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The Triple System of Family Law

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THE TRIPLE SYSTEM OF FAMILY LAW

*June Carbone & Naomi Cahn**

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INTRODUCTION

Family structures have changed over the past half century, and the paradigmatic marital family with children now constitutes less than one-half of all households. While some decry the move away from marriage and others celebrate the increase in family diversity, the best sociological work

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indicates that the changes reflect growing inequality and class divisions as much, if not more than, societal changes. In the face of these increasing class divisions, a vigorous debate asks how (and whether) the law should respond to these changes. At the core of this debate is a growing class-based disconnect between the law and family norms.¹ The elite, which, for purposes of this Article, constitutes the roughly one-third of the country who graduate from college and/or enjoy substantial incomes, has become, if anything, more likely to raise their children in committed two-parent families. The marginalized bottom third has largely given up on marriage, raising children in the context of single-parent families and contingent, rather than committed, relationships with a second adult. The middle is in flux, as it remains more likely to marry than the bottom, more likely to divorce than the top, and in the midst of an unresolved struggle to redefine the new terms for multiple parents, stepparents, and intimate partners.

In assessing the relationship between family law and class, the iconic description comes from Jacobus tenBroek. In the early sixties, he argued that family law is implemented through “a dual system,”² with two parts that differ in substance, purpose, and procedure.³ One system focused on private arrangements and supported the families of those who were economically self-sufficient.⁴ TenBroek maintained, however, that a parallel second system existed, one imposed on those who sought public assistance.⁵ In this second system: (1) the state, not individual family members, controls the

1. We argue in our forthcoming book, NAOMI CAHN & JUNE CARBONE, *MARRIAGE MARKETS: WHAT IS REALLY HAPPENING TO THE AMERICAN FAMILY* (forthcoming 2014), that the interaction between law and behavior is a two-way street. That is, the law influences behavior and changing behavior in turn influences the law. In particular, judicial decisions, as they try to make sense of changing behavior and of the application of the law to new circumstances, often ratify and systematize new norms. In this Article, we focus on how the courts choose which behavioral changes contribute to new legal understandings and which are marginalized, penalized, or ignored.

2. See generally Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (pts. I-III), 16 STAN. L. REV. 257 (1964), 16 STAN. L. REV. 900 (1964), 17 STAN. L. REV. 614 (1965) [hereinafter tenBroek Parts I-III].

3. tenBroek wrote that:

we have two systems of family law in California: different in origin, different in history, different in substantive provisions, different in administration, different in orientation and outlook. One is public, the other private. One deals with expenditure and conservation of public funds and is heavily political and measurably penal. The other deals with the distribution of family funds, focuses on the rights and responsibilities of family members, and is civil, nonpolitical, and less penal. One is for underprivileged and deprived families; the other for the more comfortable and fortunate.

Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (pt. I), 16 STAN. L. REV. 257, 257-58 (1964).

4. *Id.*

5. *Id.*

litigation and the settlements; (2) the law imposed may not necessarily reflect the community norms or the parties' understanding of the terms of their own relationships; and (3) the purpose of the litigation is to protect the public fisc and reaffirm mainstream norms, whether or not the results are in the interests of the parties to the litigation.⁶

TenBroek's analysis of the role of law for the majority rested on an analysis of the relationship between the formal law on the books and the ability of litigants to control the terms of their disputes.⁷ In a later piece, Bob Mnookin and Lewis Kornhauser examined the mechanisms that underlie the private bargains in tenBroek's first system, where the sophisticated and those with access to lawyers negotiate "in the shadow of the law."⁸ This private ordering tends to produce public pronouncements—and judicial opinions—that reaffirm mainstream principles while allowing couples the opportunity to provide for alternative arrangements without public scrutiny.⁹ The law provides the default rules, and these couples choose whether to litigate, settle, or stay away from court with an eye on how they expect the court to rule in the event of a final judicial determination.¹⁰ If the couple agrees, they may affect settlements that differ from what the law might otherwise proscribe; if they disagree with each other, the default legal terms in the background affect each partner's respective bargaining power.¹¹

Finally, Carl Schneider, in assessing the overall effect of public pronouncements and private bargains, argued that the "channelling function" in family law was critical in assessing the law's impact.¹² He explored the role of law in reinforcing shared notions of appropriate behavior.¹³ He maintained that the role of family law is an intermediate one between the public mandates of criminal law and the deference to private ordering of contract law.¹⁴ Family law thus articulates and reinforces mainstream norms, con-

6. See Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (pt. III), 17 STAN. L. REV. 614, 675-82 (1965).

7. See generally tenBroek Parts I-III, *supra* note 2.

8. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

9. See *id.* at 950-52; see also June Carbone, *Autonomy to Choose What Constitutes Family: Oxymoron or Basic Right?*, in 1 AUTONOMY IN THE LAW 11 (Mortimer Sellers ed., 2007) (examining the role of law in articulating public norms).

10. See Mnookin & Kornhauser, *supra* note 8, at 968.

11. See *id.* at 964-66, 968 (explaining that parents may privately trade custody for support in ways that the legal system may not approve).

12. See Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 496 (1992).

13. *Id.* at 498.

14. *Id.* at 497, 504 (describing the channelling function of family law as a means for promoting social institutions that does not primarily use legal coercion); cf. Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1 (2012) (examining the relationship between the crime of seduction and the role of marriage as part of a system of sexual discipline).

tributing to the redefinition of institutions such as marriage and parenthood.¹⁵ In Schneider's terms, both the first system, which creates spaces for the private bargains of the powerful, and the second system, which stigmatizes the alternative arrangements of the powerless, serve to reinforce shared understandings in society as a whole.

The tenBroekian analysis of the dual system remains foundational to our understanding of the legal regulation of the family.¹⁶ Within tenBroek's analysis, Schneider, Mnookin, and Kornhauser describe the perpetuation of a mainstream "first system." This system combines public pronouncements that reinforce a remade model of marriage that influences the private bargains of the elite.¹⁷ At the same time, state-initiated actions to determine paternity and impose support as a condition of the receipt of public benefits

15. Schneider, however, was maddeningly elusive on the subject of how norms change over time. See Schneider, *supra* note 12, at 518-19. For other influential perspectives on the relationship between the evolution of the law and the evolution of the family, see JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 2 (2011) ("Family law follows family life."); LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* 4 (2006) (discussing the government's formative role); MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS* 14-15 (2010) (discussing different theories of how the state affects families); Clare Huntington, *Staging the Family*, 88 N.Y.U. L. REV. 589, 592 (2013) (labeling the process of "drawing on dominant performances to shape legal categories—'performative family law'").

16. See, e.g., CAHN & CARBONE, *supra* note 1; Shannon Bettis Nakabayashi, Comment, A "Dual System" of Family Law Revisited: Current Inequities in California's Child Support Law, 35 U.S.F. L. REV. 593, 594 (2001). These divisions between the family law of rich and poor, private and public, voluntary and involuntary family associations have been the subject of extensive commentary. See, e.g., Kerry Abrams, *Family History: Inside and Out*, 111 MICH. L. REV. 1001, 1003 (2013); Tonya L. Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229, 238-50 (2000); Naomi R. Cahn, *Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L.J. 1189, 1211 (1999); Cynthia Godsoe, *Parsing Parenthood*, 17 LEWIS & CLARK L. REV. 113, 118 & n.22 (2013); Deborah Harris, *Child Support for Welfare Families: Family Policy Trapped in Its Own Rhetoric*, 16 N.Y.U. REV. L. & SOC. CHANGE 619, 621-29 (1988); Leslie Joan Harris, *The Basis for Legal Parentage and the Clash Between Custody and Child Support*, 42 IND. L. REV. 611, 612-14 (2009) [hereinafter Harris, *The Basis for Legal Parentage*]; Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299, 357-84 (2002); Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029, 1043-44 (2007); Amy E. Hirsch, *Income Deeming in the AFDC Program: Using Dual Track Family Law to Make Poor Women Poorer*, 16 N.Y.U. REV. L. & SOC. CHANGE 713, 715-16 (1988).

17. See, e.g., Mnookin & Kornhauser, *supra* note 8, at 963 ("This ability to compare different packages has obvious implications for private bargaining, at least when the couple has sufficient economic resources. Sophisticated parties and their lawyers will attempt to seek out circumstances in which a different characterization, because of tax effects or differences in risk or time preferences of the parties, can make both spouses better off.").

continue to penalize the families that fail to live up to the terms of the new model.¹⁸

Left out of these decade-old descriptions of how the law interacts with family structure, however, is the emergence of a third group, a group that is in the process of developing what this Article articulates as the “third system” of family law. This group differs from the first group in that: (1) regardless of whether it shares the same norms as more elite groups about marriage and parenthood, it sees itself as unable to “buy into” those norms;¹⁹ (2) existing law may not necessarily recognize or affirm the understood terms underlying these family relationships; and (3) members of the group may not necessarily have access to counsel or the sophistication to effect private bargains that secure legal recognition of terms to which they would otherwise agree. At the same time, this group, unlike the marginalized in tenBroek’s second system, are not necessarily receiving public support and are therefore not subject to state-initiated actions. Their families (and often their bargains) operate in the “shadows” of the law, neither receiving official ratification nor being subject to explicit disapproval. These families achieve agency in family affairs primarily by staying out of court. They therefore do not fit neatly into either tenBroek’s privileged group, which enjoys legal ratification of its family arrangements, or tenBroek’s marginalized second group, which is often involuntarily subject to state intervention.²⁰

18. See, e.g., Harris, *The Basis for Legal Parentage*, *supra* note 16, at 614, 620.

19. In *Family Classes*, we argue that the new “first system” of family law has redefined the terms of marriage to emphasize interdependence and shared parenting. This redefinition of marriage as an institution operates at a societal level and influences the perception of what marriage means for the country as a whole. All of the groups we describe see marriage in roughly the same terms and identify readiness for and willingness to marry in terms of participation in the redefined institution. These groups then vary significantly in their perception of the ability to meet the terms of marriage. Those who do not marry and those who do, thus, agree on the definition of what marriage is and what it requires. They often also agree on the desirability of marriage for those who have what it takes to make it work. Where they disagree most profoundly is whether marriage, in accordance with these shared definitions, is accessible to them and whether it is appropriate given their assessment of their imperfect, existing relationships. They also disagree fundamentally on whether they have an obligation to put themselves in a position to marry. The upper third of the country believes that it is necessary to finish college, hold a job, and be respectful of a partner in order to marry and that they should not have children until they are in position to do so in the context of a committed partnership. The bottom third and increasing parts of the middle do not believe that they will ever finish college, hold a reliable and satisfying job, or find a partner they trust and that they have no obligation to do so before having children. The differing norms of the two groups, therefore, are not so much about marriage or about its desirability, but about whether they have an obligation to position themselves to be able to enter the institution on its new terms.

20. See tenBroek, *supra* note 3, at 257-58; cf. Murray, *supra* note 14 (exploring the significance of practices outside of existing laws); NAOMI CAHN, *THE NEW KINSHIP*:

This Article explores the contours of this third system. First, it explains the increased class divide in family life. TenBroek's dual system distinguished between two-parent married families, which at the time described the vast majority of all American families, and marginalized single parents, who tended to be overwhelmingly poor and disproportionately African-American or Hispanic.²¹ In today's system, married two-parent families have become a marker of privilege, characterizing a disproportionately better-educated and wealthier upper third of the country. The middle group of families is not only more likely than the marginalized group to get married but also more likely than the elite group to divorce, remarry, and cohabit;²² their nonmarital birth rate, while increasing, remains lower than that of the marginalized group.²³

Second, the Article analyzes how the law of marriage, parenthood, and support contributes to three (rather than two) distinct family systems. The first system, which governs the families of the upper third, promotes interdependent finances and shared parenting as the new marital ideal. It acknowledges the relative equality²⁴ of men and women, encourages mar-

CONSTRUCTING DONOR-CONCEIVED FAMILIES (2013) (exploring the significance of practices outside of existing laws).

21. The poverty rate for blacks in 1959 was over 50%, while it was less than 20% for whites. See Dylan Matthews, *Poverty in the 50 Years Since 'The Other America,'* WONKBLOG (July 11, 2012, 9:48 AM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/07/11/poverty-in-the-50-years-since-the-other-america-in-five-charts/>. The Census Bureau only began to differentiate Hispanics from whites in the early 1970s. *Id.* Race also affected the number of children living in two-parent families. See *Social Indicators of Marital Health & Well-Being*, ST. OUR UNIONS 2011, http://www.stateofourunions.org/2011/social_indicators.php (last visited Oct. 24, 2013).

22. See Adam Isen & Betsey Stevenson, *Women's Education and Family Behavior: Trends in Marriage, Divorce, and Fertility*, in *DEMOGRAPHY AND THE ECONOMY* 107, 110-11 (John B. Shoven ed., 2010), available at <http://www.nber.org/chapters/c8408>. Others have begun to discuss the parameters of this middle group that not only does not, and cannot, adhere to the norms of the elite, but is also very different from the marginalized. See, e.g., JOAN C. WILLIAMS, CTR. FOR WORKLIFE LAW & HEATHER BOUSHEY, CTR. FOR AM. PROGRESS, *THE THREE FACES OF WORK-FAMILY CONFLICT: THE POOR, THE PROFESSIONALS, AND THE MISSING MIDDLE* (2010), available at <http://www.americanprogress.org/wp-content/uploads/issues/2010/01/pdf/threefaces.pdf>. We are among the first to identify this group within the family law system.

23. See KAY HYMOWITZ ET AL., *KNOT YET: THE BENEFITS AND COSTS OF DELAYED MARRIAGE IN AMERICA* 8 figs.IIA, IIB & IIC (2013), available at <http://nationalmarriageproject.org/wp-content/uploads/2013/03/KnotYet-FinalForWeb.pdf>.

