



5-2020

A Consumer Guide to Empirical Family Law

June Carbone

University of Minnesota Law School

Follow this and additional works at: <https://scholarship.law.nd.edu/ndlr>



Part of the [Family Law Commons](#), [Law and Economics Commons](#), and the [Law and Society Commons](#)

Recommended Citation

95 Notre Dame L. Rev. 1593 (2020).

This Article is brought to you for free and open access by the Notre Dame Law Review at NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized editor of NDLScholarship. For more information, please contact lawdr@nd.edu.

A CONSUMER GUIDE TO EMPIRICAL FAMILY LAW

*June Carbone**

INTRODUCTION	1593
I. EMPIRICAL STUDIES AND FAMILY LAW DISCOURSE.....	1599
II. WRONG DIRECTIONS PART I: THE ECONOMIC FRAMEWORK...	1602
III. WRONG DIRECTIONS PART II: THE SECOND DEMOGRAPHIC TRANSITION AND THE FOCUS ON CULTURE	1611
IV. A CONSUMER'S GUIDE TO THE NEXT GENERATION OF EMPIRICAL WORK IN FAMILY LAW	1619
A. <i>Creating a Distinctly Legal Empirical Discourse in Family Law</i>	1620
B. <i>Reintegrating Economics and Culture</i>	1623
C. <i>Identifying Partnerships That Should Not Last</i>	1626
CONCLUSION	1628

INTRODUCTION

The role of empirical research in family law has long been contested. On the one hand, empirical data, particularly when systematically collected by courts and public agencies, can create a shared foundation for policy debates.¹ On the other hand, reliance on empirical research to address complex normative questions is deeply controversial.² An important reason is that empirical research can rarely untangle multicausal developments taking place across numerous jurisdictions over an extended period of time.³ It is difficult to establish convincingly, for example, whether women's workforce participation increased the demand for divorce reform or whether the legal

© 2020 June Carbone. Individuals and nonprofit institutions may reproduce and distribute copies of this Article in any format at or below cost, for educational purposes, so long as each copy identifies the author, provides a citation to the *Notre Dame Law Review*, and includes this provision in the copyright notice.

* Robina Chair of Law, Science and Technology, University of Minnesota Law School. I would like to thank Naomi Cahn for her comments on an earlier draft of this Article and Grace O'Meara for her research assistance.

1 See, e.g., Clare Huntington, Essay, *The Empirical Turn in Family Law*, 118 COLUM. L. REV. 227, 304–05 (2018).

2 See *id.* at 241–49 (marriage equality), 250–252 (abortion), 304 (childhood poverty).

3 See Margaret F. Brinig, *Empirical Work in Family Law*, 2002 U. ILL. L. REV. 1083, 1084–94 (describing limitations of empirical work in family law and risks of overstating the impact of law on behavior).

changes in divorce grounds encouraged women to stay in the workforce, particularly when the causal arrows may run in both directions.⁴ A second reason is that intensely fought normative issues tend to produce motivated research and motivated interpretation of that research.⁵ The empirical literature on LGBT parenting, for example, grew along with same-sex couples' struggle for recognition and the opposition to such claims.⁶ The motivations behind some of the studies make them easy to dismiss.⁷ A third reason is that many scholars and policymakers are reluctant to treat fundamental values questions, such as whether abortion should be legal or unmarried fathers should have a right to see their children, as dependent on empirical findings.⁸ The fact that empirical studies cannot show that the unmarried fathers have a positive impact on their children, for example, does not necessarily answer the question of whether the fathers *should* be more involved.⁹

This Article, in considering the role of empirical research in family law, seeks to recast the debate about the utility of such research. The Article maintains that empirical research, standing on its own, cannot and should not be used to resolve the broader legal and policy issues in family law. Instead, it should be seen as an important tool in furthering the ongoing discourses about those issues. And, thus, the value of empirical tools depends on carefully considering the nature of the discourses in which the tools are embedded.

In considering family law discourses, this Article relies on Jürgen Habermas's use of the term "discourse" to describe exchanges that involve "a cooperative search for truth,"¹⁰ where "[e]ach person aims to persuade in good faith rather than seeking to threaten, trick, or bribe; each participant takes account of the others' interests and needs, and modifies her own

4 See Margaret F. Brinig, *The Role of Socioeconomics in Teaching Family Law*, 41 SAN DIEGO L. REV. 177, 181 (2004) (observing that the increase in women's workforce participation began before the legal changes and continued to increase thereafter).

5 For a discussion of the role of motivated reasoning in the use of research, see Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 7 (2011) (stating that "[m]otivated reasoning refers to the tendency of people to unconsciously process information—including empirical data, oral and written arguments, and even their own brute sensory perceptions—to promote goals or interests extrinsic to the decisionmaking task at hand").

6 Huntington, *supra* note 1, at 241–49.

7 See *id.* at 270 (describing rejection of unsupported studies); see also Brinig, *supra* note 3, at 1094–95 (describing the tension between "voice" and "bias" as many of those conducting empirical studies may have a stake in the outcomes, such as fathers conducting custody studies who have litigated custody issues in their own divorces).

8 Huntington, *supra* note 1, at 233 (arguing that "focusing on child well-being ignores the other value-based reasons for protecting father-child relationships, including gender equality and fathers' liberty interests in the relationship").

9 *Id.*

10 Jonathan Weinberg, *The Right to Be Taken Seriously*, 67 U. MIAMI L. REV. 149, 170 (2012) (quoting JÜRGEN HABERMAS, *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION* 198 (Christian Lenhardt & Shierry Weber Nicholsen trans., 1990)).

accordingly.”¹¹ Family law discourses, thought of in terms of a “cooperative search for truth,” can be framed narrowly or broadly and empirical research, when it is most useful, contributes not just to resolving the questions as the core of the discourse, but in reframing the discourse itself. For that to happen, empirical work has to become part of an exchange, rather than a given supplying fixed answers to set questions. This requires recognizing that how a given discourse is initially framed often determines the structure of the empirical work that is undertaken, and that the best empirical work often produces results that should call that framing into question. Empirical work becomes most valuable when that iterative process is recognized and used to further the inquiry.¹²

Consider, for example, empirical studies that show that systematic use of voluntary acknowledgments of paternity (VAPs) to establish legal parenthood at the time of a child’s birth make it easier to secure child support orders.¹³ Add the implications of other research that demonstrates that state-initiated child support enforcement produces counterproductive effects, reducing poor fathers’ overall material contributions to and involvement with their children.¹⁴ The role of the empirical research may then depend on the purpose of the inquiry. For example, policymakers may assume that it is beneficial to public policy objectives to increase the support children receive from parents, and their inquiry may be narrowly focused on the question: What legal changes best facilitate increased child support enforcement? Within such an exchange, empirical work could establish that VAPs facilitate child support enforcement and might suggest that the VAPs would be even more effective if child support orders were entered shortly after birth. Alternatively, however, the additional studies suggesting that child support enforcement is counterproductive might serve to prompt reconsideration of the nature of the inquiry. Perhaps the focus of the inquiry should shift from how to use child support enforcement to collect the largest amount of money to how to increase children’s well-being, taking into account a mix of private and public, material and emotional support. The empirical research could thus contribute to a redefinition of the discourse. The empirical questions asked and the structure of the research undertaken to answer them would then shift with the change in the purpose of the inquiry.

The ability of empirical research to play such a role, however, requires a fertile environment for such exchanges, and it is arguable that for many of the most important family law questions of our time, that environment does

11 Jonathan Weinberg, *Bureaucracy as Violence*, 115 MICH. L. REV. 1097, 1111 (2017) (book review).

12 See, e.g., Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM L. REV. 293, 340 (2015) (describing norm creation as an “iterative process”).

13 See, e.g., Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 205–09 (2015) (discussing child support laws).

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

not exist.¹⁵ Nonetheless, there should be room for such exchanges in the central academic inquiries that underlie family law. These debates involve identifying the changing nature of the family, understanding the causes and consequences of the changes, examining the role of the law in influencing family decisionmaking, and considering the implications for legal and public policy. Empirical discourses sometimes address these foundational issues; yet, over the course of the last several decades, empirical work has had its greatest impact either on narrowly defined questions¹⁶ or within siloed discussions.¹⁷

This has been true in part because of the lack of a more robust exchange about the nature of the discourses on family change. Instead, there have been two dominant models within the social sciences, both rejected by many legal scholars,¹⁸ but still influential in shaping empirical research. The first is Gary Becker's *A Treatise on the Family*.¹⁹ Becker, who won the Nobel Prize in Economics for his work extending economics outside of the narrow confines of commercial behavior, posited that marriage involves a trade between male "specialization" in the market and female "specialization" in the household. Within this model, women's workforce participation constitutes a loss of specialization, lowering the gains from marriage, and thereby contributing to higher divorce and nonmarital birth rates. While economists routinely observe that many of Becker's predictions have proved spectacularly wrong,²⁰ no other model has taken its place as a fundamental theory explaining family dynamics. Economist Robert Pollak explained the result: "Like all social scientists who study the family, I must position myself in relation to Gary

15 See, e.g., Huntington, *supra* note 1, at 241–50 (identifying issues such as marriage equality and abortion as such discourses).

16 The broad consensus that family violence negatively affects children is an example. See *id.* at 241 (discussing child abuse); Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment Statutes*, 53 HASTINGS L.J. 1, 4–6 (2001) (observing that "[i]n the past two decades, researchers have amassed an impressive body of empirical data demonstrating the negative impact of exposure to domestic violence upon children's psychological development and functioning").

17 The role of empirical inquiry in the abortion debate, for example, has often been channeled into limited inquiries. Compare Huntington's discussion of the empirical evidence supporting the Supreme Court decision on later term abortions, Huntington, *supra* note 1, at 251, with the empirical studies on welfare reform, see, e.g., Rebekah J. Smith, *Family Caps in Welfare Reform: Their Coercive Effects and Damaging Consequences*, 29 HARV. J.L. & GENDER 151, 176–79 (2006) (discussing the relatively few studies on abortion, the role of the Guttmacher Institute as the major source of data on abortion, and the relatively few studies examining the relationship between family caps on welfare benefits and abortion).

18 See, e.g., FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, AND SOCIETY (Martha Albertson Fineman & Terence Dougherty eds., 2005) [hereinafter FEMINISM CONFRONTS HOMO ECONOMICUS] (particularly Part V).

