Rawls' conception, the original position explaining the state of nature lies behind a "veil of ignorance."[13] So conceived, the veil requires that "no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like."[14] Furthermore, the parties in the original position are also ignorant of their special abilities, including psychological, all designed to ensure that the actors obtain no advantage and similarly suffer no ill advantages in the process of developing principles of justice. As is axiomatic, and clear from the text, a party ignorant of their own circumstances is ill-suited to selecting principles that benefit their own circumstances. Rather,

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7 Norman Daniels, Reading Rawls: Critical Studies on Rawls' A Theory of Justice xxxi (Basic Books ed., 1989).

8 Ronald Dworkin, *Social Contract*, Sunday Times (London), July 9, 1972.

9 Daniels, *supra* note 7, at xxxii.

10 *Id*.

11 Rawls, *supra* note 2, at 12.

12 *Id.*

13 *Id*.

14 *Id.*

the resulting justice as fairness depends on the idea that advantage in creation of principles is impossible and instead the product of natural chance.[15]

This basic framework yields resulting principles of a just society:

> First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others. Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.[16]

These two basic principles recognize the necessity of equal liberty and the existence of natural inequalities. However, order matters, and when in conflict, the first principle controls. As Rawls explained, the priority principle compels that departure from "equal liberty," as required by the first proposition here, "cannot be justified by, or compensated for by, greater social and economic advantages."[17] Continuing to refine application and interplay, use of these now established principles must also yield to what Rawls terms "the difference principle."[18] Having already recognized that equal liberty may yield natural inequalities, further refinement requires a limiting check. As applied, this means that unequal distribution is only tolerable where inequalities benefit all and are specifically aimed at improving the expectations of the "least advantaged members of society."[19] Otherwise, equal distribution is preferable. In this circle of competing values, the potential inequality is always linked back to maximizing liberty while tolerating beneficial inequality.[20] Here, liberty is restricted only where it

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15 *Id*. Notably, the basic terminology underlying Rawls' conceptual framework for his theory all appear in a single paragraph of the first chapter despite the entire work spanning nearly 600 pages. For all its merits, Rawls' work is burdened by its repetitiveness in addition to its density. The basic terms that form this framework could just as easily invite reference to most sections, the majority of chapters, and countless pages within the entire text.

16 *Id*. at 60.

17 *Id*. at 61.

18 *Id*. at 75-80.

19 *Id* at 75.

20 *Id*. at 76. In any summary of lengthy work, editing is not only natural but required. Here, the analysis must skip explanation of how unequal distribution results to focus on ameliorating the consequences.

leads to greater overall liberty, while inequality is tolerated to the extent it is actual beneficial, i.e. liberty-enhancing.

With established principles, pursuit of justice next extends to developing an application for their framework. Here, Rawls suggests a four-stage sequence for application that involves judging the justice of legislation and policy, creating a constitutional arrangement to reconcile conflicting opinions, and finally favoring enactments that will allow majority rule as opposed to rejecting them in favor of higher principles.[21] Explaining the sequence, Rawls suggests adoption of principles, followed by a constitutional convention, then a legislative phase to develop policy pursuant to constitutional requirements, and finally the action of judges and administrators to apply adopted rules to specific circumstances. This framework contains the basic description of developing the rule of law in a constitutional democracy, but in Rawls' universe it is further restrained by specific principles predating the constitution and emanating from a carefully constructed hypothetical condition.

The remainder of Rawls' source material further refines application to establish principles for specific scenarios and identified problems. Rawls defends civil disobedience, subject to limitations and only where it involves serious violations of liberty.[22] Morality and psychology both appear, always with due regard to principles previously established. Rawls anticipates that envy may arise where even limited inequalities remain tolerable, and he rejects hedonism, but concludes with a justification for the ultimate congruence of the competing individual views of justice and goodness within individuals.[23] His parting remarks provide a final justification for a harmonized three-part theory of justice as fairness: first, the theoretical structure; second, the institutions of justice; and third, how the preceding parts operate to create a feasible system of justice that transcends its imaginative origins.[24]

As with any important work, revisions and improvements followed. After further editions and other writings, Rawls issued a recapitulation which incorporated subsequent lectures. Paying homage to the original lectures on justice as fairness, this final

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21 *Id*. at 195.
22 *Id.* at 371.
23 *Id.* at 530, 554, 567.
24 *Id.* at 577.

addition in an independent work bore the suitable subtitle as a restatement.[25] Improving the two principles that began and permeated his original theory, Rawls amended to posit:

> (a) Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and (b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle).[26]

As restated, the principles contain updated language and look forward to subsequent applications. Rawls ends with the same structure that typified his original theory: circling back to refine, reinforce, and apply as the experiment proceeds through application.

B. *Limitations and Criticism of Rawls*

A generation of commentary followed. Available titles multiplied, growing to include substantial commentary, reader guides, critical evaluations, and collections. A basic search yields a veritable library.[27] The brief focus here is improving understanding of the essential theory to establish an appropriate framework for the instant application.

One leading compendium contains both critical commentaries arranged topically and views from other disciplines.[28] The original position, as explained by Rawls, is undoubtedly unrealistic as a construct. To achieve a true veil of ignorance, information must be withheld. Indeed, the nature of the thought experiment requires withholding information. However, suppressing information that may lead to self-interested decisions carries inherent risk. Individuals constrained by their ignorance must also be deprived of potentially valuable information that would aid them in

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25 John Rawls, Justice as Fairness: A Restatement (2001).

26 *Id.* at 42.

27 Interested readers may quickly find a blend of introductions, commentary, companion readers, and even biographies of Rawls himself. *See, e.g.*, Percy B. Lehning, John Rawls: An Introduction (2006); John Mandle & David A. Reidy, A Companion to Rawls (2013); Shaun P. Young, Reflections on Rawls: An Assessment of His Legacy (2009).

28 Daniels, *supra* note 7, at xxxi.

reaching informed, perhaps even more just, decisions.[29] In turn, the original position is limited as Rawls assumes that unanimity requires ignorance, even at the expense of denying information that is morally relevant. The result here may be disparate treatment from the outset, as the very act of compelled ignorance has unequal impact.[30]

Similarly, the original position is constrained by the potential injustice of after-acquired knowledge. The quality of judgments must include the information available in aid of those judgments in considering the justness of ultimate results. For example, a wager made with little knowledge may not be fairly enforced even after acquisition of better information. Otherwise, the justice of a contemporary choice is judged fair merely because it would have been fair earlier, under very different circumstances.[31] It may well be impossible to make fair rules, if they are made without any information, when such rules must then be applied notwithstanding subsequent developments. Here, the thrust of the criticism is that the strength of ignorance as a protection from vice does not prevent other forms of injustice once the initial limitations are removed.

Critical evaluation of theoretical constructs also compels evaluation of methodology. For example, in Rawls' conception, the starting point requires robust application of its limitations in what may be described as the "thickness of the veil."[32] If individuals are deprived of all information, natural tendencies suggest a default to utilitarian decisions. A "thicker" veil thereby fails to distinguish between useful information and information that would invite misuse. In the absence of the veil of ignorance, asymmetrical information may benefit the party with more information to the detriment of one without such information. However, the veil

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29 For example, the veiled ignorance of the original position strips actors of knowledge of their specific circumstances, such as personal predisposition for a particular career, but also necessarily deprives them of subjective value judgments about the relative merits of specific fields.

30 Daniels, *supra* note 7, at 8; Thomas Nagel, *Rawls on Justice*, 82 Phil. Rev. 220, 227 (1973).

31 *See* Daniels, *supra* note 7, at 20; Ronald Dworkin, *The Original Position*, 40 U. Chi. L, Rev. 500, 503 (1973).

32 Daniels, *supra* note 7, at 101; R.M. Hare, *Rawls' "A Theory of Justice,"* 23 Phil. Q. 91 (1973). For a longer development of the same essential criticism, see Michael J. Sandel, Liberalism and the Limits of Justice (2d ed., 1998).

may eliminate this problem by creating another. Forced ignorance removes useful, and not harmful, information by the same contrived device that restricts potentially harmful knowledge. The baby and the bathwater are both lost to the wrong side of the veil, so conceived.

The announced principles themselves are subject to valid criticism. For example, Rawls' principles prioritize the total quantum of liberty over potential evaluation of qualitative distinctions. This problem is exacerbated by the sequential analysis which suggests settling priorities as part of constitution-making rather than specific enforcement. To cite one example, restricting liberty by military conscription may be justified based on maximizing total liberty. However, the same ordering, and sequential application, loses merit when applied to conflicting individual rights.[33] Quantitative evaluation of liberty as the path to justice may come at the expense of *qualitative* evaluation on the merits. For example, by resolving liberty conflicts at the constitutional stage, Rawls does not allow judicial balancing and individual analysis. Of course, if the goal is justice, and the means are liberty-maximizing principles, then case by case analysis may be an exception that swallows the rule.

As this analysis demonstrates, the veil required in the original position is exceedingly thick and suggests that utility may be the final tipping point of decision-making. But, as a separate matter, it is reasonable to inquire about the ability of individuals constrained by required ignorance to retain the capacity for reasoned judgment. Here, Rawls does not deprive his hypothetical participants of all knowledge. They are generally aware of probabilities, talents, structure, interests, and various aspects of social structure in the abstract. Required ignorance instead strips participants of any individualized knowledge of their own selves. As a consequence, the veil of ignorance may partially shed those in the original position of the basic humanity required to perform core functions. For example, individuals may retain the capacity to appreciate the conception of individual interests, or abilities, but would be stripped of any frame of reference in the process. Stated differently, "[m]utually disinterested men might turn out to be uninterested men, men incapable of comprehending the meaning of

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33 *See* Daniels, *supra* note 7, at 240-41; H.L.A. Hart, *Rawls on Liberty and Its Priority*, 40 U. Chi. L, Rev. 534, 543-44 (1973).

interest."[34] The same as with liberty-balancing, the constraints of the original position may be over-inclusive. Application of the veil may remove necessary capacity alongside capacity for mischief.

References to Rawls, while perhaps not ubiquitous enough to be part of the vernacular, are nonetheless common. Beyond obvious interest in philosophy and social science, Rawls is well-represented in the legal lexicon. Unlike case and secondary citations which include tabulations of citing references, frequency of citations to Rawls depends on the nature of search performed. For example, a simple terms search for Rawls in proximity to both "theory" and "justice" yields over 12,000 results in the Fastcase database. A more limited search specific to citations of Rawls' principal work yields sixty-one cases. The majority of these citations are merely string-cites. However, some references are more substantive. For example, at least one court cited Rawls in addressing contractual language which prevented future consideration of drafting history.[35] That court, with footnoted reference to relative knowledge of parties behind the veil of ignorance, colorfully noted the parallel to some parts of contract negotiation where the parties "do not know whose ox the provision will gore, so it is more likely that the arrangement is efficient."[36] Similarly, another court noted that contractual requirements for arbitration might result in Rawlsian conceptions of justice if neither party knew which would be advantaged by such a requirement.[37] In one particularly poignant example, a state supreme court dissenting judge exercised the freedom that dissenting opinions afford to offer commentary that may not be appropriate for an opinion of the court.[38] After characterizing Rawls as carrying the traditional theory of social contract to a higher level of abstraction, Judge Donnelly went on to conclude that that the court's opinion had failed the test and

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34 *See* Daniels, *supra* note 7, at 295; Benjamin Barber, *Justifying Justice: Problems of Psychology, Politics and Measurement in Rawls*, 69 Am. Pol. Sci. Rev. 663, 664 (1975).

35 Texas Pac. Land Corp. v. Horizon Kinetics LLC, 306 A.3d 530, 551 n.12 (Del. Ch. 2023), *aff'd* 314 A.3d 685 (2024).

36 *Id*.

37 Global Gold Mining, LLC v. Ayvazian, 983 F. Supp. 2d 381 (S.D.N.Y. 2013).

38 Barnes v. Tools & Mach. Builders, Inc., 715 S.W.2d 518 (Mo. 1986) (Donnelly, J., dissenting).

adopted a rule for manufacturer liability that failed to adequately account for relative advantage in veiled decision-making.[39]

Commentary here serves to improve understanding. Most criticism, some pointed, is remarkably respectful of Rawls' contributions. For the purposes of this article, such criticism is useful both to explain primary source material and to design the specific experiment intended.

C. *Designing Application of Rawls to Family Law*

In adapting a theoretical construction of justice as fairness to the specialized issues of family law, setting the specific parameters is useful. It is assumed that the original position does not predate the whole of society. It may be further assumed that the present focus is on maximizing just results specifically for the designated field. While matrimonial relations are often inter-disciplinary, the limited nature of this experiment would only address other areas of the law by extrapolation rather than directly. Furthermore, while this experiment will proceed through a sequential analysis, specific constitutional limitations will be ignored to instead proceed from principles, to legislation, and finally application. Furthermore, such an analysis would be an application of Rawls rather than inspired from his works.[40]

Considering constructive criticism highlighted above in Section I(B), further modifications are appropriate. First, the original position, while still employing a veil of ignorance, will be less rigid. Decision-makers here will lack knowledge about their particular station and abilities. They will also be devoid of knowledge concerning their natural advantages, if any, from either birth or social status. As indicated above, the construct here involves formed society eliciting principles for a particular area of law with similar parameters rather than nation-building from whole cloth. To promote the desired ends, the decision-makers in this modified

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39 *Id*.

40 At least one prior effort has considered Rawls in the context of marital contracts. Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 Ind. L.J. 453 (1998). While paying tribute to Rawls and noting that the veil of ignorance may be useful to conceive of a single marriage regime, the authors then transition to considerations of how individuals, freed from any ignorance of their status, may make decisions in full awareness of their circumstances. *Id.* at 464.

original position will be aware of the general nature of matrimony, although not fully aware of any existing or proposed legal structures related to marriage. Stated differently, the original position assumes marriage already exists but is not fully defined so that the decision-makers do not suffer from the psychological disadvantage that would naturally follow if they had no knowledge of marriage itself. Restating the goal, this modified experiment will proceed from an original position beyond the state of nature but without fully formed legal structures. The veil of ignorance, so conceived, will be less rigid than would be required in a faithful application of Rawls while in keeping with the major premises of the source material. Finally, decision-makers for these purposes will have information beyond the nature of abilities and will have a rudimentary understanding of social structures, marriage in particular, although not the governing law that their hypothetical status tasked them with creating from principles forward.

Finally, here, while the focus is broadly on family law, particular issues merit special attention. First, the original position here assumes marriage exists in the abstract but not as a fully formed institution. For that reason, the nature of marriage itself forms part of the discussion. Second, to properly understand principled creation of marital institutions the decision-makers must also reflect on the nature of dissolution. This concern is partially subsumed within the first point, and more specifically how to form and dissolve a marriage. However, specific to divorce, consideration of matrimonial issues necessarily requires addressing division of marital property. Third, while less frequent and therefore less pressing than other financial issues, spousal support remains a part of existing matrimonial law and is therefore within the purview of projections from the modified original position. Finally, custody and child-related issues often permeate divorces for spouses that have children. However, otherwise operative constraints do not apply in the same way to child-related issues. A preliminary consideration of the original position, and the purpose of the veil of ignorance, involved restricting knowledge to avoid self-interested decision-making. Those same considerations would not apply with equal force to child-related issues.[41]

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41 While the self-interested behavior of parties to custodial litigation may be assumed, the purpose is simply to note deviation from the otherwise operative assumptions that limits application here.

II. Past and Present Matrimonial Law: A Survey of the Status Quo

A. *What Is Marriage?*

Principles of law necessarily demand attention to civil, rather than religious, institutions. Modern discussions of the nature of marriage often involve discussion of marriage as a status, as quasi-contractual, or as something else. However, regardless of how marriage may be characterized, it carries at least some religious connotations. As a matter of history, and in considering first principles, marriage as an institution predates matrimonial law. As Professor John Witte, Jr. notes in his description of marital evolution, that transition has its genesis as a sacramental model.[42] Development of marital status followed through Protestant reformation, where it lost some of its previously attributed sacred character before acquiring features of covenant and finally liberalized blending with elements of contract.[43] Prior to modern developments, marriage as an institution slowly moved away from religion and towards civil law as equality gained a stronger foothold in both marriage and the law.

Modern considerations of marriage, and how even authoritative sources conceive of marriage, occupy strange linguistic and conceptual spaces that are often contradictory. Marriage maintains features of status, conferred and controlled by the state, which concomitantly implies that the institution is rather more than a private familial arrangement.[44] But that hardly answers the question. In the stably evolving law, which refuses to stand still, the ancient command of state-controlled status gave way to more modern conceptions of marriage as contracts. While any developments towards marriage as contract, and thus privately controlled, did not gain immediate sanction, they did find contemporaneous and unequivocal expression of an answer to the seeming divide. What is marriage? "It is contract," at least according to Sir Henry

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42 John Witte, Jr., From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition (1997).

43 *See id*. at 9-11.

44 Joel Prentiss Bishop, Marriage and Contract (1852). *See also* Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 Unbound: Harv. J. Legal Left 1 (2010).

Maine.[45] The U.S. Supreme Court weighed in to clarify with further shades of grey:

> [W]ilst marriage is often termed by text writers and in decisions of courts as a civil contract . . . . it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change.[46]

The lack of clarity matters here. For if marriage is status, then efforts to create principles that allow formation of the marital relationship must take place consistent with progression from principle to constitution in pursuit of justice. Conversely, if marriage is conceived of as a contract then constructing principles for marriage occurs earlier in the process of applying Rawls' analytical framework. As contract, marriage principles would compel those in the original position to consider circumstances that would maximize liberty and avoid resulting inequality to the benefit of all.[47]

In the process of determining when to answer this question, and thus which analytical framework applies, perhaps the distinction and dispute remain avoidable. Even family law casebooks add to this uncertainty, weaving between status, contract, or unspecified amalgamation devoid of separate nomenclature.[48] More important than the continued waffling between options that appear to exist along an unspecified continuum, perhaps the solution lies in the insightful observation that the entire effort is a futile undertaking best replaced by tools from legal realists focused on effects.[49] Discarding classical legal thought would certainly shift the focus, but may also clarify the consequentialist focus seemingly compelled by a structured thought experiment designed to produce

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45 Henry Sumner Maine, Ancient Law: Its Connection with the Early History of Society, and Its Relation to Modern Ideas 169 (Legal Classics Library ed., (1982) (1861).

46 Maynard v. Hill, 125 U.S. 190, 210-11 (1888) (alterations as quoted in Rasmusen & Stake, *supra* note 40, at 454-55).

47 *See supra* text at note 15.

48 Halley, *supra* note 44, at 2. Professor Halley tracks five separate case law texts and draws the parallel structure in each. *Id*. at 2 n.1 (additional citations omitted). Note the timing here. In the years prior to the U.S. Supreme Court declaring that same-sex couples held a constitutionally protected right to enter marriages, attention focused not merely on the legal disputes but the status of marriage itself in this context. *See* Obergefell v. Hodges, 576 U.S. 644 (2015).

49 Halley, *supra* note 44, at 46.

justice.[50] The suggestion is counterintuitive in consideration of Rawls' focus on pre-legal constructs. But perhaps the alignment of goals is instructive in a modified thought experiment directed at merely a single area of law with better-informed participants.

Furthermore, the general trend away from fault-based divorce may further confuse the inquiry.[51] Marriage as contract would imply breach-based dissolution but would, in appropriate jurisdictions, also countenance efficient breach.[52] As to impact on status characteristics, controlled statistical analysis of increased divorce rates between 1953 and 1987, when all states adopted some form of no-fault regime, certainly cements state authority over the means of terminating marital relationships.[53] With increased power to define the nature of the relationship, marriage acquires additional elements of status. The question of status remains one of the priorities according to Rawls while complications due to any grounds for divorce likely necessitate early consideration.

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50 *See generally* Karl Llewellyn, *Behind the Law of Divorce: I*, 32 Colum. L. Rev. 1281 (1932).

51 *See* Stanford N. Katz, Family Law in America 2-3 (3d ed. 2021) (noting the trend away from the sole focus on fault and the shift towards substantive issues). *See also* Paul A. Nakonezny, Robert D. Shull, & Joseph Lee Rodgers, *The Effect of No-Fault Divorce Law on the Divorce Rate Across the 50 States and Its Relation to Income, Education, and Religiosity*, 57 J. Marriage & Fam. 477 (1995).

52 The contractual question also has strange implications for potential remedies. For if marriage is a contract, should such a characterization invite attention to contractual remedies? Marital contracts, to the extent they are characterized as such, necessarily concern unique subject-matter that as a question of remedies invites attention to specific performance as one form of equitable relief. To the extent specific performance, as a matter of common law, requires that legal remedies are insufficient then marriage may be a paradigmatic example of how courts cannot use damages alone to heal damages from breached promises. But it strains credulity to imagine courts requiring parties to specifically perform their marital obligations by remaining married, at least under modern conceptions of domestic institutions. Whether courts may equitably enforce the substance of marital promises as part of dissolving marriages is a more difficult, and more worthy, topic. Specific performance of services is generally disfavored just as continued compelled marriage would be unconscionable. *See, e.g.,* 81 C.J.S. *Specific Performance* § 96 (1955). But equitable remedies may afford courts the ability to consider crafting remedies that enforce the substance of prior promises if not requiring their exacting execution as originally intended.

53 *See* Nakonezny et al., *supra* note 51, at 480.

At the same time, a few states have also created separate status for "covenant marriage."[54] While the impact has been more limited, this partial shift towards choice in forms of marriage does suggest a system capable of accommodating, and enforcing, more individualized options.[55] Additional options, separate from marriages but sharing some common features, are also available in some foreign jurisdictions, further expanding the nature of relationships.[56] Perhaps most significantly, a majority of states have adopted one of two uniform acts concerning marital agreements.[57] Greater flexibility, and consistency in enforcement, affords parties to marriages the option to form agreements that alter and amend their marital obligations. Trends toward greater enforceability of marital and premarital agreements have also invited both criticism and state-specific variation, generally in favor of additional protections for the parties.[58]

Consistent with criticism of marital agreements, if principled consideration of family court systems yields divorce structures more akin to contract, the threat of inequality may be heightened. First, greater power in negotiating agreements may heighten the inherent disadvantages of parties often possessed of asymmetric information.[59] To the extent marriage may even be comparable to any market, this asymmetry invites distortion that would exacerbate inequality. Furthermore, realist assumptions about law may

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54 *See, e.g.*, Ariz. Rev. Stat. Ann. §§ 25-901–906 (2011); *see also* Ark. Code § 9-11-807; La. Rev. Stat. § 9:9:273. These three states currently have similar regimes.

55 *See generally* Barbara A. Atwood, *Marital Contracts and the Meaning of Marriage*, 54 Ariz. L. Rev. 11, 12, 17 (2012).

56 *Id*. at 34-37.

57 *See* Unif. Premarital Agreement Act (Unif. Law Comm'n 1983); *See also* Unif. Premarital and Marital Agreements Act (Unif. Law Comm'n 2012). A total of twenty-eight states and the District of Columbia have adopted at least portions of one, or both, uniform acts. *See Enactment History – Premarital and Marital Agreements Act*, Uniform Law Commission, https://www.uniformlaws.org/committees/community-home?communitykey=2e456584-938e-4008-ba0c-bb6a1a544400 (last visited Sept. 8, 2024).

58 *See* Atwood, *supra* note 55, at 12, 14, 33.

59 *See generally* William Samuelson, *Bargaining Under Asymmetric Information*, 52 Econometrica 4 (July 1984). If the asymmetry of parties in routine transaction, such as automobile purchases, is adversely affected by the gap between informed and uniformed participants, the danger to parties to marriages is axiomatic.

have a connection to bargaining theory such that relative power of parties may be indirectly derived from rules governing their disputes.[60]

The dispute over marriage, while worthy of consideration, may be superfluous. Regardless of the legal structures superimposed upon the marital union, perhaps it remains truly *sui generis*. But in the context of considering marriage as part of evaluating how best to form a system of laws surrounding the institution, no conclusion is required as to the current status of marriage law.

B. *Current State of Marital Property Division*

The trend away from fault in marital dissolution refocused attention towards financial considerations of divorcing spouses.[61] Common law property division, based solely on title, gradually yielded to considerations that allowed courts to equitably divide property in relationships recognized, *inter alia*, as economic partnerships.[62] Nine states recognize community property, where title must yield to the presumption that spouses acquire a one-half interest in property acquired during the marriage regardless of title.[63] Absent recognized exceptions to general rules, four of nine community property states adhere to an even division of thus-acquired community property while the remaining five incorporate some principles of equitable distribution.[64] The now-prevailing method for property distribution revolves around "equitable distribution," which incorporates factors the courts must weigh to reach fair divisions of the marital estate. While few states adopted, in toto, the Uniform Marriage and Divorce Act, various equitable distribution schemes are nonetheless inspired by a weighed factors approach alongside additional considerations that might exempt certain

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60 *See* Lewis Kornhauser & Robert Mnookin, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). *Cf.* Halley, *supra* note 44, at 48 (criticizing this view of differential power for reinstating other elements of classical legal at the possible expense of gains made in differentiating competing institutions about the status of marriage).

61 KATZ, *supra* note 51, at 2-3, 128-29.

62 *See id*. at 129-31.

63 *See id*. at 129.

64 *See id*. at 129-30.

property from the court's purview or segregate special types of property for disparate treatment.[65]

There are no perfect solutions to the conundrum. Equity is a big little word. Fairness, overall, may require consideration of other means to impact the financial circumstances of the parties.[66] The trend toward equitable distribution is consistent with rejection of common law systems where title controlled prior to, and exclusive of, equitable considerations. The status of marital property division schemes is the product of a long-trending process that rejected rigidity and sought greater flexibility in the service of shared, but elusive, goals.[67] The path towards change has been state-specific but trends are apparent.[68] Agreements concerning marital property, whether prenuptial, marital, or as settlement arrangements after filing litigation, may afford parties some degree of flexibility at various stages of marriage to control distribution of their property. There does not appear to be any resolution of the dispute between discretion versus rigidity. In adopting appropriate schemes, case studies, like case law, may add to understanding but not yield answers to every inquiry.[69]

Turning back to equitable apportionment factors, the various regimes generally share twin and common goals. First, to provide guidance to the courts in reaching equitable distribution awards. Second, to afford flexibility in weighing individual circumstances.[70] As to the latter point, not all states value flexibility and some jurisdictions have adopted specific limitations on judicial discretion. More specifically, some jurisdictions require trial courts to

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65 *See id*. at 130-34.

66 *See infra* Section II(c).

67 *See generally* Max Rheinstein, *Division of Marital Property*, 12 Willamette L.J. 413, 426 (1975).

68 *See, e.g.,* Norman Perlberger, *Marital Property Distribution: Legal and Emotional Considerations*, 25 Vill. L. Rev. 662, 672 (1980) (noting the development of then-new equitable distribution legislation and its impact on litigants in Pennsylvania).

69 *See, e.g.,* Marsha Garison, *What's Fair in Divorce Property Distribution: Cross-National Perspectives from Survey Evidence*, 72 La. L. Rev. 57, 76 (2011) (analyzing case studies in an evaluation of efforts to adopt best methods). In appropriate reference here, the author analogizes factors to sentencing guidelines which inform decision-makers while still requiring "messy" decisions which have dramatic impact on individual lives. *Id*. at 88.

70 *See* Katz, *supra* note 51, at 135.

enumerate specific findings justifying any equitable distribution award while others create a presumption in favor of equal division, at least in the case of long-term marriages.[71] Taken as a whole, the dominant trend unmistakably leans towards creating a judicial guidance framework that empowers trial courts to reach equitable results based on, arguably, predictable factors for consideration. However, to the extent equal distribution is presumed, by statutory mandate or simply in practice, robust statutory schemes providing guidance may approach superfluity.[72] Limitations on judicial discretion often yield greater predictability. But predictability can come at the expense of individualized consideration. It would be strange indeed to move from common law title theory, through a path of presumed marital property, towards more enlightened equitably distribution schemes, and then revert backwards to presumptions of equal distribution. In equitable division of marital property as in seeking better principles of justice, the tension is between flexibility afforded by additional liberties and the goals of protected equality.

C. *Equitable Considerations in Spousal Support*

Division of marital property is not the only financial consideration in marital dissolution. In states that still provide for alimony, or spousal support, courts may have additional discretion to adjust the financial circumstances of the parties by separate means. Alimony, like other aspects of matrimonial law, has an unfortunate history relative to outdated notions of gender roles. Wives, and only wives, could seek alimony as a substitute for former support during the marriage since they had been deprived of any property during the marriage.[73] Alimony law has evolved toward gender-neutrality, although the original purposes for post-divorce support have also necessarily evolved. Discretion in alimony awards may also be problematic, not only in the amount of the award but the extent of relief where lifetime awards remain

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71 *Id*. Conversely, courts do not generally apply such presumptions in short-term marriages

72 Stated differently, if courts default as to equitable distribution as a presumed equal division of marital property, statutes providing factors for consideration by the court become far less meaningful.

73 *See* KATZ, *supra* note 51, at 135.

possible.[74] Conceptually, alimony is more difficult than equitable distribution because continuing support necessarily creates an ongoing link between severed spouses whereas equitable distribution segregates formerly marital property.

Alimony reform is not a new topic. Identifying trends in alimony is more difficult than in division of marital property. Evolution of gender roles, alongside liberalized divorce with less emphasis on fault and greater attention to financial matters, created the necessity to evaluate both the continuing need for alimony and structural reform.[75] Lingering gender-specific issues also highlight ongoing problems with alimony, with continuing criticism of alimony systems from the perspective of either spouse.[76] To the extent marriage is characterized as a partnership, however, decisions made during the marriage are not capable of equitable remedies by division of property alone. Alimony may be analogous to reconciliation of partnership accounts whereby separating business partners divide their partnership property but with allowance for adjustment for capital contributions during partnership. Of course, even that analogy breaks down as business partners would rarely, if ever, be subject to ongoing maintenance awards akin to alimony following dissolution of business partnerships. Nevertheless, social changes in marriage may have eroded, but not eliminated, the need for alimony even while equitable systems for assessing and setting awards remain elusive.[77]

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74 *See id.* at 137.

75 *See generally* Carl E. Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 BYU L. Rev. 197. Evaluating the ongoing rationale for alimony, the question may become as much about the justification for any alimony scheme as a prerequisite to reform discussions, including but not limited to any remaining moral justification for alimony. *See id*. at 235.

76 *See* Jennifer L. McCoy, *Spousal Support Disorder: An Overview of Problems in Current Alimony Law*, 33 Fla St. U.L. Rev. 501 (2005). Here alimony suffers attack for its devastating impact on women while also meriting criticism for fostering involuntary servitude by payor spouses. *See id*. at 516, 521. Both may be true. But as the author concludes, the financial circumstances during marriage do not have a complete solution in division of marital property alone as the decisions during the marriage impact more than just property that exists at the time of dissolution.

77 *See* Judith G. McMullen, *Alimony: What Social Science and Popular Culture Tell Us About Women, Guilt, and Spousal Support After Divorce,* 19 Duke J. Gender L. & Pol'y 41, 51 (2011) (noting the shifting explanation for alimony awards).

Reform efforts have yielded both new alternatives and new problems. Courts in some jurisdictions have new tools to award rehabilitative alimony in appropriate cases, which affords the supported spouse necessary support while, theoretically, decreasing the need for such support over time.[78] Greater emphasis on delineated factors for determining, first, whether alimony is appropriate and, second, an appropriate award may reduce the uncertainty attendant to wide latitude in making awards. However, some forms of alimony awards, including those with conditional features, may invite spousal discord following divorce.[79] To the extent equitable distribution alone is insufficient to address the overall financial ramifications of marital dissolution, alimony remains a necessary additional tool for crafting equitable remedies to individualized circumstances.

D. *Child Custody Decisions*

As with the evolution from fault-based to no-fault divorce, the shifting landscape of family law has upended the focus of custody. Where fault was no longer the dominant, and sometimes only issue, in divorces, courts increasingly focused on financial aspects of divorce. Similarly, custody as an issue in marital litigation has become an increasing area of contention in family court litigation. Historically, custody was all but assumed. Even as courts shifted towards the "best interests of the child," that change in focus predated abolition of the maternal preference typically referenced as the "tender years" doctrine or presumption.[80] The trend towards uniform law incorporated child-focused factors to guide custody decisions while some states required more detailed proposals focused on parent-specific factors.[81] Modern custody decisions are predominantly child-focused while still incorporating pre-existing parenting practices and parental preferences into the analysis.[82] Additionally, courts in many jurisdictions have more flexible options for awarding individualized parenting plans.[83]

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78 *See* KATZ, *supra* note 51, at 139-40.

79 *See, e.g., id.* at 140-41 (discussing cohabitation condition in alimony and resulting litigation over the ongoing award).

80 *See id*. at 145-46.

81 *See id*.

82 *See id* at 147-53.

83 *See id*. at 154.

No other area of family court litigation shifts focus away from the litigants themselves to the extent necessitated by custody determinations. That shift alters the structural framework for conceptions of marriage, as even where parties enjoy greater flexibility in arranging their own conceptions of marital relations the court reserves authority over children.[84] Furthermore, child-focused inquiries that direct the court away from the parties also require the court to consider both what is best for the impacted children and what maximizes amelioration of harm.[85] Similarly, custody decisions are one of the most likely aspects of family court litigation to necessitate expert testimony.[86] Modern trends have developed additional considerations for custody cases while also shifting the emphasis from the parties.