24. Equal employment laws and constitutional jurisprudence establish women's formal equality with men, although the reality is that women continue to earn less than men, even accounting for all other factors, sex differences continue to affect women's full participation in the economy, and ideologies perpetuate gendered behaviors. See CAHN & CARBONE, *supra* note 1. Nonetheless, the new system dismantles the notion of dependent homemakers and "head of family" breadwinners, both legally and practically, insisting in-

riage between dual earners, and insists on the continued participation of both parents in childrearing following a breakup. At the same time, interdependent finances have become a bad deal for custodial parents with unreliable partners; as one young mother put it, “‘Calvin [her child’s father] mean[s] one less granola bar for the two of us.’”²⁵

Parenthood for families outside of the elite is characterized by contingent relationships in which a primary custodial parent often serves as a gatekeeper, conditioning access to the child on cooperative and supportive behavior from the other parent. While family law emphasizes the importance of the continuing involvement of both parents and shared custody orders are effectively available for the asking in most jurisdictions, empirical work shows that the likelihood of shared custody correlates strongly with income.²⁶ For those in the first system, the marital presumption ensures automatic recognition of husbands’ paternity, and divorce decrees systematically address custody in providing for children born into the marriage. For those in the third system, the state initiates actions to establish paternity and secure support, but typically does little to facilitate the non-custodial parents’ involvement with the child. For those in between, paternity, custody, and support depend on cooperation between the parents. These parents, who do typically share some involvement with their children, are developing arrangements often at odds with the formal law, through agreements that often fail to receive explicit recognition or support.

We conclude that it is time to recognize that family diversity is not merely the product of different choices, but is a reflection of a system that simultaneously reinforces the foundation of elite intimate bargains, rejects those of the marginalized, and is unwilling to acknowledge the emerging norms of the center. At the core of what this Article identifies as the triple system of family law is women’s greater autonomy, if not necessarily societal equality. At the top, the first system serves to lock in new terms that not only acknowledge women’s greater independence but also redefine marriage to offer greater protection for elite men. At the bottom, tenBroek’s second system continues, as it always has, to reject women’s greater autonomy without in fact assisting low-income men in realizing better terms for family relationships.²⁷ In the middle, the largely invisible fight is one to set

stead on the relative equality that comes from continued economic independence within an interdependent, but not necessarily permanent, partnership. *Id.*

25. HANNA ROSIN, *THE END OF MEN AND THE RISE OF WOMEN* 2 (2012).

26. PATRICIA BROWN & STEVEN T. COOK, *CHILDREN’S PLACEMENT ARRANGEMENTS IN DIVORCE AND PATERNITY CASES IN WISCONSIN* 2 (rev. ed. 2012), available at http://www.irp.wisc.edu/research/childsup/cspolicy/pdfs/2009-11/Task4A_CS_09-11_Final_revi2012.pdf.

27. See, e.g., KATHRYN EDIN & TIMOTHY J. NELSON, *DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY* (2013); Laurie S. Kohn, *Engaging Men as Fathers: The*

the terms for families where women are increasingly the more reliable breadwinners and homemakers²⁸ without the ability to lock in understandings that would reflect their greater assumption of family responsibilities. Development of the laws in this third system accordingly requires recognition that the critical choice is whether to accept women's greater authority within the family or accelerate the move away from committed relationships altogether.

I. THE SYSTEMS

A. Class

For purposes of the analysis in this Article, class is a social construct, often—but not always—correlated with income. It is a term designed to make more visible the way that society creates expectations about behavior and/or channels societal resources, such as wealth and income, parental time and attention, and human capital acquisition.²⁹ This Article identifies three different classes that interact in substantially different ways with family law.³⁰ The elite are the group of college graduates who stand apart from non-graduates in income and family formation practices. This group constitutes no more than a third of today's young adults and a smaller percentage of the adult population as a whole.³¹

The second group is the “middle” of the American population, including those who graduated from high school, but not college, and those who, while perhaps struggling economically, are not poor. The group can be defined demographically: a household at the fiftieth percentile of the American population in 2011 earned a little over \$42,000,³² and the average American adult graduated from high school, attended college, but did not com-

Courts, the Law, and Father-Absence in Low-Income Families, 35 CARDOZO L. REV. 551 (forthcoming 2013).

28. Both Liza Mundy and Hanna Rosin document the increasing economic autonomy of middle-class women and the decreasing economic autonomy of middle-class men. See LIZA MUNDY, *THE RICHER SEX: HOW THE NEW MAJORITY OF FEMALE BREADWINNERS IS TRANSFORMING SEX, LOVE, AND FAMILY* (2012); ROSIN, *supra* note 25.

29. See June Carbone, *Unpacking Inequality and Class: Family, Gender and the Reconstruction of Class Barriers*, 45 NEW ENG. L. REV. 527 (2011).

30. The top 1% stands apart from the others in terms of wealth and political influence, but for purposes of this Article, their family patterns resemble those of the elite, and we therefore do not address them separately. See CAHN & CARBONE, *supra* note 1.

31. Richard Pérez-Peña, *Milestone Is Passed as 30 Percent of U.S. Adults Report Having a College Degree*, N.Y. TIMES, Feb. 24, 2012, at A17.

32. Catherine Rampell, *Where Do You Fall on the Income Curve?*, ECONOMIX (May 24, 2011, 4:10 PM), http://economix.blogs.nytimes.com/2011/05/24/where-do-you-fall-on-the-income-curve/?_r=0.

plete a four-year college degree.³³ Unlike college graduates, this group has lost ground over the last twenty years, with shrinking income distinctions between those with some skills and those without.³⁴

The third, and final, group consists of the poor or the marginalized. The contemporary poverty rate hovers around 15% of Americans.³⁵ Using education as a measurement, the dropout rate for sixteen to twenty-four year olds in 2010 was 7.4%, and almost 15% of the entire adult population lacked a high school degree.³⁶ Defining this marginalized group in terms of economic or political marginalization, however, the group would certainly be larger, comprising those with no ability to affect public officials.³⁷ On the other hand, throughout most of this Article, the marginalized group is referred to in tenBroekian terms—those receiving stigmatized government benefits and subject to public interventions in their family life.³⁸

Consequently, we offer a caveat on education and class: the most consistently available data for purposes of charting family trends shows growing differences between groups defined in terms of education, but education and class do not always correspond.

Finally, we note that in discussing the position of the most marginalized groups, race plays a distinct role that may aggravate economic factors.

33. NICOLE STOOPS, U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2003, at 3 tbl.A (2004), available at <http://www.census.gov/prod/2004pubs/p20-550.pdf>.

34. Male high school dropouts, for example, earned only 70% in 1997 of what they earned in 1973. Jared Bernstein & Heidi Hartmann, *Defining and Characterizing the Low-Wage Labor Market*, in THE LOW-WAGE LABOR MARKET: CHALLENGES AND OPPORTUNITIES FOR ECONOMIC SELF-SUFFICIENCY 15, 25 (Kelleen Kaye & Demetra Smith Nightingale eds., 2000), available at http://www.urban.org/UploadedPDF/lowwage_labor_FR.pdf. White males during the same period saw their income stagnate. Daron Acemoglu, *Technical Change, Inequality, and the Labor Market*, 40 J. ECON. LITERATURE 7, 15 (2002). From 1969-2012, men with only a high school diploma saw their earnings decrease “by around a fourth. And men who didn’t finish high school have fared worse still: Their incomes sank by more than a third, leaving their inflation-adjusted earnings stranded in the 1950s.” Jonathan Rauch, *The No Good, Very Bad Outlook for the Working-Class American Man*, NAT’L J. (Dec. 5, 2012), <http://www.nationaljournal.com/next-economy/the-no-good-very-bad-outlook-for-the-working-class-american-man-20121205>.

35. *Income, Poverty and Health Insurance in the United States: 2011—Highlights*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/www/poverty/data/incpovhlth/2011/highlights.html> (last updated Sept. 12, 2012).

36. *Status Dropout Rates*, NAT’L CENTER FOR EDUC. STAT., http://nces.ed.gov/programs/coe/indicator_coj.asp (last updated Jan. 2013); *High School Dropout Statistics*, STAT. BRAIN, <http://www.statisticbrain.com/high-school-dropout-statistics/> (last visited Oct. 24, 2013).

37. See LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* 285 (2008).

38. See tenBroek, *supra* note 6, at 679-80.

The poverty rates for African-Americans and Latinos, for example, are more than double the rate for whites.³⁹

B. Family Demographics: The Elite and the Marginalized

At the time tenBroek wrote in the mid-sixties, the dual system of family law corresponded to a dual track for families. One could speak of a standard American family of married husband and wife, with two to three children and a gendered division of family roles. The typical man of that era graduated from high school but not college,⁴⁰ married in his early twenties, and was employed.⁴¹ More than 75% of wives with young children, in contrast, stayed home with the children.⁴² College-graduate women were comparatively rare and less likely to marry than those with only a high school education.⁴³

The notable exception to the conventional picture of family life came from poor and minority families. In the mid-sixties, during roughly the same period in which tenBroek wrote, Daniel Patrick Moynihan, then a Labor Department official, wrote an infamous report designed to call attention to the plight of African-American families.⁴⁴ Moynihan explained that while divorce rates did not differ by race in 1940, by 1964 the nonwhite rate exceeded the white rate by 40%.⁴⁵ Nonmarital births during the same period grew from 16.8% to 23.6% for blacks (compared to an increase of 2% to

39. SUZANNE MACARTNEY, ALEMAYEHU BISHAW & KAYLA FONTENOT, U.S. CENSUS BUREAU, POVERTY RATES FOR SELECTED DETAILED RACE AND HISPANIC GROUPS BY STATE AND PLACE: 2007-2011, at 1 fig.1 (2013), available at <http://www.census.gov/prod/2013pubs/acsbr11-17.pdf>.

40. See CHARLES MURRAY, COMING APART: THE STATE OF WHITE AMERICA, 1960-2010, at 25 (2012) (stating that only 8% of the U.S. population had graduated from college in 1963); *Median Age at First Marriage, 1890-2010*, INFOPLEASE, <http://www.infoplease.com/ipa/A0005061.html> (last visited Nov. 21, 2013).

41. In 1970, 97.6% of men with a high school education, but no college, were in the labor force. Abraham Mosisa & Steven Hipple, *Trends in Labor Force Participation in the United States*, MONTHLY LAB. REV., Oct. 2006, at 35, 49.

42. Elizabeth Waldman, *Labor Force Statistics from a Family Perspective*, MONTHLY LAB. REV., Dec. 1983, at 16, 18 tbl.2.

43. RICHARD FRY & D'VERA COHN, PEW RESEARCH CTR., WOMEN, MEN AND THE NEW ECONOMICS OF MARRIAGE 5 (2010), available at <http://pewsocialtrends.org/files/2010/11/new-economics-of-marriage.pdf> (providing marriage data for 1970); JOSHUA R. GOLDSTEIN & CATHERINE T. KENNEY, MARRIAGE DELAYED OR MARRIAGE FOREGONE? NEW COHORT FORECASTS OF FIRST MARRIAGE FOR U.S. WOMEN 510 (2001), available at <http://www.asanet.org/images/members/docs/pdf/featured/goldstein.pdf> (providing marriage data for 1960 and 1970).

44. DANIEL PATRICK MOYNIHAN, U.S. DEP'T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965), available at <http://www.stanford.edu/~mrosenfe/Moynihan%27s%20The%20Negro%20Family.pdf>.

45. *Id.* at 9.

3.07% for whites).⁴⁶ In addition, while middle-class African-Americans had fewer children than well-educated whites, African-Americans with less education had more children at younger ages than their white counterparts.⁴⁷

Divorce and nonmarital birth rates for whites and blacks today are much higher than the ones Moynihan documented.⁴⁸ Over the course of the seventies, marriage rates plummeted,⁴⁹ divorce rates rose,⁵⁰ and the “baby bust” years during that decade saw dramatic declines in fertility from the previous decade and a steady increase in the percentage (though not the number) nonmarital births.⁵¹ Conservatives worried about the survival of the traditional family.⁵²

Then, in the nineties, students of the family began to notice something new. During this period, as inequality began to increase, the changes in the family started to level off. The first sign was the change in divorce rates, which were no longer increasing.

Following the liberalization of divorce laws, divorce rates had soared. At least part of the reason was pent up demand. The shotgun marriages of the fifties generated many of the divorces of the seventies as the children grew up and couples, who never had much in common to begin with, grew apart.⁵³ Stephanie Coontz observes that divorce rates peaked at the point where the crest of the baby boom left home.⁵⁴ Changing gender roles contributed to marital breakups.⁵⁵ Women who felt trapped in unfulfilling roles in suburbia often felt that the only way to break free was to start anew. And with greater economic independence, women not only felt freer to leave, but unhappy men were released from the obligation to stay with dependent

46. *Id.* at 7.

47. *Id.* at 29; STEPHANIE J. VENTURA, CHANGING PATTERNS OF NONMARITAL CHILDBEARING IN THE UNITED STATES (2009), available at <http://www.cdc.gov/nchs/data/databriefs/db18.pdf>.

48. See GREGORY ACS WITH KENNETH BRASWELL, ELAINE SORENSEN & MARGERY AUSTIN TURNER, THE MOYNIHAN REPORT REVISITED 19 (2013), available at <http://www.urban.org/UploadedPDF/412839-The-Moynihan-Report-Revisited.pdf>. For example, the nonmarital birth rate today for whites, approximately 30%, is equal to what it was for blacks when Moynihan wrote. *Id.* at 3 fig.1.

49. Stéphane Mechoulam, *Divorce Laws and the Structure of the American Family*, 35 J. LEGAL STUD. 143, 148, 149 fig.5 (2006).

50. *Id.* at 161.

51. VENTURA, *supra* note 47; Mark Mather, *Fact Sheet: The Decline in U.S. Fertility*, POPULATION REFERENCE BUREAU (July 2012), <http://www.prb.org/Publications/Datasheets/2012/world-population-data-sheet/fact-sheet-us-population.aspx>.