19 GARY S. BECKER, *A TREATISE ON THE FAMILY* 31 (1981) (postulating theorems showing the relationship between specialization and increasing returns to scale).

20 See, e.g., Betsey Stevenson & Justin Wolfers, *Marriage and Divorce: Changes and Their Driving Forces*, 21 J. ECON. PERSP. 27, 43 (2007) (noting the inaccuracy of Becker's assertion that the higher-earning men would want to marry lower-earning women).

Becker. To a remarkable extent, his vision has shaped the tools we use, the questions we ask, and the answers we give.”²¹ And, indeed, in 2019, an innovative study of the impact of men’s declining workforce opportunities on family stability continued to interpret its findings through the lens of Becker’s notions of household specialization.²²

Within sociology and demography, a second framing discourse has arisen, termed “the second demographic transition” (SDT). The SDT predicts “sustained subreplacement fertility, a multitude of living arrangements other than marriage, [and] the disconnection between marriage and procreation.”²³ It describes the “primary driver of these trends” as a “cultural shift toward postmodern attitudes and norms (i.e., those stressing individuality and self-actualization).”²⁴ Like Becker’s economic theories, this work has been successful in creating an influential discourse on the family and family change. Moreover, this discourse starts with empirical assertions: the descriptions of declining fertility and greater family variety.²⁵ Yet, as with Becker’s theories, critics have claimed that the SDT theories do not completely fit the empirical findings, particularly with respect to their causal claim that expressive individualism is the driving factor behind the demographic transitions.²⁶ American family law has begun to reference SDT theories. In *Inside the Castle*, for example, Joanna Grossman and Lawrence Friedman provide a history of twentieth-century changes in marriage and divorce. Influenced by sociologists like Andrew Cherlin, they describe a major shift to “expressive marriage,” in which “[h]usband and wife were looking for personal fulfillment; they evaluated their marriage ‘in terms of self-development, as opposed to the satisfaction they gained through pleasing their spouse and raising their children.’”²⁷ The result is a more sophisticated examination of the interactions between societal change and legal reform than the Becker-style economic analyses would suggest.²⁸ Yet, the book, by focusing exclusively on

21 Robert A. Pollak, *Gary Becker’s Contributions to Family and Household Economics*, 1 REV. ECON. HOUSEHOLD 111, 111 (2003).

22 David Autor et al., *When Work Disappears: Manufacturing Decline and the Falling Marriage Market Value of Young Men*, 1 AM. ECON. REV. 161, 163 (2019) (observing that “a fall in the relative economic stature of men diminishes the gains from household specialization and therefore reduces the prevalence of marriage” (emphasis omitted)).

23 Batool Zaidi & S. Philip Morgan, *The Second Demographic Transition Theory: A Review and Appraisal*, 43 ANN. REV. SOC. 473, 474 (2017) (quoting Ron Lesthaeghe, *The Unfolding Story of the Second Demographic Transition*, 36 POPULATION & DEV. REV. 211, 211 (2010)).

24 *Id.*

25 *Id.*

26 *Id.* at 483 (observing that the claim that the undergirding mechanism is “a shift from materialism to postmaterialism (or the related child-king to king-couple)” is “problematic because consistent empirical evidence is lacking” (citations omitted)).

27 JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 58 (2011) (emphasis omitted) (quoting ANDREW J. CHERLIN, *THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY* 88 (2009)).

28 *Id.* at 13–16, 176–80 (describing how the rise of companionate marriage fueled the demand for no-fault divorce).

what the authors acknowledge is “middle-class family law,”²⁹ misses some of the tensions that concern the demographers. It does not consider, for example, why the SDT has led to increased class division, with divorce rates simultaneously declining for prosperous families and rising for poorer ones.³⁰ And as Kerry Abrams suggests, this leaves room for further consideration of how “not only . . . society shapes law but . . . law creates a feedback loop that further reconstructs society.”³¹ Boring more deeply into these issues requires a richer dialogue between those who assemble the data, those who frame the empirical research questions, and those who apply it to the legal and policy issues that shape family law.

This Article will consider the framework for empirical work on family law, arguing that the failure to ask more sophisticated questions at the beginning of the research has limited its effectiveness. In this sense, Professor Peg Brinig’s work stands out for the creativity of the questions she has asked, her exploration of underutilized databases, and her work’s potential to serve as a foundation for a new paradigm for the integration of empirical work into family law theory.

This Article will discuss the way that theory—and the creation of discourses associated with it—informs empirical research. First, it will maintain that the influence of empirical work depends on the discourse in which it is embedded. Second, it considers the influence of Becker’s paradigm on legal and economic empirical research, reviewing the ways that Becker’s influence has diverted much of the empirical work away from more productive inquiries. In particular, it will suggest that Becker’s insistence on a narrow focus on “specialization” between men and women misses the much more productive work that looks at specialization among men in the nineteenth century, specialization among women in the late twentieth century, and investment in children’s human capital as the driver of these trends. Third, it will explore the alternative sociological frames, which premise family change on cultural shifts, discounting the wholesale and multifaceted economic changes that contribute to the cultural shifts. In particular, this section will suggest that this literature misses the complex interaction between economics and culture in large part because growing inequality makes it impossible to discuss “culture” as a unified concept remaking family practices. The last section will provide a “consumer guide” to empirical family law research, identifying the missing pieces necessary to create more robust discourses connecting family change to family law and policy. This Article will conclude that class divisions along with racial and regional considerations constitute a critical lens for empirical research and that Professor Brinig’s work offers a foundation for

29 *Id.* at 2.

30 See KAY HYMOWITZ ET AL., KNOT YET: THE BENEFITS AND COSTS OF DELAYED MARRIAGE IN AMERICA 8 (describing increasing class differences in family form); Sara McLanahan, *Diverging Destinies: How Children Are Faring Under the Second Demographic Transition*, 41 DEMOGRAPHY 607, 608, 617 (2004).

31 Kerry Abrams, *Family History: Inside and Out*, 111 MICH. L. REV. 1001, 1020 (2013) (reviewing GROSSMAN & FRIEDMAN, *supra* note 27).

alternative explorations of the interactions between family law and family dynamics.

I. EMPIRICAL STUDIES AND FAMILY LAW DISCOURSE

Empirical work in family law became increasingly important as the family changed over the second half of the twentieth century. Simply establishing what happened became an issue of major concern as divorce rates soared and then leveled off, nonmarital births rose to forty percent of the total, and class-based divisions in family forms increased dramatically.³² The larger project, however, involved the question of why these changes occurred and how to make sense of the new, more varied families that emerged. The question of *why* the changes occurred is as much an empirical question as what the changes were, but it is a much more complex and multifaceted one.³³ And for legal scholars, the reason for the changes is ultimately tied up in the normative issues of how to respond to the changes. This has made the construction of family law discourses perilous because they tie inflammatory issues involving sex, race, and gender to controversial ideological issues about law and policy.

The creation of a robust discourse about the family has thus long been a perilous enterprise. Daniel Patrick Moynihan's effort to call attention to the changing African American family in the sixties effectively shut down the discussion of race and family life for at least a generation.³⁴ In the interim, a voluminous empirical literature debated the relationship between the expansion of welfare benefits and changing family form, laying the foundation for the abolition of the Aid for Dependent Families program in the nineties.³⁵ The discussion about the role of public benefits inspired a spirited legal discussion of the "dual system of family law,"³⁶ but one that largely remained

32 See generally JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* (2014) (describing increasing class differences in family formation and understandings); HYMOWITZ ET AL., *supra* note 30, at 8 fig.II; McLanahan, *supra* note 30, at 607–08, 617 (describing divergences in divorce rates and family income).

33 See, e.g., Brinig, *supra* note 3, at 1086 (observing that "[a]nother facet of family study that distinguishes it from other areas (and makes family law either fascinating or discouraging for students) is its complexity").

34 See, e.g., Linda M. Burton & M. Belinda Tucker, *Romantic Unions in an Era of Uncertainty: A Post-Moynihan Perspective on African American Women and Marriage*, 621 *ANNALS AM. ACAD. POL. & SOC. SCI.* 132, 135 (2009) (continuing to object to Moynihan's perceived criticism of African American women).

35 For a summary of these developments, see CARBONE & CAHN, *supra* note 32, at 29–31 (observing that over half of the American public still believes that the expansion of welfare benefits caused the changes in the family).

36 See generally Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (pts. 1–3), 16 *STAN. L. REV.* 257, 900 (1964), 17 *STAN. L. REV.* 614 (1965); 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, 1211–15 (1999); Deborah Harris, *Child Support for Welfare Families: Family Policy Trapped in Its Own Rhetoric*, 16 *N.Y.U. REV. L. & SOC. CHANGE* 619,

orthogonal to empirical questions about the interactions between state aid and family form.³⁷

A more robust debate about changes in the African American family took place only when African American scholars began to lead it, and even then other scholars were slow to apply the lessons to the family more generally.³⁸ Yet, a retrospective on the Moynihan report in 2009 concluded that the lessons should have been ones of general applicability, observing that “Moynihan’s core argument was really rather simple: whenever males in any population subgroup lack widespread access to reliable jobs, decent earnings, and key forms of socially rewarded status, single parenthood will increase, with negative side effects on women and children.”³⁹

Ta-Nehisi Coates nonetheless wrote in 2013 that no Moynihan report could exist today, not because it is impossible to discuss the relationship between race and the family, but because there is no audience, liberal or conservative, for Moynihan’s proposal that the government can and should do something about it.⁴⁰

In the meantime, the more general discussions of family decline have tended to focus on women’s changing roles, another subject capable of inflaming debate. In 2002, sociologist James Q. Wilson contended that greater family instability weakened society. For Wilson, the “single core event” underlying the questioning of marriage was the emancipation of

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); Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299, 368–71 (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).

37 See, e.g., Maxine Eichner, *The Privatized American Family*, 93 NOTRE DAME L. REV. 213, 255–58 (2017) (discussing the disingenuous nature of much of the empirical work).

38 See, in particular, WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* [hereinafter WILSON, *WHEN WORK DISAPPEARS*] (1996) (examining the impact of the loss of well-paying and stable blue collar jobs on rustbelt cities); and WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 83 (2d ed. 1987) (arguing that the change in family structure stemmed from a mismatch between the number of eligible males and females, with a significant percentage of African American men becoming unmarried because of high rates of unemployment, imprisonment, and other factors).