For purpose of this inquiry, the centrality of best interests' analysis alters the analytical framework as hypothetical decision-makers must consider not merely how to arrange systems for marital relations but contemplate the potential impact on children.[87] This aspect of marital litigation fits unevenly within the remainder of the applied experiment but cannot be ignored given its potential importance to any system of marital dissolution.

III. Experiment Applied: Resulting Perspectives

Having reviewed the background of the inquiry and existing systems for applying that inquiry to particular issues, the analysis turns first to the parameters for application. Applying Rawlsian

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84 *See* Unif. Premarital and Marital Agreements Act § 10 (exempting, *inter alia*, issues related from children from enforceability in premarital or marital agreements.)

85 Joseph Goldstein, Albert J. Solnit, Sonja Goldstein, & Anna Freud, The Best Interests of the Child: The Least Detrimental Alternative (1996). Combining all three books from this child-focused trilogy, the authors detail the necessity of orienting decisions away from parents and towards the minor children.

86 The Scientific Basis of Child Custody Decisions (Robert M. Galatzer-Levy & Louis Kraus, eds. 1999) (detailing multiple aspects of expert inquiry to inform custody decisions, including child psychology, custodial evaluations, and special medical needs of children).

87 This divide raises the question of which vision of public reason—Rawls' separation of moral arguments from political discourse or communitarian ideals of individuals linked to communities—provides a more secure foundation for marginalized and vulnerable groups. *See* Robert L. Hayman Jr., Nancy Levit, Richard Delgado, Stanley Fish, & Jean Stefancic, Jurisprudence: Classical and Contemporary: From Natural Law to Postmodernism 23-24 (2021).

assumptions to a modified original position compels some changes. First, the modified original position here does not predate the whole of society. Second, the focus is on maximizing just results specifically for the designated field with a necessarily limited inquiry. This does not ignore relevant aspects from other areas of law or disciplines but does distinguish this experiment from the source material. Just as with the original theory, application here will skip constitutional limitations to instead proceed from principles, to legislation, and finally application.

Application of the modified original position involves further changes to Rawls' assumptions. It decreases the rigidity of the veil of ignorance. While decision-makers here will remain ignorant of their particular station and abilities, and devoid of knowledge concerning their natural advantages, if any, from either birth or social status, knowledge about the nature of matrimony is presumed. However, ignorance is required as to any existing or proposed legal structures related to marriage. In the original position, marriage exists but awaits full definition so that decision-makers do not suffer from the psychological disadvantage that would naturally follow if they had no knowledge of marriage itself. Finally, decision-makers for these purposes will have information beyond the nature of abilities and will have a rudimentary understanding of social structures, marriage in particular, although not the governing law that their hypothetical status tasked them with creating from principles forward.

In so doing, we proceed with understanding the nature of marriage itself forms part of the discussion. Second, to properly understand principled creation of marital institutions the decision-makers must also reflect on the nature of dissolution. The thought experiment requires, specifically, how to form and dissolve a marriage. This must address both marital property and alimony as a means of resolving the overall financial status of the parties. Finally, child issues necessarily impacted by divorce are relevant but less capable of direct application in the limited nature of the experiment.

A. *Guiding Principles*

From the modified original position, with its accompanying veil of ignorance, application proceeds first with consideration of principles from such status. In stating such principles, the decision-makers are necessarily referring to preconditions for marriage in

the application of announced principles. From this original position, the following principles emerge:

> (1) Each person has the same indefeasible claim to equal status within the marital relationship, compatible with any inequalities subject to the following conditions: first, they are the product of freely chosen options within the marital relationship, and second, inequality is justified by exercise of liberty within allowable constraints (consequential principle).
>
> (2) Each person is entitled to maximum liberty of choice consistent with obligations to their spouse and constraints necessitated by the marital relationship.

The emerging principles borrow from Rawls' original formulation but invert their structure. The priority principle, previously applied to maximize total liberty, now demands that the parties arrange their relationship such that they maximize their equality. Exception is allowed solely where the product of choice consistent with the marital relationship and liberty of action is compelled by the second principle. Protection for liberty, while retained, yields to equitable concerns. The resulting marital relationship does not extinguish liberty, and specifically protects liberty of action. However, allowable choices are naturally constrained by the nature of the marital relationship itself. Inequality is permissible, but only as a result of choice, which suggests the consequential principle allows deviation but further implying that libertine departure from equality will also impart consequences.

Proceeding towards sequential analysis, and applying these first principles, attention turns to legislative choices and the extent to which initial principles constrain legislative action. To protect equality pursuant to priority principles, legislative action would be restricted and would dictate the following legislative values consistent with first principles. First, establishing marital relationships must be **predictable**. Predictability serves both equality and liberty interests, but also nods towards the consequential principle within predictable options. Second, marital relationships must be **personal**. Consistent with allowable liberty, and the ability to arrange affairs with an equality-maximizing structure, structural forms emerging from the original position would be personal. In contrast to the original position of Rawls, the decision-makers retain sufficient knowledge to understand the general nature of matrimony. Strictly limiting marital forms, or options upon dissolution, would not necessarily follow from the modified structure.

Finally, and consistent with the personal nature of marital forms, principled application of the structural experiment would produce marital forms that are **flexible**. This malleability is not unlimited, constrained at least by commands of equality and necessity for predictability. Due to the priority principle, liberty which suggests flexibility must also find constraint by mandated equality. Effectively, equality will establish both a floor and a ceiling between which liberty will afford flexibility.

Proceeding sequentially, principles then yield legislative action subject to the following restrictions on freely democratic choice which is subject to established principles. This analysis contains three phases, in contrast to Rawls' four, but is essentially subject to the same checks as constitution-making in that phase. Legislative action would produce marital structure which may well invert normative forms. While existing structures allow parties to seek counsel to enter marital agreements, legislative dictates here require marital agreement. This result does not suggest fully flexible marriages or a range of options from which putative spouses merely identify their menu choices. Rather, marital contracts would be educational to the parties. This would not require a course of study. But to ensure equality, allow liberty, and maintain predictable forms, marriage cannot proceed in the absence of features currently associated with pre-marital agreements. Accordingly, the parties would (1) retain counsel, (2) make full financial disclosure, (3) ensure freedom of choice untainted by duress or coercion.[88] Structurally this may resemble existing practice for pre-marital agreements.[89] One important distinction arises.

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[88] The application here retains flexibility consistent with options that may be available in various jurisdictions. Covenant marriages would not necessarily but excluded but would not be required. [That is the current state of the law in Arizona, Alabama, and Louisiana.] Individual states may allow greater flexibility.

[89] Specifically, enforceability of agreements under the uniform act requires, *inter alia*, voluntary consent, access to counsel (or adequate waiver), and full disclosure. *See* Unif. Premarital and Marital Agreements Act, supra note 84 at § 9. Case references in the official Comment delineate examples of structural requirements applied. *See, e.g*. Marriage of Bernard, 204 P.3d 907, 910-13 (Wash.2009) ("finding agreement 'involuntary' when significantly revised version of premarital agreement was presented three days before wedding"); Ware v. Ware, 687 S.E.2d 382, 387-91 (W.Va. 2009) ("*access* to independent counsel required, and *presumption of validity* for premarital agreement available

The result here does not require agreement of the parties. Parties retaining both flexibility and predictability may freely choose to enter marriages subject only to the legislative constraints set forth below.

B. *Freedom of Contract – Constrained*

While parties pursuant to procedural protections would not be required to enter specific marital agreements, contractual freedom like existing structures for marital agreements is permissible. The essential framework for pre-marital guidelines satisfies the prerequisites for marital agreements should the parties elect to proceed. But options here must be limited. First, and in contrast to current uniform law, enforceable agreements must not exceed the bounds of conscionability either at the time of execution or at the time of marital dissolution.[90] Consistent with current uniform law, unconscionability is a question of law for courts.[91] However, complete liberty must still yield to equality. The parties would not retain contractual capacity to prevent all property from becoming marital property. The parties would not retain absolute authority to waive alimony – subject perhaps only to conscionability of enforcement. The structure of marital agreements, if anything, would more closely resemble partnership agreements where the parties may define their roles and some procedures upon dissolution. However, the parties could not vary the essential nature of the partnership, the fiduciary nature of the marital relationship,

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only where party challenging the agreement actually consulted with independent counsel" [emphasis in original Comment]); Friezo v. Friezo, 914 A.2d 533, 549, 550 (Conn.2007) (explaining after survey of disclosure requirements that "[The standard] requires each contracting party to provide the other with a general approximation of their income, assets and liabilities.").

90 *See* Unif. Premarital and Marital Agreements Act § 9(f).

91 *See id*. at § 9, Comment ("This language broadly reflects the standard applied in a number of states." (*citing, e.g*., Connecticut Code § 46b-36g(2) (whether premarital agreement was "unconscionable . . . when enforcement is sought"); N. J. Stat. § 37:2-38(b) (whether premarital agreements was "unconscionable at the time enforcement is sought"); N. D. Cent. Code § 14-03.1-07 ("enforcement of a premarital agreement would be clearly unconscionable"); Ansin v. Craven-Ansin, 929 N.E.2d 955, 964 (Mass. 2010) ("the terms of the [marital] agreement are fair and reasonable . . . at the time of divorce"); Bedrick v. Bedrick, 17 A.3d 17, 27 (Conn. 2011) ("the terms of the [marital] agreement are . . . not unconscionable at the time of dissolution").

or allow dissolution to ignore that marriage – as a partnership – necessarily involves contributions, benefits, burdens, and rights from both.

Marital agreements here would be contrast to agreements that may otherwise emerge under existing law as a proposed solution to comprehensive legislative action on all areas of matrimonial law. Distinguished from prior efforts to allow marital agreements to fulfill the goals of personalizing the marital contract, the parties to marriages in this application would be constrained by limits imposed by the modified original position.[92] Limitations on marital agreements are compelled by the nature of marital forms emerging from the modified original position and necessary veil of ignorance. Parties designing marital forms, without full knowledge of their status, would certainly want disclosure prior to marriage but are not entitled to pierce the veil of ignorance in setting out rules of construction. Principles must proceed to specific applications. Faithful to the intention of designing structures constrained to protect liberty but maximize equality, marriage would necessarily change in structural form.

C. *Equitable Considerations in Absence of Agreement*

Where parties are not compelled to agree, default statutory provisions must follow the sequential application of emerging structures here. Thus, each area of existing law requires brief attention.

1. *Division of Marital Property*

Default rules for property here follow structurally sound existing principles, but with an important addendum. Under existing practice, most jurisdictions apply some version of equitable distribution with statutory guidelines for making awards.[93] From behind

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92 *See* Rasmusen & Stake, *supra* note 40, at 464. ("The veil of ignorance can and should be lifted by asking thousands of individual decisionmakers, with full awareness of their position, to choose rules to fit their own goals and aspirations.") While not a criticism of this earlier work, it remains a proposal inspired by Rawls rather than an application of Rawlsian principles. While freely chosen marital agreements may avoid some current problems, greater freedom to contract – without the constraints of the veil of ignorance – merely substitutes new inequities for current structural problems.

93 Katz, *supra* note 51, at 135.

the veil, parties seeking predictability would require specified factors to aid in division. But just as existing practice often collapses into default equal divisions, even equality maximizing principles here do not require that result. Rather, courts would not be constrained by a presumption of equal division but would be required to delineate the basis for decision. While not completely consistent with predictability, no system – however conceived – is completely predictable. Requirements for decision here protect predictability by allowing appellate review. Furthermore, the liberty interests that are also implicated allow parties to arrange unequal contributions that may deserve consideration in equitable distribution.

2. *Alimony*

Similar to equitable distribution, alimony provisions resulting from application of the veil do not produce wholly new systems. However, modifications would emerge. Similar to existing practice in at least some jurisdictions, decision-makers behind the veil would want factors for inclusion in any alimony decision.[94] However, alimony may be constrained by agreement subject to conscionability. Second, application of alimony would follow a sequential analysis. First, the court must determine that an award – any award – is justified based on statutory guidelines. This prerequisite aids in predictability. Next, only after preliminary decisions could the court apply factors to produce an alimony award. Finally, and in departure from existing practice, courts would be required to assess alimony in concert with equitable distribution.[95] To the extent alimony is a tool to equitably sever the marital relationship where other options are insufficient, courts applying structural analysis produced from behind the veil would necessarily be compelled to find that alimony alone is sufficient to reach equitable results.

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94 *See* Katz, *supra* note 51, at 136.

95 *See* Unif. Marriage and Divorce Act § 307-308 (suggesting in one alternative proposal for division of property that courts consider whether apportionment is "in lieu of or in addition to maintenance" while not specifically requiring consideration of marital property division as a prerequisite for alimony); *see also* Katz, *supra* note 46, at 136 (explaining that only eight states have adopted the Uniform Marriage and Divorce Act but pointing to uniform law as a basis for other statutory schemes with enumerated factors for division of property).

3. *Custody*

In limited application, custody would also follow at least some existing practice. The best interests of the child would remain the guidepost here. But important qualification remains as the structural forms produced from the modified original position do not necessarily compel decision-makers to incorporate best interests as part of this analysis. Parties that are aware of marriage, and aware of children, but ignorant of their role may well chose to prioritize children. But that prioritizing would not be from self-interest, which would not apply. Instead, emerging best interest analysis from behind the veil would produce a structure of factors which each focus specifically on the child. Parenting plans and detailed parental analysis would not only receive little attention, but decision-making behind the veil also suggests that parties would not want the burden associated with self-evaluation. Subject to minimum guarantees, such as protecting the parent child relationship for both parents, the emerging custody structure would remain flexible but be more purely child focused.

IV. Conclusion

Blind entry to marriage, from a legal and factual perspective, can produce unforeseen results. Semi-blind decisions from behind a veil of ignorance would hardly produce perfect results. But in designing a system, however conceived, to allow human actors to enter fundamental but challenging relationships, better is good enough.[96] Designing marital forms without regard to full knowledge that might be possible by contracting parties under existing structures would undoubtedly produce hedging by those seeking to protect minimum guarantees. The primary conclusion that emerges here is that both liberty and equality would remain paramount, consistent with Rawls; however, inversion of those first principles and application to existing practices may well be

96 Thus echoing Voltaire's reminder to "not let the best be the enemy of the good" M. De Voltaire, La BeGueule, Conte Moral [The Prissy: A Moral Tale] A3 (1772).

more consistent with the fundamental nature of marital relationships and the impulse to protect the interests of children. This theoretical construct, as an applied thought experiment, may assist legislators in pursuit of the great desideratum of more equitable matrimonial laws.

Child Marriage in the United States: Past, Present, and Future

by
Sandi S. Varnado*

Introduction

Child marriage[1] has existed for centuries[2] and affects girls in particular.[3] The United Nations deems its practice to be a human rights violation and a form of forced marriage, given that at least one or both parties have not given their full, free, and informed consent.[4] Nonetheless, child marriage still exists in the United States in 2024, despite significant transformations over the years, in large part because of citizens' continued belief in marriage as a "building block of society."[5] While this belief and support for child marriage are not always synonymous, Americans have historically believed that sex and childbirth belong within the confines of a

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1 The term "child marriage" within this article refers only to civil marriages validly confected under, governed by, and recognized through laws in the states of the United States. The term does not include those who married outside the bounds of codified law but whose marriages were valid nonetheless. Additionally, the term has been deemed problematic by some scholars. As one noted: The "term 'child marriage' itself is dangerous" because it "is not conscientious of youth empowerment." Marie Johnson-Dahl, *Sixteen Candles on My Wedding Cake: Implications of Banning Child Marriage in America*, 2020 U. Ill. L. Rev. 1045, 1089.

2 Hayat Bearat, *Caged by a Marriage: How Child Marriages in the United States Are Enabled by Our Immigration System*, 71 Drake L. Rev. 1, 2 (2024).

3 Nicholas L. Syrett, American Child Bride: A History of Minors and Marriages in the United States 5 (University of North Carolina Press 2016).

4 *Id.*; Khaleda Rahman, *Child Marriage Havens Emerging Across America*, Newsweek, (Jun. 13, 2024, 4:04 AM), https://www.newsweek.com/child-marriage-havens-america-1911325.

5 Syrett, *supra* note 3, at 7.

marital relationship.[6] This evidences a strong (and somewhat misguided) faith in the institution of marriage within the United States.[7] In essence, the American mindset is that marriage transforms "bad" things (for example, premarital sex and illegitimacy) into "good" things (licit sexual intercourse and legitimacy),[8] prompting one scholar to dub this mindset the "marriage cure."[9] But marriage is no magical cure for anything; instead, in the case of child marriage it bestows adulthood onto children,[10] most of whom lack the maturity to navigate it.

Unlike some other countries across the globe, the United States has never legislated the issue of child marriage at the federal level. In fact, attempts to do so have failed on more than one occasion.[11] The U.S. Congress failed to pass the International Protecting Girls by Preventing Child Marriage and has never ratified international treaties that would prohibit child marriage.[12] Instead, each of the fifty individual states govern family law within their own jurisdiction, including the laws on age to marry.[13]

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6 *Id.* at 6.

7 *Id.*

8 *Id*. at 7.

9 Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 Yale L.J. 756 (2006).

10 Syrett, *supra* note 3, at 7-8.

11 Preventing Child Marriage Act, H.R. 2140 116th Cong. (2019) (failed); Child Marriage Prevention Act, H.R. 4867 115th Cong. (2018) (failed). *See also* End Forced Child Marriages Act, H.R. 1606 117th Cong. (2021) (not attempting to prevent child marriage but implementing a reporting requirement on the Department of Health and Human Services); Jane E. Larson, *"Even a Worm Will Turn at Last:" Rape Reform in Late-Nineteenth Century America*, 9 Yale J.L. & Human. 1, 34-35 (Winter 1997).

12 These include the United Nations Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women. As to the former, the United States is one of two countries to have failed to ratify it, *id.* at 16, whereas as to the latter, it is one of only seven. Melanne Verveer & Rangita de Silva de Alwis, *Why Ratifying the Convention on the Elimination of Discrimination against Women (CEDAW) Is Good for America's Domestic Policy*, Georgetown Inst. for Women, Peace & Sec., (Feb. 18, 2021), https://giwps.georgetown.edu/why-ratifying-the-convention-on-the-elimination-of-discrimination-against-women-cedaw-is-good-for-americas-domestic-policy/.

13 Raquel Wildes Genet, *Child Marriage in America: An Interim Solution Pending a Total Ban*, 40 Cardozo L. Rev. 2999, 3011 (2019).

This article will explore how those laws have changed over the years, how they exist currently, and the future of child marriage in the United States. As presented in Part I, child marriage in the United States has evolved greatly over the country's two hundred-plus years history. While the changes were slow and met with much opposition,[14] child marriage went from being perfectly acceptable during the times of English common law to being frowned upon in the early twenty-first century. Despite this, as discussed in Part II, child marriage is currently alive and well in many states, given that only thirteen states have banned it altogether. Of the thirty-seven states allowing it, all require that the child obtain adult authorization—parental approval, judicial approval, or both. Of those requiring adult authorization, thirty-three of these states additionally require that the child be of a certain age, in effect setting a minimum marriage age.

The law of child marriage could soon change drastically, though. On August 1, 2024, Senator Dick Durbin introduced to Congress the Child Marriage Prevention Act of 2024.[15] Characterized by some advocates as "the first concerted effort by the United States Congress to condemn and prevent child marriage domestically,"[16] this multi-faceted piece of legislation provides for the collection and sharing of information on the federal level and incentives for states to study and ban child marriage, bans child marriage on federal property, and amends provisions of U.S. immigration law. This potentially ground-breaking legislation is explored in Part III. As noted therein, the future of child marriage in the United States is still uncertain, but many scholars, practitioners, activists, and survivors anxiously await the legislative developments on the Act.

I. The History of Child Marriage in the United States

The United States has recognized child marriages since its inception. Various contexts influence a person's age at marriage, whether they are structural (e.g., legal, economic, and institutional)

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14 Bearat, *supra* note 2, at 15-16.

15 Child Marriage Prevention Act, S. 4990, 118th Cong. §§ 1-10 (2023-2024) (introduced).

16 *Historic Legislation Introduced to Prevent Child Marriage in the United States*, Tahirih Justice Center (Aug. 2, 2024), https://www.tahirih.org/news/child-marriage-prevention-act-introduction/.

or cultural (e.g., religious tradition and social norms).[17] The U.S. Census Bureau did not collect information about child marriage until 1880,[18] but its statistics that year indicate that 11.7% of fifteen to nineteen-year-old girls were wives.[19] It was also around this time that statutory rape laws were enacted, but they did not apply to protect married girls.[20]

The institution of marriage essentially transformed children into adults, making marriage a singular event that defined people. Marriage was attractive to children for various reasons. One was that is allowed them to leave their nuclear families, some of which were abusive.[21] For others, especially females, marriage was economically advantageous because of their scarce employment and financial opportunities for much of American history.[22] Marriage also allowed girls greater access to inheritance rights.[23]

Historically, judges have been reluctant to annul child marriages.[24] They wanted to honor individuals' choices to marry and preserve marriage, seen as the cornerstone of social order.[25] Even if the marriage violated statutory requirements, it had already been confected. Annulling it would essentially turn "otherwise married women into single girls who were no longer virgins."[26] This, the thought process went, would tarnish the girls, the institution of marriage, and any children of the union (who could be seen as illegitimate upon the marriage's annulment).[27]

Eventually, though, as age consciousness became more prevalent, Americans began to realize that preserving child marriage in

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17 Vivian E. Hamilton, *The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent Marriage*, 92 B.U. L. Rev. 1817, 1823 (2012).

18 Anjali Tsui, *Married Young: The Fight over Child Marriage in America,* PBS Frontline (Sept. 14, 2017), https://www.pbs.org/wgbh/frontline/article/married-young-the-fight-over-child-marriage-in-america/; *see also* Syrett, *supra* note 3, at 2.

19 Syrett, *supra* note 3, at 147. Even under the statutory rape law, the age of consent to sex outside of a marriage was merely ten years old. *Id.* at 46.

20 *Id.* at 2, 46.

21 *Id.* at 91.

22 *Id.* at 5.

23 *Id.* at 92.

24 Teri Dobbins Baxter, *Child Marriage as Constitutional Violation*, 19 Nev. L.J. 39, 44 (2018).

25 Syrett *supra* note 3, at 94.

26 *Id.* at 93.

27 *Id.*

the name of social order came at the cost of protecting children.[28] They began to see children as unfit for marriage, recognizing that it deprived them of their childhood and opportunities for education and employment.[29] Over time, studies also revealed the myriad of harms to children who marry, including their high incidences of divorce.[30] Ultimately then, many Americans began to view marriage not as a cure but an ill.

A. *Early America: The Colonial Period*

In colonial America, while the general age of majority was typically twenty-one years,[31] the contract of marriage did not have such an age requirement. Early Americans cared little about age in most contexts, including marriage, focusing instead on things like maturity and financial preparation, and therefore, no universal "appropriate" age for marriage existed.[32] Not surprisingly, then, child marriages were not unusual during this time, particularly in the southern colonies.[33] As for the law in the U.S. colonies at this time, it was "an evolving blend of English common law, statutory rules adopted by colonial assemblies, and domestic common law."[34] This patchwork of legal sources informed marriage law during this time period.

Under English common law, because of the timing of average puberty, the minimum age of marriage for girls was twelve years, and for boys, it was fourteen years.[35] However, in colonial America, children

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28 *Id.* at 97.

29 Child Marriage Prevention Act, S. 4990, 118th Cong. §§ 1-10 (2023-2024) (introduced); *see also* Wendy Ross, *Protecting the Child Bride: Following Texas' Middle-Ground Approach*, 44 U. Ark. Little Rock L. Rev. 99, 111-114 (2021); Rachel L. Schuman, *State Regulations Are Failing Our Children: An Analysis of Child Marriage Laws in the United States*, 60 Wm. & Mary L. Rev. 2337, 2349-55 (2019); Mary Templeton, *Engaged and Underage: Advocating for a Child Marriage Ban in North Carolina*, 10 Wake Forest J.L. & Pol'y 311, 319-20 (2020).

30 Syrett, *supra* note 3, at 130; Alice M. Hetzel & Marlene Cappetta, *Teenagers: Marriages, Divorces, Parenthood, and Mortality,* U.S. Dept. of Health, Educ., & Welfare, Div. of Vital Statistics 1, 15-17 (Aug. 1973).

31 Schuman, *supra* note 29, at 2344.

32 Syrett, *supra* note 3, at 3.

33 Syrett, *supra* note 3, at 16; Genet, *supra* note 13, at 3011-12, n.79.

34 Hamilton, *supra* note 17, at 1829.

35 *Id.* These were considered the "ripe ages" for these children. Tsui, *supra* note 18. Thus, because these children would experience sexual desire, marriage was seen as an appropriate site for sex and reproduction. *Id.*

could actually marry at seven years of age,[36] with Americans believing that such children were capable of sound reason and judgment, though not as much as when they reached later ages.[37] Evidence suggests that many children between eight and ten years old married in early colonial America.[38] These marriages, though, were voidable, meaning that either party could dissolve it upon attaining their respective common law age, provided that it had not been consummated.[39] In essence, they were like "trial runs" for marriage.[40] These early ages were justified at the time by the idea that marriage was a vehicle through which to "transfer property rights, make political alliances, and maintain proper lineage within families."[41] Colonial Americans saw early marriage as a mean to serve and protect and promote the autonomy of girls,[42] who married at much higher rates than boys.[43]

Eventually, most of the early American states enacted statutes requiring a minimum marriageable age.[44] However, most still also allowed child marriages that satisfied the common law ages (twelve for girls and fourteen for boys), as long as the child secured parental consent for their marriage.[45] The focus, then, was on parental control of the child usually for economic reasons rather than protecting the well-being of children.[46] Nevertheless, most of

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36 Baxter, *supra* note 24, at 45. *See also* Syrett, *supra* note 3, at 19.

37 Syrett, *supra* note 3, at 21.

38 *Id.* at 19.

39 Baxter, *supra* note 24, at 45; *see also* Syrett, *supra* note 3, at 19.

40 Syrett, *supra* note 3, at 19.

41 Pamela E. Beatse, *Marital Rights for Teens: Judicial Intervention That Properly Balances Privacy and Protection*, 11 J. L. & Fam. Stud. 577, 579 (2009).

42 Syrett, *supra* note 3, at 9.

43 *Id.* at 114.

44 *Id.*; *see also* Bearat, *supra* note 2, at 16.

45 Syrett, *supra* note 3, at 16; Baxter, *supra* note 24, at 45.

46 Schuman, *supra* note 29, at 2344. They also reflected concerns about property and inheritance rights. Baxter, *supra* note 24, at 45. As one commentator notes, the child marriage laws varied by region. Syrett, *supra* note 3, at 23. Northern colonies' laws emphasized parental control, while southern colonies' laws centered around property regulation. *Id.* Some southern states barred a girl from inheriting if she married younger than sixteen years without parental approval. Tsui, *supra* note 18. The purpose of such laws, though, was to discourage men from gold-digging by allowing parents to control which male would get access to "a daughter and her fortune." *Id.*

the states did not enforce their own requirements for marriage,[47] instead, upholding the marriages of children contracted without the requisite parental consent.[48] Likewise, most of the states also failed to "expressly repudiate" the English common law ages of marital consent,[49] leading their courts to consistently uphold the validity of marriages of children meeting those age requirements.[50]

B. *Mid-Nineteenth Century: The Antebellum Period*

The antebellum period saw a shift in attitudes toward marriage, with the focus on the mutual desire of the bride and groom.[51] Instead of older practices like arranged marriages, some Americans believed that marriage should be based on love.[52] Nonetheless, child marriage was not unusual during this period, in large part because, like in colonial America, citizens did not consider younger people unfit for marriage.[53] Of course, attitudes toward child marriage varied among the states, based on each's societal norms.[54] Child marriage was least likely in the Northeast and Mid-Atlantic states, a practice scholars attribute to the rise of age consciousness in those areas.[55] Child marriage was more common in the South,[56] with historians noting the commonality of marriage by children at ages fourteen and fifteen.[57]

Existing state marriage laws were not universally enforced during the antebellum period.[58] Nevertheless, they persisted, varying by region. In the Northeast and South, parental consent was

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47 Hamilton, *supra* note 17, at 1828-29.

48 Baxter, *supra* note 24, at 44.

49 Hamilton, *supra* note 17, at 1829.

50 Baxter, *supra* note 24, at 44.

51 *Id.* at 57-58.

52 Geraldine Gudefin, *Nicholas L. Syrett, American Child Bride. A History of Minors and Marriage in the United States, Chapel Hill*, 36 Law & Hist. Rev. 191, 192 (2018).

53 Syrett, *supra* note 3, at 42.

54 As one commentator has noted, that trend has continued to this day. Andrea Jeglum, *The Alignment of U.S. Child Marriage Laws to Data and Consent: Time for a Bright-Line Rule at the Age of Majority*, 36 Wis. J.L. Gender & Soc'y 213, 218 (2021).

55 Syrett, *supra* note 3, at 51.

56 *Id.* at 57.

57 *Id.*

58 *Id.* at 42.

supreme for child marriage—no matter their age. In the West and Midwest, age minimums for child marriage were more common,[59] but parents there could still consent to the marriage of children who had not attained the requisite age.[60] Minimum ages, where they existed, varied from state to state.[61]

These minimum ages also began to trend upward over the antebellum period.[62] Eventually, some states, mostly in the Midwest and West, went further when they lowered the female age of majority from the common law number of twenty-one years down to eighteen years.[63] In other words, no longer was a female between eighteen and twenty-one years of age considered a child; instead, she was an adult who could make all of her own legal decisions, including the decision to marry.[64] The lowering of the female age of majority seemed directly tied to a female's ability to marry at an earlier age anyway.[65] In essence, then, an eighteen year-old girl seamlessly transitioned from dependency on her father to dependency on her husband, but in both circumstances, the man of the household governed her property.[66] Ultimately, during the antebellum period, laws—whether they were general on the age of majority or specific to the marital age—encouraged the early marriage of girls.[67]

Most of the concern regarding child marriage during this period revolved around loss of parental control over the child and the loss of the child's services in the parental home, upon which

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59 *Id.* at 30. Of course, state laws varied, and not all states had a minimum age. *Id.* at 30-33. For example, California mandated only parental consent. *Id.* at 33.

60 *Id. See also* Johnson-Dahl, *supra* note 1, at 1056.

61 Syrett, *supra* note 3, at 33; *see also* Johnson-Dahl, *supra* note 1, at 1056.

62 Syrett, *supra* note 3, at 30.

63 *Id.* at 34; Schuman, *supra* note 29, at 2346 (citing Erin K. Jackson, *Addressing the Inconsistency Between Statutory Rape Laws and Underage Marriage: Abolishing Early Marriage and Removing the Spousal Exemption to Statutory Rape*, 85 UMKC L. Rev. 343, 354 (2017), and noting that the marital age for women was eighteen in 80% of states and 21 for men in 85% of states prior to 1971)).

64 Syrett, *supra* note 3, at 34.

65 *Id.*; Jeglum, *supra* note 54, at 219-20 (noting that throughout history the age of marriage for females has been younger than males); Larson, *supra* note 11, at 8, n.47.

66 Syrett, *supra* note 3, at 34; Bearat, *supra* note 2, at 16; Schuman, *supra* note 29, at 2343.

67 Syrett, *supra* note 3, at 37.

many parents economically relied.[68] The child's marriage was a problem for the parent, not the child,[69] and it led to lawsuits by the parent to recover pecuniary damages for the loss but typically not the annulment of the marriage.[70] In some areas, though, marital attitudes began to shift as age consciousness became more prevalent, and along with it, the notion of age as a meaningful category of identity.[71] Thus, in some areas of the country, Americans began to see some people as unfit for marriage because of their age—whether the problem with age was that one party was either too young or too old, or that there was too much of an age gap.[72]

C. *Late Nineteenth Century to Early Twentieth Century: Early Legal Reform Efforts*

The changing views on child marriage led to significant pushback against it. Some activists opposed the practice, because it deprived children of their childhood. Others believed it would harm the family that the child formed, the institution of marriage, and society at large. Consequently, state legislatures began to act, making it more difficult for children to marry by imposing minimum marital ages or in states already having them, increasing those ages, and by changing the age needed for parental approval.

1. *Activists' Pushback Against Child Marriage*

Early women's rights activists began to push back against the practice of child marriage, referred to by one who had married at age sixteen as "the great life-long mistake."[73] In fact, some of these activists advocated for women's suffrage precisely so that

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68 *Id.* at 87-89; J. Shoshanna Ehrlich, *Too Young for Marriage but not for Abortion: Keeping Teens in the "Driver's Seat of Their Lives" Through the Intended Purpose Approach to the Shifting of Age Boundaries*, 45 Harv. J. L. & Gender 125, 132-33 (2022).

69 Syrett, *supra* note 3, at 89.

70 *Id.*

71 *Id.* at 83.

72 *Id.*; Matthew J. Lindsay, *Reproducing a Fit Citizenry: Dependency, Eugenics, and the Law of Marriage in the United States*, 1860 – 1920, 23 L. & Soc. Inquiry 541, 542 (1998) (noting that during this era many classes of people were considered unfit for marriage including "feebleminded, imbecilic, and epileptic" because the purpose of marriage was to produce healthy offspring).