52. See, e.g., JAMES Q. WILSON, THE MARRIAGE PROBLEM: HOW OUR CULTURE HAS WEAKENED FAMILIES 13-15 (2002).

53. STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP 167 (1992).

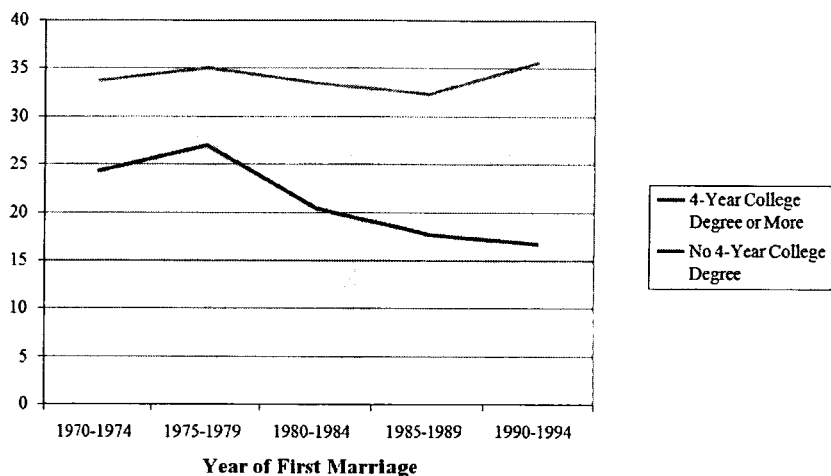
54. *Id.* at 167-68.

55. *Id.* at 166.

spouses.⁵⁶ The fragility of marriage in turn persuaded more women to invest in their careers, and economists predicted that the cycle would further destabilize the family.⁵⁷

The more detailed studies that emerged after 2000 showed that the overall change in divorce rates cloaked two different trends. Divorce rates for the college educated were plummeting while those for everyone else, after a brief hiatus, were increasing their upward climb. The following chart captures that data:

Figure 1: First Marriages Ending in Divorce Within Ten Years as a Percent of All First Marriages by Female Educational Attainment⁵⁸



The striking thing about these figures is the divergence in the slope of the curves. Starting with the couples who married in 1980, the slopes of the curves change, with the divorce rates of the well-educated dropping sharply,

56. See *id.*

57. See *id.* For more recent analyses of the effects of no-fault divorce, concluding that the change in the law contributed to women's greater investment in their own earning capacity, see Betsey Stevenson, *The Impact of Divorce Laws on Marriage-Specific Capital*, 25 J. LAB. ECON. 75 (2007) [hereinafter Stevenson, *The Impact of Divorce Laws*]; Betsey Stevenson, *Divorce-Law Changes, Household Bargaining, and Married Women's Labor Supply Revisited* (Univ. of Pa. Scholarly Commons PSC Working Paper Series, 2007) [hereinafter Stevenson, *Divorce-Law Changes*], available at http://repository.upenn.edu/psc_working_papers/7.

58. STEVEN P. MARTIN, GROWING EVIDENCE FOR A "DIVORCE DIVIDE"? EDUCATION AND MARITAL DISSOLUTION RATES IN THE U.S. SINCE THE 1970S, at 34 fig.1 (2004), available at https://www.russellsage.org/sites/all/files/u4/Martin_Growing%20Evidence%20for%20a%20Divorce%20Divide.pdf.

while the divorce rates for the rest of the population decline modestly. For those who married at the end of the eighties (examined ten years later at the end of the nineties), the divorce rates of those without college degrees *change direction* and rise significantly, while they continue to decline for the well-educated. The net result: by 2004, the divorce rates of college graduates were back down to what they were in 1965—before no-fault divorce, the widespread availability of the pill and abortion, or the sex revolution.⁵⁹ The divorce rates of the less well-educated in the meantime reached all-time highs.

Complementing the diverging divorce rates has been the increase in nonmarital births.⁶⁰ When the age of marriage began to rise for the college educated in the seventies, so too did the age of first birth.⁶¹ The result postponed family formation and lowered overall fertility.⁶² For high school graduates, the big drop in marriage for those in their early twenties came in the nineties—and it came with an increase in nonmarital births.⁶³ Young women who used to get pregnant and marry the father still got pregnant, though a little bit later than they did in the fifties or seventies.⁶⁴ It is just that they no longer married the father.⁶⁵ The result? A steady increase in nonmarital births, but not for everyone. The following chart shows that in 1982, the nonmarital birth rate for high school grads more closely resembled that of college graduates than high school dropouts. Today, the opposite is true. College graduates continue to hold the line on nonmarital births, even as that line erodes for everyone else.

59. See Sara McLanahan, *Diverging Destinies: How Children Are Faring Under the Second Demographic Transition*, 41 DEMOGRAPHY 607, 617 (2004); HYMOWITZ ET AL., *supra* note 23, at 33.

60. NAT'L MARRIAGE PROJECT & INST. FOR AM. VALUES, THE STATE OF OUR UNIONS: MARRIAGE IN AMERICA 2010: WHEN MARRIAGE DISAPPEARS: THE NEW MIDDLE AMERICA 23 fig.5 (W. Bradford Wilcox & Elizabeth Marquardt eds., 2010), *available at* <http://stateofourunions.org/2010/SOOU2010.pdf>.

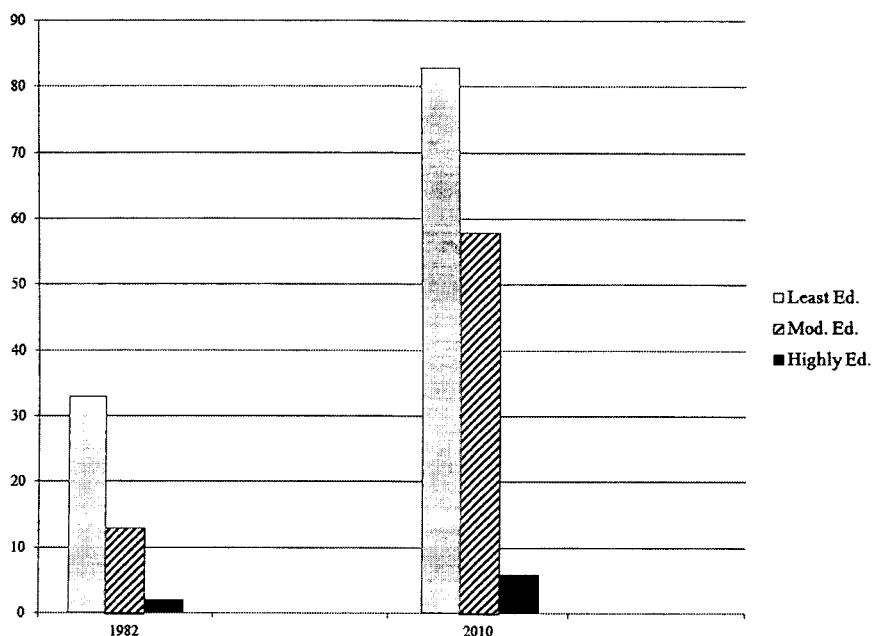
61. HYMOWITZ ET AL., *supra* note 23, at 8 fig.IIA.

62. NAT'L MARRIAGE PROJECT & INST. FOR AM. VALUES, *supra* note 60, at 83 fig.8.

63. See RICHARD FRY, PEW RESEARCH CTR., THE REVERSAL OF THE COLLEGE MARRIAGE GAP 1 (2010), *available at* <http://pewsocialtrends.org/files/2010/10/767-college-marriage-gap.pdf>; HYMOWITZ ET AL., *supra* note 23, at 23 fig.5.

64. HYMOWITZ ET AL., *supra* note 23, at 8 fig.IIC.

65. *Id.* at 10.

Figure 2: Percentage of Births to Never Married Mothers, Ages 15-44⁶⁶

When race is taken into account, the results are even more dramatic.⁶⁷ The nonmarital birth rate for white college graduates has remained at 2%, with no change in the twenty-five-year period that started in the mid-eighties.⁶⁸ The delay in starting families produced a delay in births, but not a lack of emphasis on marriage. Indeed, sociologist Brad Wilcox has found that a fourteen-year-old daughter of college graduates was *more likely* to be raised in a two-parent home between 2006 and 2008 than in the early eighties; the same held true for African-Americans as well as whites.⁶⁹

For those without college degrees, in contrast, a delay in marriage has meant an increase in nonmarital births—and in those likely never to marry.⁷⁰ For the most disadvantaged women, nonmarital birth rates have continued to rise.⁷¹ Today, for example, the nonmarital birth rate for African-Americans without a high school degree is 96%.⁷² Marriage has all but disappeared in the poorest communities.

66. NAT'L MARRIAGE PROJECT & INST. FOR AM. VALUES, *supra* note 60, at 23 fig.5.

67. *Id.* at 56 fig.S2.

68. *Id.*

69. *Id.* at 57 fig.S3.

70. *Id.*

71. *Id.*

72. *Id.*

C. Family Demographics: The Middle

In the middle, the group that experienced the largest increase in nonmarital births in the period from the mid-eighties until 2008 has been white high school graduates—a group once among the most likely to marry.⁷³ The nonmarital birth rate for this group was 5% in 1982, just barely higher than the rate for college graduates.⁷⁴ By 2008, the rate had increased to 34%, close to the 43% rate for white high school dropouts.⁷⁵ African-American high school graduates have also become much more likely to give birth outside of marriage during the same period, with the percentage of nonmarital births rising from 48% to 75%.⁷⁶ Moreover, the huge, recent expansion in the nonmarital birth rate has largely been to women in their twenties, a group once more likely to marry before the birth of a child.⁷⁷ In other ways, the middle exhibits signs of both the elite and the marginalized. Like the marginalized, their net incomes have fallen, but not nearly as dramatically.⁷⁸ Moreover, mothers in the middle (regardless of whether they are married or single parent) are more likely to work than those in the marginalized group, but somewhat less likely than those in the elite group.⁷⁹

The families in the middle of American society no longer buy into the mainstream norms of the elite to the extent they once did, while they remain sufficiently independent to evade state-imposed strictures on the conduct of their families. The result is a new third system of families, which is just beginning to become visible. At its core is a question of the understood terms between men and women. The new terms—e.g., must a woman who conceives a child with one man and raises it with a second acknowledge the parental status of the first?—are still in doubt, with inconsistent and incomplete decisions across jurisdictions. Moreover, the formation of new terms, as well as the formation of families who may not necessarily correspond to the law, biology, or marriage, often takes place outside of both the coercive system of the marginalized and the private agreements that formalize elite bargains. During tenBroek's times, differences between elite expectations and those of the center were minor; today, the elite model that underlies family law jurisprudence bears increasingly little relationship to the family lives of the middle.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. HYMOWITZ ET AL., *supra* note 23, at 19 fig.11.

78. WILLIAMS & BOUSHEY, *supra* note 22, at 6.

79. *Id.* at 7 tbl.2 & fig.2.

II. THE SYSTEMS AND THE LAW: THE NEW MARITAL SCRIPT [OR INTERACTIONS BETWEEN THE LAW AND THE TRIPLE SYSTEMS]

A. The New Private System: Replacing Dependence with Interdependence Through Divorce Law

The first system of family law, the system that governs private divorce and support actions, has been remade. This system has adopted a new model of marriage, reflected in decisions that dismantle explicitly gendered roles, assume independence, and treat intertwined finances and caretaking as the norm. Published opinions articulate the norms of the new system through conventional divorce cases. While these norms do not describe all families—plenty of neo-traditional marriages with full-time homemakers still exist, for example—popular discourse reinforces them.⁸⁰ Families with the wherewithal to manage marriage, divorce, custody, and conflict recognize the new terms of family life.

1. *Dismantling the Breadwinner/Homemaker Marriage*

The new marital ideal evolved together with a wholesale set of legal changes that dismantled the gendered nature of traditional marriage.

First, the much heralded sex revolution resulted in legal guarantees for women's reproductive autonomy. Supreme Court decisions legalized not only abortion, but also access to contraception.⁸¹ The need to usher women into early marriage in order to contain pregnancy dramatically weakened, and later marriage became economically important to the creation of the new middle-class model.⁸²

Second, the women's movement advocated laws that guaranteed women greater access to educational and workforce equality.⁸³ While the gendered wage gap remains, particularly at the top, anti-discrimination laws, together with the expansion of the service sector jobs women have traditionally held, ensure women relatively greater access to education and jobs.⁸⁴ The result eliminates much of the coercion that channeled young couples into marriage and kept them there. Women have much greater abil-

80. See, e.g., Terry Martin Hekker, *Paradise Lost (Domestic Division)*, N.Y. TIMES (Jan. 1, 2006), <http://www.nytimes.com/2006/01/01/fashion/sundaystyles/01LOVE.html?pagewanted=all>.

81. See *Roe v. Wade*, 410 U.S. 113, 154 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

82. See, e.g., ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE* 7-11 (2003).

83. For a discussion of these changes, see Deborah A. Widiss, *Changing the Marriage Equation*, 89 WASH. U. L. REV. 721, 739-40 (2012).

84. See FRY & COHN, *supra* note 43, at 8.

ity not just to make it on their own as young adults, but also to leave unhappy marriages with children in tow.⁸⁵

The changing status of women set the stage for the third change—wholesale family law reforms. Pressure had been building for at least a half a century for divorce reform. Divorce mills, whether based on manufactured proof of fault (in New York, aspiring actresses could be hired to pose with unhappy husbands, supplying proof of adultery) or surreptitious trips to liberal jurisdictions like Nevada, made a mockery of strict divorce laws.⁸⁶ When reform finally occurred, it helped modernize family law across the country as virtually every state liberalized the grounds for divorce between the late 1960s and 1985 (Ronald Reagan signed the first pure no-fault statute in California in 1969),⁸⁷ and the last title-based property regime (Mississippi) gave way in 1994.⁸⁸ These changes came as women's roles within intact marriages also changed. Legally and practically, the husband no longer controlled everything that happened in the home.

Beginning with the Married Women's Property Acts in the nineteenth century, some states began a slow move towards the functional adoption of "equitable distribution" systems.⁸⁹ That is, at divorce, the courts acquired the power to distribute the couples' assets irrespective of title, thus allowing courts to grant dependent wives an "equitable" property settlement in addition to or instead of support.⁹⁰ These trends accelerated with the implementation of no-fault divorce in the last third of the twentieth century. By 1994, every common law state had adopted either an equitable distribution or a marital property regime.⁹¹ In practice, if not always by black-letter law, these regimes typically divide the couples' property fifty-fifty at divorce.⁹²

85. For a discussion of bargaining over custody and support, see Paula England & Nancy Folbre, *Involving Dads: Parental Bargaining and Family Well-Being*, in HANDBOOK OF FATHER INVOLVEMENT: MULTIDISCIPLINARY PERSPECTIVES 387 (Catherine S. Tamis-LeMonda & Natasha Cabrera eds., 2002).