39 Douglas S. Massey & Robert J. Sampson, *Moynihan Redux: Legacies and Lessons*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 6, 13 (2009).

40 Ta-Nehisi Coates, *Revisiting the Moynihan Report, Cont.*, ATLANTIC (June 18, 2013), <https://www.theatlantic.com/national/archive/2013/06/revisiting-the-moynihan-report-cont/276978/> (“There’s no real political cost to telling people to get married. . . . Telling them that there should be a jobs program that makes more men marriage-material is different.”); see also Eichner, *supra* note 37, at 257 (describing the ideologically driven “rollback of American welfare policies, beginning with the decentralization of unemployment insurance and Medicaid to the states during the Reagan era, and continuing with welfare reform under President Clinton in 1996” (citations omitted)).

women, starting in the Enlightenment.⁴¹ Once women no longer had to rely on men to provide them with a home or social status, they did not need marriage. They finally gained the power to leave abusive or neglectful relationships—or forego them altogether.⁴² The changing status of women was thus responsible for social decay.

These observations, of course, set up empirical questions. Did women’s greater acquisition of legal rights, including the ability to leave “abusive or neglectful relationships,” constitute the principal driver of family change? Or was women’s greater economic independence, with their entry into the labor market, the more important factor?⁴³ How did women’s changing status then interact with the changing labor market for men?⁴⁴ And how did the changing legal basis for marriage, divorce, cohabitation, parentage, and custody influence the results?

If you answered, we do not know, you would be right. That is, while it is easy to find opinions on the subject, it is hard to find empirical research that fully engages these issues.⁴⁵ To be sure, such research exists. For example, it is difficult to overstate the importance of the “fragile families” studies that changed our understanding of unmarried parenting.⁴⁶ This work established that, contrary to popular expectations, “unmarried mothers,” at the time of their children’s births, were not typically “single mothers.” Instead, the vast majority were in relationships with their children’s fathers, with approximately half living with the fathers at the time of the birth.⁴⁷ In addition, ethnographic research establishes that unmarried couples value marriage⁴⁸ and that the primary factors breaking up unmarried relationships are domestic violence and infidelity.⁴⁹

41 JAMES Q. WILSON, *THE MARRIAGE PROBLEM: HOW OUR CULTURE HAS WEAKENED FAMILIES* 89 (2002) (observing that “[u]nderlying the questioning of marriage was a single core event: the slow emancipation of women”).

42 *Id.* at 214 (referring to the ability to leave abusive or neglectful relationships).

43 *See, e.g.*, Brinig, *supra* note 4, at 181 (setting up the foundational nature of these questions for teaching about the family).

44 *See, e.g.*, Maxine Eichner, *The Family, in Context*, 128 HARV. L. REV. 1980 (2015) (book review) (reviewing the limited literature examining the impact of market forces on the family).

45 One reason is that the public debate shifted from largely academic research to cause-funded think tanks issuing ideologically motivated reports. *See, e.g.*, JANE MAYER, *DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT* 111, 135–43, 157–88 (2016) (detailing right-wing funding of think tanks and academics to attack liberal welfare policies).

46 *See* Sara McLanahan & Irwin Garfinkel, *The Fragile Families and Child Wellbeing Study: Questions, Design, and a Few Preliminary Results* 41 (Ctr. for Research on Child Wellbeing, Working Paper No. 1208-00, 2000), <https://fragilefamilies.princeton.edu/sites/fragilefamilies/files/wp00-07-ff-mclanahan.pdf>.

47 *Id.* (indicating that more than eighty percent were in romantic relationships and nearly half were living with the fathers).

48 *See* KATHRYN EDIN & MARIA KEFALAS, *PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE* 6 (2005).

49 *See id.* at 81.

What does not exist is a robust family law discourse integrating the empirical findings into comprehensive visions of legal regulation and family life. This is difficult to do when some deny the basic premises of such research with, for example, some sociologists insisting that “economics can’t explain our cultural divide.”⁵⁰ At the same time, economists like Gary Becker insist that legal changes cannot explain family transformation because couples will simply bargain around the legal obstacles.⁵¹ And many legal scholars, who often believe that the law in fact impacts family change, still maintain that “no U.S. legal scholar has crystallized the theoretical issue of state regulation of market forces on families” or “articulated a model of regulation that supports families.”⁵²

Instead, empirical work on families either selectively influences narrowly constructed policy questions, such as the effectiveness of child support enforcement,⁵³ or it takes place within the framework constructed by the social sciences, and those discourses limit the utility of empirical work for family law.

II. WRONG DIRECTIONS PART I: THE ECONOMIC FRAMEWORK

The law-and-economics movement greatly increased the influence of economics on legal analysis, and the family is no exception.⁵⁴ Beginning with Gary’s Becker’s *A Treatise on the Family*, which contributed to the Nobel Prize in Economics he received in 1992,⁵⁵ Becker and like-minded economists applied the neoclassical economic framework to family decisionmaking. In his acceptance speech, he described his 1981 treatise as “the most difficult sustained intellectual effort I have undertaken.”⁵⁶ Central to Becker’s treat-

50 Charles Murray, *Why Economics Can’t Explain Our Cultural Divide*, WALL ST. J. (March 16, 2012) (capitalization altered), <https://www.wsj.com/articles/SB10001424052702304692804577281582403394206>; see also James Q. Wilson, *Why We Don’t Marry*, CITY J., Winter 2002, at 46, <https://www.city-journal.org/html/why-we-don%E2%80%99t-marry-12215.html> (explaining why economic factors cannot explain cultural changes).

51 See Brinig, *supra* note 4, at 180–81 (explaining that Becker’s position relied on the Coase theorem, which assumed that the absence of transaction costs, and the notion that transition acts do not exist with respect to the enforcement of family contracts is preposterous).

52 Eichner, *supra* note 37, at 216–17.

53 See *supra* notes 13–14 and accompanying text.

54 See generally FEMINISM CONFRONTS HOMO ECONOMICUS, *supra* note 18, at ix, 401–02 (observing that the modern extension of economic analysis to the family begins with Gary Becker).

55 See, e.g., Claire A. Hill, *Law and Economics in the Personal Sphere*, 29 LAW & SOC. INQUIRY 219, 220 (2004) (observing that “Becker won the 1992 Nobel Prize in economics ‘for having extended the domain of microeconomic analysis to a wide range of human behaviour and interaction, including nonmarket behavior’” (quoting Press Release, Kungl Vetenskapsakademien Royal Swedish Acad. of Scis., This Year’s Laureate Has Extended the Sphere of Economic Analysis to New Areas of Human Behavior and Relations (Oct. 13, 1992), <https://www.nobelprize.org/prizes/economic-sciences/1992/press-release/>)).

56 Gary S. Becker, *Nobel Lecture: The Economic Way of Looking at Behavior*, 101 J. POL. ECON. 385, 395 (1993).

ment of the family was his justification of the gendered assignment of family roles as efficient; he accordingly saw women's entry into the paid labor as reducing the gains from marriage, increasing divorce, and undermining family stability. The problem with Becker's analysis is that its premises and its predictions proved spectacularly wrong. Yet, it continues to frame the discourse about the economics of the family.

The great irony for Becker's legacy is that his approach to the family combined some of his most valuable contributions with some of his worst—and the value of his analysis would have been strengthened had his ideas been developed as part of a discourse that allowed them to be developed together. Perhaps Becker's most lasting contribution to economic analysis is the notion of human capital. Becker treated human capital as the product of investments such as education, training, experience, and health care.⁵⁷ He also argued that the impact of investment could be measured by examining, for example, income differences between high school and college graduates, thus providing a market measure of the value of higher education.⁵⁸

Rather than see the family as a vehicle for human capital investment, however, he tied the value of marriage to the notion of "specialization" as the foundation for the family. Becker argued that "a married couple could gain much from a sharp division of labor because the husband would specialize in some types of human capital and the wife in others."⁵⁹ Becker then went on to describe husbands as specializing in market labor while wives specialized in household tasks.⁶⁰ Using the theory of comparative advantage, he posited that marriage offered a way to realize gains from specialization and trade. Just as two islands would be better off specializing in coconuts and pineapples and trading, he predicted that the husbands who are most successful in the market (measured by their income) would want wives who specialize in the home, and that dual-earner unions should therefore be less stable than more traditional breadmaker/homemaker marriages because the gains from the exchange would be less.⁶¹

This idea has proved pernicious in multiple ways. First, it generated predictions that turned out to be flat wrong. Contrary to Becker's theory, the only group in American society whose marriage rates have increased are the top ten percent of women by income.⁶² And the marriages of dual-career couples, particularly those where both spouses acquire greater human capital, have become more stable with time, with much greater stability than

57 *Id.* at 392.

58 *See id.* at 393–94.

59 *Id.* at 397.

60 *Id.*

61 BECKER, *supra* note 19, at 43.

62 Michael Greenstone & Adam Looney, *The Marriage Gap: The Impact of Economic and Technological Change on Marriage Rates*, HAMILTON PROJECT (Feb. 3, 2012), http://www.hamiltonproject.org/papers/the_marriage_gap_the_impact_of_economic_and_technological_change_on_ma/.

traditional marriages further down the socioeconomic ladder.⁶³ Economists who begin their discussion of the family by genuflecting to Becker then typically distance themselves by noting the inaccuracy of these predictions.⁶⁴

Second, the theory itself rests on flawed premises. The equations that model Becker's theorems incorporate assumptions about increasing returns to scale.⁶⁵ But what does this mean within the family? Becker himself, in his work on fertility, rejected the notion that household production should be defined in terms of the number of children.⁶⁶ And others have lampooned the idea that "specializing" in the home has returns to scale. Does it mean that baking twenty batches of cookies is more efficient than one?⁶⁷ More fundamentally, how does caring for children, cooking the meals, doing the laundry, overseeing homework, and cleaning floors constitute specialization?⁶⁸

Third, and most importantly, the theory diverted the economic study of the family in ways that continued long after the economists moved away from Becker's predictions (and implicitly his theorems). As noted in the introduction, economist Robert Pollak acknowledged the extent to which the economics of the family continues to reflect Becker's influence in "the tools we use, the questions we ask, and the answers we give."⁶⁹ This has stood in the way of greater dialogue between economists and legal scholars, with one economist turned law professor advising the abandonment of neoclassical economic methods altogether.⁷⁰

63 See, e.g., SHAWN FREMSTAD & MELISSA BOTEACH, CTR. FOR AM. PROGRESS, VALUING ALL OUR FAMILIES: PROGRESSIVE POLICIES THAT STRENGTHEN FAMILY COMMITMENTS AND REDUCE FAMILY DISPARITIES (2015).