73 Syrett, *supra* note 3, at 99.

they could revise marriage laws and prevent the oppression of women by the institution.[74]

Early feminists critiqued child marriage in a variety of ways with most focused largely on how this practice deprived girls of their childhood, the time for them to become educated, have fun, and enjoy their innocence.[75] Some described a married female child as "legally dead."[76] As a result, activists criticized parents and culture for convincing girls that marriage should be their sole goal and encouraged the training and employment of them instead.[77] They also believed that early marriage was stunting girls' educational opportunities.[78] By contrast, educated girls with job opportunities had the choice to marry—or not.[79] Thus, some feminists implored mothers to train their daughters on contributing to the economic well-being of their families.[80] Such women, they believed, would seek out opportunities formerly denied to them and avoid marrying too young or for financial reasons.[81] Other activists pointed out the harmful effects that sex and childbirth, practices inherent in child marriages, have on young girls.[82]

Some activists focused instead on the harms that child marriage would cause to the families that these child spouses would form and society as a whole.[83] The idea was that until they were mature, girls could not be successful wives and mothers. In other

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74 *Id.*; *see also* Kimberly Hamlin, *What Raising the Age of Sexual Consent Taught Women About the Vote*, Smithsonian Mag., (Aug. 26, 2020), https://www.smithsonianmag.com/history/what-raising-age-sexual-consent-taught-women-about-vote-180975658/.

75 Syrett, *supra* note 3, at 102. Note that the effect of child marriage on females differed by social class, with upper and middle-class girls more negatively affected, given the privileges they enjoyed by virtue of their class that they would lose upon marriage. *Id.*; *see also* Larson, *supra* note 11, at 9.

76 Syrett, *supra* note 3, at 114; Ehrlich, *supra* note 68, at 138.

77 Syrett, *supra* note 3, at 103.

78 *Id.* at 104; Jeglum, *supra* note 54, at 223.

79 Syrett, *supra* note 3, at 104; s*ee also* Templeton, *supra* note 29, at 314-15 (noting child marriage is associated with lower income levels).

80 Syrett, *supra* note 3, at 104.

81 *Id.*

82 *Id.* at 106; Schuman, *supra* note 29, at 2353; Templeton, *supra* note 29, at 314-15.

83 Syrett, *supra* note 3, at 106-07; *see also* Schuman, *supra* note 29, at 2352 (noting that child marriage harms society at large by increasing the number of children living in poverty and on state assistance).

words, child marriage harmed the institution of marriage itself.[84] Thus, these activists targeted men and encouraged them to marry adult women as opposed to girls.[85] Some even argued that early marriages were uncivilized and that youthful mothers produced offspring lacking in vitality.[86] Thus, the thinking was that these wives, by virtue of their youth, would harm their own children and all of society.[87]

2. *Early Legal Reform Efforts*

As conversations about child marriage became more common among activists and ordinary Americans (probably due to newspaper articles focusing on young brides), views on childhood and marriage began to change. This is evidenced through some of the legal reforms of the time, including those addressing what we now call statutory rape. While these laws did not affect the age of marriage, they indicate the notion of childhood as a protected period of time.[88] That mindset, along with rising divorce rates, led to a legal round of marriage reform, but to be clear, the motivation behind these legal reforms was not protecting children.[89]

In the late 1800s, activists with the Women's Christian Temperance Union effectively succeeded in transforming the law in almost all states to raise the age of consensual sex and to criminalize nonmarital sex between a girl (typically between sixteen and eighteen) and an adult man.[90] While this signifies the earliest legal differentiation between childhood and adulthood, those advocating for reform did so to protect unmarried girls only to the extent of their purity.[91] The idea was that unmarried girls who engaged in premarital sex were destined for a life of prostitution (and possibly sexually transmitted diseases), so these activists sought to keep

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84 Syrett, *supra* note 3, at 115; Jeglum, *supra* note 54, at 224.

85 Syrett, *supra* note 3, at 106-07.

86 *Id.* at 108.

87 *Id.* at 109; Templeton, *supra* note 29, at 315-16 (noting that child marriage is associated with lower birth weights, and higher rates of infant homicide, child abuse and neglect, and academic and behavioral problems).

88 Schuman, *supra* note 29, at 2345 (citing Hamilton, *supra* note 17, at 1830).

89 Syrett, *supra* note 3, at 119.

90 *Id.* at 124-25; Larson, *supra* note 11, at 36-37.

91 Syrett, *supra* note 3, at 125; Larson, *supra* note 11, at 28-29.

sex within the confines of marriage.[92] Further, when assessing the new laws of consent, it is important to note the lack of connection between the age to consent to sex and the age to consent to marriage; also statutory rape laws did not apply to marital sex.[93] Thus, it seems safe to say that these laws were actually about sex outside of marriage and prostitution, not child marriage.

However, another set of reformers were very concerned with child marriage—those focused on curbing rising divorce rates in the United States.[94] While divorce had been an option since colonial times, its availability had greatly expanded by the late nineteenth to mirror Americans' changing views on marriage.[95] In particular, many people believed that unhappy spouses should be allowed to terminate their marriages.[96] For these Americans, marriages were based in love, not religion, and falling out of love should be grounds to leave a marriage.[97] But marriage proponents feared divorce. To prevent it, they sought to bar—or at least make it harder for—the "wrong people" to get married in the first place; this "protecting the alter" mentality, they surmised, would decrease divorce rates.[98]

One such group of "wrong people" were those thought to be too young. Thus, marriage proponents believed that increasing the age requirements for marriage, along with other measures,[99] would prevent divorce. After all, children who became spouses were more likely to divorce.[100] One major obstacle to reform was that marriage and divorce were governed by state law, so the National Conference of Commissioners on Uniform State Laws suggested uniformity in that eighteen years (for boys) and fifteen (for girls)

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92 Syrett, *supra* note 3, at 125. *See also* Hamilton, *supra* note 17, at 1830; Larson, *supra* note 11, at 29, 31.

93 Syrett, *supra* note 3, at 125; Amber Plumlee, *Don't Put a Ring on It: Abolishing the Marital Defense to Statutory Rape*, 41 Women's Rts. L. Rep. 95, 108 (Fall/Winter 2019).

94 Ehrlich, *supra* note 68, at 137; Syrett, *supra* note 3, at 127.

95 Syrett, *supra* note 3, at 127.

96 *Id.*

97 *Id.*

98 *Id.*; Ross, *supra* note 29, at 103 (noting that others while some activists wanted to end child marriage to protect children, others wanted to protect the institution of marriage from divorce).

99 Other measures included waiting periods between applying for a marriage license and the ceremony and alerting parents that their children might be planning to marry. Syrett, *supra* note 3, at 128-29.

100 *Id.* at 130; *See also* Hetzel & Cappetta, *supra* note 30, at 15-17.

should be the minimum marriageable age.[101] Other activists suggested other (older) uniform ages.[102] That did not come to fruition at the federal or state level.

However, over the course of the late nineteenth century, many states gradually made the requirements to marry more stringent by instituting minimum ages to marry, slightly raising those ages in states already having them, or changing the age at which parental approval to marry was required.[103] Parents, in efforts to prevent their children from marrying, began to notify local officials of their opposition in order to prevent clerks from issuing marriage licenses to those children.[104] Despite this trend, marriage between minor girls and adult men was still common.[105]

3. *Response to Early Reform Efforts*

Many children rejected the states' more stringent requirements for marriage, as did some parents, some of whom procured marriages for their underage daughters for economic reasons.[106] In fact, in the early 1900s, child marriage was prevalent and on the rise.[107] Additionally, courts during this time held firm to their disinclination to nullify a marriage once it had been confected.[108] Consequently, many children entered disallowable marriages, but those marriages were consistently upheld.[109] Likewise, men who married children who failed to meet the marital requirements were absolved of statutory rape.[110] In actuality, it went even further than that. Some parents (and judges) conspired to "right the ruin" of their minor daughters' out-of-wedlock pregnancies and loss of virginity by allowing statutory rapists to marry their victim-daughters.[111] In other instances, the children used marriage

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101 Syrett, *supra* note 3, at 129.

102 *Id.*

103 *Id.* at 130.

104 *Id.* at 136-41.

105 Johnson-Dahl, *supra* note 1, at 1056.

106 Syrett, *supra* note 3, at 156; Jeglum, *supra* note 54, at 231.

107 Syrett, *supra* note 3, at 148.

108 *Id.*

109 *Id.*; Jeglum, *supra* note 54, at 232-33.

110 Syrett, *supra* note 3, at 155.

111 *Id.* at 161; Caylin Jones, *Saying "I Don't" to Child Marriage: Creating a Federal Minimum Marital Age Requirement Through the Treaty Power*, 26 Sw. J. Int'l L. 396, 403 (2020).

to evade parental oversight.[112] Many such children did not subscribe to the notion of childhood as a protected life stage; they wanted adulthood.[113]

D. *The 1920s: The New Marriage Reform*

By the 1920s, attitudes towards marriage had further evolved. During this era, Americans began to not only believe that marriage should be based on love and companionship but also sexual fulfillment.[114] As a result, Americans began to openly discuss marital sex, with particular focus on the satisfaction of women.[115] But discussing the sex lives of minor girls was uncomfortable, especially those married to much older men.[116] Their marriages contradicted the view of marriage as an institution based on compatibility.[117] At the same time, Americans began to learn more about psychiatric disorders, including pedophilia.[118] Some reformers began to question child marriage as sexually exploitative.[119] Marriage reform efforts ramped up, with the focus, for the first time, on the implications of child marriage on children.[120]

1. *Anti-Child-Marriage Reformers' Efforts*

Anti-child-marriage reformers, shocked at the behavior of teenagers of the time (like smoking, drinking, dancing, and sexual activity),[121]

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112 Syrett, *supra* note 3, at 162.

113 *Id* at 162-63; Jackson, *supra* note 63, at 369; Ross, *supra* note 29, at 103; *see also* Moe v. Dinkins, 635 F. 2d 1045 (2d Cir. 1980).

114 Syrett, *supra* note 3, at 168; Livia Gershon, *A Threat to "Traditional Marriage" in the 1920s*, JSTOR Daily (Mar. 2, 2015) https://daily.jstor.org/a-threat-to-traditional-marriage-in-the-1920s/.

115 Syrett, *supra* note 3, at 168; Hamlin, *supra* note 74 (noting that a "respectable woman was not supposed to talk about sex").

116 Syrett, *supra* note 3, at 168; Genet, *supra* note 13, at 3012.

117 Syrett, *supra* note 3, at 168.

118 *Id.* at 170.

119 *Id.* at 172; Kim Hai Pearson, *Children Are Human*, 8 Tex. A&M L. Rev. 495, 511 (2021); Lara Roetzel, Tifanie Petro, & Erica Ramstad, *Beyond the Cages: Sex Trafficking in South Dakota*, 64 S.D. L. Rev. 346, 347-48 (2019) (noting that child marriage is a type of sexual exploitation similar to human trafficking).

120 Becky Little, *When a Millionaire Married a Teen and Sparked Opposition to U.S. Child Marriage*, History (Aug. 30, 2018), https://www.history.com/news/child-marriage-scandal-millionaire-married-teenager [https://perma.cc/EPP6-SYUT].

121 Syrett, *supra* note 3, at 166.

sought to eradicate the "epidemic of child marriage."[122] In their view, marriage did not operate as a protection for girls but instead exploited them.[123] Because divorce was so accessible, they reasoned, men (some older who may be child predators) could marry girls to secure sex with them that would not be allowed under the law.[124] They also believed that marriages based in sex could be miserable or abusive.[125] Thus, while earlier generations had seen marriage as a cure for social ills, these reformers questioned how transformative the institution of marriage really was.[126]

Against this backdrop, for the first time, the messaging surrounding child marriage was that it was bad for children.[127] Reformers claimed that their focus was not legislating sexual morality or promoting religious views on marriage but instead was on helping individual children.[128] However, some historians note that reformers also sought to protect the institution of marriage, which they allegedly still believed to be a building block of society, by barring children (and those otherwise unqualified) from entering it.[129] The reformers' efforts were seen in several legal goals, including waiting periods between the application and issuance of marriage licenses, documentary proof of ages, appealing to ministers and clerks to follow the laws, and raising the minimum marriageable age and the age under which parental consent was required for marriage.[130] Their efforts were at least partially successful,[131] as some states implemented waiting periods, and legislatures in at least twelve states raised their age of marital capacity during the 1920s.[132] Efforts to amend the U.S. Constitution and enact a federal law failed.[133]

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122 *Id.*

123 *Id.* at 168. *See also* Gudefin, *supra* note 52, at 192.

124 Syrett, *supra* note 3, at 168.

125 *Id.* at 176.

126 *Id.* at 177.

127 *Id.* at 168.

128 *Id.* at 173.

129 *Id.* at 175.

130 *Id.* at 178-79.

131 Some scholars attribute this success more to national outrage over certain "celebrity couples" with large age gaps. Tsui, *supra* note 18.

132 Syrett, *supra* note 3, at 178-83; Ross, *supra* note 29, at 102-03; *see also* Hetzel & Cappetta, *supra* note 30 ("Table A" showing the percentage of fifteen to nineteen-year-old teenagers married in the 1920s).

133 Syrett, *supra* note 3, at 183-86; Ross, *supra* note 29, at 103.

2. *Feminist Reformers' Efforts*

At the same time, some feminist reformers focused their efforts on fighting discrimination against females.[134] Among the state laws they attacked were those allowing women to marry before men and those that set a lower age of majority for women.[135] Their focus was less on child protection and more on equality between males and females.[136] In their view, equalizing marital ages would make marriage a more egalitarian endeavor, shrinking the odds that one spouse entered the union dependent on the other.[137] These reformers generally failed to equalize the ages of marriage for boys and girls.[138] However, all was not lost. Several states changed their ages of majority to align those for boys and girls.[139]

E. *The 1930s—World War II: The Continuation of Child Marriage*

Despite the efforts of reformers in the 1920s, child marriage continued. While child marriage did slightly decrease from the nineteenth century, so did all marriages in the United States because of the Great Depression.[140] By 1930, 10% of all seventeen-year-old girls were wives.[141] The South saw the greatest persistence of child marriage, and some of the couples (like nine-year-old Eunice Winstead Johns and twenty-two-year-old Charlie Johns in Tennessee) caught the attention of the national and international media, triggering a wider conversation about the institution.[142] Many Americans declared those states that allowed extremely young children to marry

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134 Syrett, *supra* note 3, at 195-96. Not all feminist reformers were on the same page. Those described in the text above were the National Woman's Party reformers. Others, like The League of Women Voters did not seek equality between the sexes; they recognized differences between females and males, and their focus was more on protection of the former. *Id.* at 198-200.

135 *Id.* at 196.

136 *Id.*; *see also* Larson, *supra* note 11, at 5-6; Robert A. Kutcher, *If at First You Don't Succeed…*, 67 La. B.J. 318, 318 (Feb./Mar. 2020) (noting that activists took issue with inequality in marriage, voting rights, and lack of education).

137 Syrett, *supra* note 3, at 196.

138 *Id.* at 198.

139 *Id.*

140 Syrett, *supra* note 3, at 2; Bearat, *supra* note 2, at 18-19.

141 Tsui, *supra* note 18.

142 Syrett, *supra* note 3, at 203-04; Bearat, *supra* note 2, at 18-19.

to be "uncivilized," perceiving them as backward[143] and comparing them to other countries labeled "dark" or "heathen."[144]

But, as reporters began to dig, it seemed that child marriage was not just something that happened in far-away places or in rural areas of the South. They found plenty of young, married girls across the United States.[145] Although all of the couples featured in their stories were white, child marriage was more prevalent for black girls and Mexican Americans.[146] Regardless of demographics, though, reporters accurately noted that "child marriage in America, is, after all, an established institution."[147] With all of the attention and conversation surrounding the topic, some Americans considered the 1930s a "child marriage scare."[148] As a result, several states implemented stricter regulations on it, raising the marriageable age and instituting waiting periods and fines on officials.[149] This time period in the late 1930s was a turning point in regulating child marriage across the United States.[150] It was then that most Americans began to believe that the institution of marriage could not protect young girls who were actually sexually vulnerable due to their age.[151]

Even though there was increasing recognition that marriage laws did not protect young girls, the rural areas of the South still lagged behind in recognizing age as a cultural marker.[152] Youth was not as significant there as it was in urban areas.[153] After all, states there did not prioritize the documentation of births, people did not regularly engage with the health care system to learn about childhood development, and age-graded schooling was not the norm.[154] Many children's school attendance was secondary to the

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143 Syrett, *supra* note 3, at 204-05; Bearat, *supra* note 2, at 18-19.

144 Syrett, *supra* note 3, at 208.

145 *Id.* at 207-08.

146 Syrett, *supra* note 3, at 207-08; Jeglum, *supra* note 54, at 219-20.

147 Syrett, *supra* note 3, at 209.

148 Syrett, *supra* note 3, at 204; Bearat, *supra* note 2, at 19 (noting that child marriage was still a prevalent issue in the 1930s despite states changing their age of marriage laws).

149 Syrett, *supra* note 3, at 216; Ross, *supra* note 29 at 107-08.

150 Syrett, *supra* note 3, at 216.

151 *Id.* at 218; Larson, *supra* note 11, at 21.

152 Syrett, *supra* note 3, at 218; Bearat, *supra* note 2, at 19.

153 Syrett, *supra* note 3, at 219; Bearat, *supra* note 2, at 19.

154 Robert A. Margo, Race and Schooling in the South, 1880-1950: An

labor they could provide.[155] Many of the people living in the area were also isolated, missing out on tools that might have allowed for more education about childhood.[156] Ultimately, children were not seen as all that different from the older people with whom they lived and alongside whom they worked.[157] Consequently, there was not a great divide between childhood and adulthood there,[158] with children doing adult things—like getting married.[159]

F. *The Post-WWII Period: The Teenage Marriage Scare*

The early 1940s saw an increase in the number of marriages and a decline in the age of those entering first marriages.[160] Because Congress lowered the draft age during World War II, other legal restrictions on minors came under scrutiny, including marital age requirements.[161] Also, because of the war, many people, including young people, wanted to legalize their relationships.[162] These factors contributed to the wave of teenagers getting married in the United States, a practice which continued into the 1950s.[163] Most of the child marriages during this time involved older children—sixteen years and above.[164] Marriage was attractive to them because of the exaltation of the nuclear family, the acceptance of premarital sex (leading to more teen pregnancies), and the teenagers' desire for the independence of adulthood.[165] Other contributing

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Economic History 1, 21-22 (1990); Syrett, *supra* note 3, at 218-219.

155 Margo, *supra* note 154, at 9-10 (showing the percentage of children enrolled in school in the 1930s); Syrett, *supra* note 3, at 220.

156 Syrett, *supra* note 3, at 221.

157 *Id.* at 220.

158 *Id.* at 218.

159 *Id.*

160 *Id.* at 230; Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 Tul. L. Rev. 55, 64 (2016); Eliza K. Pavalko & Glen H. Elder, *World War II and Divorce: A Life-Course Perspective*, 95 Am. J. Sociology 1213, 1215 (1990).

161 Hamilton, *supra* note 17, at 1831.

162 Syrett, *supra* note 3, at 230.

163 *Id.* at 227.

164 Hetzel & Cappetta, *supra* note 30, at 2-3 (showing percentages of married teens 15 and older throughout the 1900s).

165 Syrett, *supra* note 3, at 228-29; *see also* Megan Weinstein, *The Teenage Pregnancy "Problem:" Welfare Reform and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 13 Berkeley Women's L.J. 117, 120 (1998) (noting high teen pregnancy rates in the 1950s through the 1970s).

factors included the affluence of the 1950s, allowing working-class boys and men to support their wives (unlike in previous eras), and the seeking of security in the Cold War era.[166] Teenagers wanting to marry used several machinations to do so—they lied to their parents and government officials (which sometimes their parents did, as well), forged documents, crossed state lines to meet or pass for meeting the age requirements (referred to as "marriage migration"), and married in secret (and some in foreign countries).[167]

With the wave of teenage marriages during this period came more attention on them.[168] The alarming part of teen marriage for most Americans of this time period was the fact that middle-class white girls in cities and suburbs were the ones doing it.[169] The percentage of married white girls in urban areas rose from 2.6% in 1940 to 6.3% in 1960.[170] The concern about these marriages was triggered by worries about the school dropout rates, early pregnancies, and the increase in the incidence of divorce.[171] Those concerns were precipitated in the 1950s by the changing attitudes about teenagers. Many Americans believed that teenagers should not be marrying but should be in school instead.[172] Most adults wanted to extend the period for childhood and adolescence, finding teenagers too young to be married.[173] Some journalists and academics blamed the parents (typically mothers) for pressuring children to date, go steady, and get married before they were ready.[174] Again, though, the reporters' focus was on urban, white, middle-class children; this ignored the marriage rates of rural

166 Syrett, *supra* note 3, at 239.

167 *Id.* at 241-43; *see also* Gordon B. Dahl, *Early Teen Marriage and Future Poverty*, 47 Demography, 689, 702 (2010); Jeglum, *supra* note 54, at 220-21.

168 Syrett, *supra* note 3, at 228.

169 *Id.* at 229; Hetzel & Cappetta, *supra* note 30, at 7 (noting about 90% of teenage brides and grooms in the 1960s where white).

170 Hetzel & Cappetta, *supra* note 30, at 6 ("Table E" showing percentage of fifteen to nineteen-year old teenagers married in the 1960s); Syrett, *supra* note 3, at 247.

171 Syrett, *supra* note 3, at 229; Kevin Lang & Russel Weinstein, *The Consequences of Teenage Childbearing before* Roe v. Wade, 7 Am. Econ. J.: Applied Econ. 169, 174 (Oct. 2015).

172 Syrett, *supra* note 3, at 233.

173 *Id.* at 234.

174 *Id.* at 238.

teenagers and those of color, many of whom were poor and continued to marry at higher rates.[175]

During this time, legislators began to attempt to transform the law of child marriage to make it more difficult for children to marry, but the public did not seem interested in legal reform.[176] Sociologists focused more on why young people got married, not on the legality of how.[177] Even the director of the U.S. Women's Bureau at the Department of Labor implied that marrying at a younger age was actually an advantage for women and girls.[178] Meanwhile, schools began to suspend or expel married students as dangerous to and bad influences on their fellow classmates; in some schools, those married children allowed to remain were barred from participating in extracurricular activities.[179] But on the other side of the equation, marriage allowed some children to escape punishment from the juvenile justice system where judges tended to release or dismiss married girls from their courts.[180]

G. *The Late Twentieth Century: Child Marriage as a Rural Phenomenon*

While the post-World War II era saw the highest marriage rates for non-rural teenagers, beginning in the 1960s the age at which people marry began to increase and has continued to do so.[181] By 1970, teenage marriage rates had subsided overall,[182] but poor and rural children, particularly in the South, continued to marry into the late twentieth century.[183] In many circumstances, they did so because of their sex lives—they were either already having sex, wanting to marry in order to legitimate the sex they wanted to have,

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175 *Id.* at 247, 251; *see also* Deborah L. Rhode, *Politics and Pregnancy: Adolescent Mothers and Public Policy*, S. Cal. Rev. L. & Women's Stud. 99, 103-05 (Winter 1991).

176 Syrett, *supra* note 3, at 243-44.

177 *Id.* at 244.

178 *Id.*

179 *Id.* at 245-46; Lang & Weinstein, *supra* note 171, at 174.

180 Syrett, *supra* note 3, at 246.

181 *Id.* at 254; Jeglum, *supra* note 54, at 216.

182 Syrett, *supra* note 3, at 255; Wayne R. Barnes, *Arrested Development: Rethinking the Contract Age of Majority for the Twenty-First Century Adolescent*, 76 Md. L. Rev. 405, 423 (2017).

183 Syrett, *supra* note 3, at 251; Jeglum, *supra* note 54, at 220.

or were pregnant.[184] Child marriage in the poverty-stricken rural areas of America continued to be common because the parties saw no reason to wait, especially in places where the education system was poor, sex education was scarce, and girls had few opportunities with which marriage would interfere.[185] Other contributing factors were the mentality of certain religions in these areas—that marriage and parenting are a woman's destiny—and that marriage resolves issues of statutory rape.[186] Even the feminists were mostly quiet on the topic in the 1960s and early 1970s.[187]

During the 1970s, though, the issue of child marriage again garnered the attention of the National Conference of Commissioners on Uniform State Laws, and it enacted and revised the Model Marriage and Divorce Act (previously called the "Uniform Marriage and Divorce Act").[188] This revised model act provided that one must be at least eighteen years of age to marry as a general rule, but it also allowed children to marry by obtaining requisite approval from certain adults and/or the judiciary.[189] However, only six states adopted these provisions.[190]

The women's rights movements also began to address the issue of child marriage during the 1970s. Prior to that time, the marital consent ages were eighteen for women and twenty-one for men, but the movement challenged such distinctions based on gender,[191] prompting many state legislatures to act. They did so by equalizing the age of marriage[192] and sometimes the age of majority for boys and girls.[193] Most of those same states also equalized the ages requiring parental consent for marriage, and some

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184 Syrett, *supra* note 3, at 252; Ehrlich, *supra* note 68, at 168.

185 Syrett, *supra* note 3, at 253.

186 *Id.* at 253-54; Jeglum, *supra* note 54, at 220; Plumlee, *supra* note 93, at 108.

187 Syrett, *supra* note 3, at 257-58.

188 Uniform Marriage and Divorce Act of 1973 §§ 101-506 (Amended 1971 and 1973), https://www.uniformlaws.org/viewdocument/final-act-89?CommunityKey=c5a9ecec-095f-4e07-a106-2e6df459d0af&tab=librarydocuments.

189 *Id.*

190 *See Marriage and Divorce Act: Map*, Unif. L. Comm'n, https://www.uniformlaws.org/committees/community-home?CommunityKey=c5a9ecec-095f-4e07-a106-2e6df459d0af (last visited Sept. 18, 2024). Those states include Arizona, Colorado, Georgia, Minnesota, Montana, and Washington.

191 Schuman, *supra* note 29, at 2346.

192 *Id.*

193 Syrett, *supra* note 3, at 258.

raised the minimum age to marry.[194] More states though also enacted exceptions to their laws, especially in cases of pregnancy.[195] Ultimately, Americans still believed in marriage as the solution to premarital sex, as did some judges who could grant permission for child marriages.[196]

By the early 1970s, nearly half of all states reduced the marriageable age to eighteen years old without the need for parental consent,[197] likely due to the Twenty-Sixth Amendment to the U.S. Constitution lowering the voting age to eighteen years,[198] and by the end of the twentieth century, most states had enacted legislation that both raised the age of marital consent and ended common law marriages (in effect, displacing the common law presumptive ages of consent).[199]

Because child marriage reverted back to a rural phenomenon, journalists and academics did not pay it much attention.[200] Instead, their focus was on teenage pregnancies outside of marriage, something that had become more prevalent in the black community.[201] For various reasons, the stigma of premarital pregnancy waned, and black girls tended not to marry.[202] During the 1980s, politicians on both sides of the aisle began to blame black teenagers for the welfare system in the United States.[203] But because these children tended not to marry and the practice was also on the decline among white, middle-class, urban girls, the topic of teenage marriage took a back seat.[204]

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194 *Id.*

195 *Id.*

196 *Id.* However, the trend of child marriage due to pregnancy has declined over the years, as some pregnant girls choose abortion, adoption, or single motherhood instead. *Id.* at 263-64.

197 Hamilton, *supra* note 17, at 1831.

198 Schuman, *supra* note 29, at 2347.

199 Hamilton, *supra* note 17, at 1830-31.

200 Syrett, *supra* note 3, at 255.

201 *Id.*

202 *Id.* at 256.

203 *Id.* at 257. The focus on teenage pregnancy continued through the 1990s, when births to teenage mothers comprised about a third of all of those outside of marriage. *Id.*

204 *Id.*

H. *The Early Twenty-First Century: New Efforts to Eradicate Child Marriage*

In the early twenty-first century, activists breathed new life into the efforts to eradicate child marriage. Prior to 2017, child marriage was legal in all fifty U.S. states.[205] Since that time, organizations and legislators have been working to change that. They point to four main grounds: (1) the ease with which child marriage can be forced marriage; (2) the negative effects of child marriage on children; (3) the use of child marriage to undermine statutory rape laws; and (4) the potential for trafficking of children.[206] In the past decade, a majority of U.S. states enacted new laws to address the issue of child marriage.[207] It was also a topic of bills in numerous states in recent legislative sessions.[208]

II. The Current Status of Child Marriage in the United States

While many Americans would prefer to believe that child marriage is a thing of the past or a phenomenon happening in other countries or only engaged in by certain types of people and religious sects in the United States, this is not the case. The statistics on child marriage vary, depending on the source, but all are telling. Admittedly, the number of minors marrying fell by 61% from 2000 to 2010,[209] but one organization whose focus is

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205 *Child Marriage in the U.S.*, Unchained at Last, https://www.unchainedatlast.org/child-marriage-in-the-u-s/ (last visited Oct. 15, 2024).

206 *Id.*

207 Olivia Luongo, Hema Gharia, Mell Chhoy, Hattie Phelps, & Jessica Flynn, *Marriage and Divorce*, 25 Geo. J. Gender & L. 767, 786 (2024).

208 For example, in Missouri, Senate Bill 767 that would have increased the marital age to eighteen died in the state house. Clara Bates, *Legislation Enacting Total Ban on Child Marriage in Missouri Dies in the House,* Missouri Independent (May 17, 2024) 11:57 AM), https://missouriindependent.com/briefs/legislation-enacting-total-ban-on-child-marriage-in-missouri-dies-in-the-house/. In California, a similar bill, Assembly Bill 2924, failed, as well. *Summary of Current Child Marriage Laws Nationwide*, California Coalition to End Child Marriage (June 2024), https://cacoalitiontoendchildmarriage.org/facts/.

209 Tsui, *supra* note 18. Note, also, that the typical age gap between heterosexual spouses has decreased in the last twenty years and as of 2022, was 2.2 years. Richard Fry, *A Growing Share of U.S. Husbands and Wives Are Roughly the Same Age*, Pew Research Center (Aug. 15, 2024), https://www.pewresearch.org/short-reads/2024/08/15/a-growing-share-of-us-husbands-and-wives-are-roughly-the-same-age/.

on child marriage indicates that between 2000 and 2018, nearly 300,000 children were married in the United States.[210] Another source's numbers show that between 2000 and 2015, at least 207,459 minors were married in the United States.[211] While most incidents of child marriage today happen among the poor in rural areas,[212] child marriage is not a vestige of the distant past.[213]

Although the United States has seemingly supported efforts to end child marriage internationally, it has "failed to take meaningful steps to address this issue in our own backyard."[214] The U.S. Congress enacted the International Protection of Girls by Preventing Child Marriage Act, legislation that would ban child marriage, but it only applies to developing countries abroad.[215] Additionally, the United States has offered financial support for anti-child marriage efforts abroad, but it has historically remained silent about it domestically, essentially overlooking the issue.[216]

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210 *United States' Child-Marriage Problem*, Unchained at Last (Apr. 2021), https://www.unchainedatlast.org/united-states-child-marriage-problem-study-findings-april-2021/. Most of these children were sixteen or seventeen years old, but some were girls as young as ten and some were married to men many years older. *Durbin, Schatz, Gillibrand Introduce Child Marriage Prevention Act*, Dick Durban United States Senator Illinois (Aug. 2, 2024), https://www.durbin.senate.gov/newsroom/press-releases/durbin-schatz-gillibrand-introduce-child-marriage-prevention-act. Also, in a ten-year period from 2007 and 2017, the U.S. Citizenship and Immigration Services approved approximately 8,500 visa petitions involving at least one child, most of whom had married an American man overseas. *Id.*

211 Tsui, *supra* note 18. *See also* Vijayasri G. Aryama, *"I Don't": The Need for a Solution to the Child Marriage Problem in the United States*, 39 Women's Rts. L. Rep. 386, 386 (2018) (noting that about 57,800 U.S. children, ages fifteen to seventeen, were married as of 2014, which constitutes five of every 1,000 in that age group).

212 Templeton, *supra* note 29, at 311.

213 Ross, *supra* note 29, at 99-100; Tsui, *supra* note 18.

214 *Historic Legislation Introduced to Prevent Child Marriage in the United States*, *supra* note 16 (quoting Casey Carter Swegman, Director of Public Policy at the Tahirih Justice Center and Senator Dick Durbin).

215 Ross, *supra* note 29, at 105-06. Other foreign-directed legislation includes International Protecting Girls by Preventing Child Marriage Act of 2010, S. 987 111th Cong. (2010); International Protecting Girls by Preventing Child Marriage Act of 2009, H.R. 2103 111th Cong. (2009); International Protecting Girls by Preventing Child Marriage Act of 2011, S. 414 112th Cong. (2011); International Protecting Girls by Preventing Child Marriage Act of 2007, H.R. 3175 110th Cong. (2007).

216 Genet, *supra* note 13, at 3003.

In fact, Congress has failed on more than one occasion to enact proposed legislation to end child marriage.[217]

While thirteen states require a participant to be eighteen years of age to marry, this is not a universal rule.[218] The vast majority of U.S. states allow children to marry with adult permission, and most of them have no laws explicitly forbidding forced marriage.[219] Among states allowing child marriage with adult permission, several differences emerge. These issues are explored below.