86. See, e.g., J. HERBIE DiFONZO, BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA 67-69, 88-91 (1997); GROSSMAN & FRIEDMAN, *supra* note 15, at 168-70.

87. See DONNA S. HERSHKOWITZ & DREW R. LIEBERT, CAL. STATE LEGISLATURE, THE DIRECTION OF DIVORCE REFORM IN CALIFORNIA: FROM FAULT TO NO-FAULT . . . AND BACK AGAIN? 130 (1997), available at <http://www.library.ca.gov/crb/98/04/currentstate.pdf>.

88. *Ferguson v. Ferguson*, 639 So. 2d 921, 927 (Miss. 1994) (en banc).

89. June Carbone, *The Futility of Coherence: The ALI's Principles of the Law of Family Dissolution, Compensatory Spousal Payments*, 4 J.L. & FAM. STUD. 43, 60-61 (2002).

90. 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, 333-34.

91. GROSSMAN & FRIEDMAN, *supra* note 15, at 196. Mississippi was the last. See *Ferguson*, 639 So. 2d at 927.

92. Baker, *supra* note 90, at 334-35; see also PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 4.09 (2002) (recognizing a presumption of equal division); Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision*

While the courts retain discretion to consider the parties' respective contributions to the marriage, most courts do not make individualized determinations—they simply presume equal contributions, recognizing marriage as “an egalitarian legal community.”⁹³ The new property regime is an interdependent one.

At the same time the courts moved toward equal division of accumulated property, they became less inclined to award long-term support following divorce.⁹⁴ No-fault divorce made anachronistic the idea of alimony as ongoing support for an “innocent” wife. Women’s greater economic independence weakened the gendered claims for alimony, although it wasn’t until 1979 that the Supreme Court struck down an Alabama law that explicitly permitted only women to receive alimony.⁹⁵ Divorce reformers sought not just to make divorce easier, but also to “end, as far as possible, all personal and economic ties between the spouses” and encourage “both spouses . . . [to] become equal and independent social and economic actors.”⁹⁶

If marriage presumes *interdependence*, the ability to leave marriage carries with it an obligation to retain the capacity for financial *independence*. For example, Kristen and Derek Thomas Berger, a Michigan couple, divorced after ten years of marriage because of Derek’s affair.⁹⁷ At the time of the divorce in 2008, he made \$120,000 per year, and she worked part-time, earning \$22,000 per year.⁹⁸ The court awarded one year of alimony to Kristen, who had degrees in nursing and dance,⁹⁹ to assist in the transition after the divorce.¹⁰⁰ At least as tellingly, the court also took into account the wife’s ability to earn substantially more than her part-time job currently paid in determining the property and child-support awards.¹⁰¹ The opinion commented that “it is unreasonable and unprincipled to place nearly 100

Making, 74 N.C. L. REV. 401, 452-58 (1996) (finding that judges stay fairly close to a fifty-fifty division); cf. Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York’s Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 686 (1991) (concluding that settled property divisions are much more variable than court-ordered ones).

93. Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 77 (2004); see also Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 12 (1990) (arguing that modern marriage, understood in terms of the rational pursuit of mutual self-interest, still involves commitment to creation of an interdependent regime, not lightly dissolved simply because emotional satisfaction does not meet “soul-mate” expectations).

94. See GROSSMAN & FRIEDMAN, *supra* note 15, at 202-04.

95. See *Orr v. Orr*, 440 U.S. 268, 282-83 (1979).

96. LESLIE HARRIS, LEE E. TEITELBAUM & JUNE CARBONE, *FAMILY LAW* 389 (3d ed. 2005).

97. See *Berger v. Berger*, 747 N.W.2d 336, 347, 351 (Mich. Ct. App. 2008).

98. *Id.* at 351.

99. *Id.* at 346, 350.

100. *Id.* at 355.

101. *Id.* at 351.

percent of the financial responsibility for the children on defendant under these circumstances.”¹⁰² The court emphasized that the wife was the one who chose to divorce, and she sought custody of the children.¹⁰³ The judge added that “she has a great deal of education and is more than capable of helping to financially support her children. She should not be treated so differently from defendant simply because she wishes at this point to be essentially a stay-at-home mother.”¹⁰⁴

The court expressed a clear expectation that caretaking did not prevent full-time labor force participation and that both parties were expected to contribute to the children’s (and their own) financial needs.¹⁰⁵ And, in direct contrast to the old fault-based system, which would have blamed the divorce on the husband’s affair, the court seems to punish the wife for seeking the divorce while it rejects punishing the husband for his infidelity.¹⁰⁶ Young women with children, who initiate the majority of divorces, rely on their husbands to their peril.¹⁰⁷ These couples typically have more debts than assets, and long-term support is rare.¹⁰⁸ Today, the mothers of young children are expected to be economically independent upon divorce, and, if they are not so already, then “rehabilitative” alimony gives them a relatively short time in which to do so.¹⁰⁹ While some courts retain the ability to award

102. *Id.* at 353.

103. *Id.*

104. *Id.*

105. *Id.* at 353-54.

106. *Id.* at 352-53.

107. See, e.g., Nehami Baum, “Separation Guilt” in *Women Who Initiate Divorce*, 35 CLINICAL SOC. WORK J. 47, 48 (2007) (stating that women initiate divorce at twice the rate of men). Older women who are not currently homemakers, however, incur the least sympathy in studies of juror attitudes. Ira Mark Ellman & Sanford L. Braver, Lay Intuitions About Family Obligations: The Case of Alimony 28 (July 8, 2011) (unpublished manuscript), available at <http://ssrn.com/abstract=1737146>.

108. See GROSSMAN & FRIEDMAN, *supra* note 15, at 203.

109. “Although courts in most states retain discretion in matters of spousal support, most states now regard alimony as rehabilitative and short term.” Mark A. Fine & David R. Fine, *An Examination and Evaluation of Recent Changes in Divorce Laws in Five Western Countries: The Critical Role of Values*, 56 J. MARRIAGE & FAM. 249, 254 (1994) (citations omitted); see also Constance L. Shehan et al., *Alimony: An Anomaly in Family Social Science*, 51 FAM. REL. 308, 310 (2002); 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, 47 (2011). More recently, some states have reaffirmed the availability of long-term spousal support for women who divorce after long marriages, but the duration of such awards varies widely and depends on the payor-spouse’s income, the court’s findings about the payee’s capacity for workforce participation, and the length of the marriage. See Katharine K. Baker, *The Stories of Marriage*, 12 J.L. & FAM. STUD. 1, 49-50 (2010). The doctor who makes \$400,000 per year can be expected to support a wife with four children, two with special needs, who last worked for \$15 per hour in a medical clinic. See *Martindale v. Martindale*, No. W2003-00712-COA-R3-CV, 2005 WL 94366, at *1-4 (Tenn. Ct. App. Jan. 13, 2005).

support after longer marriages, it is difficult to predict in advance whether they will do so.

The result changes marriage from a one-size-fits-all model of breadwinner husband and homemaker wife to a more complex partnership, in which both men and women seek partners likely to make comparable (if not identical) contributions.¹¹⁰ Economist Stéphane Mechoulan observes that states that abolished consideration of fault in the property distribution showed the largest rise in marital age.¹¹¹ Mechoulan links the increase in age to more careful searches and attributes the lower divorce rates to better matches, hallmarks of the new marriage model.¹¹² Economists Betsey Stevenson and Justin Wolfers report that divorce reform is associated with a 30% decline in domestic violence and a significant drop in women's suicide rates.¹¹³ They further conclude that in pure no-fault states, couples are less likely to finance their spouse's further education and women are more likely to remain employed during marriage.¹¹⁴ All of these findings suggest that family changes altered the implicit marital bargain and did so in a way that enhanced financially independent women's negotiating power.

B. What the New Marital Script Means to the Bottom

These legal changes, though designed to assist the practical role of the courts in overseeing divorce, give voice to expectations about ongoing marriages, expectations that play out differently by class. The changes in property division, custody, and spousal and child support all reflect women's

110. Both men and women, however, tend to prefer relationships in which the males make at least as much money as females, and wives remain much more likely than their husbands to cut back on outside employment. See, e.g., Daniel Schneider, *Market Earnings and Household Work: New Tests of Gender Performance Theory*, 73 J. MARRIAGE & FAM. 845, 845, 854 (2011) (finding that the more money a wife earns, the less housework she does up until the point where she earns more than her husband, then she does more). Nonetheless, both men and women place greater emphasis on a mate's earning capacity than either group did a half century ago. See David M. Buss et al., *A Half Century of Mate Preferences: The Cultural Evolution of Values*, 63 J. MARRIAGE & FAM. 491, 501 (2001); Christine R. Schwartz, *Earnings Inequality and the Changing Association Between Spouses' Earnings*, 115 AM. J. SOC. 1524, 1526 (2010) (stating that as "women's labor force participation has grown, men may have begun to compete for high-earning women just as women have traditionally competed for high-earning men"). Studies of low-income populations also find that increases in less-educated women's earnings increase the marital prospects of those giving birth outside of marriage. See Kristen Harknett & Arielle Kuperberg, *Education, Labor Markets and the Retreat from Marriage*, 90 SOC. FORCES 41, 43 (2011).

111. Mechoulan, *supra* note 49, at 163-64.

112. *Id.* at 161, 164.

113. Betsey Stevenson & Justin Wolfers, *Bargaining in the Shadow of the Law: Divorce Laws and Family Distress*, 121 Q.J. ECON. 267, 269 (2006).

114. Stevenson, *The Impact of Divorce Laws*, *supra* note 57, at 92-93; Stevenson, *Divorce-Law Changes*, *supra* note 57, at 17.

newfound autonomy and remake the gender bargain at the core of intimate relationships. As both men and women place greater weight on their partners' earning capacity,¹¹⁵ but remain wary of relationships with too great a disparity in earning power,¹¹⁶ they delay marriage until they have more confidence in their own and their partners' circumstances.¹¹⁷ For college graduates, this means greater assortative mating as the successful have become more likely to marry similarly successful partners.¹¹⁸ For the less successful, it means greater wariness about both early marriage and marriage to a partner who is not the right fit.

While this new system gives men and women greater ability to say "no" to marriage, a particularly dramatic change for women, it also locks in their mutual commitment to their children once they do marry, protecting men's investments in their offspring and limiting women's ability to leave. The new system enshrines parenthood as a mutually assumed and permanent obligation that survives the adult relationship and includes not only joint responsibilities to their children but also a duty to foster the involvement of the other parent.¹¹⁹

The power balance is different in relationships outside of marriage. While the legal distinction between marital and nonmarital children has been largely dismantled, mothers retain greater responsibility for and greater authority over nonmarital children. As nonmarital births have become more common, the result has been the emergence of an alternative model that rests on contingent relationships and gatekeeper custodial parents. The state simultaneously rejects this model, denigrating the legitimacy of single parent families, and reinforces it as it fails to support non-custodial parents who would like more involvement with their children. TenBroek's second

115. See Buss et al., *supra* note 110, at 501.

116. See, e.g., Schneider, *supra* note 110, at 845, 854 (finding that the more money a wife earns, the less housework she does up until the point where she earns more than her husband, then she does more); D. Alex Heckert, Thomas C. Nowak & Kay A. Snyder, *The Impact of Husbands' and Wives' Relative Earnings on Marital Disruption*, 60 J. MARRIAGE & FAM. 690, 701-02 (1998) (concluding that divorce is more likely if a wife earns 50 to 75% of household income than if she earns either more than 75% or less than 50%); EDIN & NELSON, *supra* note 27, at 94-97 (quoting men who indicate that they prefer partners of equal status and similar incomes).

117. See Mechoulam, *supra* note 49, at 162.

118. Christine R. Schwartz & Robert D. Mare, *Trends in Educational Assortative Marriage from 1940 to 2003*, 42 DEMOGRAPHY 621, 623 (2005).

119. See, e.g., Renaud v. Renaud, 721 A.2d 463, 468 (Vt. 1998) (conditioning the mother's continuing custody on cooperation with repairing the father's relationship with the child); Rita Berg, *Parental Alienation Analysis, Domestic Violence, and Gender Bias in Minnesota Courts*, 29 LAW & INEQ. 5, 8, 24 (2011) (concluding that charges that one parent is undermining the child's relationship with the other parent often involve cases of physical or psychological abuse of the "alienating" partner and disproportionately result in custody awards to the father).

system occasionally intervenes in these families to impose support obligations (and sometimes to restrict custodial parents' rights), but it does little to reinforce the bargains the parents may have made themselves or to make such agreements more common or reliable.

In between, however, is a growing fight between mothers and fathers. The middle remains more likely to marry—and to divorce.¹²⁰ Fathers in the middle have greater ability to seek a role in their children's lives, and the courts are more likely to rule in their favor. Yet, as the middle, like the bottom, moves from married families to cohabitation to stepfamilies, the question of which families count, and which parent gets to call the shots, becomes more complex.

1. *Interdependence Versus Contingent Relationships*

[He says,] "I'm not working, them's not my kids." If you're not married to the person you say, "They're not yours? Hit the door then!" But if you're married to them, you say, "Hit the door, please?" You know, you start nagging and they say, "I'm not going nowhere." . . . You're stuck with them just like all the other people stuck with their marriage and stuff. . . . I think it's best not to get married. Unless you're pretty sure that person's going to take care of you.¹²¹

—A divorced mother of four in Chicago.

Amber Strader, 27, was in an on-and-off relationship with a clerk at Sears a few years ago when she found herself pregnant. A former nursing student who now tends bar, Ms. Strader said her boyfriend was so dependent that she had to buy his cigarettes. Marrying him never entered her mind. "It was like living with another kid," she said.¹²²

—Single mother in Lorain, Ohio, 2012.

Twenty-five years ago, the wariness toward marriage that Wilson documented in the divorced mother of four living in Chicago was an outlier—thought typical of the African-American underclass and no one else. Today, not only do lower income people echo the same sentiments,¹²³ so do those closer to the middle. Skepticism about whether marriage is a good thing has become typical of working-class American men and women¹²⁴—although they still want to marry, they are wary of someone who will take advantage

120. NAT'L MARRIAGE PROJECT & INST. FOR AM. VALUES, *supra* note 60, at 72-73.

121. William Julius Wilson, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 103-04 (1996).

122. Jason DeParle & Sabrina Tavernise, *For Women Under 30, Most Births Occur Outside Marriage*, N.Y. TIMES (Feb. 17, 2012), http://www.nytimes.com/2012/02/18/us/for-women-under-30-most-births-occur-outside-marriage.html?pagewanted=all&_r=1&_r=1&_r=1.