64 See, e.g., Stevenson & Wolfers, *supra* note 20, at 43 (noting the inaccuracy of Becker's assertion that the higher-earning men would want to marry full-time homemakers). Since then, however, a development not on the horizon at the time Becker wrote does make him look more prescient. Today, in a much more competitive and unequal economy, the highest earners work much longer hours than they did before 1980, and much longer hours than middle-income earners. As a result, many high-earning couples do have a spouse who takes on primary responsibility for child care (while contracting out other domestic services). See, e.g., Claire Cain Miller, *Women Did Everything Right. Then Work Got 'Greedy.'* *How America's Obsession with Long Hours Has Widened the Gender Gap*, N.Y. TIMES (Apr. 26, 2019), <https://www.nytimes.com/2019/04/26/upshot/women-long-hours-greedy-professions.html>.

65 BECKER, *supra* note 19, at 35.

66 Becker, *supra* note 56, at 397; see also Gary S. Becker et al., *Human Capital, Fertility, and Economic Growth*, 98 J. POL. ECON. S12 (1990) (describing tradeoffs between quality and quantity of children).

67 See, e.g., June Carbone, *What Do Women Really Want? Economics, Justice and the Market for Intimate Relationships*, in FEMINISM CONFRONTS HOMO ECONOMICUS, *supra* note 18, at 405, 407–08.

68 See *id.* In contrast, specialization among men and among women in careers can pay off quite handsomely. See Cain Miller, *supra* note 64 (observing increasing payoff to longer hours in the highest paying occupation).

69 Pollak, *supra* note 21, at 111.

70 Neil H. Buchanan, *Playing with Fire: Feminist Legal Theorists and the Tools of Economics*, in FEMINISM CONFRONTS HOMO ECONOMICUS, *supra* note 18, at 61–93 (suggesting that the

In considering empirical work on the family, the problem is not just that Becker erred in some places (while getting other things right), but that the dominance of his vision influenced the interpretation of work done by others⁷¹ and constitutes an obstacle to the construction of more robust understandings of family dynamics. And this is true despite the fact that better accounts use many of the same elements that Becker did. Professor Brinig, in early work we coauthored, drew on historical analyses of the family changes that accompanied the rise of industrialization to argue that Becker misrepresented the very idea of specialization. What produces increasing returns to scale, after all, is not simply growing more coconuts (or palm trees),⁷² but investing in the equipment and organization that increases productivity. Within the family, such investment takes the form of investment in children, enhancing their earning potential as adults. And specialization within the family is not a story of age-old differentiation between women and men, home and market, but rather reorganization over time to facilitate greater investment in children.⁷³ This greater investment, in turn, paid off in the nineteenth century because of greater specialization among men, and in the twentieth century because of greater specialization among women, each time requiring a different organization of the family to facilitate the investment.⁷⁴ This analysis often uses the same vocabulary as Becker (specialization, investment, human capital).⁷⁵ Yet, it produces a radically different picture: specialization among men that rewarded the human capital investment producing the rising middle class of the nineteenth century; specialization among women that rewards the investment remaking the pathways into the upper-middle class of the late twentieth century.⁷⁶ Casting the inquiry in these terms also has different consequences. The analysis becomes a story about increasing inequality as much as it is about efficiency, and it

rational actor model built into the core of Becker-style neoclassical economics is so flawed and so filled with hidden and biased assumptions that feminists should reject it entirely as an appropriate method).

71 Autor et al., *supra* note 22, at 163 (observing that “a fall in the relative economic stature of men diminishes the gains from household specialization and therefore reduces the prevalence of marriage” (emphasis omitted)).

72 See, e.g., Abraham Lustgarten, *Palm Oil Was Supposed to Help Save the Planet. Instead It Unleashed a Catastrophe*, N.Y. TIMES MAG. (Nov. 20, 2018), <https://www.nytimes.com/2018/11/20/magazine/palm-oil-borneo-climate-catastrophe.html> (discussing disadvantages of Borneo’s specialization in palm oil production).

73 See June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953, 955 (1991) (arguing that the nineteenth century involved greater specialization among men to supply the needs of the emerging industrial economy and that the twentieth century has involved greater specialization among women to meet the different labor demands of the postindustrial economy).

74 *Id.*

75 *Id.* at 955 (specialization), 966, 971 (investment), 1001 (human capital).

76 See *id.* at 955.

ultimately suggests different ways of interpreting empirical findings and understanding family change.⁷⁷

This work, focusing on investment in children rather than gender differentiated roles, integrates a broader body of research into the analysis. It draws heavily on historical research describing the family of the separate spheres, with its separation of home and market, not as a universal of the human family, but as an artifact of industrialization.⁷⁸ With the movement of men and productive activities out of the household and into the market, the purpose of the home—and women’s roles within it—changed. Middle-class mothers oversaw their children’s education and moral development, ensuring not only that the children stayed in school longer, but that the boys did not get the girls pregnant too soon.⁷⁹ The postponement of marriage and childbearing became important partly so that the boys could complete the education and training that would increase their employment prospects, and partly so that they would have sufficient incomes to facilitate the investment in the next generation when they did have families.⁸⁰ The men of this era did not invest in “the market” as an undifferentiated activity, but rather in specific types of employment. The new pathways to the middle class became the professions: science and engineering, managerial roles, and other positions that required more formal education, training, or experience.⁸¹ Access to these positions required greater specialization among men, a specialization that was the product of human capital investment.⁸² To facilitate that investment required a reorganization of the family and of women’s roles within it.⁸³ The shift from the agricultural to the industrial era, however, was as much about the creation of greater class differences—the product of the fact that the greater ability to invest in children was not universally available—as it was about greater specialization between men’s and women’s roles.

This model of greater specialization among men similarly applies to the greater specialization among women that occurred in the twentieth century. The changes started with the expansion of the service economy and greater

77 See, e.g., Margaret F. Brinig, *Some Concerns About Applying Economics to Family Law*, in *FEMINISM CONFRONTS HOMO ECONOMICUS*, *supra* note 18, at 450 (discussing the limits of economic analysis).

78 See Carbone & Brinig, *supra* note 73, at 973–74 (describing nineteenth-century changes).

79 See MARY P. RYAN, *CRADLE OF THE MIDDLE CLASS: THE FAMILY IN ONEIDA COUNTY, NEW YORK, 1790–1865*, at 184–85 (1981) (describing how middle-class status required greater moral instruction and supervision of the young in nineteenth-century Utica, New York).

80 *Id.* (describing increase in the average age of marriage).

81 See, e.g., W. ELLIOT BROWNLEE & MARY M. BROWNLEE, *WOMEN IN THE AMERICAN ECONOMY: A DOCUMENTARY HISTORY, 1675 TO 1929*, at 26 (1976) (discussing greater importance of education to the middle class).

82 *Id.*

83 See also RYAN, *supra* note 79, at 184–85 (describing how “native-born couples began in the 1830s to limit their family size, thereby concentrating scarce financial and emotional resources on the care and education of fewer children”).

demand for women's market labor,⁸⁴ and women's greater demand in turn for nannies, housekeepers, labor-saving devices, and fast-food restaurants.⁸⁵ The changes accelerated as women embraced the pill and abortion in the seventies and increased their educational levels over the next several decades.⁸⁶ With growing economic inequality, payoffs increased further for investment in children. Middle-class couples responded as they did in the nineteenth century: by delaying marriage and childbearing, reducing fertility, and reorganizing family roles to facilitate more intensive parenting.⁸⁷ Today, for example, better-off mothers spend an hour a day more in development time with their children than do poorer mothers, and income differences matter more to child outcomes than they once did among parents with similar levels of education.⁸⁸ The results are very similar to those in the nineteenth century: greater class differences as a result of dramatically greater class-based differences in investment in children.⁸⁹

Recasting changes in the family in this way changes the questions asked and interpretations of the results that come from empirical research. For example, Lloyd Cohen's early work on the move to unilateral divorce assumed that the only way to encourage a Becker-style "efficient" division of household labor was to enforce the marriage contract,⁹⁰ principally by recognizing fault.⁹¹ Cohen argued that women would be more vulnerable than men to the risk of unilateral divorce, adoption of no-fault divorce would make men more likely to seek divorce, and overall, the family would become less stable.⁹²

84 Carbone & Brinig, *supra* note 73, 973 & n.85.

85 PAUL R. AMATO ET AL., *ALONE TOGETHER: HOW MARRIAGE IN AMERICA IS CHANGING* 123–24 (2007) (observing that women's workforce participation conflicted less with family life for better-educated women because of their greater ability "to afford services, such as high-quality child care, take-out meals, and home cleaning, that help to ease the family burdens associated with dual employment").

86 See generally Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions*, 110 J. POL. ECON. 730 (2002) (describing how the greater ability to control reproduction contributed to women's greater educational attainment).

87 See Hymowitz et al., *supra* note 30, at 8 fig.IIA (showing steady increase in average age of marriage for college graduates); see also Adam Isen & Betsey Stevenson, *Women's Education and Family Behavior: Trends in Marriage, Divorce and Fertility* 21 (Nat'l Bureau of Econ. Research, Working Paper No. 15725, 2010), <http://www.nber.org/papers/w15725.pdf> (describing increased differences by education).

88 See ROBERT D. PUTNAM ET AL., HARVARD SCH. OF GOV'T, *GROWING CLASS GAPS IN SOCIAL CONNECTEDNESS AMONG AMERICAN YOUTH, 1975–2009*, at 10 fig.3 (2012), https://hceconomics.uchicago.edu/sites/default/files/file_uploads/Putnam-et-al_2012_Growing-Class-Gaps.pdf.

89 *Id.* at 11 (summarizing the differences).

90 See BECKER, *supra* note 19, at 14–37. Becker wrote that "one can even say that 'marriage' is defined by a long-term commitment between a man and a woman." *Id.* at 31.