A. *Child Marriage Prohibited Without Exception*

In 2018, Delaware became the first state to outlaw child marriage,[220] and since that time, twelve more have followed suit. Currently, then, only thirteen states in the United States completely ban child marriage.[221] In these states, one must be eighteen years of age to marry, and unlike many other states, no exceptions exist. That is, neither parents nor judges may grant permission to children to marry. In these states, even a seventeen-year-old with parental consent cannot marry, and judicial approval is not an

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217 Larson, *supra* note 11, at 34-35; Ross, *supra* note 29, at 106. *See also* Preventing Child Marriage Act, H.R. 2140 116th Cong. (2019) (failed); Child Marriage Prevention Act, H.R. 4867 115th Cong. (2018) (failed); End Forced Child Marriages Act, H.R. 1606 117th Cong. (2021) (not attempting to prevent child marriage but implementing a reporting requirement on the Department of Health and Human Services).

218 Schuman, *supra* note 29, at 2346.

219 *United States' Child-Marriage Problem*, *supra* note 210. Only nine states in the United States have criminal statutes expressly addressing forced marriage. *Criminal Laws Addressing Forced Marriage in the United States*, Tahirih Justice Center (Sept. 2017), https://www.tahirih.org/wp-content/uploads/2017/09/UPDATED-2017-Tahirih-Memo-on-State-Criminal-Laws-on-Forced-Marriage.pdf. Several states' statutes, however, base the criminalization of forced marriage in the idea of seduction or defilement, concepts that are over 100 years old, and rarely used by prosecutors. *Id.* In 2017, the Tahirih Justice Center noted that it had no knowledge of any recent prosecutions brought under forced marriage criminal statutes. *Id.*

220 Del. Code Ann. tit. 13, § 123(a) (West 2018).

221 Conn. Gen. Stat. Ann. § 46b-20a (West 2023); Del. Code Ann. tit. 13, § 123; Mass. Gen. Laws Ann. ch. 207, § 7 (West 2022); Mich. Comp. Laws Ann. § 551.51; Minn. Stat. Ann. § 517.02 (West 2020); N.H. Rev. Stat. Ann. § 457:4 (West 2025); N.J. Stat. Ann. § 37:1-6 (West 2018); N.Y. Dom. Rel. Law § 15-a (West 2021); 23 Pa. Stat. & Cons. Stat. Ann. § 1304(1) (West 2020); 15 R.I. Gen. Laws Ann. § 15-2-14 (West 2021); Vt. Stat. Ann. tit. 18, § 5142 (West 2023); Va. Code Ann. § 20-48 (West 2024); Wash. Rev. Code Ann. § 26.04.010 (West 2024).

available option. Some of the thirteen states specifically provide that a marriage violating the rules is void.[222]

B. *Child Marriage Allowed in Certain Scenarios*

Even though states have begun to prohibit child marriage, migratory marriage is still a viable option because such bans are not the norm. Consequently, minors may simply travel to wed in states allowing them to do so—many of which have no residency requirements.[223] In fact, thirty-seven states and the District of Columbia allow children to marry under certain circumstances. In a handful of states, a child may marry only if they are emancipated.[224] In most states, the child must obtain permission to marry from an adult. In some of those states, the child must have also attained a minimum age, and in some, there is also an age gap restriction between the minor and the prospective spouse. Of course, not all states govern the approval of child marriage in the same way, as explored below.

1. *Permission Alone*

While all of the jurisdictions allowing child marriage require adult permission, there are distinctions among them regarding whether parents or a judge may provide the authorization for the child to marry. There are several combinations, because states may require parental consent alone, judicial consent alone, either parental or judicial consent, or both parental and judicial approval. The idea, of course, is that these adults would only act to protect the child's best interest. However, scholars have noted that these adults have their personal views, particularly when it comes to premarital pregnancy, such that they may feel compelled, based on their own biases, to consent to the child's marriage.[225]

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222 *See, e.g.,* Mich. Comp. Laws Ann. § 551.51; Wash. Rev. Code Ann. § 26.04.010.

223 Rahman, *supra* note 4.

224 *See* Ariz. Rev. Stat. Ann. § 25-102 (West 2018) (also requires an age gap no greater than three years); Ga. Code Ann. § 19-3-2 (West 2019); Ky. Rev. Stat. Ann. § 402.210(2)-(3) (West 2018); Tex. Fam. Code Ann. § 2.101 (West 2017); Wyo. Stat. Ann. § 20-1-102 (West 2023). In Texas and Georgia, emancipation is the only way a minor may marry.

225 Templeton, *supra* note 29, at 324-25.

Parental Consent[226] *Alone*

Many states allow for child marriage with parental consent alone.[227] In many of them, parental consent is provided via a boilerplate consent waiver,[228] and the parent's refusal to consent to the marriage cannot be overturned.[229] Of course, the parental consent requirement differs among these states. One difference is who qualifies as the parent allowed to provide the requisite consent. In some states, if the parents are separated or divorced, either may consent to their child's marriage, even one who is not a custodial parent;[230] in others, only the parent with custody may decide.[231] Another difference is the need for parental agreement

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226 Most states recognize that situations arise in which the child has no parent or the parent is incapable of consenting. In such scenarios, most of those states allow a guardian or some other specified adult to consent instead. *See, e.g.,* ARIZ. REV. STAT. ANN. § 25-102; CAL. FAM. CODE §§ 302-303 (West 2019); FLA. STAT. ANN. § 741.04 (West 2018); HAW. REV. STAT. ANN. § 572-2 (West 2024). This article will use the term "parental consent" and like synonyms to broadly include situations where another enumerated adult consents instead.

227 ALA. CODE § 30-1-5 (West 2019) (as long as the child had not been married before); ARIZ. REV. STAT. ANN.§ 25-102; ARK. CODE ANN. §§ 9-11-102 to 105 (West 2021); COLO. REV. STAT. ANN. §§ 14-2-106(1)(a)(I) to 108(1) (West 2023); D.C. CODE ANN. § 46-411 (West 2001); IDAHO CODE ANN. § 32-202 (West 2020); MO. ANN. STAT. § 451.090 (West 2018); NEB. REV. STAT. ANN. § 42-105 (West 2024); N.D. CENT. CODE ANN. § 14-03-02 (West 2023); OKLA. STAT. ANN. tit. 43, § 3 (West 2024); OR. REV. STAT. § 106.060 (West 2024); S.C. CODE ANN. § 20-1-250 (West 1976); TENN. CODE ANN. § 36-3-106 (West 2019); W. VA. CODE ANN. § 48-2-301 (West 2023).

228 Genet, *supra* note 13, at 3018.

229 Thomas R. Young, *Marriage*, 1 LEG. RTS. CHILD. REV. 3D § 11:3 (3d ed. 2023). In a few states, a court may allow a child to marry over the objection of the parents. *See, e.g.,* ALASKA STAT. ANN. § 25.05.171 (West 2022) (permitting judicial approval if the parents are "arbitrarily and capriciously withholding consent"); ARK. CODE ANN. §§ 9-11-102 to -105 (allowing judicial approval if a parent is "not fit to make decisions concerning the" minor; and the marriage is in the minor's best interest); IOWA CODE ANN. § 595.2 (West 2024) (permitting judicial approval if parental consent is "unreasonably withheld"); NEV. REV. STAT. ANN. § 122.025 (West 2019) (allowing court approval in extraordinary circumstances); OKLA. STAT. ANN. tit. 43, § 3 (allowing parents to be heard but overruled).

230 Young, *supra* note 229, at 592.

231 *See, e.g.,* 247 Ala. Op. Att. Gen. 30 (Ala. A.G.), 1997 WL 1054014; AZ. REV. STAT. ANN. § 25-102; IOWA CODE ANN. § 595.2; MO. STAT. ANN. § 451.090 (West 2018); MONT. CODE ANN. §§ 40-1-203, 40-1-213 (West 2021); NEB. REV. STAT. ANN. §§ 42-102, 42-105 ; N.C. GEN. STAT. ANN. §§ 51-2, 51-2.1 (West 2021); UTAH CODE ANN. §§ 81-2-304, 81-2-403 (West 2024); W. VA. CODE ANN. § 48-2-301; WIS. STAT. ANN. § 765.02 (West 2007); WYO. STAT. ANN. § 20-1-102.

on the consent. In most states, the law requires both parents to consent,[232] but in several, only one parent must do so,[233] even over the objection of the other parent.[234] A final difference is how the authorizing parent manifests the requisite consent. In most states, the consent must be in a specific form, usually a verified writing,[235] but in some, form requirements are not mentioned or in-person consent is also an option.[236] In one state, the parents must join the application,[237] and at least one court has held that a parent's attendance at and witness of an incapable child's wedding without objection constitutes consent even in the absence of a parental signature on the marriage license.[238]

Critics of parental approval note that in cases of a minor's forced marriage, these parents are typically the ones doing the forcing, yet many states lack oversight ensure that the child is marrying willingly.[239] As one advocate aptly observed, "[O]ne person's 'parental consent' can be another's 'parental coercion.'"[240] Thus, while parental consent is supposed to safeguard

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232 Fla. Stat. Ann. § 741.04; Haw. Rev Stat. Ann. §§ 572-2-(2), 572-2 (West 2024); 750 Ill. Comp. Stat. Ann. 5/203, 5/208 (West 2011); Iowa Code Ann. § 595.2; La. Child. Code Ann. §1545 (West 2019); Me. Rev. Stat. Ann. tit. 19-A, § 652 (West 2023); Md. Code Ann., Fam. Law § 2-301 (West 2022); Mont. Code Ann. §§ 40-1-202, 40-1-213; N.M. Stat. Ann. § 40-1-6 (West 2013); N.D. Cent. Code Ann. § 14-03-02; Tenn. Code Ann. §§ 36-3-105 to 36-3-106 (West 2019).

233 Cal. Fam. Code §§ 302-303; D.C. Code Ann. § 46-403, 46-411 (West 2008); Idaho Code Ann. § 32-202 ; Kan. Stat. Ann. § 23-2505 (West 2024); Miss. Code Ann. § 93-1-5 (West 2021); Mo. Ann. Stat. § 451.090 ; Nev. Rev. Stat. Ann. § 122.025 (West 2019); S.C. Code Ann. § 20-1-250; S.D. Codified Laws § 25-1-9 (West 2019); Utah Code Ann. §§ 81-2-304, 81-2-403.

234 Young, *supra* note 229, at 592.

235 *See, e.g.,* Ala. Code § 30-1-5 (requiring a notarized affidavit); Fla. Stat. Ann. § 741.04 (requiring acknowledged consent); Idaho Code Ann. § 32-202 (same); Miss. Code Ann. § 93-1-5; Neb. Rev. Stat. Ann. § 42-102; S.C. Code Ann. § 20-1-250; S.D. Codified Laws § 25-1-9; W. Va. Code Ann. § 48-2-301.

236 *See, e.g.,* Kan. Stat. Ann. § 23-2505); Okla. Stat. Ann. tit. 43, § 3; Wis. Stat. Ann. § 765.02; Wyo. Stat. Ann. § 20-1-102.

237 Tenn. Code Ann. §§ 36-3-105, 36-3-106 (West 2018).

238 Young, *supra* note 230, at 592 (citing Stiles v. Estate of Stiles, 496 So. 2d 856 (Fla. Dist. Ct. App. 1986)).

239 Johnson-Dahl, *supra* note 1, at 1070. *See also United States' Child-Marriage Problem*, *supra* note 210.

240 *United States' Child-Marriage Problem, supra* note 210.

against forced and coerced marriage, it "realistically serves to do just the opposite."[241]

Judicial Consent Alone

Some states allow child marriage on judicial consent alone.[242] In some of them, in instances of parental opposition, a presumption exists that the marriage is not in the child's best interest,[243] but in others, judicial consent is an option to overturn a parent's denial. For example, in Alaska, a judge may order the issuance of a marriage license to a child who has attained at least sixteen years of age if the parents have arbitrarily and capriciously withheld their consent or if the parent is "unfit to decide."[244]

Most states allowing judicial consent employ the "best interests of the minor" standard,[245] sometimes with a list of factors to assist the judge in making the decision.[246] One notable factor is a child's premarital pregnancy or childbirth. In some states, this

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241 Johnson-Dahl, *supra* note 1, at 1072.

242 Ark. Code Ann. §§ 9-11-103 to 105 (only in cases of people who are at least sixteen years of age where the teenager is pregnant); Alaska Stat. Ann. § 25.05.171; Colo. Rev. Stat. Ann. § 14-2-108; Ind. Code Ann. § 31-11-1-5 (West 2020); Kan. Stat. Ann. § 23-2505 (only in cases of people who are at least fifteen years old); Ky. Rev. Stat. Ann. § 402.210; Nev. Rev. Stat. Ann. § 122.025 (only in "extraordinary circumstances); N.M. Stat. Ann. § 40-1-6 (for children under sixteen years old); Ohio Rev. Code Ann. §§ 3101.02, 3101.04-.042 (West 2019); Okla. Stat. Ann. tit. 43, § 3 (West 2024) (if the child is under sixteen years of age); Wyo. Stat. Ann. § 20-1-102 (West 2023).

243 Ind. Code Ann. § 31-11-1-5 ; N.C. Gen. Stat. Ann. §§ 51-2 to 51-2.1.

244 Alaska Stat. Ann. § 25.05.171. *See also* Ark. Code Ann. §§ 9-11-102 to 105 (if the parent "not fit to make decisions concerning the" minor; and the marriage is not in the minor's best interest.); Nev. Rev. Stat. Ann. § 122.025 (extraordinary circumstances); Okla. Stat. Ann. tit. 43, § 3 (allowing parents to be heard but overruled); Iowa Code Ann. § 595.2 (if parental consent is "unreasonably withheld").

245 Ark. Code Ann. § 9-11-103 to 105; Alaska Stat. Ann. § 25.05.171; Colo. Rev. Stat. Ann. § 14-2-108; 750 Ill. Comp. Stat. Ann. 5/208; Iowa Code Ann. § 595.2; Kan. Stat. Ann. § 23-2505 (for 15-year-old teenagers); La. Child. Code Ann. § 1547 (West 2019); Mont. Code Ann. §§ 40-1-202, 213; Nev. Rev. Stat. Ann. § 122.025; N.C. Gen. Stat. Ann. §§ 51-2, 51-2.1; Ohio Rev. Code Ann. §§ 3101.02, 3101.04-.042; Utah Code Ann. §§ 81-2-403, 81-2-304.

246 *See, e.g.,* Colo. Rev. Stat. Ann, § 14-2-108; La. Child. Code Ann. § 1547; Nev. Rev. Stat. Ann. § 122.025; N.C. Gen. Stat. Ann. § 51-2.1. Some states allowing this judicial discretion do not list factors for consideration. *See* Alaska Stat. Ann. § 25.05.171; 750 Ill. Comp. Stat. Ann. 5/208; Iowa Code Ann. § 595.2; Kan. Stat. Ann. § 23-2505; Mont. Code Ann. §§ 40-1-202, 213.

is a relevant inquiry into the minor's best interest.[247] Other state laws specify that "pregnancy alone does not establish that the best interests of the party would be served."[248] In a few states, judges must conduct interviews[249] or appoint a guardian ad litem for the child.[250] In several states, the couple must participate in premarital counseling.[251]

Just like the critics of parental approval, those assessing judicial approval for child marriage question whether judges are sufficient gatekeepers. After all, judicial discretion opens the door for personal bias, which could lead to the imposition of the judge's views on the child.[252] In some states, the judges are not even the ones issuing the marriage license; court clerks are.[253] Even in cases where the judges issue the license, in most scenarios, the judge often is not privy to the full picture behind the request to marry.[254] A minor may feel pressured, or even forced, to say they want to marry even if they do not.[255] Nevertheless, in camera interviews of the prospective spouses (and other interested persons) are not required in many states,[256] and judges rarely appoint a guardian ad litem for the child.[257] In some states, judges lack the proper training and foundation to discern which marriages are coerced,[258] a major problem in cases where a child's "'yes' does not really mean 'yes.'"[259]

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247 Ark. Code Ann. § 9-11-103; La. Child. Code Ann.§ 1547; Okla. Stat. Ann. tit. 43, § 3.

248 Colo. Rev. Stat. Ann. § 14-2-108; 750 Ill. Comp. Stat. Ann. 5/208; Iowa Code Ann. § 595.2; Mont. Code Ann. § 40-1-213; Nev. Rev. Stat. Ann. § 122.025; N.C. Gen. Stat. Ann. § 51-2.1.

249 *See, e.g.,* Cal. Fam. Code §§ 302-303; La. Child. Code Ann. § 1547.

250 *See, e.g.,* Colo. Rev. Stat. Ann. § 14-2-108 (West 2021); N.C. Gen. Stat. Ann. §§ 51-2, 51-2.1; Ohio Rev. Code Ann. §§ 3101.02, 3101.04-.042.

251 *See, e.g.,* Mont. Code Ann. §§ 40-1-202, 213; Utah Code Ann. § 81-2-304.

252 Jones, *supra* note 111, at 414.

253 Genet, *supra* note 13, at 3017-18.

254 Ross, *supra* note 29, at 114.

255 Jones, *supra* note 111, at 414.

256 Only a couple of states require the judge to conduct interviews. *See, e.g.*, Cal. Fam. Code §§ 302-303; La. Child. Code Ann. 1547.

257 Johnson-Dahl, *supra* note 1, at 1071. Only handful of states utilize guardian ad litem. *See, e.g.,* Colo. Rev. Stat. Ann. § 14-2-108 (West 2021); N.C. Gen. Stat. Ann. §§ 51-2, 51-2.1; Ohio Rev. Code Ann. §§ 3101.02, 3101.04-.042.

258 Genet, *supra* note 13, at 3017; Ross, *supra* note 29, at 114; Templeton, *supra* note 29, at 324.

259 Johnson-Dahl, *supra* note 1, at 1071.

Consequently, some statistics indicate that judges in some states approve child marriages at higher rates than one might expect.[260]

Consent of Either or Both

A few states allow a child to marry by obtaining *either* parental *or* judicial approval. These include Illinois, Kansas, Maine, North Carolina, and Wisconsin.[261] In those states, a child may marry with one or the other of the requisite approval. In many states, though, *both* parental and judicial approval must be obtained.[262] In these states, a judge must authorize the marriage, but in most instances, will not do so without parental consent.

2. *Permission Plus*

In some states, obtaining the requisite permission is only the beginning for a minor seeking to marry. Among those states, some also require the child to be of a certain age. Some require that the age gap between the child and their prospective spouse not be too wide.

Permission Plus Minimum Age Requirement

In four states, a child of any age may marry with the requisite permission, essentially meaning that in these states, there is no minimum age at which a child may marry. These states include California, Mississippi, New Mexico, and Oklahoma.[263] Theoretically, then, a nine-year-old like Eunice Winstead Johns (the

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260 *See United States' Child-Marriage Problem*, *supra* note 210.

261 750 ILL. COMP. STAT. ANN. 5/203, 5/208); KAN. STAT. ANN. § 23-2505 ((judicial approval only for sixteen- to seventeen-year old teenagers); ME. REV. STAT. ANN. tit. 19-A, § 652(7)-(8) (judicial approval only in instances of no parents); N.C. GEN. STAT. ANN. §§ 51-2-2.1 (West 2021); WIS. STAT. ANN. § 765.02 (judicial approval only in instances of no parents).

262 CAL. FAM. CODE §§ 302-303 (unless there are no parents or the parents are incapable); FLA. STAT. ANN. § 741.04; HAW. REV. STAT. ANN. §§ 572-1(2), 572-2; IOWA CODE ANN. § 595.2(4); LA. CHILD. CODE ANN. § 1545; MD. CODE ANN., FAM. LAW § 2-301 (only if the child is pregnant or has given birth); MISS. CODE ANN. § 93-1-5; MONT. CODE ANN. §§ 40-1-202, 213 (unless there are no parents or the parents are incapable); NEV. REV. STAT. ANN. § 122.025(1)-(2) (absent extraordinary circumstances in which case the court alone grants permission); N.M. STAT. ANN. § 40-1-6 (for sixteen- and seventeen-year-old teenagers); S.C. CODE ANN. § 20-1-250; UTAH CODE ANN. §§ 8-2-304, 8-2-403.

263 CAL. FAM. CODE § 302-03); MISS. CODE ANN. § 93-1-5; N.M. STAT. ANN. § 40-1-6(B); OKLA. STAT. ANN. tit. 43, § 3.

child mentioned earlier who married an adult man in Tennessee in the 1930s)[264] could, in 2025, still marry in those four states if the appropriate adult allows it. By contrast, in other states, the child must not only obtain the requisite permission but also be of a minimum age. Of course, like many other rules pertaining to child marriage, this minimum age varies among those states. Of the states allowing child marriage with requisite permission, several mandate that the child also have reached seventeen years of age.[265] Most require the child to be at least sixteen years-old.[266] Kansas and Hawaii require a minimum age of fifteen years to marry with permission.[267]

Permission Plus Age Gap Restriction

To attempt to minimize the potential exploitation of children, some states require that the age gap between the child and their prospective spouse not be too large. Again, variety exists among these states as to how large the age gap must be in order to bar the marriage. Florida's law is the strictest, allowing only a two-year age gap,[268] so a seventeen-year-old could only marry someone younger than nineteen years of age. Utah's law is the most lenient, allowing seven years to separate the couple,[269] so a seventeen-year-old could marry someone up to twenty-four years-old. Most states

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264 *See supra* text at note 142.

265 Ark. Code Ann. § 9-11-102; Fla. Stat. Ann. § 741.04; Ky. Rev. Stat. Ann. § 402.210; Me. Rev. Stat. Ann. tit. 19-A § 652; Md. Code Ann., Fam. Law § 2-301(b); Neb. Rev. Stat. Ann. § 42-102; Nev. Rev. Stat. Ann. § 122.025; Ohio Rev. Code Ann. §§ 3101.02, 3101.04-.042; Or. Rev. Stat. Ann. §§ 106.010, 106.0; Tenn. Code Ann. §§ 36-3-105, 36-3-106.

266 Ala. Code § 30-1-4 & 5; Ark. Code Ann. § 9-11-103 (applicable only in the case of pregnancy or having given birth); Alaska Stat. Ann. § 25-05.171; Ariz. Rev. Stat. Ann. § 25-102; Colo. Rev. Stat. Ann. § 14-2-108; Idaho Code Ann. §§ 32-202 to 203; 750 Ill. Comp. Stat. Ann. 5/203, 5/208; Ind. Code Ann. § 31-11-1-5; Iowa Code Ann. § 595.2; La. Civ. Code Ann. art. 90.1 (West 2019); Mo. Ann. Stat. §§ 451, 451.090; N.C. Gen. Stat. Ann. §§ 51-2, 51-2.1; N.D. Cent. Code Ann. § 14-02-02; Ohio Rev. Code Ann. §§ 3101.02, 2101.04-.042; S.C. Code Ann. §§ 20-1-100, 20-1-250; S.D. Codified Laws § 25-1-9; Tex. Fam. Code Ann. §§ 2.101, 2.003; Utah Code Ann. §§ 81-2-304, 81-2-403; W. Va. Code Ann. § 48-2-301; Wis. Stat. Ann. § 765.02; Wyo. Stat. Ann. § 201-1-102.

267 Haw. Rev. Stat. Ann. §§ 572-1 to 572-2; Kan. Stat. Ann. § 23-2505.

268 Fla. Stat. Ann. § 741.04.

269 Utah Code Ann. §§ 81-2-304, 81-2-403.

addressing the age issue have included restricted gaps of three[270] or four years.[271]

III. The Future of Child Marriage in the United States

The future of child marriage in the United States is in question. Historically, the institution of marriage has been considered vitally important, with William Blackstone referring to it as "the most important contract of any."[272] This is, in part, because marriage is—at least in theory—a "lifelong union" and therefore, also a long-term contract.[273] As important as many deem it and despite Americans' historical faith in the institution, the popularity of marriage is trending downward. In 2024, the U.S. Census Bureau released estimates indicating that married-couple households made up 47% of all U.S. households in 2022, down from 71% in 1970.[274] Additionally, a recent survey indicates that a majority of registered American voters say that society is "just as well off if people have priorities other than marriage and children."[275] Furthermore, most parents no longer consider their children getting married as "important," and children no longer feel pressured by their parents to do so.[276] This is because the parents no longer inextricably link marriage, i.e., the piece of paper evidencing the union's legality, to financial security; in fact, some see marriage as contrary to

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270 Alaska Stat. Ann. § 25.05.171; Ariz. Rev. Stat. Ann. § 25-102; Idaho Code Ann. § 32-202 ; La. Civ. Code Ann. art. 90.1; Mo. Ann. Stat. § 451.090.

271 Ga. Code Ann. § 19-3-2; Ind. Code Ann. § 31-11-1-5); N.C. Gen. Stat. Ann. §§ 51-2, 51-2.1; Ohio Rev. Code Ann. §§ 3101.02, 3101.04-.042 (if one prospective spouse is a major); S.D. Codified Laws § 25-1-9; W. Va. Code Ann. § 48-2-301.

272 Templeton, *supra* note 29, at 321.

273 *Id.*

274 *Census Bureau Releases New Estimates on Families and Living Arrangements*, U.S. Census Bureau, (May 30, 2024), https://www.census.gov/newsroom/press-releases/2024/families-living-arrangements.html.

275 Stephanie H. Murray, *Why Parents Don't Mind If Their Kids Don't Marry*, The Atlantic (Jul. 15, 2024), https://www.theatlantic.com/family/archive/2024/07/parents-grown-kids-marriage-pressure/678989/?utm_source=substack&utm_medium=email.

276 *Id.*

economic stability.[277] Many modern parents want their children to find romantic partners without economic considerations.[278]

In addition to the evolving attitude toward marriage as an institution, the negative effects of child marriage have been well-established. Statistics indicate that a disproportionate number of minors who marry, compared with those who do not, struggle to complete their education, live in poverty, and suffer health problems and abuse.[279] They also see higher rates of divorce and in some states, an inability to protect themselves.[280] Nevertheless, in the majority of U.S. states, minors are allowed to legally marry before they can vote, drink, or buy lottery tickets.[281]

Consequently, the United Nations Sustainable Development Goals has called for the end of child marriage by 2030; it is projected that, without more progress globally, that more than "120 million girls will be married before the age of 18 by 2030."[282] Most legal scholars in the United States support a total ban on child marriage.[283] Yet it has continued to persist, albeit in declining numbers.[284] While some legislators and scholars still support a child's right to marry, those seeking to eradicate child marriage have seen some success over recent years with many states considering the issue.[285]

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277 *Id.* Parents are concerned with their children's economic welfare, a concern that has not wavered. However, in the past, parents viewed marriage as the means by which their children could achieve financial stability, and that is what has changed. *Id.* Thus, many parents now view marriage and child-rearing as optional. *Id.* This does not mean that parents are unconcerned with their children's personal relationships; they desire fulfilling relationships for their children. They just do not prioritize the legal union as they once did. *Id. See also* June Carbone & Naomi Cahn, Marriage Markets: How Inequality Is Remaking the American Family (2014).

278 Murray, *supra* note 275.

279 Child Marriage Prevention Act, S. 4990, 118th Cong. §§ 1-10 (2023-2024) (introduced); *see also* Ross, *supra* note 29, at 111-14; Schuman, *supra* note 29, at 2349-55; Templeton, *supra* note 29, at 312-20.

280 Child Marriage Prevention Act, S. 4990, 118th Cong. §§ 1-10 (2023-2024) (introduced); Ross, *supra* note 29, at 111-14; Templeton, *supra* note 29, at 312-20.

281 Aliana Demopoulos, "*I Was Handed to a Complete Stranger": the Survivors Fighting to End Child Marriage in 37 US States – and the People Who Want to Keep It Legal*, The Guardian (Jul. 9, 2024, 8:00), https://www.theguardian.com/society/article/2024/jul/09/child-marriage-laws.

282 Bearat, *supra* note 2, at 3.

283 *Id.* at 4.

284 *Id.* at 6.

285 Luongo, et al., *supra* note 207, at 786. Several bills failed. *See supra* text

The issue is gaining traction at the federal level, too. On August 1, 2024, Senate Majority Whip, Dick Durbin, on behalf of himself and two other passionate senators, introduced the Child Marriage Prevention Act of 2024 (hereinafter "Act")[286] in the U.S. Senate. All three legislators have decried the ills of child marriage.[287] The sections below summarize the Act, along with the views of its supporters and those expected to oppose it.

A. *Summary of the Child Marriage Prevention Act of 2024*

The Child Marriage Prevention Act of 2024 is a multi-faceted piece of legislation, attacking child marriage on numerous fronts. First, the Act contains an educational component, under which governmental agencies will collect and share information about the practice. Second, it provides incentives for states to study and ban child marriage within their borders. Finally, it affirmatively bans child marriage from occurring on federal property and amends provisions of the U.S. immigration law to combat the international practice of child marriage.

To collect and share information, the Act establishes the National Commission to Combat Child Marriage within the Department of Health and Human Services, tasked with studying, evaluating, and reporting on eradicating the practice in the United States.[288] The commission must include a child marriage survivor and representatives of nonprofit entities with expertise

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in note 208.

286 Child Marriage Prevention Act, S. 4990, 118th Cong. §§ 1-10 (2023-2024) (introduced).

287 As Senator Durbin, noted: "Child marriage is a significant problem domestically, and it overwhelmingly affects underage girls who are married to adult men, often with dire consequences for their life outcomes. This loss of dignity and independence is unacceptable." *Durbin, Schatz, Gillibrand Introduce Child Marriage Prevention Act*, *supra* note 210. Senator Brian Schatz commented: "It's absurd and unacceptable that despite everything we know about the horrific outcomes of child marriage, hundreds of thousands of young girls are still forced into unions they want no part of." *Id.* Senator Kirsten Gillibrand, echoed: "Child marriage leaves girls vulnerable to abuse and exploitation. It is a wildly outdated practice that has no place in 21st century American society." *Id.*

288 Child Marriage Prevention Act, S. 4990, 118th Cong. §§ 1-10 (2023-2024) (introduced); *see also Historic Legislation Introduced to Prevent Child Marriage in the United States, supra* note 16.

in working with survivors and state governments on the issue.[289] More specifically the commission must examine existing laws on child marriage (along with the lack thereof), the frequency and circumstances of child marriages, and the impact of the practice on children.[290] Under the Act, this commission is directed to (1) review the existing governmental findings and recommendations on child marriage and build upon them, (2) hold hearings, request information from existing entities, and conduct listening sessions on child marriage with pertinent stakeholders (i.e., child marriage survivors, advocates, and experts), and (3) report to various government officials on the issue.[291] Additionally, it mandates that the Government Accountability Office examine child marriage in the United States and prepare a report (mostly targeted towards immigration matters on the issue).[292]

The Act also incentivizes the U.S. states to study and act on this issue through a few avenues. First, it allows the Health and Human Services Secretary to award grants for states that develop task forces to examine child marriage.[293] The Act also sets forth the duties of the task forces, along with the qualifications of its members.[294] Second, the Act increases grant funding for states banning child marriage.[295] In fact, assuming the commission mentioned above timely submits its mandated report, the Act allocates $5 million for 2027 through 2032.[296] Additionally, the Act requires the U.S. Attorney General to create a Department of Justice

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289 Child Marriage Prevention Act, S. 4990, 118th Cong. §§ 1-10 (2023-2024) (introduced); *see also* Dick Durbin, Brian Schatz, & Kirsten Gillibrand, *Child Marriage Prevention Act of 2024 Section-by-Section Summary*, Tahirih Justice Center (Aug. 2024), https://www.tahirih.org/wp-content/uploads/2024/08/Child-Marriage-Prevention-Act-of-2024-Updated-Final-Section-by-Section_8.7.24.pdf.

290 *Id.*

291 *Id.*

292 Child Marriage Prevention Act, S. 4990, 118th Cong. §§ 1-10 (2023-2024) (introduced); *see also* Durbin, Schatz, & Gillibrand, *supra* note 289; *Durbin, Schatz, Gillibrand Introduce Child Marriage Prevention Act*, *supra* note 210.

293 Child Marriage Prevention Act, S. 4990, 118th Cong. §§ 1-10 (2023-2024) (introduced).

294 *Id.*

295 *Id.*

296 *Id.*

working group to promulgate a model state statute prohibiting child marriage.[297]

Finally, the Act attacks child marriage on the federal level by taking two approaches—one focused on domestic child marriage and one focused on child marriage through immigration. On the domestic front, the Act completely bans child marriage on property owned, leased, used, or funded by the federal government.[298] This provision sends a strong message about the federal government's views on the seriousness of child marriage. On the immigration issue, the Act sets a minimum age for spouse and fiancée visas, amends the definition of proxy marriage, requires educational materials on the changes to immigration law to be produced in multiple languages, and tasks several government departments with promoting information on the harms of child marriage and resources for support.[299]

B. *Expected Responses to the Act (and Child Marriage Generally)*

Obviously, the Act is supported by its sponsors, who have characterized it as a tool to "protect our kids"[300] by taking "meaningful steps toward finally ending"[301] child marriage in the United States. As Senator Durbin stated, the Act is "a powerful statement of our priorities as a nation and something that will change the futures of hundreds of thousands of young girls if enacted."[302] Advocacy groups also endorse this legislation.[303] As one remarked: "Girls everywhere

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297 *Id.*

298 *Id.*

299 *Id.* The Act allows the Secretary of Homeland Security to waive this requirement for those who are at least 16 years of age for "compelling humanitarian reasons arising from a risk of individualized and targeted harm to such noncitizen." Durbin, Schatz, & Gillibrand, *supra* note 289.