123. See, e.g., EDIN & NELSON, *supra* note 27; KATHRYN EDIN & MARIA KEFALAS, *PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE* (2005).

124. NAT'L MARRIAGE PROJECT & INST. FOR AM. VALUES, *supra* note 60, at 40-41 (over half of working-class Americans report that marriage has not worked out for people they know).

of them. The legal regulation of the family complicates things further—and mandated sharing of assets, children, and lives can be a threat to those whose lives are unstable and unequal.

In the meantime, the poor have all but given up on marriage, and the middle struggles between two models: the hard-to-realize later marriages of the upper third and the contingent single-parent relationships of the bottom group. Andrew Cherlin observes in *The Marriage-Go-Round* that the distinctive characteristic of American relationships in comparison with other developed countries is “sheer movement”; children born to married American parents are more likely to see their parents breakup than children born to cohabiting parents in countries like Sweden.¹²⁵ He also reports that working class couples, where the husband had a blue collar job and neither spouse graduated from college, “reported the most stressed, least happy marriages of any group.”¹²⁶

In the poorest communities, single-parent families are the norm.¹²⁷ Relationships have become ever more unstable and multi-partner fertility common.¹²⁸ In these circumstances, a monolithic two-parent model is meaningless. Instead, adult partnerships form, dissolve, and reform without any necessary long-term relationship to the assumption of parenting roles. In a study that included 90% of all nonmarital families in Wisconsin from 1997 to 2007, researchers found that, by the age of five, approximately half of the children were likely to have at least one half-sibling through either their mothers or, more likely, their fathers.¹²⁹ In these families, custodial parents, rather than engaging in shared parenting, act as gatekeepers who trade access to the child for need, support, and assistance.

Sociologist Linda Burton and her colleagues have studied these contingent relationships among low-income women.¹³⁰ The women in the study overwhelmingly bear children outside of marriage and almost all express wariness about men.¹³¹ Burton describes, for example, a woman named Angie, who rejected marriage out of hand, but who sought partners who could

125. ANDREW J. CHERLIN, *THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY* 5, 18 (2009).

126. *Id.* at 169.

127. NAT’L MARRIAGE PROJECT & INST. FOR AM. VALUES, *supra* note 60, at 25.

128. Sara McLanahan & Audrey N. Beck, *Parental Relationships in Fragile Families*, *FUTURE OF CHILD.*, Fall 2010, at 17, 22; EDIN & NELSON, *supra* note 27.

129. MARIA CANCEAN & DANIEL R. MEYER, UNIV. OF WIS.-MADISON, INST. FOR RESEARCH ON POVERTY, *THE IMPLICATIONS OF COMPLEX FAMILIES FOR POVERTY AND CHILD SUPPORT POLICY* (2012), available at <http://www.irp.wisc.edu/publications/media/webinars/Cancian%20%20Meyer%20Webinar%20September%202012%20to%20post.pdf>.

130. See Linda M. Burton et al., *The Role of Trust in Low-Income Mothers’ Intimate Unions*, 71 *J. MARRIAGE & FAM.* 1107 (2009).

131. *Id.* at 1111, 1114.

help her buy things for her house and her children, or provide care for her elderly ailing parents.¹³² She quotes Angie as observing that

"I ain't looking for that love shit," she declared. "I need a man to help me for a minute, and he's out of my house after that. You see, we got to have an understanding. I get what I need, he gets what he needs, and it's a done deal. I don't need to know nothin' about how he gets what he gets [e.g., acquiring financial resources]. I don't want to know nothin' that particular. I'm in control. I run this shit up in here."¹³³

Harvard's Kathy Edin and co-author Timothy Nelson found similar mistrust among men of the mothers of their children.¹³⁴ These relationships are built on short-term, transactional exchanges about parenting that may or may not ever develop into anything more permanent. The partners have made no long-term commitment to each other, and their continued mutual involvement with the child depends on successfully negotiating the relationships with the other adult.¹³⁵ To the extent that the law intrudes into these relationships, it tends to impose parental status on the basis of biology in ways that may bear little relationship to the underlying parenting norms.¹³⁶

In between the top and the marginalized is a working class in transition. Working-class conceptions take place the same way as they did in the old days—in the context of courtships that tend to be "sexual and brief."¹³⁷ These couples may not know each other terribly well at the time of the child's birth.¹³⁸ In another era, they would have married, and the dependent mother would have stayed with the father so long as he brought home a paycheck.¹³⁹ He could still go out with the boys, and she might rely more on her relatives than her husband to care for the children, but his ties to the family would have depended on the strength of his relationship to her.¹⁴⁰ If he refused to marry her or if they divorced, his relationship to the child would typically end.¹⁴¹ In some parts of the country today, these couples still marry, but those who do also divorce and remarry at high rates.¹⁴² In other

132. *Id.* at 1117.

133. *Id.*

134. EDIN & NELSON, *supra* note 27, at 95-96.

135. *Id.* at 86, 89 (observing that parents of young children often do not know each other well or have much in common at the time the woman becomes pregnant).

136. See Harris, *The Basis for Legal Parentage*, *supra* note 16, at 612, 614.

137. George A. Akerlof, Janet L. Yellen, & Michael L. Katz, *An Analysis of Out-of-Wedlock Childbearing in the United States*, 111 Q.J. ECON. 277, 279 (1996). Cf. Edin & Nelson, *supra* note 27, at 31.

138. *Id.*

139. *Id.* at 86.

140. *Id.* (observing that in the fifties, sixties, and seventies, men had no relationship with children independent of their relationship with their wives).

141. *Id.*

142. CHERLIN, *supra* note 125, at 16, 18 (finding that Americans marry and cohabit at younger ages than other Western countries and are more likely to breakup and remarry).

parts of the country, the couples cohabit instead and marry only if they secure employment and a measure of financial stability.¹⁴³

The new relationship scripts of the upper third and the legal decisions that give voice to the understanding that underlie them simply do not work for much of the rest of the country. The college-educated class expects dual-earner arrangements, and it also accepts the interdependence that accompanies modern marriage. The working class has preferred more traditional and gendered roles, but has become less likely to realize them.¹⁴⁴ Both groups want partners who will contribute financially and emotionally.¹⁴⁵

The result increases the conviction of lower-income women that they will have to look to their own earnings to support themselves and their children. Sociologist Kathleen Gerson found that the coming generation of young men and women overwhelmingly accept an egalitarian ideal, but both men and women feel vulnerable.¹⁴⁶ Women who fear being trapped in an unhappy marriage or are afraid of being deserted by an unfaithful spouse treat work "as essential to their survival."¹⁴⁷ Men worry more about meeting the demands of the workplace and continue to see employment success as central to their self-esteem.¹⁴⁸ While these attitudes have become increasingly common for everyone, the level of agreement varies with race and class. African-American women top the charts in saying that the alternative is self-reliance; the number who opt for self-reliance over a neo-traditional gendered role is close to 100%.¹⁴⁹ Next are the working class and poor of any race, with 80% of this group preferring self-reliance, compared to 58% of whites taken as a group (42% chose a neo-traditional family arrangement).¹⁵⁰

143. McLanahan & Beck, *supra* note 128, at 25 (finding a strong positive link between fathers' employment and earnings and relationship quality and stability).

144. See PAUL AMATO ET AL., *ALONE TOGETHER: HOW MARRIAGE IN AMERICA IS CHANGING* 26 (2007) (discussing marital distress among working-class couples unable to achieve the traditional model).

145. See, e.g., EDIN & NELSON, *supra* note 27, at 95 (observing that low-income men "avoid attachments to women who hold the expectation that the man will be the sole provider").

146. See KATHLEEN GERSON, *THE UNFINISHED REVOLUTION: HOW A NEW GENERATION IS RESHAPING FAMILY, WORK, AND GENDER IN AMERICA* 11-12 (2010).

147. *Id.* at 11.

148. See *id.* at 166.

149. *Id.* at 128.

150. *Id.* at 127 figs.6.1 & 6.2. Gerson's findings appear to differ from Amato's conclusion that working-class women would prefer more traditional roles, but in fact the two findings can be reconciled. First, Gerson is looking at young couples while Amato focused on a data set from 2000 that included many older couples. Second, Gerson is describing expectations about the future among couples who overwhelmingly do not yet have children. Amato in contrast is describing tensions among married couples, who are more likely to have children. Third, Amato's findings reflect the fact that working-class women are frequently trapped in unsatisfying family-unfriendly jobs, when they would prefer to spend more time

Consider what would happen to Bethenny and Calvin, a young couple with a child in Virginia Beach, if they married and divorced.¹⁵¹ In *The End of Men*, author Hanna Rosin described how Calvin talked about the jobs he once had and then lost and the ones he was trying to get.¹⁵² Rosin's conclusion was that what Bethenny said she wanted was a traditional model of marriage, but that she recognized:

Calvin was not going to drive up in a Chevy and take his rightful place at the head of the table one day soon, because Bethenny was already occupying that space, not to mention making the monthly payments on the mortgage, the kitchen renovation, and her own used car. Bethenny was doing too much but she was making it work, and she had her freedom. Why would she want to give all that up?¹⁵³

If their lives continued along the paths they were on at the time of the interview, Bethenny would be the primary wage-earner *and* the primary caretaker. Calvin might provide her with some much needed help with their daughter, and he could contribute financially, if not always reliably. Yet, Calvin could neither assume the "head of the family" role nor was he likely to settle into a subordinate one. If they split, Bethenny could reasonably expect that the courts would equally divide the house, the car, and the bank accounts acquired during the marriage, even if Bethenny had been making the monthly payments on the house, paid for the car out of her earnings, and had put aside the savings for the child's education. The property that comes out of her earnings is "marital," and the courts do not itemize the parties' respective contributions, but instead characterize whatever is acquired during the marriage as a jointly owned total.¹⁵⁴

In addition, in a changing sign of the times, Calvin might claim joint custody of the child and, if Bethenny continued to earn more than he did, spousal or child support.¹⁵⁵ The very threat of an alimony claim might persuade her to settle the property or custody claims, and the very thought may be enough to persuade her not to marry in the first place.¹⁵⁶ No surprise that

with their children, while Gerson's questions focus more on the ability to depend on a partner's income.

151. See ROSIN, *supra* note 25, at 3-4.

152. *Id.* at 3-4, 261-63.

153. *Id.* at 3-4.

154. See Baker, *supra* note 90, at 333-34.

155. Alimony awards generally, however, remain rare, awarded in less than 15% of all divorces. See Jonathan Zimmerman, *Alimony Myth Persists in New Jersey's Divorce-Reform Drive*, PHILLY.COM (June 5, 2012), http://articles.philly.com/2012-06-05/news/32056763_1_alimony-divorce-reform-women.

156.

[S]ome litigators find that their female clients had no idea what was ahead when they chose to support their husbands financially and emotionally through most of the marriage out of a sense of obligation and kindness. The idea that they would [be] asked to continue to do so after the dissolution never occurred to them.

Bethenny is not holding her breath in anticipation of a romantic marriage proposal from a man who cannot hold his own in either a financial or a nurturing role.

C. What the New Marital Script Means to the Middle

In tenBroek's system, the middle of American society did not enjoy the same ability as elites to hire lawyers, negotiate settlements, or determine family life on terms of their choosing. But they did share the same assumptions about what reputable families meant. They married before they gave birth, generally stayed married, and expected husbands to pay support in the event of divorce.

With the divergence of the family patterns of the middle of the American family spectrum, the middle no longer shares the same family life patterns that underlie the norms and family law of the elite. Today, the middle of American society lives different lives, with more frequent divorces and nonmarital births, than the elite. These unmarried relationships often rest on different assumptions that may not include either sharing or interdependence. A majority of those who do not graduate from college now give birth outside of marriage and manage family relationships in terms of contingent, rather than integrated, relationships.¹⁵⁷

Second, this group, which is much less likely than the poor to receive stigmatized public benefits, is not subject to the public system tenBroek described. At the same time, however, it enjoys less access to lawyers and less ability to forge legal agreements on terms of its choosing. In tenBroek's time, of course, blue-collar families would also have had less access to legal counsel and formalized agreements than wealthier families. Yet, if such families ended up in court, they would have at least faced judges applying familiar legal principals. In contrast, today's working-class families enjoy their greatest autonomy by staying out of court.

Finally, in terms of the substance of family law, the new mainstream system balances men's continuing greater wealth, which is subject to division at divorce, with fathers' greater ability to secure shared parenting, limiting women's ability to end family unions on terms of their choosing. The result effects a new gender balance designed to preserve family stability. For the rest of society, however, the system privileges state interests in recouping child support payments that fill state coffers in ways that distort the gender balance between gatekeeper custodial parents (overwhelmingly

Lenore Skomal, *Woman Who Pay Alimony: It's More Frequent than You Think*, DIVORCE360, <http://www.divorce360.com/divorce-articles/alimony/information/women-paying-alimony.aspx?artid=1065&page=2> (last visited Oct. 24, 2013).

157. HYMOWITZ ET AL., *supra* note 23, at 19, 26-29.

moms) and non-custodial parents who would like to maintain a relationship with their children.

The result is something the sociologists have labeled “deinstitutionalization”¹⁵⁸ and which we have argued elsewhere takes family law “out of the channel and into the swamp.”¹⁵⁹ These changes accord the greatest deference to family autonomy when couples evade the legal system by refusing to marry, failing to establish paternity, declining to seek formal orders of support, and managing contact with children (or severing parental ties altogether) through non-legal mechanisms that leave the status of parental relationships in limbo. The results may aggravate children’s feelings of abandonment by absent parents who, in turn, may rightly feel deprived of a relationship to which they were entitled; confuse parents’ understandings of the respective family obligations they owe to each other; and leave many adults angry at another parent whose demands may not correspond to the obligations they thought they assumed.

This third system of family law operates in the shadows of the law and it is time to bring it to light.