91 See generally Lloyd Cohen, *Marriage, Divorce, and Quasi Rents; or, "I Gave Him the Best Years of My Life,"* 16 J. LEGAL STUD. 267 (1987).

92 *Id.* at 287, 303.

Empirical work on divorce, however, suggests a different story. The states provided a natural laboratory as they reformed their divorce laws at different times. Those adopting no-fault grounds generally did experience an increase in divorce rates immediately following the reforms.⁹³ Over time, however, the rates across the states converged. Economist Stéphane Mechoulan found that the states eliminating consideration of fault in the property division produced later marriage ages.⁹⁴ The change in the age of marriage by itself produced a small but statistically significant decline in divorce rates.⁹⁵ The much bigger effect was the increase in “assortative matching,” that is, the tendency of better-educated and higher-earning men and women to marry each other.⁹⁶ While Mechoulan speculated that the greater age at marriage was due to women’s more careful search for mates, he acknowledged that a full understanding of the results “awaits being connected with other branches of research.”⁹⁷ Since then, divorce rates have fallen further, particularly for college graduates, with most researchers speculating about the impact of later marriages, and perhaps a change in the composition of those who do marry.⁹⁸ But Mechoulan’s interpretation of his results, which primarily referenced Lloyd Cohen, suggested that women engaged in long searches because they could no longer rely on enforcement of the marriage contract to protect their investments in household production.⁹⁹ The alternative, of course, is that the later age of marriage was part of a shift to a new family model, with adoption of no-fault grounds, later marriage, and greater assortative mating all serving as mutually reinforcing indicia of the shift.¹⁰⁰

Some of Professor Brinig’s most influential work builds on—and questions—Cohen’s analysis. In an article with Doug Allen, Brinig found that contrary to Cohen’s predictions, women initiate approximately two-thirds of

93 Stéphane Mechoulan, *Divorce Laws and the Structure of the American Family*, 35 J. LEGAL STUD. 143, 145–46 (2006).

94 *Id.* at 165. Other research, however, has found that the property divisions and custody results in fault and no-fault states are approximately the same. See Margaret F. Brinig & Michael V. Alexeev, *Legal Rules, Bargaining, and Transactions Costs: The Case of Divorce*, in SYSTEMATIC ANALYSIS IN DISPUTE RESOLUTION 91, 98 tbl.6.1 (Stuart S. Nagel & Miriam K. Mills eds., 2002).

95 Mechoulan, *supra* note 93, at 165.

96 *Id.* at 164–66 (tying the effect to women’s later age of marriage and their tendency to marry men with similar levels of education); see also Christine R. Schwartz, *Earnings Inequality and the Changing Association Between Spouses’ Earnings*, 115 AM. J. SOC. 1524 (2010) (describing the increase in high-earning couples to marry each other, with the greatest gains in family income going to the women who marry high-earning men, increasing societal income inequality).

97 Mechoulan, *supra* note 93, at 166.

98 See Joe Pinsker, *The Not-So-Great Reason Divorce Rates Are Declining*, ATLANTIC (Sept. 25, 2018), <https://www.theatlantic.com/family/archive/2018/09/millennials-divorce-baby-boomers/571282/>.

99 See Mechoulan, *supra* note 93, at 165.

100 For discussion of this new model and the relationship to an older age of marriage, see NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE (2010).

divorces and have done so dating back to periods long before the adoption of no-fault divorce.¹⁰¹ The principal exception involved older men in long term marriages; they were more likely than their wives to initiate the proceedings.¹⁰² Brinig and Allen also found that expectations about custody influence divorce filing. Women who anticipate that their husbands will receive custody become dramatically less likely to file for divorce,¹⁰³ leading the authors to conclude that expectations about custody are “by far” the most important factor in determining who files for divorce.¹⁰⁴ These findings, in general, suggest a more complex picture about the role of divorce. The authors, however, filter most of their discussion through the economic frames provided by Becker and Cohen.¹⁰⁵ Yet, their most intriguing finding is the substantial effect custody laws have in discouraging women from filing for divorce.¹⁰⁶ As I have argued elsewhere, this suggests not just that custody laws have an impact on the incidence of divorce, but they may also influence the decision to marry.¹⁰⁷ Since this conclusion did not fit within the economic discourse at the time, however, the authors did not consider it, nor is there subsequent empirical work testing the idea in the United States. Yet, the notion that custody terms rather than fault or property issues are an important factor in divorce decisions has profound implications—implications that deserve a more in-depth consideration in family law.

Brinig’s empirical work with Steve Nock took on the idea of specialization more directly. Nock and Brinig found that the divorce rate does not increase with women taking on more “male” tasks; instead, it goes down.¹⁰⁸ Perhaps, more surprisingly, they also found that whenever men *or* women take on more “female” tasks, family instability increases.¹⁰⁹ The happiest families appear to be those where neither spouse does the housework. Brinig and Nock’s most innovative finding, however, involves the issues of fairness. Their study shows “that the most stable marriages were *not* those in which both husband and wife felt that the division of labor force and household

101 Margaret F. Brinig & Douglas W. Allen, “*These Boots Are Made for Walking*”: *Why Most Divorce Filers Are Women*, 2 AM. L. & ECON. REV. 126, 128 (2000). The authors also found evidence that the person filing appeared generally to be the person who initiated the divorce. *Id.* at 154.

102 *Id.* at 143–45.

103 *Id.* at 155.

104 *Id.* at 158.

105 *Id.* at 128–30, 133, 135, 138, 142–43 (discussing Cohen’s theories about opportunistic behavior, particularly when older husbands leave long-term wives).

106 *Id.* at 158.

107 See CARBONE & CAHN, *supra* note 32, at 117 (observing that even if custody laws that apply to married and unmarried couples are the same, shared custody in at least some form has become automatic in many states at divorce, while for unmarried couples there is no proceeding at separation, disadvantaging unmarried fathers who would prefer stronger custody rights).

108 Steven L. Nock & Margaret F. Brinig, *Weak Men and Disorderly Women: Divorce and the Division of Labor*, in THE LAW AND ECONOMICS OF MARRIAGE AND DIVORCE 171, 186 (Antony W. Dnes & Robert Rowthorn eds., 2002) (emphasis omitted).

109 *Id.* at 183.

responsibilities was ‘about right.’”¹¹⁰ Rather, the most stable families are “those in which the work inequality was recognized by both spouses,” and each agreed that the other took on an unfair amount of work.¹¹¹ In other words, when each spouse sympathized with the other, the marriage was more likely to last.

This work is innovative and important. Still, its significance and impact might be greater if, instead of interpreting the findings through the lens of Becker’s clearly misplaced theories of specialization, it was being interpreted in light of the growing literature on class division. In *Alone Together*, for example, Amato and his colleagues also found that women’s workforce participation did not in itself destabilize relationships, and that the impact depended on perceptions of fairness.¹¹² But this work linked the perceptions of fairness to the dynamics that underlie class, finding that “dual-earner arrangements [i.e., two working spouses] are linked with positive marital quality among middle-class couples and with negative marital quality among working-class couples.”¹¹³ The middle-class couples in the study had careers that were often a source of satisfaction for both. Many of the working-class wives, on the other hand, worked outside the home more than they would have liked because of what they perceived as their husbands’ failures to keep their end of the bargain. As a result, the income the women produced came at “a steep price in the form of greater marital tension, low job satisfaction, and a desire . . . to decrease . . . hours of employment or return to . . . homemaking.”¹¹⁴ The middle-class couples, in turn, may have been more content with the division of family responsibilities because they could “afford services, such as high-quality child care, take-out meals, and home cleaning, that help to ease the family burdens associated with dual employment.”¹¹⁵ Perhaps the most striking finding in the study was that between 1980 and 2000, couples who reported feeling substantial economic distress had become far more divorce prone, while those reporting greater financial security had become substantially less divorce prone.¹¹⁶ These results correlate, in turn, with findings that, beginning in the mid-1990s, divorce rates were diverging by class, increasing sharply for the working class while falling for college graduates.¹¹⁷

Considered as a whole, the empirical studies of the family influenced by the intersection of economic analysis and legal change present, at best, an incomplete picture. They consistently find that women’s “specialization” in the home seems to have very little to do with relationship stability. More

110 Margaret F. Brinig & Steven L. Nock, “*I Only Want Trust*”: Norms, Trust, and Autonomy, 32 J. SOCIO-ECON. 471, 476 (2003); see also Nock & Brinig, *supra* note 108, at 188.

111 Brinig & Nock, *supra* note 110, at 476 (emphasis omitted).

112 AMATO ET AL., *supra* note 85, at 163–64.

113 *Id.* at 139.

114 *Id.*

115 *Id.* at 123–24.

116 *Id.* at 132, fig.4.8.

117 See McLanahan, *supra* note 30, at 607–08, 617.

intriguingly, the Brinig and Nock results tied together with Amato's work and sociological studies going back to the Moynihan report to suggest that male failure to live up to the income earning role may be of greater significance than women's workforce participation in predicting family dissolution. Brinig's work also implies that the relationship to children is more important than who mops the floors, making changes in custody law at least as important as the property division and divorce grounds in affecting relationship decisionmaking. Indeed, the fact that men are more likely to initiate divorce only after longer term marriages when presumably the children have grown while women are more likely to file for divorce while the children are still young, provides a tantalizing indication that family law dynamics are more multifaceted than the conventional analyses indicate. The pieces of the puzzle that emerge from the empirical work as a whole thus provide clues to the construction of overall picture, but without a discourse that places the different pieces in context with each other, that picture has yet to come into focus.

III. WRONG DIRECTIONS PART II: THE SECOND DEMOGRAPHIC TRANSITION AND THE FOCUS ON CULTURE

If imperial economics has supplied a dominant discourse for the construction of empirical work on family law, the competing discourse has come from sociology. This discourse has insisted that economics cannot explain family change; the answers need to lie with shifts in cultural norms, as though economic changes and cultural shifts are necessarily distinct. At times, this insistence that economics cannot explain the changing family has been remarkably broad.¹¹⁸ In examining the impact of welfare benefits, for example, conservative critic Charles Murray argued that the expansion of the Aid to Dependent Children program undermined the cultural connections between marriage and childbearing, but dismissed the possibility that the disappearance of decent-paying blue-collar jobs had anything to do with the result.¹¹⁹ Those opposed to Murray, on the other hand, often responded by rejecting out of hand the idea that women have children in order receive welfare benefits, without considering whether welfare benefits might influence the feedback loops that strengthen or weaken the societal norms associated with childrearing.¹²⁰ These positions obscure the possibility that long-

118 For a description of skepticism more generally, see Hill, *supra* note 55, at 219 (describing the particularly strong hostility toward extending law and economics into the personal sphere).