300 *Durbin, Schatz, Gillibrand Introduce Child Marriage Prevention Act*, *supra* note 210 (quoting Senator Gillibrand).

301 *Id.* (quoting Senator Schatz).

302 *Id.* (quoting Senator Durbin).

303 *Id.* These organizations include Tahirih Justice Center; National Alliance to End Sexual Violence; Jewish Women International; Esperanza United; Resiliency Foundation; Global Hope 365; Ujima, the National Center on Violence Against Women in the Black Community; Womankind; The Person Center; Indiana Youth Services Association; Naila Amin Foundation; SK Sultana LLC; ASISTA; Raksha; National Resource Center on Domestic Violence; Catholic Charities Fort Wayne South Bend; Daya Houston; Too Young to Wed; and Legal Momentum.

are only as safe as the weakest law allows, and this bill acknowledges the many ways current U.S. law fails to protect girls here and abroad from this human rights abuse."[304] Meanwhile, many survivors echo this sentiment, with one explaining: "I envision a United States without child marriage, visa exploitation, abandonment, and abuse. This is precisely why Congress needs to act fast and pass The Child Marriage Prevention Act to protect girls."[305]

Of course, the Act is not without opposition. After all, the U.S. Supreme Court has generally left matters of domestic relations to the states, and therefore, the Act may implicate federalism concerns.[306] That is not the sole concern, as the cohort of those opposing child marriage bans raises several arguments to support its practice. This group consists of many conservative lawmakers and some left-leaning organizations, prompting some to describe it as "odd."[307] Nevertheless, they are on the same page that banning child marriage could harm minors in other ways.

The group on the right, appropriating the notion of "choice," is seemingly clinging to the idea of marriage as a cure. According to them, such a choice by a child is reasonable in certain scenarios. For example, "[W]hat about a pregnant teen who wants to marry the baby's father? Or a girl whose slightly older boyfriend is about to deploy overseas?"[308] They also frame child marriage as a matter of religious freedom.[309] These legislators have likewise latched on to the idea that allowing child marriage will decrease the frequency of abortions.[310] As one state representative asked: "Are we not in fact making abortion a much more desirable alternative, when marriage might be the right solution for some freedom-loving couple?"[311] This group of opponents has also been accused of at-

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304 *Durbin, Schatz, Gillibrand Introduce Child Marriage Prevention Act*, *supra* note 210 (quoting Casey Carter Swegman, Director of Policy at the Tahirih Justice Center).

305 *Historic Legislation Introduced to Prevent Child Marriage in the United States, supra* note 16 (quoting Sasha Taylor, a woman who was forced to marry when she was 15 years old).

306 Aryama, *supra* note 211, at 424.

307 Demopoulos, *supra* note 281.

308 *Id.*

309 Johnson-Dahl, *supra* note 1, at 1073.

310 *Id.* The National Right to Life movement employs this rationale. Jonathan Black, *Marital Discord*, 104 A.B.A. J. 16, 17 (Jan. 2018).

311 *Id.*

tempting to use child marriage as a tool in today's culture wars, evidenced by some state senators' actions and statements. As one remarked: "The same people who put [trans issues] in elementary schools and libraries are suddenly hyper-moralistic about 17 year old [*sic*] High School Sweethearts getting married, I don't get it."[312]

Meanwhile, some left-leaning organizations also oppose child marriage bans but for very different reasons. This group of opponents purports to defend the rights of children, arguing that the retention of child marriage is necessary to do so. Some opponents maintain that marriage is a fundamental right for everyone, including minors.[313] Some opponents are concerned that limiting a child's right to marry could weaken other rights of children, especially their reproductive rights.[314] Others fear that a child marriage ban will deprive minors of the ability to leave foster care via emancipation.[315] Some of these and similar arguments have been made previously to oppose child marriage bans on the state level. For example, in California in 2023, local chapters of the American Civil Liberties Union and Planned Parenthood opposed a law that would have banned child marriage in the state.[316]

Conclusion

Child marriage has had a long history in the United States. Over the years, it has morphed from a common, accepted practice to being prohibited in thirteen U.S. states. Its future is uncertain. The current trend of new legislation banning or restricting its practice seems to signal that this issue has become an important one to many state legislatures around the country. Whether it is one important enough to the federal government remains to be seen. Tracking the Child Marriage Prevention Act of 2024 work its way through Congress will tell.

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312 Anna Liz Nichols, *Child Marriage Is Now Banned in Michigan*, Mich. Advance (July 11, 2023, 3:28 PM), https://michiganadvance.com/2023/07/11/child-marriage-is-now-banned-in-michigan/.

313 Young, *supra* note 229. *See also* Tsui, *supra* note 18 (stating that the ACLU of California argues a complete ban on minors marrying intrudes on the fundamental right to marry). Courts have held that restricting marriage by age is constitutional. *See* Moe v. Dinkins, 669 F.2d 67 (2d Cir. 1982).

314 Elrich, *supra* note 68, at 162.

315 Black, *supra* note 310, at 17.

316 *Id.*; Demopoulos, *supra* note 281.

Comment, The Intersectional History of Guardianship in American Divorces

I. Introduction

After the long and dangerous journey from the shores of England to the New World, the first American colonists reached the Atlantic beaches with their wares, religion, and the basis for what would become the American legal system: the common law of England.[1] While they would not enshrine the English law officially, its influence shaped the new country's laws from the earliest days of their occupation.[2] With their newly acquired religious freedom, the colonists, largely (but not exclusively) Puritan, established a system where their piety and strict values were the foundation on which the law would be built for all who would endeavor to establish these new people, the Americans: young and old, able-bodied and impaired alike.

The early colonizers were more similar than they were different, due to the journey to the New World intentionally excluding those with minds and bodies "undesirable or unlikely to survive the voyage," a determination made by communal definitions of race, class, wealth, and religion, in addition to beliefs about cognitive abilities.[3] This homogeny meant that some challenges could not be avoided—namely, how the law, designed for the ideal new American, who was strong, independent, and eager, would apply to those who were *not* considered ideal: the incompetent, the impaired, the disabled. How would they fit into this New World, this Garden of Eden, an opportunity for perfection away from the suffocating rule of the British Monarchy? How were they to navigate this new land, with its challenging landscapes, strife with the indigenous tribes (and each other), and the already mountainous battle of living in a world not built for them? Who would advocate for

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1 Shepherd Braithwaite Kitchin, A History of Divorce 211 (Chapman & Hall (London) 1912).

2 *Id.*

3 Kim E. Nielsen, A Disability History of the United States 20 (2012).

them, legally, so that they would be in all rights and respects citizens worthy of all benefits bestowed to Americans?

II. The First American Divorce and Guardianship

Under the guidance of the Geneva Bible, the early law of the land, at least colloquially, was that marriages were holy, permanent and a bond that "ought not to be broken."[4] During that time, it was not unheard of for a colonist to desert "unwanted or offending mates,"[5] and the spouse left behind might even go so far as to publish offers of reward for the return of a runaway spouse in local newspapers.[6] However, with marriage came divorce, an idea reluctantly but necessarily brought by the colonists to the Americas in the early 1600s.[7] The idealization of past Americans has famously concluded that divorce was not present in the early days, but that is wholly untrue: the first couple to obtain a legal divorce decree did so in 1639 from "a Puritan court in Massachusetts."[8]

In December of that year, James Luxford's lawful wife, Elizabeth, who was already a mother to his daughter and pregnant with his second child, approached the Court of Assistants to plead her cause for divorce: Mr. Luxford was already married to at least one, and maybe two, other women.[9] The court believed that Mr. Luxford had likely abandoned his wife or wives in England prior to making the journey across the Atlantic "for his country's good."[10] Additionally, the court noted that "the pseudo-wife is innocent of the bigamy" and that its ruling "should stand on the ancient ways."[11]

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4 *Matthew* 19:3 (Geneva Bible, 1599).

5 Glenda Riley, Divorce - An American Tradition 3 (Oxford University Press 1991).

6 *Id*. at 9.

7 *Id*. at 4.

8 *Id*.

9 *The Puritan Divorce Allows Escape from the Chain of Matrimony*, New England Historical Society (Sept. 10, 2024, 9:51 AM), https://newenglandhistoricalsociety.com/puritan-divorce-allows-escape-from-the-chain-of-matrimony/; Rybicka Law Office, *A (Brief) History of Divorce*, (Sept. 10, 2024, 8:11 AM), https://www.rybickalawoffice.com/blog/2016/4/14/a-brief-history-of-divorce.

10 Charles Cowley, Our Divorce Courts: Their Origin and History; Why They Are Needed; How They Are Abused; and How They May Be Reformed 17 (Penhallow Printing Co. 1879).

11 *Id*.

The court records are fragmentary, but a court later found Mr. Luxford guilty of bigamy.[12] At the granting of divorce, the court ordered Mr. Luxford to release all of his property to the former Mrs. Luxford and her children, and to never be in her presence again; he was additionally fined one-hundred pounds (roughly £19,282[13] or $25,186 in U.S. dollars today[14]), ordered to serve an hour in the stocks on a market day, and banished from America back to England.[15] Mrs. Luxford retook her maiden name, Albone, and remarried, enjoying "the beneficence of the church in Cambridge."[16] Mr. Luxford, however, was not immediately sent back to the motherland. The same court records indicate he later was found guilty of "forgery, lying, and other foul offenses," resulting in a punishment of a public whipping and further banishment, only after having both of his ears cut off.[17] Mr. Luxford fled to Plymouth Plantation and lived out the rest of his days a disfigured, disabled pauper.[18]

Puritans in colonial America held fast to the belief that a person with a disability, physical, mental, or otherwise, was the consequence of God's anger, a belief socially prevalent in their former English homes.[19] Because the early settlers brought the English common law with them, the undercurrents of classism and ableism followed as well. Like the English, colonial Americans held the views that indigents and the incapacitated were "deemed to fall outside the protection of laws that emphasized self-reliance and industry."[20] These views, in congruence with the religious piety

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12 *Id*.

13 Bank of England Inflation Calculator, https://www.bankofengland.co.uk/monetary-policy/inflation/inflation-calculator (last visited Oct. 6, 2024) (input "£100" in year "1639" cost in "Aug 24").

14 Travelex, https://www.travelex.co.uk/currency/currency-pairs/gbp-to-usd (last visited Oct. 6, 2024) (input "19,282" in GBP).

15 Riley, *supra* note 5, at 12.

16 *Id.* at 8.

17 Cowley, *supra* note 10, at 17, 18.

18 *The Puritan Divorce Allows Escape from the Chain of Matrimony, supra* note 8.

19 *See* David L. Braddock & Susan L. Parish, *An Institutional History of Disability, in* Handbook of Disability Studies 11, 25 (Gary L. Albrecht, et al., eds., 2001).

20 Jonathan Mattloff, *Idiocy, Lunacy, and Matrimony: Exploring Constitutional Challenges to State Restrictions on Marriages of Persons with Mental Disabilities*, 17 Am. U. J. Gender Soc. Pol'y & L. 497 (2009).

of the Puritans, resulted in the early American cobbling-together of regulations for the lesser-loved colonists: indigents and the incapacitated were usually thrown under the same umbrella of laws intended to manage them, regardless of how related (and usually unrelated) their circumstances and abilities were. A prominent connection, however, was that the indigent and the incapacitated person were most commonly deemed to be in the class of those designated as poor and idle, a liability to their village, and ultimately of the lowest caste.

Under Queen Elizabeth's Poor Law of 1601, designed to provide work and housing for indigents and the incapacitated, a community was ultimately responsible for the care of its impoverished, abandoned, and disabled. Early American communities, to avoid taking responsibility, "warned out" indigents and incompetents from their townships, demanding they leave immediately; otherwise, they would be subject to public whippings as penalty for their stay.[21] It is here that the colonists began implementation of guardianships.

Under the guise of observing the law, and in service to the Crown, a colonist could take on the charity of guardianship for these poor and idle. This charity, however, was not often seen as such, since a guardian could request payment for his services rendered: in 1637, Ambrose Harmer, guardian of Benomi Buck, an intellectually disabled man, successfully petitioned King Charles I for "secure payment for the guardianship."[22] Mr. Buck was deemed incapacitated from birth, and thus "in no way able to governe himself, or to manage that small estate left him" by his father at death.[23] Little is known about what is arguably the first recorded guardianship in colonial America, but it is important to note that Harmer was a landowner and politician in early Virginia, in a time where regulation of the guardian-ward relationship was minimal, if it existed at all.[24] Mr. Buck's guardians, of which there would be many, ultimately were found to have "had much inriched [themselves] from the stocks" intended to provide for him.[25] The

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21 Braddock & Parish, *supra* note 19, at 26.

22 *Id*. at 25.

23 Nielsen, *supra* note 3, at 24.

24 Jon Kukla Speakers and Clerks of the Virginia House of Burgesses, 1643–1776 43, 44 (1981).

25 Nielsen, *supra* note 3, at 24.

assumption is that Mr. Buck, deemed socially "poor and idle," was useful to Mr. Harmer specifically only for the guardianship fee; the limited record is silent.

Divorce in America has only become more prevalent in the centuries since the Luxfords' landmark dissolution. It is incredibly common: in 2022 alone, there were approximately 673,989 divorces and annulments in the United States.[26] The 2022 divorce rate among first marriages was as high as 43%, with second and third marriages resulting in dissolution at substantially higher rates.[27] The rise of cohabitation and the waning of religious rule have no doubt greatly impacted the once-taboo act of divorce.

Adult guardianships in America have also been increasingly prevalent, but the statistics are not nearly as simple to compile: Jim Berchtold cites "insufficient funding and resources, non-unified court systems that are locally governed, outdated technology or lack of technology, varying case management systems within a state and from state to state, and lack of standardized methodology to label and count cases" as just a few of the countless hurdles to accurate reporting of guardianship data.[28] In short, guardianship simply does not have the oversight that marriage and divorce does in the United States. Nonetheless, the use of guardians for incapacitated adults is also experiencing an increase in social acceptance, at least anecdotally. Scientific advances, like fetal DNA screens, improved amniocenteses, and biochemical marker tests in the blood of the mother, are leading to early detection of many disabilities.[29] And as the general life span of Americans increases, so does the need for caretaking for adults who are in some way incapacitated for short periods or lifetimes.[30] In short, like divorce,

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26 Centers for Disease Control and Prevention, *Provisional Number of Divorces and Annulments and Rate: United States,* 2000-2022, https://www.cdc.gov/nchs/data/dvs/marriage-divorce/national-marriage-divorce-rates-00-22.pdf

27 Christy Bieber, *Revealing Divorce Statistics in* 2024, Forbes (Oct. 14, 2024, 6:31 PM), https://www.forbes.com/advisor/legal/divorce/divorce-statistics/#sources_section.

28 Jim Berchtold, *Guardianship Data Reform,* Justice in Aging Reform (June 12, 2024, 11:19 PM), https://justiceinaging.org/guardianship-data-reform/.

29 Chris Kaposy, *From Baby Doe to Selective Termination for Down Syndrome*, *in* Intellectual Disabilities and Autism: Ethics and Practice 56 (Andria Bianchi & Janet A. Vogt eds., 2024).

30 Kenneth D. Kochanek, et. al., *Mortality in the United States*, 2022, NCHS Data Brief No. 492 (Mar. 2024), https://dx.doi.org/10.15620/cdc:135850.

guardianships for the disabled will continue to be part of the American story, despite their being an often-forgotten but integral part of her history.

Marriage has always been a hallmark in American traditions, religious practices, and common law. From the first colonial divorce of the Luxfords in 1639, divorce has been inextricably tied to the idea of marital unions, however taboo and unpopular it was at various times throughout American history. Likewise, caretaking for incapacitated individuals, in addition to the care of widows and orphans, has also been ever present in the American story, though it has rarely been highlighted, because it also has been considered an unsavory but necessary burden. These two ideas, divorce and adult guardianship, make an exceptional juncture in American law and society today: when an incapacitated adult is the subject of a divorce proceeding, only her guardian can loyally speak on her behalf. While this is not uncommon today, there is a lesser known, but rich history of guardians representing their wards in divorce proceedings, built on the precedents created in Mrs. Luxford and Mr. Buck's lifetimes and culminating in the first formal representations in the Civil War Era.

III. The Ever-Changing Definitions of "Disabled"

The journey to the New World was an arduous one for early European settlers, and allowed only the most able-bodied of journeymen to embark.[31] Excluded from the adventure were individuals "with bodies or minds deemed undesirable or unlikely to survive."[32] Subsequently, European colonists arrived on the beaches of America without their weak and "undesirables" so that they could establish robust settlements free from those that might have hindered their success.

In those times, a person was considered able-bodied if he could still perform labor.[33] If a settler could still contribute to work, even if he was partly-blind or an amputee, he was not socially considered disabled. Those with mental disabilities, however, were labeled unable to work and subsequently subject to

31 NIELSEN, *supra* note 3, at 19.
32 *Id*. at 12.
33 *Id*. at 20.

early legislation during the creation of the New World.[34] The Body of Liberties, the first legal code of sorts, was established in 1641, intended to protect mentally incapacitated individuals from making unsound financial decisions and guarantee that no one be required to perform "public service" if they had a "defect in mind."[35] Though the Puritan social ethic required caring for the disabled, their language was not always so charitable: typically, incompetents were labeled "idiots" and "lunatics."[36] These terms pervaded society's attempt to classify individuals with varying disabilities and persisted well-beyond Colonial America and into the twenty-first century.

Early attempts to categorize a person's level of incompetency drew largely on the believed source of defect. English statutes in the Middle Ages titled the mentally ill the aforementioned "lunatics" who may be able to restore their capacity, as opposed to "idiots" who were born "natural fools" and unlikely to ever reach capacity.[37] Though the language is harsh, it establishes the distinction between mental illness and intellectual disability. John Locke, in *An Essay Concerning Human Understanding*, further defined the differences between these two populations, stating that "mad men put wrong ideas together, and so make wrong propositions, but argue and reason right from them: but idiots make very few or no propositions, but argue and reason scarce at all."[38] While the terms themselves are outdated, offensive, and ableist in these modern times, their general ideas are not: the "madman" or "lunatic," presumably, represents a person suffering from mental illness who was likely once functioning and competent, while the "idiot" is incapacitated from birth via defect, or later debilitating trauma, resulting in a stunted level of understanding. At the time of Locke's writing in 1690, this was the common view of incapacitated individuals and was the general understanding of disabilities for colonial Americans.

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34 *Id*.

35 *Id.* at 21.

36 *Id*. at 22.

37 Samuel Jan Brekel et al., The Mentally Disabled and the Law 10-11 (3d ed. 1985).

38 John Locke, I An Essay Concerning Human Understanding 134 (Oxford at the Clarendon Press 1689).

In the late colonial period between 1700 to 1776, the societal view of incapacity retained its derogatory terms but broadened the characteristics that would classify a person as mentally disabled: he may show signs of "despair, sordidness, and viciousness," as Samuel Coolidge, a 1738 Harvard graduate, schoolteacher and preacher, was described after slipping into a lifelong insanity.[39] Mr. Coolidge, formerly a brilliant intellectual, was an early beneficiary of the public charity required under common law: town officials compensated fellow villagers to house, clothe, and feed him; however, as his condition reached its peak, he was ultimately refused care and spent his last year of life locked in a room until his death in 1764.[40] With the formation of early institutions (commonly referred to as "almshouses" by people of the time), Mr. Coolidge's experience became more commonplace, as a new "dumping ground" housed "persons under distraction and unfit to go at large, whose friends do not take care for their safe confinement" and "ideots, lunatics, and other persons of unsound minds."[41]

The American Revolution's patriots, newly freed from the patriarchal oversight of England, made freedom to vote a national priority; with that voting power, however, a potential voter must be deemed competent: the new republic would not survive unless "the minds of its citizens were capable."[42] Legislators had to differentiate a person "worthy of full citizenship," and thus a competent voter, from "idiots, lunatics, women of all races, people of indigenous nations, and African Americans."[43] As with laws limiting the votes of enslaved and freed African Americans, women, and indigenous people, legislation sought and succeeded to exclude from the voting rolls disabled individuals, who were considered "deficient and defective."[44] This idea, along with rising institutionalization for incompetents, remained the norm all the way through to the mid-nineteenth century, when abolitionist and former slave Frederick Douglass stated that "the true basis of rights was the capacity of individuals."[45]

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39 Nielsen, *supra* note 3, at 31.
40 *Id*. at 32.
41 *Id*. at 37.
42 *Id*. at 50.
43 *Id*.
44 *Id*.
45 *Id*. at 52.

The American Reconstruction and industrialization, in the wake of the Civil War, made disability "heroic," but only for male soldiers with "physical, and visibly exhibited" disabilities.[46] The vital support needed for veterans only slightly redefined disability as being "increasingly reliant on medical determinations" and as previous generations had stated, an "incapacity to perform manual labor."[47] Later, in the 1880s, an incapacitated person fell within seven narrowly-construed categories of "insanity": mania, melancholia, monomania, paresis, dementia, dipsomania, and epilepsy.[48]

The Progressive Era shifted society's views of the disabled from the Puritan caretaking charity and the so-called "ugly laws"[49] of the Reconstruction, into a morbid curiosity about "deviant bodies,"[50] from the commercial sideshows of the time to the footstool of modern medical research.[51] Subsequently, America experienced a significant rise in institutionalization, often targeting freed African American slaves, who were believed to have gone "insane" from freedom.[52] Similarly, immigrants coming to America were also unfairly marginalized as incompetent: upon examination, an immigrant was labeled disabled for facial expressions, "oddity of dress," being chatty, "witticism," "unnatural actions, mannerisms, and other eccentricities," and even if they appeared to have same-sex attraction (considered evidence of insanity and proof they were not able-bodied).[53]

Eugenics became an unlikely, but widespread argument in the sphere of disability, as it was popularized in the American scientific research fields. Dr. Henry Clay Sharp created a sterilization program to prevent "the spread of hereditary defects" of the "degenerate class," consisting of "the insane, the epileptic, the

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46 *Id*. at 87.

47 *Id*. at 86.

48 Michael Rembis, Disability : A Reference Handbook 6 (ABC-CLIO 2019).

49 Nielsen, *supra* note 3, at 89. During the 1860s, as veterans returned home from war and industrialization-generated disabled workers became widely prevalent, several major cities passed "ugly laws," *id.*, with the intent of banning a person who is "diseased, maimed, mutilated, or in any way deformed so as to be an unsightly or disgusting object" from public streets. *Id*.

50 *Id*.

51 *Id*. at 91.

52 *Id*.

53 *Id*. at 104-05.

imbecile, the idiotic, the sexual perverts; many of the confirmed inebriates, prostitutes, tramps, and criminals . . . the habitual pauper . . . [and] children in our orphan homes."[54] This is the time in American history that the umbrella of incapacity was arguably at its broadest. American educator and eugenicist Harry Laughlin testified in support of the Immigration Act of 1924, citing that forced sterilization for the "socially inadequate" and "degenerates" (which included, according to him: European immigrants indiscriminately deemed insane and Jews born "feeble-minded," along with the otherwise incapacitated) would lessen the burden of over-crowded asylums.[55] His model became widely popular, eventually being championed by Adolf Hitler in his pursuit for racial purity.[56]

As time progressed, these definitions changed, due in large part to the growing reign of the American governmental systems, advances in society and sciences, and the incredible need for more specific understanding of the disabled community. In the age of modernity, the definitions have been altered largely depending on the arena in which the term is being used. In the late 1950s, the Committee on the Rating of Mental and Physical Impairment of the American Medical Association produced a guide that defined disability and impairments for the medical field as not just a medical condition, but when the disabled individual can no longer participate in productive activities.[57] In the early 1990s, the U.S. Social Security Administration defined a person as disabled if he could no longer "engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment" that could cause him death or incapacitate him "for a continuous period of not less than 12 months," for the pragmatic purpose of supplying him with government aid.[58]

The modern-day definition of disabled is an assortment of terms and ideas: a person is classified as disabled if he has a "physical or mental impairment that substantially limits … major

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54 *Id*. at 102.

55 *Id*.

56 *Id*.

57 *See* Barbara M. Altman, *Disability Definitions, Models, Classification Schemes, and Applications, in* Handbook of Disability Studies, *supra* note 19, at 97, 100.

58 *Id*. at 98.

life activities"; however, he may also be judged disabled if he "has a history or record" of the impairment or if he is simply "perceived by others" as being impaired, according to the Americans with Disabilities Act.[59] On its face, the ADA requirement maintains the gray area of subjective interpretation that for centuries has plagued the attempts to define incompetency. But considering the incredible advances in science, medicine, and social understanding, this gray area may be necessary to provide those individuals who do *not* fit into a black letter definition of disabled an opportunity to safely and equitably participate in American life.

IV. Cornerstone Cases of Guardianships and Divorce, from the Civil War to the Twenty-First Century

Having the undercurrents of English common law as the foundation for rules in the New World, the early colonists were familiar with the doctrine of *parens patriae*, which established that the British King was essentially the "political father and guardian of his kingdom."[60] This divine right, modeled foremost by King James I as the first colonies were established, gave the Crown the authority that a father has over his family, an unquestionable and God-given right.[61] In the first "royal colonies" the King bore the responsibility for "the custody of any idiot."[62] From this cornerstone was built the ideals regarding guardianship in the New World, and successively, the American legal concept of guardianships would thus evolve.

Unfortunately, while cases of guardianship and divorce were well-established in colonial America, the limited records and the

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59 U.S. Department of Justice Civil Rights Division, *Guide to Disability Rights Laws*, ADA.GOV, https://www.ada.gov/resources/disability-rights-guide/#:~:text=An%20individual%20with%20a%20disability%20is%20defined%20by%20the%20ADA,as%20having%20such%20an%20impairment (last visited Aug. 19, 2024).

60 Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgement*, 100 YALE L.J. 1, 18 (1990) (discussing the historical definition and idea of *parens patriae*).

61 *Divine Right of Kings,* ENCYCLOPEDIA BRITANNICA. https://www.britannica.com/topic/divine-right-of-kings (June 14, 2024).

62 Larry D. Eldridge, *"Crazy Brained": Mental Illness in Colonial America*, 70 BULL. HIST. MED. 361 (1996).

then-rarity of a guardian-defended or -initiated divorce has left little for modern historians to recollect. It is for that reason that the earliest divorce involving an adult guardian to review presently (with court records and historical accuracy, and not *just* anecdotes) is from Vermont in 1858, during the Civil War Era.

A. *The Civil War Era*

The case of *Nichols v. Nichols* was brought to the Supreme Court of Vermont by Mr. Nichols, who stated that his wife had committed the grave sin of adultery, and he should thus be freed of their marriage.[63] The lower court had deduced that Mrs. Nichols was insane and promptly assigned her a guardian ad litem[64] (this assignment occurred in a time where "idiocy" was added to the list of legal reasons for divorce in some jurisdictions).[65] Her unnamed guardian argued that Mrs. Nichols' act of infidelity, not done "in a lucid interval," removed her from liability.[66] Mr. Nichols presented the holding of an earlier case, *Matchin v. Matchin*, as his chief argument: that "insanity is no bar to a petition for divorce for adultery."[67] The court, however, turned the ruling on its head and greatly reprimanded Mr. Nichols for even presenting it; the court held that Mr. Nichols, "having sworn to love, comfort, honor and keep, in sickness and in health, till death" Mrs. Nichols, had decided to renege his sacred vows with her "in the hour of her utmost necessity."[68] The Vermont Supreme Court also publicly chastised Chief Justice Gibson's opinion in *Matchin*, calling the ruling "truly revolting to all just sense of propriety and decency."[69] The court further stated that by knowing Mrs. Nichols was insane, a fact never contested by either party, it was Mr. Nichols' duty to "guard against" her propensities, and he was thus equally as guilty as if he had encouraged her successfully to

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63 Nichols v. Nichols, 31 Vt. 328 (Vt. Nov. 1858).

64 *Id*.

65 Riley, *supra* note 5, at 41.

66 *Nichols*, 31 Vt. at 331.

67 *Id*. It should be noted that the *Matchin* case is cited incorrectly by the record as Matchin v. Matchin, 6 Barr 332; the accurate citation is 6 Pa. 332 and was decided in July of 1847 by the Supreme Court of Pennsylvania.

68 *Nichols*, 31 Vt. at 330.

69 *Id*. at 332.

commit a murder.[70] The Vermont court held fast to the Puritan religious view that marriage was sacred and ought to be protected at all costs from divorce, and Mr. Nichols' petition for divorce was unsurprisingly dismissed.[71]

During the early years of the American Reconstruction and industrialization period stands a rarity among the already rare cases presented here. In 1874, the Supreme Court of Massachusetts decided the case of *Garnett v. Garnett*, in which *both* parties appeared under the representation of a guardian appointed by the probate court.[72] This case, notably, is one of the first under Massachusetts law that allowed a divorce to be "filed and prosecuted [o]n behalf of an insane person," a legal unicorn rarely before recorded.[73]

Mr. Garnett had previously filed and was granted "a divorce from the bond of matrimony" and subsequently had surrendered most of his personal property as alimony to Mrs. Garnett, who was deemed insane. However, since Mr. Garnett was then made a pauper whose only support was the charity of a local almshouse, he sought restoration of a share of his property to aid his living expenses.[74] On appeal, the court noted that the divorce previously granted was not total, and thus did not dissolve the marriage contract between Mr. and Mrs. Garnett, a fact complicated by Mr. Garnett joining Mrs. Garnett in being deemed incapacitated by reason of insanity.[75] For Mr. and Mrs. Garnett to receive a final decree of divorce, the court weighed the difficulty of the facts, considering that neither party could provide "intelligent consent" to counsel, despite the agreement of both of their guardians.[76] Ultimately, the court refused to be relieved from the "responsibility of considering what course [of] public policy," along with the interests of the parties, should be pursued, and ordered a further hearing. The subsequent hearing never occurred, was not formally recorded, or has simply been lost to history.

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70 *Id*. at 330.
71 *Id*. at 332.
72 Garnett v. Garnett, 114 Mass. 379, 380 (D. Mass. Jan. 1874).
73 *Id*.
74 *Id*.
75 *Id*. at 379.
76 *Id*. at 381.

B. *The Progressive Era*

Only a short time later in 1899, the Progressive Era, another notable marital dispute took place, this time in the Illinois Court of Appeals. On its face, the case was a plea for alimony in a short-lived union. However, the case of *Pyott v. Pyott* made a longstanding spectacle of the brief Pyott marriage: Mrs. Pyott admitted to being induced to marry Mr. Pyott only for his "much valuable real estate" in Chicago, which Mr. Pyott, a widower, had secretly deeded to his adult children from his prior marriage before his consummation with the new missus (equaling $230,000: approximately $8,723,262 in 2024).[77]

Mr. Pyott was deemed to have been suffering from "senile dementia," a "form of insanity in the aged."[78] After it was determined that Mr. Pyott was "not of sound mind and memory, but was insane," the court appointed him a guardian ad litem, Mr. Pyott's son and beneficiary, James M. Pyott, Jr. as next of friend to represent him in the hotly contested proceedings for support and maintenance.[79] The court reviewed a list of symptoms of Mr. Pyott's insanity: he refused to attend church or pray before meals; he began reading French novels; he "told indecent stories"; he began using "profane and vulgar language," even if a woman was present; and finally, he once entertained guests "in his bare feet."[80]

The junior Pyott argued that his father, at age seventy-two, was "so impaired as to render him incapable of entering into any contract of marriage" and thus the marriage should be voided entirely; the couple were married only a year before the filing of the action,[81] and had cohabitated for a single month before Mr. Pyott's alleged desertion.[82] The junior Pyott, no

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77 CPI Inflation Calculator, https://www.officialdata.org/us/inflation/1898?amount=230000 (last visited Oct. 7, 2024 (input "230000" in start year of "1891" to end year of "2024"). Pyott v. Pyott, 1900 U.S. Dist. LEXIS 215 (Ill. App. Ct. July 5, 1900). Mr. James M. Pyott, the incapacitated individual in this case, had been a co-owner (with his brother) of a prestigious ironworking factory in Chicago, Illinois. For more information on his historic business, see *Holmes, Pyott & Co.,* Vintage Machinery (Jan. 20. 2011, 1:54 PM), http://vintagemachinery.org/mfgindex/detail.aspx?id=2353&tab=0.

78 Pyott v. Pyott, 191 Ill. 280, at 283 (Ill. June 19, 1901).

79 Pyott v. Pyott, 90 Ill. App. 210, at 216 (Ill. July 5, 1900).

80 *Pyott*, 191 Ill. at 284.

81 *Pyott*, 90 Ill. at 216.

82 *Pyott,* 191 Ill. at 281.

doubt motivated by his ward's valuable property being recently deeded to him, requested the court consider a cross-bill for a "decree annulling the marriage" to overcome a tricky Illinois legal obstacle.[83]

For the younger Pyott to maintain ownership of the deeded property, he had to establish that the marriage of Mr. and Mrs. Pyott was not proper in the first place but that his appointment as guardian ad litem was proper. However, in Illinois, even then, divorce was "a personal right" that required "the *intelligent* action of the injured party," meaning that an action for absolute divorce could *not* be brought by a guardian ad litem when the party seeking divorce was incompetent.[84] In addition to his former burdens, the junior Pyott had to also request that the court recognize the marriage as not absolute, but a void marriage; if the court deemed the marriage a void marriage, only then could a guardian bring an action for dissolution. These hurdles could only be approached when a jury found that Mr. Pyott was indeed insane (a requirement under the Illinois statute at the time of the trial).[85]

The younger Pyott first argued that because both parties had previously agreed that Mr. Pyott was inarguably insane, the court need not require fact-finding by a jury, and the court agreed.[86] Because Mr. Pyott was then legally recognized as incompetent at the time of the marriage inducement, the court recognized that he could not have entered an absolute marriage and was thus automatically in a void marriage. Finally, the Junior Pyott could petition the court for a nullification of a void marriage.[87] The Illinois Court of Appeals found that the marriage was void *ab initio*, and subsequently dismissed Mrs. Pyott's petitions for alimony.[88] The landmark case for divorce of an incompetent in the Progressive Era had been resolved, and the *Pyott* precedent would stand for decades to come.