III. THE SYSTEMS AND THE LAW: THE NEW PARENTHOOD SCRIPT

The law has its greatest impact when it articulates expectations about behavior that reinforce evolving norms.¹⁶⁰ For married college graduates, this has involved the relatively subtle readjustment of incentives that encourage unions between men with reliable incomes and women who earn a bit less, with a joint commitment to the children.¹⁶¹ The legal images we have described, which punish both dependent women and women who refuse to encourage the relationships between their husbands and their children, lock in the terms of the new marital regime.¹⁶²

A. Law, Parental Bargains, and Shared Custody—for the Elite

If the elimination of fault and the increase in women’s financial independence strengthened women’s negotiating power at divorce, the counter-

158. Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARRIAGE & FAM. 848, 848 (2004).

159. June Carbone, *Out of the Channel and into the Swamp: How Family Law Fails in a New Era of Class Division*, 39 HOFSTRA L. REV. 859, 859 (2011).

160. See Schneider, *supra* note 12, at 509. Schneider, in describing family law’s efforts to create a sense of commonality, emphasized that the law has little ability to compel parents to stay together or to eliminate conflict between warring adults. *Id.* at 511.

161. See discussion *supra* Section II.B.

162. See discussion *supra* Section H.B.

balance for men in the elite has come from shared parenting.¹⁶³ In some ways, the most dramatic change in family law has been the transition from a legal presumption that mothers should receive custody of children of tender years to a preference for the continued involvement of both parents.¹⁶⁴ A high percentage of the public also agrees that fathers should play more of a role in their children's lives. Indeed, a decade ago, when Massachusetts put a proposition on the ballot mandating shared custody, it passed by a vote of 530,716 to 97,211.¹⁶⁵

This makes child support the most important financial division to occur in modern divorce. Had the maternal presumption remained in place, a young woman would be able to leave her husband with the children in tow and command generous support through the children's age of majority.¹⁶⁶ We have written elsewhere that this dynamic has made custody battles "[g]round [z]ero in the [g]ender [w]ars."¹⁶⁷

The easiest way for an ex-husband to lower child-support awards was to seek a greater share of the children's time.¹⁶⁸ And just as more egalitarian gender rules justified the "clean break" at divorce, so too did they justify increased emphasis on shared parenting.¹⁶⁹ Joint custody, which many courts

163. See Carbone, *supra* note 89, at 75 (explaining that the two parties that cause concern in initiating divorce are older, well-off men and younger women with children who leave "good enough" marriages).

164. See Theresa Glennon, *Still Partners? Examining the Consequences of Post-Dissolution Parenting*, 41 FAM. L.Q. 105, 105 (2007).

165. *Results of Local, Regional Ballot Questions*, BOSTON.COM NEWS, http://www.boston.com/news/special/politics/2004_results/general_election/questions_all_by_town.htm (last visited Oct. 24, 2013). The proposition stated:

Shall the state representative from this district be instructed to vote in favor of legislation requiring that in all separation and divorce proceedings involving minor children, the court shall uphold the fundamental rights of both parents to the shared physical and legal custody of their children and the children's right to maximize their time with each parent, so far as is practical, unless one parent is found unfit or the parents agree otherwise, subject to the requirements of existing child support and abuse prevention laws?

SEC'Y OF THE COMMONWEALTH OF MASS., STATE ELECTION 2004 BALLOT QUESTIONS 10 (2004), available at <http://www.sec.state.ma.us/ele/elepdf/balques04.pdf>.

166. See McMullen, *supra* note 109, at 43-44, 55 (discussing women's feelings of guilt about initiating divorce as factor in lack of alimony awards); see also JUDITH S. WALLERSTEIN & JOAN B. KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* 23 (1980) (asserting that the party initiating divorce is likely to ask for less financial support).

167. JUNE CARBONE, *FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW* 180 (2000).

168. See Carbone, *supra* note 89, at 75.

169. See, e.g., Margaret F. Brinig, *Does Parental Autonomy Require Equal Custody at Divorce?*, 65 LA. L. REV. 1345, 1367-68 (2005) (finding a decrease in child support after statutory changes in custody provisions took effect); Margaret F. Brinig, *Penalty Defaults in Family Law: The Case of Child Custody*, 33 FLA. ST. U. L. REV. 779, 806 (2006) [hereinafter

initially greeted with some hostility, has become increasingly accepted in almost all states, and many jurisdictions have adopted “friendly parent” provisions that support the award of custody to the parent who will best facilitate the continuing involvement of the other parent.¹⁷⁰ Indeed, fathers’ rights groups have pressed for a presumption in favor of an equal division of the child’s time in all divorces.¹⁷¹ Joint custody has won widespread public support.¹⁷² In two innovative studies discussed in a 2011 article, the participants strongly preferred joint custody, irrespective of the existence of conflict between the parents during the divorce.¹⁷³ Study participants expressed significant reservations only when one of the parents had instigated the conflict.¹⁷⁴

Joint-custody provisions effectively give greater weight to the continued involvement of both parents than to consideration of the reasons for the breakup, the strength of the child’s bond with each parent, or the comparative ability of each parent to provide for the needs of the child. Law professor Martha Fineman has devoted more than one volume to the change in the law that has weakened women’s bargaining position at divorce, particularly through the change from a maternal presumption to more facially neutral rules.¹⁷⁵ While women are more likely to file for divorce than men, they are comparatively less likely to do so if they are unsure they will secure custody of the children.¹⁷⁶ Shared custody can accordingly become a divorce deter-

Brinig, *Penalty Defaults*] (noting that there was an increase in joint custody where couples separated after the statute took effect).

170. HARRIS, TEITELBAUM & CARBONE, *supra* note 96, at 692.

171. For discussion of these movements and the objections to them, see Brinig, *Penalty Defaults*, *supra* note 169, at 780-81.

172. Sanford L. Braver et al., *Lay Judgments About Child Custody After Divorce*, 17 PSYCHOL. PUB. POL’Y & L. 212 (2011); see also Linda Nielsen, *Shared Parenting After Divorce: A Review of Shared Residential Parenting Research*, 52 J. DIVORCE & REMARRIAGE 586, 587 (2011); *Results of Local, Regional Ballot Questions*, *supra* note 165 (detailing a proposition in favor of shared parenting passed overwhelmingly).

173. Braver et al., *supra* note 172, at 227, 231.

174. *Id.* at 236.

175. See MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 79-95 (1991); MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 82-83 (1995). Much earlier, of course, Mnookin and Kornhauser also observed that any change to gender-neutral custody rules would weaken women’s bargaining power at divorce. See Mnookin & Kornhauser, *supra* note 8, at 978.

176. 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 tbl.1, 136-37 (2000) (stating that approximately two-thirds of those filing for divorce are women and that custody laws affect willingness to file).

rent, and there is broad support in states in favor of the continued involvement of both parents following divorce.¹⁷⁷

In accordance with the new legal doctrines, fathers have fought for increasing shares of the children's time both because engaged husbands want the continuing contact and because, with mandatory child-support formulas, the easiest way for a higher-earning parent to lower child-support awards is to seek more time with the child.¹⁷⁸ Just as the disappearance of long-term spousal support has reinforced the emphasis on dual incomes, the emphasis on shared custody has encouraged male participation in child-rearing—for those men with access to the child.

B. Parenthood Scripts for the Marginalized

Public welfare serves as the backdrop for the parenthood scripts for the poor. At the time ten Broek wrote of a “dual system” of family law, those caught up in the public welfare system were single mothers, whether because of divorce, separation, widowhood, or an unmarried birth, who sought support from the expanded welfare state of the sixties. One of the last of the New Deal programs to pass, AFDC was based on programs originally designed to aid widows and their children.¹⁷⁹ It was premised on the notion that a single mother could not be expected to care for her children and work outside the home.¹⁸⁰ “Morals” restrictions imposed by the states limited it to the “deserving” poor (unmarried mothers need not apply) and included criteria making those who worked in agricultural or domestic service ineligible, disproportionately excluding African-Americans.¹⁸¹

During the sixties, various AFDC restrictions disappeared. The Supreme Court struck down the “man-in-the-house” rules, which considered

177. See, e.g., DOUGLAS ABRAMS, NAOMI R. CAHN, CATHERINE J. ROSS & DAVID D. MEYER, *CONTEMPORARY FAMILY LAW* 743 (3d ed. 2012).

178. See, e.g., WIS. STAT. § 767.41(2) (2012) (establishing that joint legal custody is presumed); *id.* § 767.41(4) (noting that the court “shall set a placement schedule that allows the child to have regularly occurring, meaningful periods of physical placement” and “maximize[] the amount of time the child may spend with each parent”); see also LESLIE BENNETTS, *THE FEMININE MISTAKE: ARE WE GIVING UP TOO MUCH?* 110-12 (2007).

179. CARBONE, *supra* note 167, at 201; Tonya L. Brito, *From Madonna to Proletariat: Constructing a New Ideology of Motherhood in Welfare Discourse*, 44 VILL. L. REV. 415, 421-22 (1999).

180. It initially proposed to cover children under sixteen for whom there was “no adult person, other than one needed to care for the children, able to work and provide a reasonable subsistence compatible with decency and health.” CARBONE, *supra* note 167, at 201 (quoting LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 1890-1935*, at 277 (1995)).

181. See Brito, *supra* note 16, at 240-43; Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. GENDER, RACE & JUST. 617, 623 (2012).

the income of any cohabitant available to the children, thus making their mother ineligible for benefits.¹⁸² The Court also upheld unannounced monitoring visits by caseworkers.¹⁸³ Racially motivated exclusions were eliminated, and the percentage of AFDC recipients who were African-American rose to 46% in 1967.¹⁸⁴ The benefits also became more generous, making it easier for a young mother to live on her own. While the AFDC caseload rose relatively modestly between 1950 and 1965, after the changes, it increased 125% from 1965 to 1970, increased further by 29% between 1970 and 1975, and then leveled off as Congress adopted more and more restrictions thereafter.¹⁸⁵

As a condition of the receipt of benefits, the state increasingly attempted to impose order. Central to these efforts was child-support enforcement. In the sixties, the principal way to establish paternity was marriage. If a child was born during a marriage, the husband and wife automatically became legal parents and need take no action to establish parenthood.¹⁸⁶ For a child born outside of marriage, establishing paternity typically required a civil action.¹⁸⁷ With the expansion of public benefits came an effort to hold the “real culprits” responsible: the supposedly ne’er-do-well men who had fathered the children receiving state support and then abandoned the mothers.¹⁸⁸ The system stigmatized the available benefits and conditioned them on the mother’s cooperation with the state in establishing paternity and securing child support.¹⁸⁹ Driven by federal efforts to minimize costs, the regulations eventually produced a much greater degree of national standardization in paternity establishment and child support enforcement than in other areas of family law.¹⁹⁰

In doing so, the system imposed mainstream norms on parties who either may not share these norms or cannot realize them when they do share

182. *King v. Smith*, 392 U.S. 309, 311-13, 316 (1968).

183. *Wyman v. James*, 400 U.S. 309, 326 (1971).

184. JAMES T. PATTERSON, *FREEDOM IS NOT ENOUGH: THE MOYNIHAN REPORT AND AMERICA’S STRUGGLE OVER BLACK FAMILY LIFE—FROM LBJ TO OBAMA* 96 (2010).

185. CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980*, 10TH ANN. ED. 166 (1994). It increased 7% in the 1950s and 24% from 1960-1965. *Id.*

186. See Harris, *The Basis for Legal Parentage*, *supra* note 16, at 614.

187. HARRIS, TEITELBAUM & CARBONE, *supra* note 96, at 899.

188. Jill Hasday observes, for example, that: “[f]rom the start, this program [ADC] was grounded in a suspicion of fathers who had failed to support their families, on the assumption that there was almost no acceptable reason for that state of affairs.” Hasday, *supra* note 16, at 359.

189. CARBONE, *supra* note 167, at 157; see also Harris, *The Basis for Legal Parentage*, *supra* note 16, at 614, 620-21; Brito, *supra* note 16, at 256-60.

190. See, e.g., Harris, *The Basis for Legal Parentage*, *supra* note 16, at 614, 620-21; Brito, *supra* note 16, at 256-60.

them.¹⁹¹ This system vindicates public rather than private interests and often imposes punitive or counterproductive measures insensitive to the individual circumstances of the affected parties.¹⁹² While the family and the nature of state support have changed since tenBroekian times, state-initiated paternity and support actions continue to differ in form and purpose from private paternity and support litigation.¹⁹³

The child support system, especially when connected to the drive to collect money from poor dads to benefit public coffers, continues to reflect an image of deadbeat dads abandoning their families.¹⁹⁴ It fails to reflect the reality of families in the bottom third where the mother may have rejected the father after she found someone else, with the father struggling to support a new blended family dependent on his contributions.¹⁹⁵ It most certainly does not reflect fathers “doing the best [they] can,” caught in between the women’s demands that they provide more and an employment system unforgiving of criminal convictions (major or minor), limited skills, and family needs.¹⁹⁶

191. The literature displays many misunderstandings on this point because most groups share the same aspirations, but not necessarily the same assumptions, about the steps necessary to realize the aspirations. Both middle-class and poor couples believe, for example, that fathers should contribute to their children. Custodial parents who divorce, however, may believe that court orders, coupled with custody schedules and paycheck deductions, give them greater security, while poor parents, whose partners may have less reliable income, may prefer to trade off support and access to the child as circumstances change. For example, Mnookin and Kornhauser, observed that:

[i]f a father who values visitation fails to make support payments, then, quite apart from the mother’s ability to enforce his promise in court (which may often be too slow and expensive to be effective), the mother may believe that she can retaliate by informally cutting off the father’s visitation or making it more difficult. Even though this tactic has no legal validity, it is nevertheless likely to be faster, cheaper, and more effective than court enforcement. Similarly, a father may believe that his ability to cut off support will ensure that the mother will keep her word concerning visitation.

Mnookin & Kornhauser, *supra* note 8, at 965.

192. See, e.g., Leslie Joan Harris, *Questioning Child Support Enforcement Policy for Poor Families*, 45 FAM. L.Q. 157, 165-66 (2011).