119 See CHARLES MURRAY, *COMING APART: THE STATE OF WHITE AMERICA, 1960–2010*, at 178 (2012) (again insisting that the changing employment picture cannot explain the change in norms) [hereinafter MURRAY, *COMING APART*]; CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950–1980* (1984); Murray, *supra* note 50.

120 See Hill, *supra* note 55, at 249 (observing that “[i]n many circles, it is of course quite controversial to argue that if it’s made more financially advantageous for a woman to have a child, she’s more apt to do so”); Huntington, *supra* note 1, at 275 (discussing the controversies over empirical efforts to measure whether providing low-income families with material support affects their childrearing behavior).

term economic changes may create environments receptive to norm shifts, and that the norm shifts may take hold more completely when they help navigate the economic changes. Economics and cultural norms may simultaneously be separate from each other and intertwined in complex and mutually reinforcing ways.¹²¹ Yet, much of this literature seems determined to deny the possibility that economic changes can have anything to do with changing morality.¹²²

It is therefore disappointing that one of most promising efforts to capture the interaction between economic change and cultural norms, the SDT, has been narrowly cabined.¹²³ The SDT concept starts with empirical demographic findings. Ron Lesthaeghe, one of the SDT's originators, uses the term to describe long-term historical trends that include "subreplacement fertility," that is, falling fertility trends that will produce a falling global population, "a multitude of living arrangements other than marriage, [and] a disconnection between marriage and procreation."¹²⁴ Lesthaeghe also positions the second demographic transition in apposition to the first demographic transition, which accompanied industrialization and also included falling fertility, later age of marriage, greater investment in children,¹²⁵ and, at least initially, greater economic inequality.¹²⁶ Lesthaeghe presents the SDT as an "'overarching' theory that spans both economic and sociological reasoning."¹²⁷ It does this by addressing "ideational changes," that is, changes in cultural concepts creating new norms that remain stable through fluctuations in the economic cycle.¹²⁸ Practically, this means that although economic shifts may provide the context for cultural change, once a cultural shift occurs, it tends to last through good times and bad.

The limiting part of the SDT analysis is its attribution of cause. Lesthaeghe acknowledges that the first demographic transition accompanied the rise of industrialization, but only obliquely ties the family shifts to the

121 See, e.g., Hill, *supra* note 55, at 220.

122 See, e.g., Wilson, *supra* note 50 (explaining why economic factors cannot explain cultural changes). Some of this, of course, may come from an unduly narrow view of economics, conflating reliance on the rational actor model or equations calculating the marginal effect of a change in price with a broader consideration of the role of economic transformations such as industrialization and deindustrialization on cultural developments. Compare Buchanan, *supra* note 70, at 62 (critiquing the limits of economic methodology), with Hill, *supra* note 55 (defining its utility in broader terms).

123 See generally Ron Lesthaeghe, *The Second Demographic Transition: A Concise Overview of Its Development*, 111 PROC. NAT'L ACAD. SCI. 18112 (2014).

124 *Id.* at 18112.

125 *Id.* (noting the first demographic transition was "unleashed by an enormous sentimental and financial investment in the child" (quoting Philippe Aries, *Two Successive Motivations for the Declining Birth Rate in the West*, 6 POPULATION & DEV. REV. 645, 649 (1980))).

126 Lesthaeghe does not mention inequality, but the most influential application to American family changes does. See McLanahan, *supra* note 30, at 608.

127 Lesthaeghe, *supra* note 123, at 18113.

128 *Id.*

economic changes.¹²⁹ And he claims that “[t]he SDT theory fully recognizes the effects of macrolevel structural changes and of microlevel economic calculus,” without saying anything more about them.¹³⁰ Instead, the SDT refers to Maslow’s theory of changing needs. This theory posits that “[a]s populations become wealthier and more educated, the attention shifts away from needs associated with survival, security, and solidarity” and places greater weight instead on “individual self-realization, recognition, grassroots democracy, expressive work, and educational values.”¹³¹ It is this value shift that explains the changing family, as individuals become freer to seek personal fulfillment.¹³²

Some of the scholars who embrace this view then attribute higher divorce and nonmarital birth rates to the dismantling of the social discipline that came with the assumption of prescribed roles. Brad Wilcox and Jeffrey Dew, for example, argue that marriage has become a marker of personal fulfillment, referring to a shift from “institutional marriage” to “soulmate marriage,” that is, the selection of a partner based on sexual and emotional intimacy.¹³³ These scholars then conclude that sexual and emotional intimacy is a flimsy foundation for family relationships, particularly in contrast with unions based on a commitment to permanence and an assignment of gendered roles.¹³⁴ They express concern about the break-up of “good enough” marriages because of conflict about family responsibilities or the failure to meet one or the other of the spouse’s higher-order expressive needs.¹³⁵ Other sociologists see the change in marriage to an “intensely private spiritualized union” that symbolizes personal self-development as a reason couples do not marry.¹³⁶ Andrew Cherlin, for example, in a study of working- and lower-middle-class couples, described marriage as a marker of “individual achievement,” with the couples in his study insisting on a secure

129 *Id.* at 18114 (stating that religious groups feared “that urbanization and industrialization would lead to immorality and atheism,” and these groups together with socialist and liberal parties, “saw the family as the cornerstone of society,” best served “by a sharp sex-based division within the family: husbands assume their roles as devoted breadwinners and women as guardians of quality-related issues in the home (order and neatness, health, education, etc.)”).

130 *Id.* at 18112.

131 *Id.* at 18113.

132 See GROSSMAN & FRIEDMAN, *supra* note 27, at 8–9.

133 W. Bradford Wilcox & Jeffrey Dew, *Is Love a Flimsy Foundation? Soulmate Versus Institutional Models of Marriage*, 39 SOC. SCI. RES. 687 (2010); see also Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARRIAGE & FAM. 848 (2004) (defining deinstitutionalization as the weakening of the social norms that define people’s behavior in a social institution such as marriage and arguing that the acceptance of cohabitation, changing marital roles, nonmarital births, and same-sex unions contributed to this weakening).

134 Wilcox & Dew, *supra* note 133.

135 Brinig and Allen’s work on divorce often fits into these views as they document both women’s willingness to initiate divorce without traditional fault grounds and older men’s willingness to leave older, dependent spouses, often for new partners. See Brinig & Allen, *supra* note 101, at 144, 150.

136 CHERLIN, *supra* note 27, at 140.

economic foundation as a precondition for marriage.¹³⁷ These couples see the ability to buy a home, secure stable employment, pay off debts, and obtain reliable transportation as a precondition for marriage, even if they already have children together.¹³⁸ Cherlin associates these attitudes with an idea of marriage as personal expression rather than institutional design.¹³⁹

The difficulty with these analyses is that they conflate three different developments: the centuries-long rise of expressive individualism,¹⁴⁰ the dismantling of fixed gender roles and control of women's sexuality over the last half century,¹⁴¹ and the increasing class divisions in family life that have accelerated over the course of the past twenty-five years.¹⁴² While scholars debate the precise contours of expressive individualism, they situate it within the changing relationship between individual, community, and state.¹⁴³ In earlier centuries, the individual's place within a community might be defined by kinship ties defined by marriage and lineage; membership in a group-based religion (Irish Catholics versus Protestant Scots-Irish); and the assumption of a productive role (farmer, duchess, artisan) likely to reflect family tradition, inheritance, or marriage.¹⁴⁴ Modernism, on the other hand, arguably begins with the embrace of democratic ideals and religious tolerance.¹⁴⁵ It increases with the individual's ability to choose a life course through greater ability to move to a new location and to access to the education and training necessary to enter one's chosen calling.¹⁴⁶ And while the shift from arranged marriages to companionate relationships took centuries to complete, it became an important symbol of the greater ability of the indi-

137 *Id.* at 140.

138 *Id.* at 140–41.

139 Cherlin, *supra* note 133.

140 See generally EDWARD L. RUBIN, *Soul, Self, and Society: The New Morality and the Modern State* (2015) (examining the evolution of changing moral systems over the course of the last two millennia); JUNE CARBONE, "Blue" *Morality and the Legitimacy of the State—Ed Rubin's Soul, Self, and Society: The New Morality and the Modern State*, 42 LAW & SOC. INQUIRY 582, 597–606 (2017) (describing the rise of modern and postmodern notions of morality tied to individual self-realization).

141 See CAHN & CARBONE, *supra* note 100 (arguing that a defining element in the cultural polarization is the reaction to women's changing roles and their impact on the age and prevalence of marriage.).

142 See generally CARBONE & CAHN, *supra* note 32. Income inequality in the United States begins to increase in by the late seventies, but the class-based divergence in divorce rates, unintended pregnancy, and nonmarital birth rates takes hold more completely in the nineties.

143 See, e.g., RUBIN, *supra* note 140, at 85, 119 (comparing the personalized nature of royal rule with more democratic and bureaucratic organizations).

144 *Id.* at 108–11 (describing how societal roles and religious identity contributed to individual meaning and sense of place in the world).

145 *Id.* at 194 (linking religious tolerance to the morality of self-fulfillment).