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83 *Id*. at 290.
84 *Id.* at 288 (emphasis added).
85 *Id*. at 289.
86 *Id*. at 290.
87 *Id*. at 289-90.
88 *Id*.

C. *World War I and the Roaring Twenties*

During World War I, America was plagued with Hitler's popularized notion of eugenics. Disabled Americans had never before been viewed in such an unsavory light: the belief that "social engineering through controlled or selective reproduction could help purify the human race" prejudiced the incapacitated, to the point of increasingly restrictive laws being passed that unfairly and openly targeted those with disabilities, often resulting in mass and unethical institutionalization.[89] In July of 1919, the Supreme Court of New York's Appellate Division decided *Laudo v. Laudo*, a stereotypical case involving the banishment of a disabled citizen into an institution as a means of cure for adultery.[90]

The marriage of Mr. and Mrs. Laudo was largely uneventful: they wed in New York City in May of 1912 and continued to live together in marital bliss until six years later. In June of 1918, Mrs. Laudo was out-of-town visiting family when she was alleged to have committed adultery with three different men.[91] Three days later, by order of the Supreme Court, Mrs. Laudo was "committed as an insane person" for the sudden onslaught of hallucinations, emotional disturbances, and mental deterioration.[92] Mr. Laudo demanded divorce on the grounds of his wife's adultery.

Testimony from a physician at the institution had observed that Mrs. Laudo was "mentally incapable of understanding the nature, quality, effect and consequences" of her extramarital actions and that she suffered from "*dementia praecox*," a mental disease considered to be permanent[93] Her court-appointed guardian ad litem, along with Mr. Laudo's counsel, did not contest Mrs. Laudo's insanity as complete grounds for divorce.[94] Despite the parties' agreement, the court, however, had to determine if insanity was an appropriate ground for divorce in the State of New York.[95]

The only case the court considered in its analysis was the aforementioned *Matchin* case, at this point, over seventy years

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89 Mattloff, *supra* note 20, at 501.
90 Laudo v. Laudo, 1919 U.S. Dist. LEXIS 699 (N.Y. App. Div. July 3, 1919).
91 *Id*.
92 *Id*. at 700.
93 *Id*.
94 *Id*.
95 *Id*.

old.[96] The court cited the case's reasoning that the goal of divorce is "undoubtedly to keep the sources of generation pure," and further included the *Matchin* court's passage that divorce for adultery is "less grievous" for a husband because he comes home empty-handed, while a woman will bring home an unwanted child.[97]

The guardian was extensively involved in this case, and acted, presumably, as defense counsel for Mrs. Laudo: he called witnesses, cross-examined Mr. Laudo's witnesses, and made inquiries with the court. The judge pointed out that though the ad litem bore the burden of proving insanity, he was swayed by testimony (including that from Mr. Laudo), that had effectively established that her insanity at the time of her adultery was uncontested, for the most part.[98] The judge ruled that while it was not presented as a defense explicitly, he considered the matter of insanity presented via testimony and ruled that it was an allowed defense to adultery; however, insanity was not proper grounds for divorce in the State of New York in the early 1900s, and Mr. Laudo's petition was dismissed with costs.[99] Only a few short years later, state lawmakers began introducing legislation that added incurable insanity to the growing list of grounds for divorce, having the mutual benefit of cleanly cutting ties with an incapacitated party, while also supporting the conservative religious belief that uniform divorce law was the only thing keeping the collapse of the American family at bay.[100] Though times were changing, the deep-rooted ideals of conservative Christianity's early influence on the fledgling country's legal system were still somehow permeating into the twentieth century.

D. *The Great Depression*

In 1934 the Supreme Court of Michigan decided the landmark case of *Stevens v. Stevens*, where Mr. Charles Stevens, through his probate court-appointed guardian ad litem, petitioned for divorce on the grounds of his wife's "extreme cruelty"; it was a case of

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96 *Id*.
97 *Id.* at 701.
98 *Id*. at 706.
99 *Id.* at 707.
100 Riley, *supra* note 5, at 134, 135.

first impression in the state.[101] Upon learning of the guardian's appointment, the defendant wife filed a motion to dismiss Mr. Stevens' petition because he was an incompetent and therefore "could not obtain a divorce either in his own name or in the name of his guardian."[102] Interestingly, it was Mrs. Stevens who had petitioned the court two years prior to have Mr. Stevens "committed to an institution for the insane"; the results of that petition are unknown.[103]

The judge allowed Mr. Stevens to resubmit his request after removal of mention of the guardian and with his sole signature as seal.[104] On those revisions and upon hearing arguments from the parties, the trial court judge granted Mr. Stevens' request for divorce and division of marital assets.[105] Mrs. Stevens appealed. Like the *Pyott* case, legal technicalities plagued Mr. Stevens' path to marital dissolution: a state statute flatly prohibited a guardian bringing a divorce action on behalf of her ward,[106] but Mr. Stevens was not formally adjudicated insane when Mrs. Stevens had requested it two years prior.[107] Further, the judge reasoned that the action before the court was not an action for divorce brought by an incapacitated person because the probate court had improperly granted Mr. Stevens an ad litem: probate's assignment of the guardian, while within the court's power, was purely statutory and had to be observed as such.[108] Improper service had rendered the probate court without jurisdiction for the guardian's appointment.[109]

The court upheld the trial judge's granting of divorce, because Mr. Stevens "was presumed to have mental capacity to comprehend the nature and effect" of the trial court proceedings, and because the presumption of competency also applied when "evidence was taken" during oral argument.[110] Though this case was mired with technicalities, it stands as one of the first cases

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101 Stevens v. Stevens, 1934 U.S. Dist. LEXIS 446, 448 (Mich. Apr. 3, 1934).
102 *Id*.
103 *Id*.
104 *Id*.
105 *Id*
106 *Id.* at 449.
107 *Id.*
108 *Id*.
109 *Id*.
110 *Id*. at 450.

where a guardian attempted to advocate divorce on behalf of an incapacitated ward, despite the challenging social views of disabled Americans at the time.

E. *The Modern Era*

In the coming decades, legislatures across the country unsuccessfully drafted bills that further complicated divorce actions with antiquated and anti-egalitarian ideas of marriage; these proposed statutes also ignored the situations of disabled people seeking marital dissolution.[111] Much to the chagrin of the conservatively religious, however, the sexual revolution in the 1960s and 70s would permeate the legal system with the gradual but powerful introduction and implementation of no-fault divorce statutes. California was the first state to enact no-fault divorces via the Family Law Act of 1969, signed into law by the then-governor Ronald Reagan.[112] The new act effectively removed the state's seven grounds for divorce and replaced them with only two: "irremediable breakdown of a marriage and incurable insanity."[113] California's new law proved to be the beginning of a landslide for much needed divorce reform, with only three states – Illinois, Pennsylvania, and South Dakota – keeping the former adversarial system in place by 1977.[114] Though imperfect, the introduction of no-fault divorce was and remains a highly favored mechanism for dissolution throughout the United States and is currently vehemently challenged by the Republican party to this day.[115]

The Court of Appeals for the Western District of Missouri decided the case of Ms. Lavon C. Parmer and her request for divorce in July of 1988.[116] *In re Parmer* was a difficult case: Ms. Parmer, who had been diagnosed with brain cancer, was deemed incapacitated, since she was struggling with the secondary effects of the cancer (including chronic confusion and seizures).[117] Prior to her diagno-

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111 Riley, *supra* note 5, at 135, 136.

112 *Id*. at 163.

113 *Id*.

114 *Id*.

115 Betsy Reed, *Conservative US Lawmakers Are Pushing for an End to No-Fault Divorce,* Guardian (June 25, 2024), https://www.theguardian.com/us-news/article/2024/jun/25/republicans-no-fault-divorce.

116 *In re* Parmer, 755 S.W. 2d 5 (Mo. Ct. App. 1988).

117 *Id*. at 6.

sis, however, Ms. Parmer had initiated an action for divorce against her husband, Mr. Harold B. Parmer.[118] Two months later Mr. Parmer petitioned the probate court for guardianship and conservatorship over his wife, but was challenged with a competing petition by Mrs. Winnie Michaels, Ms. Parmer's mother.[119] The court granted the guardianship and conservatorship to Mrs. Michaels, and Mr. Parmer did not appeal this decision.[120]

In short order, Mrs. Michaels petitioned the probate court for authorization to continue the action for divorce on behalf of her daughter.[121] She argued that because the action was initiated prior to Ms. Parmer's incapacity, it was in Ms. Parmer's best interest, and that but for the incapacity the action would be pursued by Ms. Parmer herself.[122] Mr. Parmer then entered as an interested party and contested the petition, requesting a change of judge and Mrs. Michaels' removal as guardian; his requests were denied and the court took the case under advisement.[123]

After testimony from Ms. Parmer's doctor and oral argument, the court reasoned that Mrs. Michaels had a duty to act in Ms. Parmer's best interests, and that as her guardian and conservator, Mrs. Michaels was "specifically authorized to prosecute and defend all actions instituted in behalf of or against" her daughter.[124] Ms. Parmer had demonstrated her desire for divorce while mentally able and had solidified that desire by filing the action; it was Mrs. Michaels' duty to continue that action, and the court deemed this course of action in her daughter's best interest. Mr. Parmer appealed that decision, but his efforts were ultimately unsuccessful.

Some thirty years later in Ohio, the court of appeals decided *McMillan v. McMillan*, in which the court was tasked with finding evidence that the incapacitated party *opposed* the divorce proceedings.[125] After thirteen years of marriage, Mr. James B.

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118 *Id*.

119 *Id*. at 5.

120 *Id*.

121 *Id*. at 5, 6.

122 *Id*. at 6.

123 *Id*.

124 *Id*.

125 McMillan v. McMillan, No. 109048, 2021 Ohio App. LEXIS 701 (Ohio Ct. App.), at *33.

McMillan left his marital home and begin a years-long stay at the home of Ms. Arizinna Hood, his biological daughter from a previous marriage.[126] Ms. Hood promptly filed for guardianship over her father, only days before he filed an action for divorce against his spouse, Mrs. Tonya McMillan, alleging "gross neglect of duty and incompatibility." Mrs. McMillan denied both allegations and assert that Mr. McMillan was incapacitated and could not, therefore, file an action for divorce.[127] Despite this, Mrs. McMillan petitioned unsuccessfully to be her husband's guardian.[128] The court granted Ms. Hood's motion, noting discrepancies in many of Mrs. McMillan's filings and testimony after finding that Mr. McMillan was diagnosed with "vascular and Alzheimer's dementia after suffering a stroke" and suffered from "cognitive deficits in language and memory, and was incompetent."[129] A year later, after Mr. McMillan had been moved to an assisted living facility, Mrs. McMillan requested the probate court determine that Mr. McMillan was "competent to divorce or competent to voluntarily dismiss the divorce proceedings," but the court refused, and the determination of incapacity stood.[130]

The domestic relations court heard testimony from Ms. Hood and Mrs. McMillan regarding Mr. McMillan's desires regarding his marriage. The testimony offered polar views: Ms. Hood testified that her father had filed for divorce multiple times, and his most recent filing was of his own volition and without her input; Mrs. McMillan testified that he had only filed once before and that it was not his desire to continue with the divorce proceedings currently.[131] Neither party called Mr. McMillan to testify.[132]

The court found no evidence of gross neglect of duty or incompatibility, but because Mr. McMillan had been absent from the marital home for longer than a year (under an Ohio statute[133]), there were grounds for divorce.[134] The court granted a decree

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126 *Id*. at *3.
127 *Id*.
128 *Id*. at *4.
129 *Id*. at *4, *10.
130 *Id*. at *6.
131 *Id*. at *6, *7.
132 *Id*. at *8.
133 Ohio Rev. Code. Ann. § 3105.01(J).
134 *McMillan*, 2021 Ohio App. LEXIS 701, at *9.

of divorce in August of 2019, which Mrs. McMillan unsuccessfully appealed. In her appeal, Mrs. McMillan alleged the court erred by disallowing Mr. McMillan to testify and by allowing the testimony of his guardian, Ms. Hood, to be the basis for granting the divorce.[135] While the previous cases hinged on whether an incapacitated party could *consent* to divorce, Mrs. McMillan asked the court to determine if Mr. McMillan could *oppose* the divorce proceedings. The court found that Mr. McMillan lacked capacity to oppose and that there was no evidence presented at trial indicating as much.[136] The court of appeals affirmed the judgment granting the divorce.[137]

Conclusion: Where the States Stand Today

To address the growing need for assistance, many states have created offices of public guardians or their equivalent, where a court may assign an ad litem to a person who, for various reasons, has been deemed in need of guardianship. The first of these states was, predictably, California: in 1945, Los Angeles County opened the Office of the Public Guardian, designed to initially aid those who were deemed incapable of managing their own finances due to incapacity.[138] Soon, other counties in California would model their guardianship programs after Los Angeles', broadening the guardianship duties, and eventually the idea would spread across the country.

Today, thirty-nine states have some form of a public guardian, operating at the county- or state-level for the indigent, incapacitated, and abandoned. Among those, only a select few—New York, California, Michigan, Minnesota, and Oregon—have statutes or case law that allow for a guardian to initiate, defend, or continue a divorce proceeding, with notable caveats (usually, that the guardian bears the burden of proving that the divorce is in the ward's

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135 *Id*. at *13, *17.

136 *Id*. at *32.

137 *Id*. at *33.

138 *Public Guardian*, Los Angeles County Department of Mental Health, https://dmh.lacounty.gov/our-services/public-guardian/#:~:text=The%20Los%20Angeles%20County%20Office,civilly%20committed%20to%20psychiatric%20facilities (last visited Oct. 7, 2024).

best interest).[139] Two states, Florida and Texas, allow a guardian to defend or continue a divorce action, but bar a guardian from initiating one.[140]

The remaining eleven states, Arkansas, Connecticut, Delaware, Idaho, Iowa, Kansas, Maryland, Mississippi, New Jersey, Oklahoma, and South Dakota, either lack formal state-wide programs, have limited services available, or must rely on local courts, private organizations, family members, and other private individuals to provide guardianship services for incapacitated adults. This gap in coverage typically leaves vulnerable adults without legal, medical, and financial protection and opens up those adults to varying forms of abuse, including domestic abuse within the confines of marriage.

The *Luxford* and *Buck* cases in colonial America set important legal precedents that would form the foundation of divorce and guardianship law in the United States for centuries to come. And the law only continues to change today: as recently as January 2024, North Carolina enacted legislation requiring public guardianship be considered only after exploring other less restrictive alternatives, such as a power of attorney or family support systems, which may be regarded as ineffective or intrusive, in order to protect and encourage autonomy in individuals whose incapacity is limited and not complete.[141] The work to advocate for individuals who are disabled and require counsel for divorces, annulments, and other types of dissolutions continues.

Divorce and disability have been and will be a part of the American story for as long as America has a story. Both are legal, personal, and public issues that have permeated the country's history and culture since the very beginning and continue to this day. Compared to those first cases, the United States has made substantial progress to restore dignity to those Americans who were once considered lesser-than. Though imperfect and requiring the work to continue, legal advocacy for disabled Americans has never been better: a guardian, in any of the varying definitions, has the power

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139 Cal. Fam. Code § 2332; Minn. Stat. § 524.5-313(10); N.Y: Surr. Ct. Proc. Act (§§ 1750 – 1761 (A Guardians of Persons Who are Intellectually Disabled and Developmentally Disabled); Or. Rev. Stat. § 125.315(1)(h); Burgess v. Burgess, No. 348068, 2020 Mich. App. LEXIS 2233 (Mich. Ct. App. Mar. 24, 2020).

140 Fla. Stat. § 744.361; Texas Estate Code § 1151.

141 N.C. Sess. L. 2023-124.

to enact the necessary mechanisms to ensure that a disabled citizen receives and retains all rights, respects, and benefits bestowed on all Americans. The country owes no small debt of gratitude to the lengthy and hard-fought battles of the disabled Americans that first stepped foot upon the shores of Virginia over four hundred years ago.

Kirsten Houtz

Comment, From Love to Law: The Evolution of Prenuptial Agreements Through History

Introduction

Prenuptial agreements, once viewed by courts as undermining the sanctity of marriage, have become a recognized tool for couples to define financial rights and obligations. This shift reflects broader societal changes in marriage and beliefs about individual autonomy and the legal community's efforts to establish enforceable yet equitable frameworks for these agreements. A prenup is a premarital agreement which is a legally binding contract that couples sign before getting married. Prenups have existed since at least the sixteenth century to alter the legal regimes for marital property and management.[1] The English Statute of Frauds requires that prenups be in writing to be enforceable.[2] As prenups have become more commonplace, they have also become more flexible and customizable to individual relationships.[3]

Before the Uniform Premarital Agreement Act (UPAA), prenups mostly protected the interests of the more propertied partner.[4] Prenups were typically not taken seriously until the UPAA.[5] States have adopted the UPAA to help prenups be more enforceable.[6] Twenty-seven states have adopted the Uniform Premarital Agreement Act (UPAA), but with specific variations.[7] These

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1 Leslie J. Harris et al., Family Law 624 (6th ed. 2023).

2 Sharon Thompson, Prenuptial Agreements and the Presumption of Free Choice 200 (2015).

3 *Id.*

4 *Id.*

5 *Id.*

6 "The Uniform Premarital Agreement Act (UPAA) has been adopted in 27 states." Linda J. Ravdin, *Postmarital Conduct Affecting Validity of Premarital Agreements*, Prac. Law., Aug. 2024, at 17.

7 Jenna Christine Colucci, Note, *The "P" Word: Ohio Should Adopt the Uniform Premarital Agreements Act to Achieve Consistency and Uniformity in the Treatment of Prenuptial Agreements*, 66 Clev. St. L. Rev. 215, 241 (2017).

variations can include standards, flexibility, and other aspects.[8] Since headlines about prenups are usually associated with celebrities, people may assume prenups are just for the rich and powerful.[9] But marriage laws seek to protect the most-propertied partner.[10] As prenups have become more common two groups of people are likely to get a prenup.[11] Those who are educated and have high incomes.[12] These couples typically have accumulated assets before marriage.[13] The other group likely to get a prenup are people getting married for a second time.[14] They do this to protect the assets from the first marriage.[15] To be valid, prenups have to pass the usual contract requirements.[16] They must be voluntary, with consideration, and satisfy the statute of frauds, and, some states have more requirements that need to be satisfied for a prenup to be valid.[17] There are three approaches to considering the enforceability of contracts.[18] There is the Uniform Premarital Agreement Act (UPAA) approach, the American Law Institute (ALI) approach, and the Uniform Premarital and Marital Agreement Act (UPMAA) approach.[19] Part I of this Comment consider the UPAA approach, Part II considers the ALI approach, and Part III considers the UPMAA approach.

I. The Uniform Premarital Agreement Act (UPAA) Approach

In 1983, there was recognition of a need for uniform standards when determining the enforceability of premarital agreements.[20]

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8 *Id*.

9 Allison A. Marston, *Planning for Love: The Politics of Prenuptial Agreements*, 49 Stan. L. Rev. 887, _898 (1997).

10 Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 Yale J.L. & Feminism 229, 234 (1994).

11 Marston, *supra* note 9, at 898.

12 *Id.* at 892.

13 *Id.* at 896.

14 *Id.* at 895.

15 *Id.*

16 *Id.* at 898.

17 *Id.*

18 *Id.*

19 Harris et al., *supra* note 1, at 624.

20 *See* Elizabeth Barker Brandt, *The Uniform Premarital Agreements Act and the Reality of Premarital Agreements in Idaho*, 33 Idaho L. Rev. 539, 540-41 (1997). *See generally* Unif. Premarital Agreement Act § 9 (Unif. Law Comm'n 1983).

The Uniform Premarital Agreement Act sought to establish a standardized framework for the creation, interpretation, and enforcement of prenuptial agreements across jurisdictions.[21] The core principles of this approach are voluntariness, financial disclosure, and fairness. The Act aimed to balance individual autonomy with public policy concerns about equity and justice.[22] This problem came from the recognition that couples can live in multiple states throughout their marriage.[23] The lack of a uniform standard can leave couples with an unenforceable and invalid agreement upon relocation.[24] The Uniform Premarital Agreement Act takes the position that the parties should reach the agreement they want and should be able to rely on the enforceability at separation or divorce.[25] This sought to ensure that premarital agreements that are properly executed in one state would still be binding and valid in another state.[26] Under the UPAA a premarital agreement is not enforceable if the party against whom enforcement is sought proves that either (1) they did not voluntarily execute the agreement or (2) the agreement was unconscionable at the time of the execution and they did not receive adequate financial disclosure.[27] To do this the party has to show they (1) were not provided a "fair and reasonable disclosure" of the other party's assets and financial

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21 *See Why States Should Adopt UPAA*, Unif. L. Comm'n, *http://www.uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UPAA* (last visited Nov. 15, 2024).

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

26 *See* Jorge E. Salazar, *More Than Just Paper: The Rising Popularity of Premarital Agreements*, 66 Advocate 32, 34 (Dec. 2023).

27 As stated in the UPAA:

> A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:(1) that party did not execute the agreement voluntarily; or (2) the agreement was unconscionable when it was executed and, before execution of the agreement, that party (i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party; (ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and (iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

Unif. Premarital Agreement Act § 6(a) (Unif. Law Comm'n 1983).

obligations; (2) did not "voluntarily and expressly waive, in writing any right to disclosure" of the other party's assets or financial obligations, (3) "did not have, or reasonably could not have had, an adequate knowledge" of the other party's assets or financial obligations.[28] The other party can disprove that a disclosure was not made.[29] This approach does not require a substantive review of the agreement. In other words, the UPAA is willing to enforce an unconscionable agreement as long as the parties disclose and satisfy all the requirements when it comes to disclosing properly.[30] There is an exception to the lack of substantive review, if there is an alimony provision.[31] This approach will examine a premarital agreement to determine at the time of enforcement whether the terms of the agreement modify or eliminate alimony.[32] Under the UPAA, the provisions that eliminate or modify alimony would be invalid if they cause one party to be eligible for public assistance.[33] There are courts that will at least consider the advice of counsel a factor in establishing if there was no fraud or duress.[34]

By focusing on voluntariness and disclosure, the UPAA places a burden on the disadvantaged party to challenge the agreement after its execution. Arguably, this framework disproportionately favors wealthier and more legally sophisticated parties who may exploit their position to enforce terms that leave the disadvantaged party vulnerable. An example of this would be

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28 *Id.*

29 *Id*.

30 *Id.*

31 *Id.*

32 As stated in the UPAA:

> If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility.

See Unif. Premarital Agreement Act § 6(b) (Unif. Law Comm'n 1983).

33 *Id.*

34 *See, e.g.,* Owen v. Owen, 759 S.E.2d 468, 472 (W. Va. 2014) ("although advice of independent counsel at the time parties enter into a prenuptial agreement helps demonstrate that there has been no fraud, duress or misrepresentation, and that the agreement was entered into knowledgeably and voluntarily, such independent advice of counsel is not a prerequisite to enforceability").

the lack of mandatory requirements for independent legal counsel. The UPAA is also criticized because it is silent on substantial fairness at the time of enforcement. This approach was drafted in 1983, and it did not anticipate the complexities of modern relationships. Examples might include agreements that could become inequitable over time due to unforeseen changes such as the birth of children or significant career changes made by one spouse. The act is also silent on assets such as intellectual property and cryptocurrency, which leaves courts to look for terms outside the Act.

II. The American Law Institute (ALI) Approach

Before the American Law Institute (ALI) approach, there were public policy concerns regarding the enforcement of prenuptial agreements. Factors such as rising divorce rates, changes in gender roles, and increased individual financial independence led to a greater acceptance of prenuptial agreements.[35] The American Law Institute has played a significant role in finding an enforceable yet equitable way for couples to define financial rights and obligations. The ALI approach was introduced in 2002 through its *Principles of the Law of Family Dissolution*.[36] The standards aim to address procedural fairness, transparency, and substantive equity in prenuptial agreements.[37] This approach has three main principles and recommendations. The first principle is procedural fairness.[38] To achieve this, there has to be a full disclosure of financial information. ALI recommends that there be independent legal counsel to ensure that there was informed consent.[39] The second principle is

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35 Angela Marie Caulley, *Policing the Prenup: When Love at First Sight Deserves a Second Look*, 55 Am. J. Fam. L. 123 (2023).

36 AM. LAW INST. (ALI), PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION ANALYSIS AND RECOMMENDATIONS (2002), § 7.02 cmt. a.

37 *Id.*

38 *Id*.

39 *Id.* § 7.04(3)(c). Section 7.04(3)(c) provides:

> In the case of agreements concluded without the assistance of independent legal counsel for each party, the agreement states, in language easily understandable by an adult of ordinary intelligence with no legal training,
>
> (i) the nature of any rights or claims otherwise arising at dissolution that are altered by the contract, and the nature of that altercation, and independent counsel,

substantive fairness, which focuses on whether agreements are unconscionable or create severe inequalities.[40] This approach recommends that there be judicial review to balance freedom of contract with public policy.[41] The third principle is the timing of execution and the voluntariness of the parties when agreeing. The ALI approach has guidelines to mitigate those concerns. [42]

A starting point in this approach is that the agreement must be in writing and signed by both parties to be enforceable.[43] The agreement must be signed voluntarily.[44] This means that the agreement was signed with consent and the parties were not under duress.[45] A party can show that the agreement was not signed voluntarily if it demonstrates: (1) the parties signed the agreement thirty days or fewer before marriage, (2) the parties were not advised to seek legal advice, and (3) the parties did not have a "reasonable" amount of time to seek legal advice.[46] If neither party sought out independent legal advice then they have to disclose in the agreement that the agreement may be altered at the time of divorce.[47] The party who seeks the enforcement of the clause must show that they disclosed all their financial assets and they provided a safe-harbor

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(ii) that the interests of the spouses with respect to the agreement may be adverse.

40 *Id.*

41 *Id.*

42 *Id.* § 7.04(5). Section 7.04(5) provides:

> To enforce terms that limit claims the other party would otherwise have to compensatory payments, or to share in marital property, a party must show that prior to the agreement's execution the other party knew, at least approximately, the moving party's assets and income, or was provided by the moving party with a written statement containing that information. The general standard set forth in the preceding sentence is always satisfied by a showing -prior to signing the agreement - that the party seeking to enforce it provided the other party with a written statement accurately listing (i) his or her significant assets, and their total approximate market value; (ii) his or her approximate annual income for each of the preceding three years; and (iii) any significant future acquisitions, or changes in income, to which the party has a current legal entitlement, or which the party reasonably expects to realize within three years of the agreement's execution.

43 *Id.* § 7.04(1).

44 *Id.* § 7.04(2).

45 *Id.*

46 *Id.* § 7.04(3).

47 *Id.* § 7.04(3)(b).

clause detailing income and assets.[48] The ALI approach has three triggers that would allow a court to engage in a substantive review of the agreement. The three triggers are: (1) a certain amount of time has passed (this approach suggests at least ten years), (2) the parties did not have any children at the time the prenuptial agreement was executed, or the parties adopted a child or had a child while married, and (3) the parties experienced a "substantial change in circumstances" that they could not have anticipated at the time of signing.[49] The ALI approach places greater weight on the fairness of the result at the time of enforcement even if it makes the result less predictable.[50] A court under this approach would not enforce an agreement if enforcement would create a "substantial injustice."[51] In determining if there is a substantial injustice, a court would focus on what the party's position would be if the agreement were enforced versus what the outcome would be if state law governed.[52]

III. The Uniform Premarital Agreement Act (UPMAA) Approach

The Uniform Premarital Marital Agreement Act adopted in 2012 takes a middle-ground relative to the UPPA and ALI approaches; it considers common law and is rooted in contract doctrine. The UPMAA approach also stemmed from the concern that there is no uniformity in the enforcement of prenuptial agreements.[53] This approach also recognizes that problems arise as couples move to different states.[54] The goals of the UPMAA are ensuring consistency among states that adopt it, protecting both

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48 *Id.*

49 *Id.* § 7.05(2)(c) ("There has been a change in circumstances that has a substantial impact on the parties or their children, but when they executed the agreement the parties probably did not anticipate either the change or its impact.").

50 Barbara A. Atwood & Brian H. Bix, *A New Uniform Law for Premarital and Marital Agreements*, 46 Fam. L.Q. 313, 330 (2012).

51 *See* ALI Principles, *supra* note 36, § 7.05(3).

52 *Id.*

53 *See Premarital and Marital Agreements Act*, Unif. L. Commission, http://www.uniformlaws.org/Act.aspx?title=Premarital%20and%20Marital%20Agreements%20Act (last visited Nov. 17, 2024).

54 *Id.*

parties from coercion or unfair agreements, encouraging clarity and precision in drafting agreements, and addressing the changes in societal attitudes towards marriage and divorce since the 1980s.[55] Unlike the UPA, the UPMAA addresses both prenuptial and postnuptial agreements and reflects understanding that both of these types of contracts are increasingly used.[56] The agreement must be in writing and signed by both parties.[57] Execution must be voluntary.[58] This approach is explicit in forbidding agreements that were made under duress, coercion, or undue influence.[59] No additional consideration is required beyond the act of marriage itself. Both parties must provide a "fair and reasonable" disclosure of assets, liabilities, and income unless expressly waived. Inadequate disclosure is a key factor in invalidating agreements.[60] The UPMAA uses a two-pronged approach when addressing whether there was unconscionability. It asks whether the agreement was unconscionable when executed and whether the terms would be unfairly one-sided at the time of enforcement due to unforeseen circumstances.[61] This ensures that agreements remain reasonable and fair over time.[62] Provisions related to spousal support can be unenforceable if they leave one party destitute or dependent on public assistance.[63] Agreements affecting child support or custody are prohibited, purposely leaving it up to the courts to protect the best interests of the child.[64]

Under this approach an agreement is unenforceable if the party against whom enforcement is sought proves: (1) the party

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55 *Id.*

56 *Compare* Unif. Premarital Agreement Act § 6 (Unif. Law Comm'n 1983), *with* Unif. Premarital and Marital Agreements Act § 9 (Unif. Law Comm'n 2012).

57 Unif. Premarital and Marital Agreements Act § 9(a)(1) (Unif. Law Comm'n 2012).

58 *Id*.

59 *Id*.

60 *Id.* § 9(a)(4).

61 Terry Care, *Why States Should Adopt SB 247: Uniform Premarital and Marital Agreement Act*, at 1, https://www.leg.state.nv.us/App/NELIS/REL/77th2013/ExhibitDocument/OpenExhibitDocument?exhibitId=4237&fileDownloadName=Why%20States%20Should%20Adopt-Terry%20Care-SB%20247.pdf (last visited Nov. 17, 2024).

62 *Id.*

63 *Id.*

64 *Id.*

did not voluntarily sign or consent was given under duress, (2) the party did not have access to independent counsel, (3) if the party did not have access to legal counsel, the agreement did not include a notice of waiver of rights or a plain language explanation of the rights and/or if obligations are being waived or modified, or (4) the party did not receive adequate disclosure of the other party's finances or assets.[65] A court can refuse to enforce a term of a premarital agreement if the party against whom enforcement is sought proves either that the term was unconscionable when the agreement was signed or the enforcement of the term would result in a "substantial hardship" for a party due to a "material change in circumstances arising after the agreement was signed."[66]

By creating a consistent standard, this approach reduces the likelihood of different rulings in different states. The detailed requirements for voluntariness, disclosure, and unconscionability make the drafting process more transparent. This act addresses unforeseen changes which allows the courts to assess fairness both at the time of execution and enforcement. Although the UPMAA has strengths, there are still some aspects to it that have been criticized. Not all states have adopted this approach leading to continued inconsistency.[67] Critics argue that the safeguards in this approach are still not enough to protect vulnerable parties from being exploited.[68] Others argue that the unconscionability provision gives judges too much latitude which undermines contractual certainty.[69]

IV. State Approaches to Prenuptial Agreements

States have chosen how they approach prenuptial agreements. There are some similarities and differences as to how these states have approached prenuptial agreements. The following are the approaches some states have taken.

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65 Unif. Premarital and Marital Agreements Act § 9(a)(1) (Unif. Law Comm'n 2012).

66 Unif. Premarital and Marital Agreements Act § 9(f)(2) (Unif. Law Comm'n 2012).

67 *See generally* ALI Principles, *supra* note 36, § 7.05; Unif. Premarital Agreement Act § 6 (Unif. Law Comm'n 1983); Unif. Premarital and Marital Agreements Act § 9 (Unif. Law Comm'n 2012).