193. See, e.g., Schneider, *supra* note 12, at 526.

194. See generally Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325 (2005).

195. See, e.g., JUNE GIBBS BROWN, DEP’T OF HEALTH & HUMAN SERVS., CLIENT COOPERATION WITH CHILD SUPPORT ENFORCEMENT: CHALLENGES AND STRATEGIES TO IMPROVEMENT 6 tbl.2 (2000), available at <http://oig.hhs.gov/oei/reports/oei-06-98-00041.pdf>. Of the possible reasons for noncooperation, 94% of surveyed child-support caseworkers report the mother’s desire to protect the noncustodial parent and 88% report the fear of losing informal support, with an additional 63% reporting the fear of domestic violence. *Id.* For the surveyed welfare office caseworkers, the numbers are similar: 92% report the desire to protect the noncustodial parent and 88% report the fear of losing informal support, while 73% report the fear of domestic violence. *Id.*

196. For a portrait of these men, see EDIN & NELSON, *supra* note 27.

The *Fragile Families* studies provide a strong grounding for our understanding of single parenthood in the marginalized group.¹⁹⁷ While in other eras unmarried mothers (particularly white mothers) typically did not have a continuing relationship with the father, more recent studies indicate that at the time of the child's birth, 30% of unwed parents are romantically involved, and 50% live together.¹⁹⁸ Indeed, even fathers who were no longer with the mothers tended to remain in touch with their children, with 87% having seen their children after the birth and 63% having seen their children more than once in the preceding month.¹⁹⁹ By the fifth year, 37% of children had had no contact with their fathers in the last one to two years, 43% saw their fathers regularly, and 20% were in between.²⁰⁰ Black, non-Hispanic men were more likely to have maintained contact with their children, to have seen them in the past month, and to have seen them frequently.²⁰¹

Unmarried fathers' relationships with their children occur in the context of the contingent relationships they negotiate with the mothers, and every study indicates that the father's continuing relationship with his children depends on how he manages that relationship. In some cases, the father will be living with the mother in a relationship that becomes more like marriage with the passage of time. In most cases, however, the unmarried mother and father will eventually part. In these cases, the access to the child the mother allows often depends on the father's willingness to pay for things the child needs, cooperate with the mother, and assist when she needs help.²⁰² Mothers value fathers' contributions not solely by the amount of support contributed, but also by non-economic factors, such as role modeling.²⁰³ Outside of the formal child custody system, men often saw their children's mothers as controlling access.²⁰⁴

Patterns of parental involvement among unmarried and non-resident parents involve significant cultural divisions and vary significantly by race,

197. Sara McLanahan & Irwin Garfinkel, *The Fragile Families and Child Well-Being Study: Questions, Design, and a Few Preliminary Results* (Inst. for Research on Poverty Discussion, Paper No. 1208-00, 2000), available at <http://crcw.princeton.edu/workingpapers/WP00-07-FF-McLanahan.pdf>.

198. *Id.* at 41.

199. Marcia J. Carlson, Sara S. McLanahan & Jeanne Brooks-Gunn, *Coparenting and Nonresident Fathers' Involvement with Young Children After a Nonmarital Birth*, 45 DEMOGRAPHY 461, 472-73 (2008).

200. *Id.*

201. *Id.*

202. See NANCY E. DOWD, REDEFINING FATHERHOOD 3 (2000); Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 2 (2004); Harris, *supra* note 192, at 171.

203. See Maureen R. Waller, *Viewing Low-Income Fathers' Ties to Families Through a Cultural Lens: Insights for Research and Policy*, 629 ANNALS AM. ACAD. POL. & SOC. SCI. 102, 109-10 (2010).

204. See EDIN & NELSON, *supra* note 27, at 208.

as well as class. African-American fathers, for example, are more likely to be involved with children with whom they don't live than fathers of other races, and they have higher quality coparenting relationships.²⁰⁵ Moreover, for whites, fathers' involvement with their children declines most if the fathers remarry or take responsibility for new partners and new children, while for African-Americans and Hispanics, the largest declines are associated with the mothers' new relationships.²⁰⁶ These findings suggest that different communities have established different tradeoffs as parents balance responsibility to multiple children in different households. The law, in contrast, as a formal matter draws few such distinctions. It emphasizes shared parenting whether parents marry or not, and it often privileges first families ahead of subsequent families.²⁰⁷ In practice, however, significant differences exist that make the reality of working class families' interactions with the legal system quite different from those of the better-off upper third.²⁰⁸

For these couples, the second system of family law provides little of the legal "readjustment" of the new gender bargain that has occurred for the elite. Instead, it often increases gender distrust and undermines existing relationships.

C. Parenthood Scripts in the Middle

For those in the middle, the system fails to frame the issue of gender balance in ways that make it visible at the same time that the courts struggle with a culture war over the terms of parenthood. Cherlin's description of a "marriage-go-round" best describes the middle of American society that marries young, divorces at rates higher than the rest of world, and then remarries or at least cohabits with new partners.²⁰⁹ In this world, the critical question is who counts as a parent—the biological father who may never have had a relationship with the child, the husband who may be a legal father if the birth occurred within the marriage (or a lower status "stepparent" if it did not), or the functional father, married or not, who established a relationship with the child?

205. McLanahan & Beck, *supra* note 128, at 27.

206. Kathryn Edin, Laura Tach & Ronald Mincy, *Claiming Fatherhood: Race and the Dynamics of Paternal Involvement Among Unmarried Men*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 149, 161 (2009).

207. See, e.g., Adrienne Jennings Lockie, *Multiple Families, Multiple Goals, Multiple Failures: The Need for "Limited Equalization" as a Theory of Child Support*, 32 HARV. J.L. & GENDER 109, 110-11 (2009).

208. See Daniel L. Hatcher, *Don't Forget Dad: Addressing Women's Poverty by Rethinking Forced and Outdated Child Support Policies*, 20 AM. U. J. GENDER SOC. POL'Y & L. 775, 779 (2012).

209. See CHERLIN, *supra* note 125, at 16-18.

The states critically disagree not only on the outcomes but also on the images and the reasoning that attend these disputes. Texas, for example, declared the marital presumption unconstitutional in the nineties expressly because it “leave[s] this determination of the child’s best interest and the definition of family, itself, exclusively to the biological mother.”²¹⁰ The court objected to a distinction that would, in effect, grant rights only to those fathers whom the mothers had permitted to develop a relationship with the child.²¹¹ The courts’ objection to maternal choice was thus central to the decision. California, in contrast, has reaffirmed the marital presumption but then largely ignored marriage itself. Instead, California rewards the men (and women) who have lived with the mother and child and assumed a parental role.²¹² In this calculus, neither biology nor marriage counts as much as function. The state does acknowledge, however, (though only in an intermediate appellate opinion), that this means that the mother can effectively block the biological father from assuming a parental role, thus reaching the point where he acquires parental rights.²¹³

State by state, these cases sometimes provide guidance. Thus, Texas holds that a woman who had a man’s child owes him the opportunity to develop a relationship with that child,²¹⁴ while California concludes that a mother has such an obligation primarily to the partner she chose to allow into the child’s life.²¹⁵ But the effect of the Texas opinion gives women greater incentive to lie about paternity, and no other state has followed California’s unqualified embrace of functional parenthood.

D. Parenthood Revisited: How the Triple System Plays Out in Custody

An elaborate, federally mandated system exists to secure child support enforcement while fathers who would like to secure contact with their children are left largely on their own. The result builds in procedures that make

210. *In re J.W.T.*, No. D-1742, 1993 Tex. LEXIS 101, at *29-30 (Tex. June 30, 1993) (depublished).

211. *Id.*

212. *See, e.g., In re Jesusa V.*, 85 P.3d 2, 13, 15 (Cal. 2004) (recognizing the husband, who had not lived with the mother at the time of the child’s conception or birth, as a presumed father); June Carbone, *From Partners to Parents Revisited: How Will Ideas of Partnership Influence the Emerging Definition of California Parenthood?*, 7 WHITTIER J. CHILD. & FAM. ADVOC. 3, 4 (2007).

213. *See, e.g., H.S. v. Superior Court*, 108 Cal. Rptr. 3d 723, 726 (Ct. App. 2010) (recognizing that the statute does “allow the mother and her husband to prevent the biological father from ever establishing parental rights over a child”); *Gabriel P. v. Suedi D.*, 46 Cal. Rptr. 3d 437, 439 (Ct. App. 2006) (noting that the mother, Suedi, allowed Anthony, the non-biological father, to live with her, accompany her to the hospital, and voluntarily declare paternity).

214. *In re J.W.T.*, 872 S.W.2d at 198.

215. *In re Jesusa-V.*, 85 P.3d at 13.

the enforcement of parental rights and obligations very different at the top, the bottom, and the center of American society.

The legal differences start with the ease of establishing paternity. The marital presumption establishes the spouses as the legal parents, and divorce decrees routinely recite whether children of the marriage exist and include orders that reflect mandatory state child-support guidelines.²¹⁶ In this system, marriage becomes, essentially, “a contract for trade in children which transfers a defined share of rights to children from a woman to her husband. As a result, men must pay for marriage in exchange for custodial rights.”²¹⁷ Shared parenting is deeply embedded in modern marriages, the foundation of the families of the upper third.

For unmarried parents, establishing paternity is more difficult and requires the cooperation of both parents, although federal law encourages the state to streamline paternity procedures.²¹⁸ The primary means for doing so is a “voluntary acknowledgment of paternity” (VAP) signed in the hospital by the mother and father attesting to the man’s paternal status.²¹⁹ The alternative is a paternity proceeding, which unlike a VAP requires access to the courts and a relatively expensive paternity test. The *Fragile Families* and other studies have found that the more closely involved with each other the parents were prior to the birth, the more likely they were to sign a VAP and to do so within the first month of the child’s life.²²⁰ Those fathers who sign VAPs are more likely to pay support and stay involved in the child’s life if the mother and father part; those who do are also more likely to be employed.²²¹

The Wisconsin Department of Children and Families has been collecting data on custody arrangements in three kinds of actions: divorce, VAPs, and paternity adjudications. The Wisconsin study finds that shared custody, which constitutes approximately half of the custody awards at divorce in the state, is more common among higher-income parents, among parents whose incomes are roughly similar, and in cases in which the father has legal representation.²²² When the parents were married, the rate of equal, shared custody was 28.3%, while it was 7.1% when the father voluntarily acknowl-

216. See EDIN & NELSON, *supra* note 27, at 213-14 (noting that the courts automatically assign visitation when imposing child-support obligations in the context of divorce).

217. MAYA ROSSIN-SLATER, ENGAGING ABSENT FATHERS: LESSONS FROM PATERNITY ESTABLISHMENT PROGRAMS 6 (2012), available at http://www4.gsb.columbia.edu/filemgr?&file_id=7221308.

218. Harris, *supra* note 192, at 161, 166-67.

219. 42 U.S.C. § 666(a)(5)(C) (2006) (setting out the requirements for VAPs).

220. Harris, *supra* note 192, at 168 (citing BROWN & COOK, *supra* note 26; Ronald Mincy, Irwin Garfinkel & Lenna Nepomnyaschy, *In-Hospital Paternity Establishment and Father Involvement in Fragile Families*, 67 J. MARRIAGE & FAM. 611 (2005)).

221. *Id.* at 169-70 & n.69.

222. BROWN & COOK, *supra* note 26, at 28-29.

edged paternity and 4.2% when paternity had to be adjudicated.²²³ The study found that in 2006 and 2007, shared placement ranged from 10% of the cases in which the family's income was under \$25,000 a year or less to over 47% of the cases reporting family income over \$150,000 per year.²²⁴ The study, which looked only at court data, did not indicate whether the results reflected the parties' preferences, the incentive for higher-income parents to seek more of the child's time, wealthier fathers' greater access to legal representation, or all of the above. In contrast, shared custody in paternity adjudications—where actions are generally brought against a nonmarital parent and which typically do not occur among the elite—remains rare.²²⁵

These figures suggest that even though shared parenting is the dominant legal norm, the system readily facilitates the ability of the middle class to effect the kind of trade Mnookin and Kornhauser described as an exchange of more time with the child in exchange for less support.²²⁶ In contrast, unmarried men have greater difficulty gaining access to formal custody orders, both because of the obstacles to establishing paternity and of using the legal system more generally. They are accordingly far more dependent on the relationship with the mother for access to the child, while subject to the dictates of the state when it comes to enforcement. Edin and Nelson observe that “[i]n a startling reversal of the way gender typically operates in American society, unwed childbearing seems to offer mom, and not dad, all the power: ‘it’s her way or the highway,’ in the words of one father.”²²⁷

Yet, the legal system does not necessarily recognize the terms of such relationships. While the emphasis on shared custody facilitates the informal trade of time for less support, the second system of family law does not recognize the informal support non-custodial fathers often provide. And the middle is developing less formal bargains of its own.

E. Parenthood Revisited: How the Triple System Plays Out in Child Support

The formal system that governs the upper third has made dual parenting more common. The welfare system that imposes support obligations has, ironically, interfered with fathers' involvement with their children. In between is an informal system that ratifies parental bargains only when they remain veiled from public view.

223. *Id.* at 18-23.

224. *Id.* at 19.

225. *Id.* at 20.

226. See Mnookin & Kornhauser, *supra* note 8, at 964.

227. EDIN & NELSON, *supra* note 27, at 214.

Law professor Kathy Baker argues that recognition of paternity involves contractual understandings between mother and father.²²⁸ Men tend to support “the one they’re with” and provide the most support to the women and their children with whom the men have an on-going relationship.²²⁹ Women, in turn, encourage the greater involvement of the men who contribute to their children, either financially or otherwise, and often form new relationships when the father does not remain involved.²³⁰

The formal system of child-support enforcement interferes with these ongoing bargains.²³¹ VAPs make child-support collection easier, privatizing dependence through public-law-imposed procedures that are oblivious to the actual arrangements that couples make for custody and support. The *Fragile Families* studies found that 24% of non-resident fathers paid formal cash support, whereas 35% paid cash informally, and 44% provided in-kind support.²³² Moreover, the dollar value of the informal support was worth more than the formal support.²³³ Yet, almost no fathers (6%) paid both.²³⁴ The mothers accordingly preferred the informal support, which tended to be greater in value, to go directly to the child, and which could be tailored to what the father could afford and when he was able to contribute.²³⁵ These informal contributions were more common among couples who had separated recently, and tended to diminish over time.²³⁶ Insistence on formal child-support enforcement, on the other hand, tended to alienate the fathers.²³⁷ They often became angry at the mothers, and they became less likely to see the mothers or contribute informally to the children.²³⁸ Leslie Harris concludes that while formal orders increased support from fathers who would otherwise not have contact with their children, they were counterpro-

228. See generally Baker, *supra* note 202.

229. *Id.* at 36-37.