146 See, e.g., *id.* at 278 (emphasizing that "the modern administrative state is *designed* to serve the needs of its citizens, including the basic material needs that every citizen requires, at a minimum, to pursue his or her chosen life path" (emphasis added)).

vidual to choose one's path in life.¹⁴⁷ These changes accordingly do frame many of the more recent changes in the family.¹⁴⁸ The problem is tying the centuries-long developments to recent family changes in ways that make them the subject of meaningful measurement and discussion. The embrace of modernist or postmodern values cannot explain by itself why, in the United States, for example, divorce rates simultaneously increase for the traditionalist working class and fall for the modernist upper-middle class.¹⁴⁹

The primary alternative explanation involves the role of gender in these developments.¹⁵⁰ When scholars refer to an earlier era of prescribed gender roles, they are not just referring to Becker-style specialization: men go off to the factory while women do the laundry. They are also referring to reciprocal moral obligations. Women in the era before contraception were viewed as intrinsically vulnerable because of the risk of pregnancy. The solution was to channel sexuality into marriage and keep it there—principally by blocking women's opportunities for economic independence, stigmatizing women's nonmarital sexuality, making divorce difficult, and persuading men to accept their responsibility to support their dependent wives.¹⁵¹ Indeed, Professor Brinig has written about the rise of the engagement ring as a form of "extralegal contract guarantee" designed to protect women who made the mistake of sleeping with a man in reliance on his promise to marry her.¹⁵² The sexual revolution and the women's movement changed this equation. With greater ability to enter the paid labor market, women gained greater ability

147 Carbone, *supra* note 140, at 592 (observing that "[w]hile the transition from arranged marriages to matches chosen on the basis of love took centuries to complete," it ultimately made mutual consent to the marriage a critical element in the legitimacy of marital unions); *see also* RUBIN, *supra* note 140, at 95 (describing importance of mutual consent).

148 And they certainly affect the way we talk past each other. *See, e.g.*, Carbone, *supra* note 140, at 597–602 (describing how religious conservatives see the idea of self-actualization as license while secular liberals tend to see the idea of the religiously based family values as hypocrisy); June Carbone, *What Does Bristol Palin Have to Do with Same-Sex Marriage?*, 45 U.S.F. L. REV. 313, 314 (2010).

149 McLanahan, *supra* note 30, at 607–08, 617.

150 *See* Frances Goldscheider et al., *The Gender Revolution: A Framework for Understanding Changing Family and Demographic Behavior*, 41 POPULATION & DEV. REV. 207 (2015).

151 Immanuel Kant, for example, concluded that, once a relationship progressed to the point of creating vulnerability and dependence, a mutual commitment to preserve the relationship became morally compelled. "These duties include not committing breaches of trust, actively promoting the ends of the other, and cultivating the emotions needed to preserve the relationship." Josefine Charlotte Nauckhoff, *The Role of the Emotions in the Moral Life According to Immanuel Kant* 265 (1994) (unpublished Ph.D. dissertation, University of Pennsylvania), <https://repository.upenn.edu/cgi/viewcontent.cgi?article=3928&context=edissertations>.

152 *See* Margaret F. Brinig, *Rings and Promises*, 1 J.L. ECON & ORG. 203, 213 (1990) (describing engagement rings as an extralegal contract guarantee that arose following the abolition of "heartbalm" statutes that had recognized a cause of action for breach of the promise to marry).

to leave unhappy unions and raise children on their own.¹⁵³ With access to contraception and abortion, they obtained greater ability to enjoy sexual relationships without the risk of pregnancy.¹⁵⁴ Men in turn felt less obligation to marry women they impregnated or to stay with the women they married.¹⁵⁵ Feminist scholars argue that much of what has been termed the SDT can be explained by the adjustment to women's roles.¹⁵⁶ With the permanence of marriage no longer produced by female dependence or coercive divorce laws, couples marry later and become pickier about their choice of partners.¹⁵⁷ Managing a relationship premised on formal equality is a different enterprise from managing one based on hierarchy and dependence.¹⁵⁸ Psychologists find that for relationships to endure today, it is important for the partners to maintain equal respect and an ability to engage with each other, and a sense of fairness in the allocation of relationship responsibilities.¹⁵⁹ Thus, what some sociologists see as a search for a "soulmate," feminists see as a desire for equal respect. And American legal scholars have argued that, within this system, marriage has become premised legally and practically on formal equality, requiring "high degrees of commitment, maturity, and trust,"¹⁶⁰ and nonmarital relationships have emerged as the alternative for those who cannot manage relationships on such terms.

The problem with both the SDT and the European feminists' response is that it does little to explain the class-based family divisions in the United States.¹⁶¹ Yet, in American legal circles, the concept of the SDT has taken

153 See generally Brinig, *supra* note 4.

154 Goldin & Katz, *supra* note 86, at 747.

155 See George A. Akerlof et al., *An Analysis of Out-of-Wedlock Childbearing in the United States*, 111 Q.J. ECON. 277, 278–79 (1996).

156 Goldscheider et al., *supra* note 150.

157 This development can be explained by multiple factors: the economic advantages of assortative mating, Schwartz, *supra* note 96, at 1526; the need for greater maturity and flexibility in dealing with dual income relationship roles, see June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 59 (2016); and the advantages that come from greater career investment before marriage and childbearing, HYMOWITZ ET AL., *supra* note 30, at 8, 14–15.

158 See Hara Estroff Marano, *Love and Power*, PSYCHOL. TODAY (Jan. 24, 2018), <https://www.psychologytoday.com/us/articles/201401/love-and-power>.

159 See *id.*

160 Carbone & Cahn, *supra* note 157, at 59. We also argued that some couples who do not marry may not do so because their relationships are not only more contingent, but also more unequal. *Id.* at 94.

161 See Linda C. McClain, *The Other Marriage Equality Problem*, 93 B.U. L. REV. 921, 928 (2013) (discussing the role of demographic theories in explaining class divergence in marriage, divorce, and childbearing patterns). European feminists have argued that "there are 'two halves' of the gender revolution." Zaidi & Morgan, *supra* note 23, at 485. The first involves the changes in women's employment that disrupted traditional gender relationships, contributing to the SDT declines in fertility and union stability. *Id.* The second requires a change in men's roles. *Id.* Goldscheider et al. maintain that relationship norms are moving toward a more equitable division of parenting and household labor, and that these changes will increase fertility and union stability. Goldscheider et al., *supra* note 150, at 229. Yet, this response does not address the class-based divergences in male gender

hold most forcefully in describing the impact of growing economic inequality. In 2004, Sara McLanahan's article *Diverging Destinies: How Children Are Faring Under the Second Demographic Transition*¹⁶² argued that the first demographic transition had increased the investment in "child quality" in the industrialized West while the SDT had both raised and lowered the investment in children in diverging ways.¹⁶³ By the fifties, McLanahan maintained that, as a result of the first demographic transition, children had become "more likely than those growing up 100 years earlier to live in traditional nuclear families, to be in good health, and to attend school."¹⁶⁴ A half century later, on the other hand, the SDT had produced "two different trajectories . . . with different implications for children."¹⁶⁵ Most discussions of cultural change portray college-educated women as leading the fight for the new values of personal fulfillment; these women embraced the right to enter into intimate relationships on terms of their choosing, to dismantle gendered family roles, and to raise children on their own or in untraditional ways.¹⁶⁶ McLanahan showed, however, that in fact "college-educated women are more likely to marry than other women" and "less likely to divorce," contradicting the argument "that the most economically independent women are choosing single motherhood over marriage."¹⁶⁷ Instead, the SDT changes associated with delays in childbearing and increases in maternal employment have produced dramatically greater family incomes and resources to invest in childrearing.¹⁶⁸ In the meantime, parents who do not attend college have become less likely to marry, more likely to divorce, more likely to bear children outside of marriage, with corresponding drops in the resources they have available to invest in their children.¹⁶⁹

The result is not a story of broad-based and shared cultural change, as society as a whole embraces the search for personal fulfillment. Instead, it is a story of stark divergences along class, racial, and regional lines in both norms and behavior, with varying consequences for the interactions between families and the legal system.¹⁷⁰ Starting in the nineties, divorce rates fell for college graduates. Indeed, the levels returned back to the levels before the

attitudes or earning capacity. See Andrew J. Cherlin, *A Happy Ending to a Half-Century of Family Change?*, 42 POPULATION & DEV. REV. 121, 125 (2016) (observing that lower-income men tend to have more traditional gender attitudes, making them unlikely to play a househusband role, and insufficient earning capacity to play a breadwinner role).

162 McLanahan, *supra* note 30.

163 *Id.* at 607.

164 *Id.*

165 *Id.* at 608.

166 *Id.*; see Akerlof et al., *supra* note 155, at 279.

167 McLanahan, *supra* note 30, at 612 (emphasis omitted).

168 *Id.* at 608.

169 *Id.*

170 See June Carbone & Naomi Cahn, *The Triple System of Family Law*, 2013 MICH. ST. L. REV. 1185.

adoption of no-fault divorce.¹⁷¹ At the same time, however, divorce rates continued to rise for other parts of the population.¹⁷² Between 1982 and 2008, nonmarital birth rates stayed low for white college graduates while rising for almost everyone else, until they reached approximately forty percent of the total.¹⁷³ During the same period, unintended pregnancies fell in half for better-off women, while increasing dramatically for women below the poverty line.¹⁷⁴ During some eras in American history, family developments move in tandem for much of the American population. African American divorce rates, for example, were the same as white rates in 1940.¹⁷⁵ And while college graduates had lower divorce rates than couples with less education, the trends moved in the same direction between the seventies and the nineties.¹⁷⁶ Today, however, the story of cultural change has to take into account increasing class differences, and that requires a different framework for empirical work in family law.¹⁷⁷ Studies that look at divorce, nonmarital unions, custody determinations, and other family developments risk missing critical parts of the picture if they look at overall numbers without attention to changes in norms and behavior that drive different parts of the population in opposite directions.¹⁷⁸

Professor Brinig's work again offers critical insights about these developments. Her results showing that women's workforce participation does not increase relationship dissolution fit nicely with the feminist theories that interpret these trends in terms of a transition to a new gender system, rather than societal breakdown or individual self-indulgence.¹⁷⁹ Yet, the Brinig and

171 Carbone, *What Does Bristol Palin Have to Do with Same-Sex Marriage?*, *supra* note 148, at 319.

172 McLanahan, *supra* note 30, at 607.

173 See HYMOWITZ ET AL., *supra* note 30, at 18; NAT'L MARRIAGE PROJECT, THE STATE OF OUR UNIONS: MARRIAGE IN AMERICA 23 fig.3, 56 (W. Bradford Wilcox et al. eds., 2010), http://www.virginia.edu/marriageproject/pdfs/Union_11_12_10.pdf; see also MURRAY, COMING APART, *supra* note 119, at 159–60 (white nonmarital birth rates), 167 (concentration by class); Amy Zietlow & Naomi Cahn, *The Honor Commandment: Law, Religion, and the Challenge of Elder Care*, 30 J.L. & RELIGION 229, 236 (2015) (stating that “more than 40% of children [are] born in nonmarital families”).