68 Brandt, *supra* note 20.

69 *Id.*

District of Columbia

The statute that governs prenuptial agreements in the District of Columbia is D.C. Code § 46-401. Prenups are allowed for domestic partners.[70] This means that same-sex or opposite-sex couples are allowed to get a prenup. In the District of Columbia, prenuptial agreements are legal contracts created to outline how assets, debt, and other financial matters will be handled in the case of divorce, separation, or death. They are enforceable if certain requirements are met. The agreements must be voluntary.[71] Both parties must agree voluntarily, without any coercion or duress.[72] There must be full disclosure.[73] Both parties must provide fair and reasonable disclosure of their assets, liabilities, and other financial circumstances.[74] The terms have to be fair and reasonable at the time it is signed and not deemed unconscionable. This means the agreement cannot be extremely unfair or one-sided. A prenuptial agreement must be in writing and signed by both parties. Oral agreements are not enforceable. While legal counsel is not required, it is highly recommended that both parties seek independent legal counsel to ensure that they understand the agreement and are giving informed consent. If one party does not have legal representation, it could affect whether an agreement is enforced or not.

Prenuptial agreements are generally enforceable in the District of Columbia unless they contain provisions that are illegal or against public policy. These provisions could be waiving child support or violating other protected provisions.[75] If the terms of the agreement are disputed, a court will review the agreement to see if it is fair, voluntary, and based on full financial disclosure. A prenuptial agreement could address property division (how assets and debts will be divided in case of divorce), alimony (whether one spouse will receive spousal support and if so, how much), estate planning (how assets will be handled after death), debts (who will be responsible for debts acquired before or during the marriage).[76] A prenuptial agreement can be modified or revoked

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70 D.C. Code § 46-401 (Supp. 2023).
71 D.C. Code § 46–502 (1996).
72 *Id.*
73 *Id.* § 46–506.
74 *Id.*
75 *Id.* § 46–502.
76 *Id.*

after marriage through a written agreement signed by both parties.[77] Postnuptial agreements are also enforceable in the District of Columbia with the same requirements for disclosure, fairness, and voluntary consent.[78]

Arizona

Prenuptial agreements are governed by the Arizona Uniform Premarital Agreement Act (UPAA). It is codified in the Arizona Revised Statutes §§ 25-201 to 25-205. The agreement must be voluntary.[79] Both parties must enter the agreement willingly, without coercion, undue influence, or duress.[80] If there is evidence of pressure to sign the agreement then there is a possibility the agreement could be found unenforceable.[81] The agreement must be written and signed by both parties.[82] Under Arizona law, verbal agreements are not enforceable.[83] There must be full disclosure.[84] Before the agreement is signed, both parties must fully disclose their financial situation, including assets, debts, and income.[85] If relevant information is not disclosed, then the agreement can be found to be invalid.[86] The agreement must be fair and reasonable at the time of signing the agreement.[87] An agreement can favor one party but it cannot be so one-sided that it would be found unconscionable.[88] Legal counsel is not required. If the legal conditions are not met then a court may declare an agreement partially or wholly unenforceable. Arizona is a community property state.[89] This means that assets and debts acquired during the marriage are generally considered jointly owned.[90] This can be overridden by a

77 *Id.*
78 *Id.* § 46–505.
79 Ariz. Rev. Stat. Ann. § 25-201 (2024).
80 *Id.*
81 *Id.*
82 *Id.*
83 *Id.* § 25-202.
84 *Id.* § 25-201.
85 *Id.*
86 *Id.*
87 *Id.*
88 *Id.*
89 Ariz. Rev. Stat. Ann. § 25-211 (2024).
90 *Id.*

prenuptial agreement if couples decide to depart from the default rule and address how property and finances are handled.

The prenuptial agreements can address the division of property (specify how property is to be divided in the event of divorce or separation), spousal maintenance (also known as alimony—whether one party will pay spousal support and if so the amount and duration), debts (determine responsibility for debts incurred before and after marriage), business interests (protection of business ownership brought into a marriage), and estate planning (define inheritance rights and other estate planning matters).[91] There are some limitations in Arizona of what can be included in a prenuptial agreement. A prenuptial agreement cannot decide matters related to child support or custody.[92] These issues will be determined by a court based on the children's interests at the time of separation or divorce.[93] If the agreement is found to be excessively unfair or was signed under unfair circumstances (such as incomplete disclosure), a court could refuse to enforce it.[94] A prenuptial agreement can be modified or revoked after marriage if both parties agree in writing.[95]

Arkansas

In Arkansas, prenuptial agreements are legally governed by the Uniform Premarital Agreement Act (UPAA). It is codified in Arkansas Code Annotated §§ 9-11-401 to 9-11-409. Both parties must agree willingly.[96] Coercion, undue influence, or duress could invalidate the agreement.[97] The prenuptial agreement must be in writing and signed by both parties.[98] Verbal agreements are not enforceable. Both parties must provide a fair and full disclosure of their financial circumstances, including assets, debts, and income.[99] If one party withholds financial information, the agreement could

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91 *Id.* § 25-203.
92 *Id.*
93 *Id.*
94 *Id.*
95 *Id.* § 25-204.
96 Ark. Code Ann. § 9-11-402 (2023).
97 *Id.*
98 *Id.*
99 *Id.* § 9-11-406.

be invalidated.[100] The agreement must not be unconscionable, meaning it cannot be grossly unfair at the signing or at enforcement.[101] A court may scrutinize the terms to make sure they are not excessively one-sided.[102]

The prenuptial agreement can cover division of property (cover how assets and debts will be divided in the event of divorce or separation), spousal support (also known as alimony; whether one spouse will pay spousal maintenance, and if so, how much), debt responsibility (allocation of debts incurred before or during the marriage), business interests (protection of business assets or interests owned before the marriage), estate planning (designation of inheritance rights or exclusions).[103] There are limitations to what can be included in a prenuptial agreement in Arkansas. One of the limitations is child support and custody.[104] A prenuptial agreement cannot address or limit child support, custody, or visitation rights. A court determines these matters based on the best interest of the child. Another limitation is illegal or unconscionable terms.[105] Provisions that are illegal or heavily unfair may render the prenuptial agreement unenforceable.[106] Arkansas is an equitable distribution state, meaning that in the absence of a prenuptial agreement, marital assets are divided fairly but not necessarily equally in the event of a divorce.[107] In Arkansas, a prenuptial agreement can be modified or revoked if both parties agree to it in writing.[108]

California

In California, prenuptial agreements are governed by the California Uniform Premarital Agreement Act (UPAA), codified in California Family Code §§ 1610-1617. Both parties must sign the agreement willingly.[109] Any evidence of coercion, undue influence,

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100 *Id.*
101 *Id.*
102 *Id.*
103 *Id.* § 9-11-403.
104 *Id.*
105 *Id.*
106 *Id.*
107 *Id.* § 9-11-402.
108 *Id.* § 9-11-405.
109 Cal. Fam. Code § 1611 (2023).

or duress can make the agreement invalid.[110] Both parties must provide full and fair disclosure of their financial circumstances, including assets, debts, income, and liabilities before signing the agreement.[111] California requires that both parties have access to independent legal counsel or explicitly waive this right in writing.[112] If one party does not have legal representation, they must be fully informed of the terms and voluntarily waive their right to an attorney.[113] California requires at least seven days between the presentation of the prenuptial agreement and its signing to ensure neither party feels rushed or pressured.[114] The terms of the agreement must be fair and not unconscionable at the time of enforcement.[115] Courts will review the agreement to ensure that it does not disproportionately favor one party.[116]

A prenuptial agreement in California can address the division of property (how community and separate property will be divided in case of divorce or separation), spousal support (include terms about waiving or limiting spousal support), debt responsibility (clarify responsibility for debts acquired before or during the marriage), business interests (protect business assets or income generated during the marriage), estate planning (designate inheritance rights, trusts, or other estate planning considerations).[117] A prenuptial agreement in California cannot dictate child support, custody, or visitation arrangements.[118] These matters are determined by the court based on the child's best interests. Provisions that are excessively unfair or would leave one party financially destitute may be struck down by a court.[119] Any terms that violate state or federal law are unenforceable.[120] A provision covering spousal support can be included in a prenuptial agreement but is subject to heavy scrutiny and may be invalidated if it is deemed unfair or one-sided

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110 *Id.* § 1614.
111 *Id.*
112 *Id.*
113 *Id.*
114 *Id.*
115 *Id.*
116 *Id.*
117 *Id.* § 1612.
118 *Id.*
119 *Id.*
120 *Id.*

at the time of enforcement.[121] California is a community property state, which means that absent a prenuptial agreement assets and debts acquired during the marriage are typically divided upon divorce. A prenuptial agreement in California can be amended or revoked after marriage through a written agreement signed by both parties.[122]

Colorado

Prenuptial agreements are governed by the Colorado Uniform Premarital and Marital Agreements Act, codified under the Colorado Revised Statutes § 14-2-301 to § 14-2-313. Both parties must agree voluntarily.[123] Evidence showing otherwise can make an agreement be deemed invalid.[124] Prenuptial agreements must be in writing and signed by both parties to be enforceable.[125] Under Colorado law, verbal agreements are not valid.[126] Both parties must provide fair and reasonable disclosure of their financial circumstances, including assets, liabilities, income, and debts.[127] Failure to disclose relevant financial information can render the agreement unenforceable. The terms of the agreement must be fair and reasonable.[128] A court may refuse to enforce a prenuptial agreement that is excessively one-sided or unconscionable.[129] The agreement must be executed before the wedding to avoid claims of undue pressure or lack of time to review.[130] A prenuptial agreement can address property division, spousal maintenance, debts, business interests, and estate planning. If there is a waiver of spousal maintenance, then the waiver cannot be unconscionable at the time of enforcement.[131] A prenuptial agreement cannot have child-related matters, unfair or unconscionable terms, or public

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121 *Id.*
122 Cal. Fam. Code § 1614 (2023).
123 Colo. Rev. Stat. § 14-2-309 (2023).
124 *Id.* § 14-2-306.
125 *Id.* § 14-2-310.
126 *Id.* § 14-2-309.
127 *Id.*
128 *Id.*
129 *Id.*
130 *Id.*
131 *Id.*

policy violations.[132] Public policy violations can include encouraging divorce or illegal activities.[133]

Colorado is an equitable distribution state, meaning that if there is no prenuptial agreement, marital property is divided fairly but that may not necessarily be equally at divorce.[134] Separate property (property owned before the marriage, gifts, or inheritances) typically remains with its original owner, unless it has been commingled with marital assets.[135] A prenuptial agreement can provide clarity by defining how property will be classified and divided. A prenuptial agreement can be modified or revoked but any changes must be in writing, signed by both parties, and follow the same formalities as the original agreement.[136]

Connecticut

In Connecticut prenuptial agreements are governed by the Connecticut Premarital Agreement Act, codified in the Connecticut General Statutes §§ 46b-36a to 46b-36j. The key requirements for prenuptial agreements are: both parties must sign the agreement willingly, they must be in writing and signed by both parties to be legally binding, there must full and fair disclosure of their financial circumstances, and the agreement must be reasonable and fair.[137] Prenuptial agreements can cover division of property, spousal support, debts, business interests, and estate planning.[138] For a prenuptial agreement to be enforceable, it must have been executed with adequate time for review and understanding.[139]

Prenuptial agreements can be modified or revoked after marriage if both parties agree to it in writing.[140] Absent a prenuptial agreement, Connecticut follows the equitable distribution system

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132 *Id.* § 14-2-310.
133 *Id.*
134 *Id.* § 14-2-302.
135 *Id.*
136 *Id.*
137 Conn. Gen. Stat. § 46b-36a (1995).
138 *Id.* § 46b-36d.
139 *Id.* § 46b-36g.
140 *Id.* § 46b-36f.

for dividing marital property after a divorce.[141] Marital property will be divided fairly although not necessarily equal.[142]

Delaware

In Delaware, prenuptial agreements are recognized and governed by general contract principles and Delaware Code Title 13, Chapter 1, Section 301. The key requirements are that both parties must agree voluntarily, the prenuptial agreement must be in writing and both parties must sign, and there has to be full and accurate financial disclosure and fair and reasonable terms.[143] A prenuptial agreement can cover the division of property, spousal support, debt allocation, business interests, and estate planning.[144] Although spousal support can be specified or waived, a court may scrutinize provisions that leave one party in financial hardship.[145] A prenup cannot include child support and custody, unfair or unconscionable terms (determined at the time of enforcement), or public policy violations.[146]

The prenuptial agreements can be amended or revoked after marriage but any changes must be made in writing and signed by both parties.[147] Absent a prenuptial agreement, Delaware will follow the equitable distribution model for dividing property during a divorce.[148] Assets and debts are divided fairly although that may not be equally.

Florida

The Uniform Premarital Agreement Act (UPAA) approach is followed in Florida. It is codified in Florida Statutes §§ 61.079. These agreements allow engaged couples to establish rules about property division, spousal support, and financial responsibilities before the marriage.[149] The key requirements are that the parties

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141 *Id.* § 46b-36.
142 *Id.*
143 Del. Code Ann. tit. 13, § 322 (2023).
144 *Id.* tit. 13, § 323.
145 *Id.* tit. 13, § 326.
146 *Id.* tit. 13, § 323.
147 *Id.* tit. 13, § 325.
148 *Id.* tit. 13, § 311.
149 Fla. Stat. § 61.079(4)(a) (2018).

must agree voluntarily, the agreement must be written and signed by both parties, there must be a full financial disclosure, and the agreement must be fair and reasonable at the time of enforcement.[150] The parties are not required to seek independent legal counsel. A verbal agreement is not valid.[151]

A prenuptial agreement is not allowed to address child support or custody, have public policy violations, or contain unfair or unconscionable terms.[152] Terms that are the result or coercion, fraud, or duress or that are excessively one-sided or would leave a party destitute may be struck down.[153] Florida is an equitable distribution state so marital property is divided fairly but not necessarily equally in case of a divorce without a prenuptial agreement.[154] Prenuptial agreements can be modified or revoked after marriage if both parties agree in writing.[155]

Hawaii

In Hawaii, prenuptial agreements are governed by the Uniform Premarital Agreement Act, codified in Hawaii Revised Statutes § 572D-1 to § 572D-11. The key requirements for a prenuptial agreement include that it has to be entered into voluntarily, written, and signed by both parties, provide a full financial disclosure, and the terms have to be fair and reasonable.[156] Prenuptial agreements can cover the division of property, spousal support, debt allocation, business interests, and estate planning.[157]

Prenuptial agreements cannot cover child support and custody.[158] These matters are decided by the court based on the child's best interests. The prenuptial agreement cannot include any provisions that are public policy violations.[159] Terms that are excessively one-sided or leave one party in severe financial hardship

150 *Id.* § 61.079(7).
151 *Id.*
152 *Id.* § 61.079(4)(b).
153 *Id.*
154 Fla. Stat. § 61.077 (2018).
155 *Id.* § 61.079(6).
156 Haw. Rev. Stat. § 572D-6 (2023).
157 *Id.*§ 572D-3.
158 *Id.* § 572D-6.
159 *Id.*

may not be enforced by a court.[160] In the absence of a prenuptial agreement, Hawaii is an equitable distribution state.[161] This means that the court will divide assets fairly but not necessarily equally. Prenuptial agreements in Hawaii can be revoked or modified if both parties agree to it in writing.[162]

Idaho

In Idaho, prenuptial agreements are governed by the Uniform Premarital Agreement Act (UPAA), codified in Idaho Code §§ 32-921 to 32-924. The essential requirements for a prenuptial agreement are voluntariness, the agreement must be in writing and signed by both parties, full financial disclosure, and fair and reasonable terms.[163] In Idaho, prenuptial agreements can cover the division of property, spousal support, debts, business interests, and inheritance rights.[164]

Prenuptial agreements cannot contain provisions regarding child support, custody, or visitation rights. They also cannot contain unfair or unconscionable terms or terms that would violate public policy.[165] Courts could refuse to enforce a prenuptial agreement if it was signed under duress or coercion, significant financial information was withheld, or if the agreement's terms were grossly unfair at enforcement.[166] Idaho is a community property state, meaning that in the absence of a prenuptial agreement, marital assets and debts are generally divided equally during a divorce.[167] A prenuptial agreement can be modified or revoked if both parties agree to it in writing.[168]

Illinois

Prenuptial agreements in Illinois are governed by the Illinois Uniform Premarital Agreement Act (IUPAA). This is codified in

160 *Id.*
161 *Id.* § 580-12.
162 *Id.* § 572D-5.
163 Idaho Code § 32-925 (1995).
164 *Id.* § 32-923.
165 *Id.* § 32-925.
166 *Id.*
167 *Id.* § 32-906.
168 *Id.* Idaho Code § 32-924.

750 ILS 10/1 to 10/11. Prenuptial agreement have to be voluntary, written and signed by both parties, provide full financial disclosure, and fair and reasonable terms.[169] Prenuptial agreements can cover division of property, spousal support, debt allocation, business interests, and estate planning.[170]

Child support and custody, public policy violations, and unfair or unconscionable terms cannot be included in a prenuptial agreement.[171] A prenuptial agreement can be amended or revoked after marriage if both parties agree in writing.[172] Illinois is an equitable distribution state so in the absence of a prenuptial agreement, marital property is divided fairly but not necessarily equally in a divorce.[173]

Indiana

Prenuptial agreements are governed by the Uniform Premarital Agreement Act (UPAA) codified in Indiana Code Title 31, Article 11, Chapter 3. The key requirements for a prenuptial agreement are that both parties must agree voluntarily, and the agreement must be written and signed, with full disclosure, and fair and reasonable terms at the time of signing and enforcement.[174] A prenuptial agreement can include provisions regarding the division of property, alimony, debt allocation, business interests, and estate planning.[175]

A prenuptial agreement cannot include provisions regarding child support or custody, provisions that violate public policy or state law, or unfair or unconscionable terms.[176] Indiana is an equitable distribution state so in the absence of a prenuptial agreement, assets will be divided fairly but not equally.[177] A prenuptial agreement can be amended or revoked after marriage but it must be done in writing and signed by both parties.[178]

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169 750 Ill. Comp. Stat. 10/7 (2023).
170 750 Ill. Comp. Stat. 10/4 (2023).
171 *Id.*
172 750 Ill. Comp. Stat. 10/6 (2023).
173 750 Ill. Comp. Stat. 5/503 (2023).
174 Ind. Code § 31-11-3-8 (1997).
175 *Id.* § 31-11-3-5.
176 *Id.*
177 Ind. Code § 31-15-7-5 (2023).
178 Ind. Code § 31-11-3-7 (1997).

Kansas

In Kansas, prenuptial agreements are governed by the Kansas Premarital Agreement Act (KUPAA), which is codified in Kansas Statutes Annotated § 23-2401 to 23-241. Both parties must voluntarily sign the agreement.[179] Coercion, fraud, or duress could make the agreement invalid.[180] Prenuptial agreements must be in writing and signed by both parties.[181] Verbal agreements are not enforceable.[182] Both parties must fully disclose their financial situation, including assets, debts, and income.[183] Failure to disclose material financial information can render the agreement unenforceable.[184] The terms must be fair and reasonable at the time of signing, and they must not be unconscionable when enforced.[185] Kansas courts will not enforce an agreement that would leave one party destitute or otherwise unfairly disadvantaged.[186] Prenuptial agreements can include provisions regarding the division of property, spousal support, debt responsibility, business interests, and inheritance rights.[187]

Prenuptial agreements cannot address child support, custody, or visitation rights.[188] These issues are decided by the court based on the best interests of the child. Provisions that violate public policy or state law, including those that are deemed unconscionable or unfair, will be unenforceable.[189] Kansas is an equitable distribution state meaning that in case of a divorce marital property is divided fairly but not necessarily equally. A prenuptial agreement allows couples to override this default rule.[190] A prenuptial agreement can be modified or revoked after marriage. However, any modifications must be made in writing and signed by both parties.[191]

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179 Kan. Stat. Ann. § 23-2403 (2023).
180 *Id.* § 23-2407.
181 *Id.*
182 *Id.*
183 *Id.*
184 *Id.*
185 *Id.*
186 *Id.*
187 *Id.* § 23-2404.
188 *Id.*
189 *Id.*
190 Kan. Stat. Ann. § 23-2711 (2012).
191 Kan. Stat. Ann. § 23-2406 (2023).

Maine

In Maine, prenuptial agreements are governed by the Maine Uniform Premarital Agreement Act, codified in Title 19-A, § 610 of the Maine Revised Statutes. Both parties must agree voluntarily.[192] The prenuptial agreements must be in writing and signed by both parties.[193] In Maine, verbal agreements are not enforceable. Both parties must fully disclose their financial situation, including assets, debts, and income.[194] If a party fails to disclose significant information, that can render the agreement unenforceable.[195] The terms must be fair and reasonable at the time they are executed and at the time of enforcement.[196] A prenuptial agreement can cover the division of property, alimony, debt allocation, business interests, and estate planning.[197]

A prenuptial agreement cannot dictate child support and custody. Any provision that violates public policy or is deemed illegal by state law is unenforceable.[198] Provisions that would leave one party destitute or in severe financial hardship may not be upheld.[199] An agreement may not be enforced by a court if it was signed under duress or coercion, did not include full financial disclosure, or contains grossly unfair or unconscionable terms.[200] Maine is an equitable distribution state.[201] In the event of a divorce, marital property will be divided fairly but not necessarily equally if there is no prenuptial agreement to override this. A prenuptial agreement can be modified or revoked after marriage if both parties agree in writing to the changes.[202]

Montana

Prenuptial agreements are governed by the Montana Uniform Premarital Agreement Act (MUPPA), codified in Montana Code

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192 Me. Rev. Stat. Ann. tit. 19-A, § 608 (2024).
193 *Id.* § 603.
194 *Id.* § 608.
195 *Id.*
196 *Id.*
197 *Id.* § 604.
198 *Id.*
199 *Id.*
200 *Id.* § 608.
201 *Id.* § 953.
202 *Id.* § 607.

Annotated Title 40, Chapter 2, Part 6. A prenuptial agreement must be entered into voluntarily, written, and signed, and provide full financial disclosure, and fair and reasonable terms at the time of execution and at the time of enforcement.[203] In Montana, a prenuptial agreement can cover the division of property, alimony, debt allocation, business interests, and estate planning.[204]

A prenuptial agreement cannot determine child support, custody, or visitation arrangements.[205] These decisions are made by the court based on the best interests of the child. A prenuptial agreement cannot violate public policy or state law.[206] There cannot be any unfair or unconscionable terms.[207] Montana follows equitable distribution principles for dividing marital property.[208] This means that in the absence of a prenuptial agreement, property will be divided fairly, but not necessarily equally, in the event of divorce. A prenuptial agreement can be modified or revoked after marriage if both parties agree to the changes in writing.[209]

Nebraska

In Nebraska, prenuptial agreements are governed by the Uniform Premarital Agreement Act. This is codified in Nebraska Revised Statutes § 42-1001 through § 42-1011. These agreements allow couples to establish rules regarding property division, finances, and other matters before marriage to provide clarity and protection in the event of divorce, separation, or death. Both parties must agree voluntarily without coercion, fraud, or duress.[210] If one party was pressured into signing, the agreement may be invalidated. A prenuptial agreement must be in writing and signed by both parties to be enforceable.[211] Both parties must provide a fair and reasonable financial disclosure of their assets, liabilities, income, and debts.[212] The terms must be fair and reasonable at

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203 Mont. Code Ann. § 40-2-608 (1987).
204 *Id.* § 40-2-605.
205 *Id.*
206 *Id.*
207 *Id.* § 40-2-608.
208 *Id.* § 40-4-202.
209 *Id.* § 40-2-607.
210 Neb. Rev. Stat. § 42-1006 (2024).
211 *Id.* § 42-1003.
212 *Id.* § 42-1006.

the time of signing and at the time of enforcement.[213] A prenup in Nebraska can cover property division, alimony, debts, business interests, and inheritance rights.[214]

Child-related matters cannot be determined in a prenuptial agreement.[215] A prenuptial agreement also cannot include terms that are deemed unconscionable or grossly unfair at the time of signing or enforcement.[216] Provisions that violate Nebraska law or public policy, such as those encouraging divorce or involving illegal activities, will not be enforceable.[217] Nebraska is an equitable distribution state in which marital property is divided fairly although not necessarily equally, in the event of divorce absent a prenuptial agreement.[218] A prenuptial agreement in Nebraska can be modified or revoked after marriage but any changes must be in writing, signed by both parties, and follow the same formalities as the original agreement.[219]

Nevada

Prenuptial agreements are governed by the Uniform Premarital Agreement Act (UPAA), which is codified in Nevada Revised Statutes Chapter 123A. Both parties must voluntarily agree.[220] Prenuptial agreements must be in writing and signed by both parties.[221] Both parties must fully disclose their financial situation.[222] The terms of the agreement must be fair and reasonable at the time the agreement is executed and at the time it is enforced.[223] Prenuptial agreements can cover a wide variety of financial and property-related matters.[224]

In Nevada, prenuptial agreements cannot cover child support and custody. They also cannot include any public policy violations or

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213 *Id.*
214 *Id.* § 42-1004.
215 *Id.*
216 *Id.* § 42-1006.
217 *Id.* § 42-1004.
218 *Id.* § 42-366.
219 *Id.* § 42-1006.
220 Nev. Rev. Stat. ch. 123A.080 (1989).
221 *Id*. ch. 123A.040.
222 *Id.* ch. 123A.080.
223 *Id.*
224 *Id.* ch. 123A.050.

unfair terms.[225] A court may refuse to enforce the agreement if it was signed under duress, financial disclosure was not made by one or both parties, or the agreement is found to be grossly unfair.[226] Nevada is a community property state meaning that in the absence of a prenuptial agreement, property acquired during the marriage is generally considered jointly owned and is subject to equal division.[227] A prenuptial agreement can be modified or revoked, but any amendment must be in writing, with the consent and signature of both parties.[228]

New Mexico

In New Mexico, prenuptial agreements are governed by the Uniform Premarital Agreement Act (UPAA), which is codified in New Mexico Statutes 40-3A-1 to 40-3A-9. Prenuptial agreements can address division of property, spousal support, debt allocation, business interests, and estate planning.[229] Prenuptial agreements cannot dictate child custody or child support provisions.[230] Any provision that violates New Mexico law or public policy will be unenforceable.[231] If the terms of the prenuptial agreement leave one party in extreme financial hardship or are otherwise grossly unfair, a court may refuse to enforce them.[232] New Mexico is a community property state so in the absence of a prenuptial agreement, assets acquired throughout the marriage will be considered jointly owned so it will be divided equally.[233] A prenuptial agreement can be modified or revoked after marriage, but any changes must be made in writing, signed by both parties, and executed voluntarily.[234]

North Carolina

Prenuptial agreements are governed by the North Carolina Uniform Premarital Agreement Act, codified in North Carolina

225 *Id.*
226 *Id.*
227 *Id.* ch. 123.220.
228 *Id.*
229 New. Mex. Rev. Stat., ch. 40 -3A-1 (1995).
230 *Id.*
231 *Id.*
232 *Id.* § 40-3A-7.
233 *Id.* § 40-4-7.
234 *Id.* § 40-3A-6.

General Statutes Chapter 52B. The agreement must follow the same formalities listed in the Uniform Premarital Agreement Act. Prenuptial agreements can define how property will be divided in the event of divorce or death.[235] They can also set terms, waive spousal support, and determine the responsibility for debts incurred before or during the marriage.[236] In addition, they can cover business assets and estate planning.[237] North Carolina is an equitable distribution state.[238] Property acquired before a marriage is generally considered separate property.[239] In the event of a divorce, if there is no prenuptial agreement, the property will be divided fairly but that might not be equally.[240] A prenuptial agreement can be modified or revoked, but the changes must be made in writing, made voluntarily, and signed by both parties.[241]

North Dakota

The North Dakota Uniform Premarital Agreement Act (UPAA), codified in North Dakota Century Code Title 14, Chapter 14-03, governs prenuptial agreements. It has the same formalities as the Uniform Premarital Act. Prenuptial agreements can address a wide variety of financial and property-related matters.[242] To be enforceable a prenuptial agreement must be entered into voluntarily, provide full financial disclosure, and the terms must be fair and reasonable at the time of execution and enforcement.[243] A court may refuse to enforce the agreement if it was signed under duress, financial disclosure was incomplete, or the terms are grossly unfair.[244] The default rule in case of divorce is equitable distribution: that marital property is to be split fairly but it does not have to be divided equally.[245] A prenuptial agreement allows couples to bypass this rule. In North Dakota, a prenuptial agreement

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235 N.C. Gen. Stat. ch. 52B-4 (1987).
236 *Id.*
237 *Id.*
238 N.C. Gen. Stat. ch. 50-20 (2023).
239 *Id.*
240 *Id.*
241 N.C. Gen. Stat. ch. 52B-6 (1987).
242 N.D. Cent. Code § 14-03-01 (2013).
243 *Id.* § 14-03-08.
244 *Id.* § 14-03-09.
245 N.D. Cent. Code § 14-05-24 (2022)

can be modified or revoked, if any changes or revocation are made in writing and signed by both parties.[246]

Oregon

Oregon follows the same approach as the Uniform Premarital Agreement Act. This is codified in Oregon Revised Statutes Chapter 108.700 to 108.730. Both parties must agree voluntarily and provide full disclosure, and the terms must be fair and reasonable.[247] Prenuptial agreements can address a wide range of matters including division of property and alimony.[248] A prenuptial agreement cannot address child support, custody, or visitation.[249] These matters are decided by a court. The agreement also cannot have terms that are heavily one-sided or have any terms that would violate Oregon law or public policy.[250] Oregon is an equitable distribution state, so if there is no prenuptial agreement, marital assets will be divided fairly although not necessarily equally.[251] A prenuptial agreement can be amended or revoked as long as the two parties are doing it voluntarily and have a signed written agreement.[252]

Rhode Island

In, Rhode Island, prenuptial agreements are governed by the Rhode Island Premarital Agreement Act. This is codified in the Rhode Island General Laws § 15-17. Both parties must agree voluntarily, and evidence showing otherwise could render the prenuptial agreement unenforceable.[253] Prenuptial agreements must be in writing and signed by both parties.[254] Both parties must provide full financial disclosure.[255] The terms of the prenuptial agreement must be fair and reasonable at the time

246 *Id.*
247 Or. Rev. Stat. § 108.725 (2023).
248 *Id.* § 108.710.
249 *Id.* § 108.725.
250 *Id.*
251 *Id.* § 107.105(1)(f).
252 *Id.* § 108.720.
253 R.I. Gen. Laws § 15-17-6 (2023).
254 *Id.* § 15-17-2.
255 *Id.* § 15-17-6.

of signing.[256] Prenuptial agreements can cover the division of property, alimony, debt allocation, business interests, and estate planning. [257]

A prenuptial agreement cannot address child support or custody, violate public policy, or have unconscionable terms.[258] A court could refuse to enforce a prenuptial agreement if one party was coerced into signing the agreement, there was incomplete or misleading information disclosed regarding finances, or the terms were so unfair that one party would face hardship at the time of signing.[259] If there is no prenuptial agreement, marital property will be divided fairly although not necessarily equally because Rhode Island follows equitable distribution principles.[260]

South Dakota

South Dakota follows the Uniform Premarital Agreement Act approach. This is codified in the South Dakota Codified Laws Chapter 25-2. Both parties must agree voluntarily.[261] The agreement must be in writing and signed.[262] There must be a full financial disclosure by both parties.[263] Prenuptial agreements can cover a wide variety of financial and property-related issues.[264]

A prenuptial agreement cannot dictate any matters related to child support or custody.[265] The terms cannot be unfair or unconscionable.[266] There cannot be any provision that would violate state law or public policy.[267] In the absence of a prenuptial agreement, marital property will be divided fairly although it may not be an equal division.[268]

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256 *Id.*
257 *Id.* § 15-17-3.
258 *Id.*
259 *Id.* § 15-17-6.
260 *Id.* § 15-5-16.1.
261 S.D. Codified Laws § 25-2-21 (1989).
262 *Id.* § 25-2-17.
263 *Id.* § 25-2-21.
264 *Id.* § 25-2-18.
265 *Id.*
266 *Id.* § 25-2-21.
267 *Id.* § 25-2-18.
268 *Id.* § 25-4-44.

Texas

In Texas, prenuptial agreements are governed by the Texas Family Code, specifically Chapter 4. Both parties must agree voluntarily, and if it can be shown that one party was pressured into signing, a court may not enforce the agreement.[269] Prenuptial agreements must be in writing and signed by both parties to be legally valid.[270] The terms must be fair and reasonable at the time of signing.[271] Texas law does *not* require parties to fully disclose their financial situation, but a Texas court could interpret failure to disclose as unconscionable.[272] Prenuptial agreements can cover property division, spousal support, debts, business interests, and inheritance rights.[273]

A prenuptial agreement cannot dictate child support or custody.[274] It also cannot have terms that are so one-sided that one of the parties would face hardship.[275] Any provision that violates Texas law or public policy will not be enforced by a court.[276] Texas follows the community property system.[277] In the absence of a prenup, marital property will be considered owned jointly. Property acquired before the marriage is considered to be owned separately.[278] The prenuptial agreement can be modified or revoked if both parties agree to it and sign.[279]

Utah

Utah follows the same approach as the Uniform Premarital Agreement Act. This can be found in Utah Code Title 30, Chapter 8. Both parties must agree voluntarily.[280] The agreement must be in writing and signed.[281] Utah law does not explicitly require full

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269 Tex. Fam. Code § 4.006 (1997).
270 *Id.* § 4.002.
271 *Id.* § 4.006.
272 *Id.*
273 *Id.* § 4.003.
274 *Id.*
275 *Id.* § 4.006.
276 *Id.* § 4.003.
277 *Id.* § 3.002.
278 *Id.*
279 *Id.* § 4.005.
280 Utah Code § 30-8-6 (2023).
281 *Id.* § 30-8-3.

financial disclosure but it suggests parties should provide a full financial disclosure to avoid a claim of fraud.[282] Prenuptial agreements can cover a wide variety of matters.[283] Child-related matters cannot be covered in a prenuptial agreement.[284] Utah follows the equitable distribution model so if there is no prenup then the property is distributed fairly even though it may not be an equal distribution.[285] Utah allows prenuptial agreements to be modified or revoked as long as both parties agree and sign off on it.