230. *Id.*; see also CAHN & CARBONE, *supra* note 1. Men are also more likely to establish paternity if they have a close relationship with the mother. See Mincy, Garfinkel & Nepomnyaschy, *supra* note 220, at 615. A smaller Wisconsin study found that almost half of the unmarried parents in the state filed VAPs within a few months of birth for children born in 2005. BROWN & COOK, *supra* note 220, at 13-14. The mothers were more likely to use VAPs if they were older or college educated and less likely to do so if the mother was receiving public support. *Id.* at 16, 27.

231. Harris, *The Basis for Legal Parentage*, *supra* note 16, at 631-33.

232. LENNA NEPOMNYASCHY & IRWIN GARFINKEL, CHILD SUPPORT ENFORCEMENT AND FATHERS' CONTRIBUTIONS TO THEIR NONMARITAL CHILDREN 19-20 (rev. ed. 2007), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3060035/>.

233. See Harris, *supra* note 192, at 164.

234. NEPOMNYASCHY & GARFINKEL, *supra* note 232, at 19-20.

235. *Id.* at 10; see also TIMOTHY S. GRALL, U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2009, at 7-8 (2011), available at <http://www.census.gov/prod/2011pubs/p60-240.pdf>.

236. Harris, *supra* note 192, at 165.

237. *Id.* at 171.

238. *Id.*

ductive for the larger group of dads who did have a continuing relationship with their children.²³⁹

Couples in the middle, who are neither on welfare nor likely to benefit significantly from child support, often prefer different types of arrangements. The custodial parents benefit less from formal orders. The 2009 census data, for example, indicates that divorced custodial parents are significantly more likely to have support orders than unmarried custodial parents (many of whom may have been compelled to seek a formal order because of their receipt of public benefits).²⁴⁰ Moreover, divorced custodial parents are wealthier and are more likely to receive the child support when it is ordered.²⁴¹ Of divorced custodial parents due child support, 43% received all of the child support payments due and 25% received nothing, while for comparable custodial parents who had never been married, 34% received all payments and 34% received none.²⁴²

Bargains that deviate from state-mandated guidelines are difficult, and courts will not often support a trade of in-kind support for access to the child or a termination of the other parent's involvement and support, even among the elite. Michael Jackson could not persuade the courts to accept his agreement with his ex-wife, Debbie Rowe, for example, to terminate Rowe's parental status in exchange for a release in responsibility for support.²⁴³ On the other hand, for those couples not on welfare, if the custodial parent does not seek support, no one is likely to notice.

Census data from 2009 provides a detailed look at the reasons custodial parents do not seek child support orders, and they correspond to the informal bargains that characterize much of the middle of American societies.²⁴⁴ Those without such orders listed as reasons, in the following order:

Other parent provides what he or she can	34.4%
Did not feel need to make legal	32.1%
Other parent could not afford to pay	29.2%
Did not want other parent to pay	21.1%

239. *Id.*

240. GRALL, *supra* note 235, at 6 tbl.2.

241. On wealth, see WENDY WANG, KIM PARKER & PAUL TAYLOR, PEW RESEARCH CTR., BREADWINNER MOMS: MOTHERS ARE THE SOLE OR PRIMARY PROVIDER IN FOUR-IN-TEN HOUSEHOLDS WITH CHILDREN; PUBLIC CONFLICTED ABOUT THE GROWING TREND 19 (2013), available at http://www.pewsocialtrends.org/files/2013/05/Breadwinner_moms_final.pdf. On child-support collection, see Philip N. Cohen, *Child Support Glass Nearly Half Full*, FAM. INEQUALITY (Nov. 9, 2009, 10:55 PM), <https://familyinequality.wordpress.com/2009/11/09/child-support-glass-nearly-half-full/>; GRALL, *supra* note 235, at 6 tbl.2.

242. GRALL, *supra* note 235, at 6 tbl.2.

243. *In re Marriage of Jackson*, 39 Cal. Rptr. 3d 365 (Dist. Ct. App. 2006).

244. GRALL, *supra* note 235, at 7 fig.3.

Child stays with other parent part of the time	17.7%
Could not locate other parent	16.8%
Did not want to have contact with other parent	16.7% ²⁴⁵

These results describe a number of different types of relationships. In the cases where the custodial parent reports that the other parent “provides what he or she can,” “[d]id not feel need to make it legal,” or the “[c]hild stays with other parent part of the time,” the parents may have an ongoing relationship of some kind and have worked out support on a cooperative basis. Where the parents do not want contact with the other parent or could not locate the other parent, on the other hand, the relationship may have broken down, and the parents may have decided they do not want further involvement with each other.

Consider, for example, the likely denouement of the relationship between Bristol Palin (the daughter of former vice-presidential candidate and Alaska governor Sarah Palin), who became pregnant at seventeen, and her high school sweetheart, Levi Johnston, who continue to replay their continuing conflicts over the blogosphere. While the celebrity of Bristol’s mother put the family in an elite class of its own, high school dropouts Levi and Bristol are more typically the struggling middle of the American spectrum. When their relationship broke down not long after the birth of their son, Tripp, Bristol (who had not yet appeared on *Dancing with the Stars*) struggled to provide for their son on her own and sued Levi for support.²⁴⁶ Levi responded by seeking custody.²⁴⁷ The litigation became intense, with the parties exchanging charges in the press as well as in court and including attacks on other family members. Levi’s contact with the child increased after he and Bristol reconciled; they went back to fighting after Bristol discovered that Levi had fathered another child. Online tabloids reported (confirmed by Bristol’s attorney) that Levi was delinquent in child support and owed tens of thousands in back payments.²⁴⁸ He also rarely sees his son.²⁴⁹ We frequently see such disputes end with the mother’s decision to give up on collecting support in exchange for never having to deal with the father again, and the father’s acceptance of the implicit bargain as a good one.

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245. *Id.* Additional reasons listed include: “did not legally establish paternity” (9.3%), “other reasons” (6.1%), and “child was too old” (.5%).

246. *Bristol Palin—Levi Johnston’s a Deadbeat Dad*, TMZ (Apr. 7, 2012, 6:00 AM), <http://www.tMZ.com/2012/04/07/bristol-palin-levi-johnston-child-support/>.

247. Michael Y. Park, *Levi Johnston to Sue for Joint Custody of Son Tripp*, PEOPLE (Nov. 9, 2009, 1:10 PM), <http://www.people.com/people/article/0,,20318502,00.html>.

248. *Bristol Palin—Levi Johnston’s a Deadbeat Dad*, *supra* note 246.

249. *Id.*

The legal insistence on two parents and the preference for shared parenting applies in theory to everyone, married or single, wealthy or poor. In fact, the interaction of the legal preferences with couples' parenting arrangements varies considerably. For those with the resources to litigate—and to have their paychecks subject to withholding for support—it ups the stakes underlying parental disputes. For those who marry only after a lengthy search, it reinforces an interdependent marital ideal and a norm of continued two-parent involvement after a breakup. For those who marry hastily, at too young an age or because of an unplanned pregnancy, it changes the dynamic at divorce. These marriages are most likely to end because of the mothers' dissatisfaction. Historically, young women stayed in these unhappy relationships because of financial dependence; today, the threat of shared custody is the remaining factor counseling hesitation.²⁵⁰ When such couples divorce, the most likely result is either a father who seeks equal custody to reduce child support obligations or an informal agreement to forego support in exchange for less contact with the child. We suspect that the choice between the two reflects the father's resources, both in the absolute and in comparison with the mother.

This latter dynamic frames the choices for the unmarried as well. They differ, however, in two respects. First, for the mother, paternity becomes a lot like marriage. If the mother does not trust the father, or if she fears a state takeover of the terms of their relationship, she may prefer to avoid formal legal ties. Signing a VAP makes it harder to change your mind about a parental partner. Nonetheless, if the mother and father are together, they may welcome public acknowledgement of their relationship to the child, which also establishes the foundation for later support and custody orders. Mothers like Bristol often initiate support actions because of anger at unfaithful fathers or frustration with their failure to provide support voluntarily. Fathers may want recognition of their status to protect their investment in a relationship with the child from a vengeful, unfaithful, or erratic mother. VAPs provide an intermediate status for parents who are likely, sooner or later, to parent apart. Second, for those families who need public assistance, it also means that the state, rather than the parties, is likely to initiate child-support actions. At a symbolic level, these actions reinforce the dual parenting model, but they do so in a way that renders invisible and systematically undermines the informal exchanges that sustain non-custodial parents' continuing involvement with their children.²⁵¹

250. See Brinig & Allen, *supra* note 176, at 136-37.

251. See Kohn, *supra* note 27; see also Debra A. Madden-Derdich & Stacie A. Leonard, *Parental Role Identity and Fathers' Involvement in Coparental Interaction After Divorce: Fathers' Perspectives*, 49 FAM. REL. 311, 313 (2000) (describing mothers' roles in encouraging or undermining father involvement).

These disparities reinforce a triple system of family law. Couples who bear children together or adopt within marriage enjoy an unequivocal embrace of shared parenting at the national level. 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. Families in the middle, who are more likely than the elite to marry young, separate, remarry, cohabit, and raise children with multiple partners, are in limbo, with legal opinions that neither embrace nor repudiate their relationships and only rarely illuminate the evolving norms that govern their behavior.

At the core of these divisions is a growing class-based disparity in family behavior, which the law both reflects and reinforces. Parental investment in children has increased considerably, and it has done so for both men and women.²⁵² These figures, however, differ significantly by class. In the seventies, college-graduate parents and those who didn't graduate from college spent about the same amount of time per day with their children.²⁵³ Today, however, college-graduate parents spend several hours more a week with their children than those without college degrees.²⁵⁴ The gulf is particularly great for men, with college-graduate fathers spending almost double the amount of time with their children as high school graduate or high school dropout parents.²⁵⁵ Even separating married and unmarried fathers, the time studies indicate that better-educated men have embraced a dual parenting norm to a greater degree than less-educated men, in part because of the fragility of working-class relationships.²⁵⁶

CONCLUSION

Ultimately, legal developments contribute to the class divide in family life. In turn, the class divide affects the law: The interaction between law and behavior is iterative,²⁵⁷ with courts choosing which behavioral changes to embrace (those of the elite), which to reject (those of the marginalized),

252. ROSIN, *supra* note 25, at 69-70.

253. See ROBERT D. PUTNAM, CARL B. FREDERICK & KAISA SNELLMAN, GROWING CLASS GAPS IN SOCIAL CONNECTEDNESS AMONG AMERICAN YOUTH 13 fig.5 (2012), available at http://academia.edu/1625348/Growing_Class_Gaps_in_Social_Connectedness_among_American_Youth.

254. *Id.*

255. *Id.*

256. McLanahan, *supra* note 59, at 617; EDIN & NELSON, *supra* note 27, at 167, 208 (explaining that while fathers' relationships with their children now depend less on the strength of the relationship with the mother, the mother still plays a gatekeeping role that determines access).

257. See *supra* note 1.

or which to ignore (the middle). The law effectively channels the elite into the institutions of marriage and parenthood by reinforcing a new gender bargain, one that gives the parties room to negotiate arrangements that adapt the laws to their needs. For the top, the rule is get married, stay married, and if you do not, then negotiate parenthood either to sever the other progenitor's parental ties or to lock in shared financial and custodial arrangements.

Public welfare law insists on upholding mainstream norms as a condition of public benefits, even when the effort is counterproductive. It continues to proceed from the premise that poor men have "abandoned" their children in an era when it is more likely that the mothers have given up or walked out on the fathers. The law accordingly refuses to recognize the contributions marginalized fathers make and to insist on measures that make dual-parental contributions less likely at the same time that the law refuses to ratify the responsibility poor women have assumed for their children. At the bottom, interdependent finances make marriage a bad bargain absent shared contributions and financial stability. And outside of marriage, men face more hurdles establishing paternity and securing access to the child even if their parenthood is not in doubt. For these women, the best strategy is not to marry, not to allow a man to acknowledge paternity voluntarily, and to be wary about any long-term relationship with a man who cannot pull his own weight. The result is the continuation of a second system that gives lip service to mainstream norms, as it heavily handedly applies them to a group unable to realize them.

In the middle, women try to choose functional second parents, rather than spouses or biological parents, for their children, and they seek financial independence from their partners. The law, which seeks to reaffirm male authority, has dealt warily and uneasily with women's greater ability to evade the system altogether. For this group, the law no longer expresses shared norms, in part because family norms are in fact less-widely shared, in part because the middle can no longer realize elite norms and in part because the courts have dealt with greater family diversity by substituting more formulaic decisions that fail to grapple with underlying normative disputes.²⁵⁸ This normative disengagement leaves the middle, which is not subject to the second system's punitive interventions, free to ignore the law altogether.

At the core of these family law developments are different allocations of power to the three different groups. First, at the top, men with resources are more likely than other men to marry to marry a woman who earns less than they do and to seek a larger share of the child's time at divorce. The formal system of family law protects their investment in their children. Second, in the middle, for women who do not enjoy the opportunity to marry a

258. See Bakke, *supra* note 90, at 320.

man with resources, a reliable income, or dependable behavior, not marrying may be the better course. These women retain greater power over their families, whether intact or not, if they do not legally commit to the men in their lives. For the unmarried, the onus is on the father to establish paternity, seek a custody order and enforce it if the mother does not cooperate—barriers that may be well beyond those without access to lawyers. This new system of family law accords unmarried women greater power in the family by looking other way. Third and finally, those who receive public benefits remain largely powerless. Neither the men nor the women control the legal terms of their relationships as the state imposes terms that may not reflect either the adults' private bargains or the children's' interests. This system reserves the greatest power for the state.

For the future, we hope the law adapts to the changing structure of the American family, recognizing the multiple ways that fathers can support children without direct financial contributions, acknowledging the dependence and interdependence that marriage creates, and recognizing the significance of the primary caretaker. Fundamentally, this requires recognizing and respecting women's increasing autonomy. Our social understandings and law are still somewhat in flux on these issues, our social scripts still are not completely settled, and instead of playing a divisive and coercive role, the law should play a supportive role.