Virginia

In Virginia, prenuptial agreements are covered by Virginia Code Title 20, Chapter 3, specifically under the Virginia Premarital Agreement Act (Virginia Code § 20-147 through § 20-155). Both parties must enter the agreement voluntarily.[286] A prenuptial agreement must be in writing and signed by both parties.[287] The terms of the agreement must be fair and reasonable at the time of signing.[288] Full disclosure of financial information is not explicitly required by the law, but the failure to disclose could render the agreement invalid because a court could find it was unconscionable to fail to disclose this.[289] Prenuptial agreements can address division of property, spousal support, debts, business interest, and inheritance rights.[290] Virginia follows the equitable distribution model for dividing marital property in case of divorce.[291] Generally under Virginia law, property acquired before the marriage, or property acquired by gift or inheritance is separate property and is not subject to division unless it has been commingled with marital property.[292] A prenuptial agreement can be modified or revoked

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282 *Id.* § 30-8-6.
283 *Id.* § 30-8-4.
284 *Id.*
285 *Id.* § 30-3-1.
286 Va. Code Ann. § 20-151 (1986).
287 *Id.* § 20-149.
288 *Id.* § 20-151.
289 *Id.*
290 *Id.* § 20-150.
291 *Id.* § 20-107.3.
292 *Id.*

after marriage as long as that modification is in writing and signed by both parties.[293]

Wisconsin

Prenuptial agreements are governed by the Wisconsin Marital Property Act and are generally enforceable under Wisconsin Statutes Chapter 766. It has the same requirements as all the states that follow the Uniform Premarital Agreement Act. A prenuptial agreement can cover a larger amount of issues.[294] There cannot be anything in the prenup that dictates child support or custody.[295] There also cannot be any public violation or unfairness.[296] To be enforceable the agreement must be written and signed.[297] Full financial disclosure is legally required by state law.[298] Wisconsin is a community property state so in the absence of a prenuptial agreement, marital property will be divided equally.[299]

V. Conclusion

Prenuptial agreements were once viewed as controversial and even contrary to the core ideals of marriage. These agreements have evolved into an accepted and valuable tool for individuals seeking to define financial responsibilities and expectations in marriage. Although prenuptial agreements are typically associated with people with higher economic status, such as celebrities or the very wealthy, it is becoming common to see middle-class people get a prenuptial agreement.

Early prenups that followed English Common Law usually at minimum fulfilled the requirement of the English Statute of Frauds which is that a prenuptial agreement had to be in writing to be enforceable. Even in the sixteenth century, prenuptial agreements were a way to set terms for property management. With the rise of dual-income households, greater financial independence, and more complex family structures, prenuptial agreements have

293 *Id.* § 20-153.
294 Wis. Stat. § 766.58(3) (2023).
295 *Id.*
296 *Id.*
297 *Id.* § 766.58(1).
298 Wis. Stat. § 766.58(6)(c) (2023).
299 *Id.* § 766.31.

become a tool used by both men and women to safeguard personal and shared assets. This shift has been reflected in legal reforms and the establishment of standard approaches to prenuptial agreements. Over time, these agreements have adapted to reflect shifts in societal norms, including greater autonomy for individuals and the complexities of modern relationships. The increasing relevance and acceptance of prenuptial agreements are a response to the ever-changing marriage dynamics and the need for legal frameworks that balance personal autonomy with fairness, especially in case of a divorce or separation. States have taken different approaches in how they balance these interests, but the goal remains to provide some kind of consistency in how prenuptial agreements are to be enforced. Typically to be valid prenuptial agreements have to satisfy the requirements to form a contract. These requirements are that a prenuptial agreement has to be voluntary with consideration and satisfy the statute of fraud. Some states require even more than this for a prenuptial agreement to be valid and legally enforced.

There are three approaches that the states and courts take in determining whether a prenuptial agreement is valid or not. These three approaches are the Uniform Premarital Agreement Act approach (UPAA), the American Law Institute approach (ALI), and the Uniform Premarital and Marriage Agreement Act approach (UPMAA). Each of these approaches provides a different set of rules and guidelines for ensuring that prenuptial agreements are both enforceable and equitable, balancing personal choice with the need to protect vulnerable parties.

The first attempt at trying to form consistency in the enforcement of prenuptial agreements is the UPAA. The Uniform Premarital Agreement Act is typically considered the strictest approach. This approach, established in 1983, represented a step towards uniformity in prenuptial agreements, focusing on voluntariness and financial disclosure. This approach is heavily aligned with regular contract law. The limitations in this approach, particularly the lack of independent legal counsel and its reliance on the parties' ability to show that they were not coerced or uniformed, raised concerns. Critics argued that this approach may disproportionately favor wealthier or more legally sophisticated parties, leaving the disadvantaged party in a more vulnerable position to be exploited. In addition, this approach did not address

the long-term implications of the agreements such as unforeseen changes in financial circumstances, and the complexities of modern assets like intellectual property and cryptocurrency.

The next attempt at trying to form consistency in the enforcement of prenuptial agreement is the American Law Institute approach, introduced in 2002. This approach attempts to balance the principles of autonomy and fairness, by advocating for independent legal counsel and allowing for judicial review of agreements that might be deemed unconscionable or unfair at the time of enforcement. This attempt will also consider what the position of each party was at the time of drafting and what their position was at the time of divorce. However, this approach has also been critiqued for imposing too much judicial oversight, for potentially restricting the freedom of contract, and for its inability to keep up with evolving family structures and new forms of assets.

The third attempt to create consistency in the enforcement of prenuptial agreements is the Uniform Premarital and Marriage Agreement Act, adopted in 2012; this approach takes requirements from the previous attempts. It takes a more balanced approach by offering detailed provisions for both prenuptial and postnuptial agreements. It seeks to address the need for consistency across the states while protecting individuals from coercion and ensuring fairness in the long term. This approach emphasizes transparency in drafting, thorough disclosure, and the possibility of judicial review of unconscionable provisions, particularly those related to spousal support or material changes in circumstances. This approach considers whether general contract requirements are fulfilled and if there would be a hardship if the enforcement took place. While this approach represents an improvement in terms of flexibility and fairness, the UPMAA still faces challenges in terms of inconsistent state adoption and criticisms regarding the potential for overly broad discretion. It is up to each state to decide what approach to take. This means that enforcement of prenuptial agreements is different depending on what approach a state decides to take.

Despite the advances made by these various legal frameworks, prenuptial agreements remain a subject of debate and ongoing reform. As marriage laws and societal norms continue to evolve, future legal reforms will need to address emerging issues such as digital assets, non-traditional family structures, and the

globalization of marriages. Additionally, while prenuptial agreements are increasingly seen as a way to ensure financial clarity and protect individual rights, they must also remain sensitive to the emotional and relational dimensions of marriage, which can encompass implicit economic inequalities that are often not captured in a contractual framework.

Ultimately, the continuing development of prenuptial agreement laws reflects a broader societal shift towards greater autonomy and fairness in personal relationships. As individuals navigate the complexities of marriage in an increasingly fluid and unpredictable world, the legal system's role in balancing personal choice with protective safeguards will remain central to the ongoing conversation about the future of marriage and family law.

Jaquelin Veloz

Historical Perspectives on Family Law: An Annotated Bibliography

Allen Rostron*

This bibliography lists articles and books that provide historical perspectives on major aspects of family law. It focuses on legal history, but it includes some works that look at family relationships and issues through the broader lenses of social history, cultural history, or other historical approaches.

Adoption 742
Child Custody and Child Support 744
Child Protection 746
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Parenthood 758

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Adoption

Adoption in America: Historical Perspectives (E. Wayne Carp ed., 2004) (containing a collection of essays that provide an overview of the history of adoption in the United States, including several essays on adoption in the nineteenth century).

Julie Berebitsky, Like Our Very Own: Adoption and the Changing Culture of Motherhood, 1851-1950 (2001) (considering the development of legal rules governing adoption in the century from the enactment of the first adoption laws in 1851 to the postwar "baby boom" era).

Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 Duke L.J. 1077 (2003) (tracing the historical development of adoption law in nineteenth century legal sources and discussing how this history provides a novel and useful way to examine the complicated relationships among traditional and alternative family forms).

E. Wayne Carp, Family Matters: Secrecy and Disclosure in the History of Adoption (1998) (examining how the confidentiality surrounding adoption has inhibited the historical study of adoption).

Saba Deutschmann, Comment, *U.S. Intercountry Adoption Policy: A Brief History*, 36 J. Am. Acad. Matrim. Law. 509 (2024) (looking at the history of international adoption and the international agreements concerning it).

Ann Fessler, The Girls Who Went Away: The Hidden History of Women Who Surrendered Children for Adoption in the Decades Before Roe v. Wade (2006) (providing oral history accounts about young single women who gave up children for adoption in the era between World War II and *Roe v. Wade*).

Gabrielle Glaser, American Baby: A Mother, a Child, and the Shadow History of Adoption (2001) (examining the history of adoption in America after World War II and claiming that adoption was a lucrative and exploitative industry founded on secrecy and lies).

Linda Gordon, The Great Arizona Orphan Abduction (2001) (recounting a dramatic episode in which vigilantes kidnapped Irish orphans that had been brought to a remote Arizona mining camp, by Catholic nuns and priests, in order to be adopted by Mexican families).

Chris Guthrie & Joanna L. Grossman, *Adoption in the Progressive Era: Preserving, Creating, and Re-Creating Families*, 43 Am. J. Legal Hist. 235 (1999) (using court records and orphanage reports to examine the law and practice of adoption in the late nineteenth and early twentieth centuries in Alameda County, California).

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Ruth-Arlene W. Howe, *Adoption Practice, Issues, and Laws 1958-1983*, 17 Fam. L.Q. 173 (1983) (discussing the legal roots of adoption, from ancient times to the modern era, and describing the key developments and issues for adoption law in the 1950s through the 1980s).

Kathryn Joyce, The Child Catchers: Rescue, Trafficking, and the New Gospel of Adoption (2013) (criticizing the promotion of transnational adoption by evangelical Christian families and comparing it to abuses in the "Baby Scoop" era after World War II).

Yasuhide Kawashima, *Adoption in Early America*, 20 J. Fam. L. 677 (1981-1982) (looking at adoption practices prior to the era, in the mid nineteenth century, when American legislatures began to enact adoption statutes).

C.M.A. McCauliff, *The First English Adoption Law and Its American Precursors*, 15 Seton Hall L. Rev. 656 (1986) (examining the first English adoption statute, enacted in 1826, and the early American adoption statutes of the 1850s).

Barbara Melosh, Strangers and Kin: The American Way of Adoption (2002) (examining how the field of social work supported and influenced the development of adoption in twentieth century America).

David Ray Papke, *Pondering Past Purposes: A Critical History of American Adoption Law*, 102 W. Va. L. Rev. 459 (1999) (reviewing the historical origins and evolution of the procedures and institutions of American adoption law).

Amanda C. Pustilnik, Note, *Private Ordering, Legal Ordering, and the Getting of Children: A Counterhistory of Adoption Law*, 20 Yale L. & Pol'y Rev. 263 (2002) (arguing that while the standard history of adoption focuses on legislative enactments, the history of adoption is better understood as a non-statutory practice with deep roots in contract law).

Elizabeth J. Samuels, *The Idea of Adoption: An Inquiry into the History of Adult Adoptee Access to Birth Records*, 53 Rutgers L. Rev. 367 (2001) (examining the legal history concerning adoptees' access to birth records and using that history to analyze the complex relationship between legal rules and social attitudes about this issue).

Elizabeth J. Samuels, *Surrender and Subordination: Birth Mothers and Adoption Law Reform*, 20 Mich. J. Gender & L. 33 (2013) (analyzing a collection of adoption surrender documents from the mid twentieth century, finding that birth mothers in that era did not seek and were not guaranteed lifelong anonymity, and concluding that efforts to block access to adoption records perpetuates a culture of shame and secrecy).

Burton Z. Sokoloff, *Antecedents of American Adoption*, Future of Child., Spring 1993, at 17 (discussing the historical development of adoption law, from the colonial era to the modern day).

Rickie Solinger, Wake Up Little Susie: Single Pregnancy and Race Before Roe v. Wade (1992) (examining the American adoption system from 1945 to 1965, with a focus on unequal treatment of women based on race).

Katarina Wegar, Adoption, Identity, and Kinship: The Debate over Sealed Birth Records (1997) (exploring the history of adoption, the debate over sealed adoption records, and the movement favoring access to information for those searching for their birth parents).

Child Custody and Child Support

Sarah Abramowicz, Note, *English Child Custody Law, 1660-1839: The Origins of Judicial Intervention in Paternal Custody*, 99 Colum. L. Rev. 1344 (1999) (arguing that the Tenures Abolition Act of

1660, which enabled fathers to appoint guardians for their children in their wills and was intended to strengthen and extend the power of fathers to control their families even after their deaths, wound up undermining paternal rights by creating a tradition of judicial intervention in child custody matters).

Paul J. Buser, *Habeas Corpus Litigation in Child Custody Matters: An Historical Mine Field*, 11 J. Am. Acad. Matrim. Law. 1 (1993) (tracing the historical development of the right to habeas corpus in English common law, its adoption by American judges and legislators, and the use of habeas corpus in litigation about child custody, visitation, adoption, foster care, and parental termination disputes).

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Leslie Joan Harris, *Child Support for Post-Secondary Education: Empirical and Historical Perspectives*, 29 J. Am. Acad. Matrim. Law. 299 (2017) (examining the legal history of child support enforcement since the nineteenth century, describing the evolving social understandings and expectations about parental support for higher education for children, and arguing that courts should have the authority to order divorced or separated parents to pay support for their children's post-secondary education).

Elizabeth D. Katz, *Criminal Law in a Civil Guise: The Evolution of Family Courts and Support Laws*, 86 U. Chi. L. Rev. 1241 (2019) (discussing the history of child support laws and arguing that child support enforcement was generally a criminal law matter until legislatures in the 1930s began strategically recharacterizing family courts and child support enforcement as civil matters).

Mary Ann Mason, From Father's Property to Children's Rights: The History of Child Custody in the United States (1994) (examining the history of American child custody law since the colonial era).

Mary Ann Mason, *The Roller Coaster of Child Custody Law over the Last Half Century*, 24 J. Am. Acad. Matrim. Law. 451 (2012) (tracing the history of child custody rules and how the development of these rules reflects the evolving realities and perceptions of American histories).

Corinne Schiff, Student Research, *Child Custody and the Ideal of Motherhood in Late Nineteenth Century New York*, 4 Geo. J. on Fighting Poverty 403 (1997) (discussing how the emergence of ideals of motherhood and childhood advanced women's legal rights with respect to child custody but also worked against women in child neglect proceedings).

Donna Schuele, *Origins and Development of the Law of Parental Child Support*, 27 J. Fam. L. 807 (1988-1989) (examining the formative years of the modern law of child support and how courts and legislatures sought to protect the financial integrity and independence of fathers but prevent impoverished children from becoming drains on public resources).

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Stud. Rev., Feb. 1999, at 43 (examining the complex ideological and organizational conflicts in German child welfare policy in the Weimer Republic era and how they contributed to the conditions that made Naziism an attractive alternative to the existing institutional arrangements).

Martin Guggenheim, *The History and Influence of the National Association of Counsel for Children – An Alternate Perspective*, 39 Child. Legal Rts. J. 12 (2019) (examining the history of the child welfare field and the advocacy work of the National Association of Counsel for Children).

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Dorothy Roberts, Shattered Bonds: The Color of Child Welfare (2001) (arguing that the child welfare system has systematically and disproportionately harmed black families and children).

Patricia A. Schene, *Past, Present, and Future Roles of Child Protective Services*, Future of Child., Spring 1998, at 23 (looking at the historical origins and development of child protective services and arguing that this history reveals the unresolved tension between the aim of rescuing children from abusive homes and strengthening the care that children receive within their families).

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Sallie A. Watkins, *The Mary Ellen Myth: Correcting Child Welfare History*, 6 Social Work 500 (1990) (debunking a historical myth, widely perpetuated in social work literature, about how a child

abused by a foster parent in the nineteenth century could be protected only if treated as a member of the animal kingdom and brought within the reach of animal cruelty laws).

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Norma Basch, *The Emerging Legal History of Women in the United States: Property, Divorce, and the Constitution*, Signs, Autumn 1986, at 97 (assessing the development of the field of women's legal history and discussing the need for further exploration of changes in women's relationships to family and state).

Norma Basch, Framing American Divorce: From the Revolutionary Generation to the Victorians (1999) (examining divorce in America from 1770 to 1870 from multiple perspectives, including analysis of the legal and legislative aspects, accounts of individual cases and experiences, and the imagery of divorce through fictional and non-fictional narratives in popular culture).

Naomi Cahn, *Faithless Wives and Lazy Husbands: Gender Norms in Nineteenth-Century Divorce Law*, 2002 U. Ill. L. Rev. 651 (analyzing trial reports of famous nineteenth-century divorce cases and examining the role that conformity with gendered expectations played in social and legal norms).

Andrew J. Cherlin, *The Origins of the Ambivalent Acceptance of Divorce*, 71 J. Marriage & Fam. 226 (2009) (arguing that Americans have had a moral and legal ambivalence toward divorce since the colonial era and that this ambivalence accounts for the relatively greater acceptance of single parenthood resulting from divorce versus single parenthood resulting from nonmarital births).

Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 Va. L. Rev. 1497 (2000) (looking back at the legal doctrines and practices surrounding divorce in the era when divorces required proof of fault).

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Robert L. Griswold, *Law, Sex, Cruelty, and Divorce in Victorian America, 1840-1900*, 38 Am. Q. 721 (1986) (analyzing court decisions about false accusations of marital infidelity and how they shed light on the complicated connections among Victorian ideology, sexual behavior, and acceptable marital conduct).

Suzanne Kahn, Divorce, American Style (2021) (examining how divorced women and policymakers responded to the increase in divorce rates in the 1970s).

Saskia Lettmaier, *A Tale of Two Countries: Divorce in England and Prussia, 1670-1794*, 69 Am. J. Comp. L. 1 (2021) (discussing sociocultural explanations for changes in the divorce laws of England and Prussia in the period from 1670 to 1794, when Prussia had Europe's most liberal divorce laws while England maintained a more restrictive approach).

Harry Munsinger, The History of Marriage and Divorce (2019) (explaining the legal, economic, religious, evolutionary, and psychological issues surrounding marriage, divorce, and re-marriage).

Roderick Phillips, Putting Asunder: A History of Divorce in Western Society (1988) (examining the evolution of divorce laws and the development of religious and social attitudes toward divorce).

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W. Andrew Achenbaum, *From the Margins to Pacesetting: The Place of the Elderly in U.S. Legal History from a Historian's Perspective*, 7 Marq. Elder's Advisor 93 (2005) (examining the history of old age in America and the proliferation of age-related legal regulations and entitlements).

Lawrence A. Frolik, *The Developing Field of Elder Law: A Historical Perspective*, 1 Elder L.J. 1 (1993) (discussing the development of elder law as a field within law school curricula, legal scholarship, and legal practice).

Hendrik Hartog, Someday All This Will Be Yours: A History of Inheritance and Old Age (2012) (chronicling the history of lawsuits seeking to enforce commitments made in situations where aging parents use promises of inheritance to persuade their children to provide care for them).

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Michael Grossberg, Governing the Hearth: Law and the Family in Nineteenth-Century America (1985) (analyzing the formation of legal policies relating to families, including the law regarding marriage, adoption, and children).

Jonathan L. Hafetz, *"A Man's Home Is His Castle?": Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries*, 8 Wm. & Mary J. Women & L. 175 (2002) (examining the interplay of social factors that shaped legal doctrines concerning homes and families, including laws concerning marital violence, interspousal tort immunity, spousal evidentiary privileges, child welfare, and housing reform).

Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 Cal. L. Rev. 2017 (2000) (analyzing twentieth-century reforms of family law and women's rights, including the evolution of laws concerning marriage and divorce).

Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & Fam. Stud. 337 (2008) (analyzing the historical origins and development of the best interests of the child doctrine).

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Martha Minow, *'Forming Underneath Everything That Grows:' Toward a History of Family Law*, 1985 Wis. L. Rev. 819 (criticizing the traditional view of family law history, which portrays a steady line of progress from traditional patriarchal to egalitarian family values, and arguing that a better understanding of family law history requires looking beneath traditional conceptions of family law to uncover how women challenged the roles assigned to them and implemented alternative models of family governance and values).

Merril Sobie, *The Development of New York's Family Court*, 17 Jud. Notice 26 (2022) (discussing the historical origins of New York Family Court).

Luke Taylor, Constructing the Family: Marriage and Work in Nineteenth-Century English Law (2023) (examining how legal conceptions of work and family relations changed in England in the nineteenth century and contributed to the development of family law).

Lee E. Teitelbaum, *Family History and Family Law*, 1985 Wis. L. Rev. 1135 (arguing against the standard view of family law in the nineteenth century, which posits that the law in that era moved toward regarding families as private entities immune from judicial or governmental intervention, and arguing that the history of that time period actually demonstrates increased public interest and intervention in family matters).

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Jeffrey R. Baker, *The Failure and Promise of Common Law Equity in Domestic Abuse Cases*, 58 Loy. L. Rev. 559 (2012) (reviewing the history of equity and the law of domestic violence, from the Middle Ages to the modern era, and arguing that equity failed in the past as a means of protecting victims from abuse but equitable remedies should be part of law's response to domestic abuse today).

Astrid Cubano-Iguina, *Legal Constructions of Gender and Violence Against Women in Puerto Rico Under Spanish Rule, 1860-1895*, 22 Law & Hist. Rev. 531 (2004) (using court records of domestic violence and rape cases in the Arecibo Superior Court to examine the interactions among judges, prosecutors, police, witnesses, accused men, and plaintiff women).

Elspeth Cypher et al., *The Impact of Dr. Lenore Walker on the Legal History of Domestic Violence*, 57 Suffolk L. Rev. 1 (2024) (reviewing the history of domestic violence law and discussing the impact of Lenore Walker, who was the first psychologist to study and obtain reliable data about abused women).

Frances E. Dolan, Marriage and Violence: The Early Modern Legacy (2009) (comparing views of domestic violence in the early modern period and today, including its depiction in popular culture and the press as well as its treatment in the legal system, and arguing that marriage continues to be seen as an "economy of scarcity" in which one person becomes weaker if the other becomes stronger).

Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 Cal. L. Rev. 1373 (2000) (uncovering the forgotten debate over marital rape that occurred in the second half of the nineteenth century).

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Richard Johnson, *Changing Attitudes About Domestic Violence*, Law & Order, Apr. 2002, at 60 (presenting a historical overview of the legal system's evolving approach to domestic violence).

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Carolyn B. Ramsey, *A Diva Defends Herself: Gender and Domestic Violence in an Early Twentieth-Century Headline Trial*, 55 St. Louis U. L.J. 1347 (2011) (assessing a case in which a jury acquitted a wife of murdering her abusive husband in Nevada in 1909).

Carolyn B. Ramsey, *Domestic Violence and State Intervention in the American West and Australia, 1860-1930*, 86 Ind. L.J. 185 (2011) (analyzing domestic assault and homicide cases in the American West and Australia in the late nineteenth and early twentieth centuries, finding that arrests for domestic violence were common, and victims were often reluctant to cooperate with prosecutors, and husbands who killed their wives tended to be convicted of murder but women who killed their abusive husbands sometimes succeeding in establishing that they had legal justification for doing so).

Carolyn B. Ramsey, *The Exit Myth: Family Law, Gender Roles, and Changing Attitudes Toward Female Victims of Domestic Violence*, 20 Mich. J. Gender & L. 1 (2013) (arguing that the criminal justice system was relatively sympathetic and responsive to situations involving family violence until at least 1930, but that shifted in subsequent decades as women gained rights and economic opportunities, which caused society and the legal system to stop viewing abused women as frail victims in need of protection and to assume that women were capable of leaving abusive situations and taking care of themselves).

Carolyn B. Ramsey, *Intimate Homicide: Gender and Crime Control, 1880-1920*, 77 U. Colo. L. Rev. 101 (2006) (presenting research on the legal system's responses to murders of intimate partners in the late nineteenth and early twentieth centuries and finding that

men accused of killing their partners often received stern punishment while women charged with similar crimes were treated more leniently).

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Riva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 Yale L.J. 2117 (1996) (explaining how courts in the nineteenth century repudiated the right of chastisement, which had meant that a husband could physically punish his wife as long as he did not inflict permanent injury, but nevertheless continued to treat cases about family violence differently from other cases about assault and battery and claimed that doing so would protect family privacy and promote marital harmony).

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Jillian Jimenez, *The History of Grandmothers in the African-American Community*, 76 Soc. Servs. Rev. 523 (2002) (examining the role of grandmothers in African-American communities from Reconstruction through the New Deal and finding that they were central to the economic survival of families).

Daniel R. Victor & Keri L. Middleditch, *Grandparent Visitation: A Survey of History, Jurisprudence, and Legislative Trends Across the United States in the Past Decade*, 22 J. Am. Acad. Matrim. L. 391 (2009) (exploring the issue of grandparent visitation rights, including the history of the issue in common law and legislation).

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Elizabeth Abbott, A History of Marriage (2009) (exploring the origins, development, and impact of marriage, with discussion of traditions including arranged marriages, dowries, and wedding ceremonies).

Deborah J. Anthony, *To Have, to Hold, and to Vanquish: Property and Inheritance in the History of Marriage and Surnames*, 5 Brit. J. Am. Legal Stud. 217 (2016) (observing how customs concerning family surnames have been closely tied to views about property, describing how surname adoption was a highly variable and fluid cultural practice until about 1600, and arguing that diverse surname practices disappeared as women's property rights became severely restricted).

Norma Basch, In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York (1982) (examining the changes in laws concerning married women's property rights in New York in the nineteenth century).

Kristin Celello, Making Marriage Work: A History of Marriage and Divorce in the Twentieth-Century United States (2009) (arguing that rising divorce rates in the era after World War I caused deep anxiety about marriage, drove couples to seek advice about how to strengthen marriages, and cemented the idea of marriage as "work").

Kristin A. Collins, *Administering Marriage: Marriage-Based Entitlements, Bureaucracy, and the Legal Construction of the Family*, 62 Vand. L. Rev. 1085 (2009) (investigating the legal construction of marriage as it relates to eligibility for marriage-based entitlements, based on a study of early nineteenth century applications for military subsidies for widows).

Stephanie Coontz, Marriage, a History: How Love Conquered Marriage (2006) (tracing the history of marriage from ancient to modern times and arguing that the idea of marrying for love led marriage to thrive as a personal relationship but suffer as an institution).

Nancy Cott, Public Vows: A History of Marriage and the Nation (2000) (exploring how marriage has always been a public matter, regulated and shaped by governments, with important implications for citizenship, immigration, equality, and governance).

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Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 Yale L.J. 1641 (2003) (discussing the history of marriage in American law and how views about marriage and female economic dependency affected legal treatment of unmarried women).

Darlene C. Goring, *The History of Slave Marriage in the United States*, 39 J. Marshall L. Rev. 299 (2006) (tracing the evolution of practices and beliefs about the right to marry for slaves and freed African-Americans in the antebellum and postbellum periods).

Hendrik Hartog, Man and Wife in America: A History (2000) (providing a detailed study of marriage in America in the nineteenth century, with a focus on separation and other non-legal ways of exiting marriages that demonstrated how husbands and wives did not necessarily act in ways that matched the expectations or assumptions of law).

Hazel D. Lord, *Husband and Wife: English Marriage Law from 1750: A Bibliographic Essay*, 11 S. Cal. Rev. L. & Women's Stud. 1

(2001) (tracing the development of English statutory law concerning marriage).

Shelly Lundberg & Robert A. Pollak, *The Evolving Role of Marriage: 1950-2010*, Future of Child., Fall 2015, at 29 (examining the dramatic changes in marriage behavior since 1950, particularly the growing number of births taking place outside marriage, and considering why the decoupling of marriage and parenthood has been much less prevalent among college graduates).

Joanna Alexandra Norland, *When the Vow Breaks: Why the History of French Divorce Law Sounds a Warning About the Implications for Women of the Contemporary American Marriage Movement*, 17 Wis. Women's L.J. 321 (2002) (discussing developments in French divorce legislation between 1792 and 1816 and how they suggest that anti-divorce campaigns that purport to have the goal of protecting women may reinforce women's dependence on men within a hierarchical family structure).

Reva B. Siegel, *Home as Work: The First Women's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 Yale L.J. 1073 (1994) (considering nineteenth-century women's claims that sought to reform the doctrine of marital service, which gave husbands property rights in their wives' labor, and gave wives joint rights in family assets).

Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 Geo. L.J. 2127 (1994) (analyzing the implementation of a prominent reform statute, enacted in New York in 1860, that gave wives property rights in their labor and earnings, and discussing the impact of decades of litigation over women's claims under earnings statutes).

Nicholas L. Syrett, American Child Bride: A History of Minors and Marriage in the United States (2016) (exploring the history of marriages involving minors and examining why these marriages continue to receive legal and social approval while other forms of sexual activity with minors do not).

Arland Thornton, *Comparative and Historical Perspectives on Marriage, Divorce, and Family Life*, 1994 Utah L. Rev. 587 (discussing how European scholars studied marriage and family

life in various societies around the world, were unable to accept the enormous differences they observed as simply representing cross-cultural variations in family structure and form, and instead assumed that other societies' practices were at a lower or earlier stage of development but were gradually progressing toward the family structures and processes prevalent in Europe).

John Witte Jr., From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition (2d ed. 2012) (exploring the theological underpinnings of marriage and arguing that marriage was once a complex spiritual and social institution but has become a simpler matter of private contracting and choice).

Marcia A. Zug, Buying a Bride: An Engaging History of Mail-Order Brides (2016) (studying court cases about mail-order marriages in order to exploring the troubling legal issues raised by such marriages, including domestic abuse, immigration fraud, and human trafficking).

Parenthood

Mary Frances Berry, The Politics of Parenthood: Child Care, Women's Rights, and the Myth of the Good Mother (1993) (assessing the history of child care policy in the United States in the nineteenth and twentieth centuries and arguing that mothers continued to have primary responsibility for child care even when the number of women in the work force increased dramatically).

Paula S. Fass, The End of American Childhood: A History of Parenting from Life on the Frontier to the Managed Child (2016) (looking at the history of childhood and parenting, from America's founding era to the modern day, and arguing that increased levels of parental oversight have undermined the independence and initiative of children).

Stephen M. Frank, Life with Father: Parenthood and Masculinity in the Nineteenth Century American North (1995) (reconstructing the role of fathers in parenting in New England and the Midwest in the eighteenth and nineteenth centuries, based on personal documents, such as letters and diaries, as well as representations of fatherhood in popular culture).

Robert L. Griswold, Fatherhood in America: A History (1994) (tracing the fundamental shift from the nineteenth century father as "patriarch" to the late twentieth century "Dad" who shares responsibility for working and earning income with his wife).

Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 Geo. L.J. 299 (2002) (arguing that two different approaches to parents and children have coexisted in American law since the late nineteenth century, with one based on suspicion of parental autonomy and eagerness to reshape family relations, and the other based on extreme deference to parents and reluctance to intervene in family matters).

Molly Ladd-Taylor, Mother-Work: Women, Child Welfare, and the State, 1890-1930 (1994) (examining how child welfare became a matter of national policy, rather than just private family responsibility, and arguing that women's experience as mothers led them to become active in the development of public health, education, and welfare services).

Ralph LaRossa, The Modernization of Fatherhood: A Social and Political History (1997) (examining how the government and media affected the development of modern conceptions of fatherhood).

Steven J. Macias, *The Huck Finn Syndrome in History and Theory: The Origins of Family Privacy*, 12 J.L. & Fam. Stud. 87 (2010) (discussing the historical origins of the concepts of parents' rights and family privacy, particularly in the Supreme Court's decisions in *Meyer v. Nebraska* and *Pierce v. Society of Sisters*).

Helen McCarthy, Double Lives: A History of Working Motherhood (2020) (looking at the dramatic transformation in Britain's economy and society over the past century, as working mothers became the norm).

Carol Sanger, *Separating from Children*, 96 Colum. L. Rev. 375 (1996) (examining the social history of situations in which mothers have been separated from their children and arguing that mother-child separations were not seen as an abnormal or harmful aspect of mothering until the mid nineteenth century).

Rickie Solinger, Pregnancy and Power: A Short History of Reproductive Politics in America (2005) (arguing about the role of social, racial, economic, and political forces in the history of motherhood and reproductive rights).

Jodi Vandenberg-Daves, Modern Motherhood: An American History (2014) (examining the historical evolution of motherhood and how American society continues to struggle with the conflicts between idealized beliefs about motherhood and practical realities).