174 GUTTMACHER INST., UNINTENDED PREGNANCY IN THE UNITED STATES (2019), <https://www.guttmacher.org/fact-sheet/unintended-pregnancy-united-states>; see also Lawrence B. Finer & Mia R. Zolna, *Unintended Pregnancy in the United States: Incidence and Disparities*, 2006, 84 CONTRACEPTION 478, 480 (2011).

175 DANIEL PATRICK MOYNIHAN, U.S. DEP'T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION 5 (1965), <http://www.blackpast.org/?q=primary/moynihan-report-1965>.

176 See McLanahan, *supra* note 30, at 613 fig.4.

177 In contrast, a larger body of research addresses divergences by race, starting with Wilson's work in the eighties and nineties. See, e.g., WILSON, WHEN WORK DISAPPEARS, *supra* note 38.

178 See McLanahan, *supra* note 30, at 607–08, 612 (showing that divorce rates have been declining for college graduates at the same time that they are increasing for the rest of the population).

179 Nock & Brinig, *supra* note 108, at 186 (finding that women's increased labor-force participation does not increase dissolution rates).

Nock finding that relationship stability suffers when either spouse takes on a larger share of traditional homemaking does not necessarily lead to a conclusion that the solution for working-class relationships is a less gendered division of labor. Instead, it suggests very different implications. Societal inequality—and greater family dysfunction—also rose after the first demographic transition, with working-class children realizing the benefits of the new family system only after the unionization movement took hold in the twentieth century and white blue-collar workers gained access to a “family wage.” Brinig’s work implies that the new family terms, whether defined as the ability to afford a cleaning crew or the ego strength to identify with the unfairness of the other partner’s assumption of domestic responsibilities, may simply be beyond the reach of today’s working classes. This in turn suggests that creation of new working theories of family change must revisit the mechanics that connect cultural shifts and economic change. In a retrospective on the Moynihan report, which attempted to chart changes in the African American family in the mid-1960s, it was the *sociologists* who argued for a renewed focus on economics. They wrote that the much-vilified Moynihan report’s “core argument was really rather simple: whenever males in any population subgroup lack widespread access to reliable jobs, decent earnings, and key forms of socially rewarded status, single parenthood will increase, with negative side effects on women and children.”¹⁸⁰

In other words, economic shifts and cultural change are intrinsically interrelated. So long as the economic and sociological literatures talk past each other, empirical family law will lack the robust discourse necessary to give meaning to the findings. The solution is to address the ways that such a discourse might be created within family law even if they do not already exist in the social sciences. And that requires that family law scholars become more informed consumers of empirical analysis.

IV. A CONSUMER’S GUIDE TO THE NEXT GENERATION OF EMPIRICAL WORK IN FAMILY LAW

The challenge for the next generation of empirical work in family law will be to create legal discourses that include, inform, and learn from empirical analysis. These discourses should complement those in the social sciences, but they should also not be limited by them. Creation of these discourses needs to pay particular attention to three factors, in particular: the need to create a distinctly legal empirical discourse; the integration of economic and cultural changes into that discourse; and attention to the intersection of class, race, and regional differences in the creation of new databases and in the interpretation of family decisionmaking.

180 See Douglas S. Massey & Robert J. Sampson, *Moynihan Redux: Legacies and Lessons*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 6, 13 (2009).

A. *Creating a Distinctly Legal Empirical Discourse in Family Law*

Family law includes a number of canonical works that emphasize the way that the impact of the law on family decisionmaking extends well beyond statutory provisions and judicial decisions. These works include Mnookin and Kornhauser's *Bargaining in the Shadow of the Law: The Case of Divorce*,¹⁸¹ which argued that divorce negotiations constitute a form of "private ordering" that allows couples to create their own legally enforceable commitments that may differ in significant ways from formal adjudications.¹⁸² The discourse extends further to Schneider's *The Channelling Function in Family Law*, which maintains that "the law recruits, builds, shapes, sustains, and promotes social institutions."¹⁸³ Schneider argues that this "channelling function" operates through the individual's internationalization of shared societal obligations rather than through more coercive legal means.¹⁸⁴ The discussion of how law affects family decisionmaking also builds on the lengthy and well-established legal literature depicting a "dual system of family law."¹⁸⁵ This literature acknowledges the traditional "first system," which Mnookin and Kornhauser describe, that is governed by the laws of marriage and divorce and the formal contracts between the parties.¹⁸⁶ It also critiques a "second system," governed by the public law that addresses eligibility for government benefits, and argues that this second system often imposes involuntary obligations on poorer families at odds with the parties' own understanding of their relationships.¹⁸⁷ Taken together, these works create a robust framework for thinking of the law as an iterative process that contributes to establishing understood norms and moral obligations, but sometimes with different consequences for different groups of people.¹⁸⁸

Professor Brinig's empirical work has contributed to and enriched this tradition. Her work on engagement rings, for example, explored how the engagement ring custom arose during a time period when state legislatures were abolishing legal redress for breach of the promise to marry, and the rings acted as an informal form of "liquidated damages" or insurance for breach.¹⁸⁹ Her work on custody has influenced the way that Naomi Cahn and I view decisions not to marry. Building on Professor Brinig's work, we

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

182 *Id.* at 950–52.

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

184 *Id.* at 503–04, 506, 530 (contrasting more coercive legal systems, such as the criminal law, with family law's channeling function).

185 See *supra* note 36 and accompanying text.

186 See tenBroek, *supra* note 36.

187 See, e.g., Hasday, *supra* note 36, at 306 n.14, 368–71; Hatcher, *supra* note 36, at 1043–44.

188 See Scott & Scott, *supra* note 12, at 340 (contrasting norm creation within institutions with more varied norms outside of institutions like marriage).

189 See Brinig, *supra* note 152.

have argued that there is a “third system of family law,” one defined in terms of couples who order the terms of their relationships by avoiding contact with the first two systems. The prototypical example of such a system involves couples who have children together without marriage and without seeking public benefits for the children.¹⁹⁰

Seeing decisions to marry in their legal context can change the interpretations of empirical work on nonmarital unions. Naomi Cahn and I have argued, for example, that the shift in women’s roles from intrinsically dependent to potentially independent has remade the understandings of what marriage is about both legally and practically. These shifts then inform in turn decisions not to marry, and the norms that govern nonmarital relationships.¹⁹¹ Three changes, in particular, influence the results. First, marriage has changed from a hierarchical and dependent relationship to a more egalitarian and interdependent one.¹⁹² This means that high-earning partners who do not wish to share their assets equally with their lower-earning partners,¹⁹³ and legal parents who do not wish to grant their partners equal parental status may simply opt out of marriage, thereby enjoying legal default rules that do not impose equal or reciprocal obligations on the parties.¹⁹⁴

Second, unmarried obligations may involve a different allocation of decisionmaking power. As Brinig and Allen indicated, women are more likely to initiate divorce, and their custody laws influence their decisions to do so.¹⁹⁵ Changing state laws, however, have placed increasing emphasis on shared parenting, routinely entering divorce decrees that give both parents a continuing role in their children’s lives.¹⁹⁶ If parents do not marry, on the other hand, relationships typically end when the father moves out. If the father then wants custodial rights, he must either enlist the mother’s cooperation, or he bears the burden of going to court and securing a custodial order. Empirical studies indicate that unmarried fathers are dramatically less likely than married fathers to obtain such orders.¹⁹⁷ Some scholars have criticized

190 See Carbone & Cahn, *supra* note 170.

191 See generally Carbone & Cahn, *supra* note 157 (describing how married and unmarried relationships differ).

192 *Id.* at 84 (describing marriage as a system premised on equality and interdependence).

193 *Id.* at 100 (describing decisions not to marry as often following from a lack of trust or commitment).

194 See PATRICIA BROWN & STEVEN T. COOK, INST. FOR RESEARCH ON POVERTY, UNIV. OF WIS.-MADISON, CHILDREN’S PLACEMENT ARRANGEMENTS IN DIVORCE AND PATERNITY CASES IN WISCONSIN 9–12, 18–21 (2012), https://www.irp.wisc.edu/wp/wp-content/uploads/2018/06/Task4A_CS_09-11_Final_revi2012.pdf (showing that unmarried fathers are much less likely than married fathers to have parenting orders).

195 Brinig & Allen, *supra* note 101, at 156–58 (indicating that women are more likely to file for divorce).

196 See Margaret F. Brinig, *Penalty Defaults in Family Law: The Case of Child Custody*, 33 FLA. ST. U. L. REV. 779, 781–82 (2006) (discussing movement toward equalizing custodial rights at divorce).

197 See BROWN & COOK, *supra* note 194, at 9–12, 18–21.

these results as mothers' "gatekeeping," but the mothers' primary role is consistent with working-class (though not upper-middle-class) norms.¹⁹⁸

In a similar fashion, higher-earning partners, who tend overwhelmingly to be men, gain greater control over their separate resources by not marrying. These partners may be similar to the married men who initiate divorce after long-term relationships (i.e., relatively well-off men paired with lower-earning partners), but they may also include older couples entering into new relationships who wish to preserve their assets for their children from earlier relationships.¹⁹⁹ Higher-earning partners' ability to maintain relationships outside of marriage enhances their bargaining power both within these unions and at the time of dissolution.²⁰⁰ Important empirical questions involve how large these various groups are, and the degree to which a legal regime designed to benefit one group disadvantages others.

Third, staying out of marriage increases the ability of the couple to set their own terms for their relationships. For unmarried parents, these terms involve the ability to trade custody and support. As Leslie Harris argues, couples who succeed in staying out of court are more likely to combine father involvement and paternal support in their children's lives than couples who litigate—or who have support terms imposed by the state.²⁰¹ Cynthia Bowman argues as well that part of the motivation for unmarried couples who choose to live apart is the desire to retain greater control over each partner's independent life; these couples share their intimate lives, but not necessarily their housekeeping and financial responsibilities.²⁰² The ability to negotiate individual solutions may be particularly important in communities that do not share mainstream norms, but they may also motivate those who wish to flout them, such as higher-earning partners who reject the obligation to care for dependent partners.²⁰³

Considering these factors makes nonmarriage—and the third system of family law—not just a matter of cultural expression, but an alternative legal regime that orders family obligations in a different manner from the formal law of marriage or parentage. It deserves to be a subject of discourse—and empirical research—on terms of its own.

198 See, e.g., KATHRYN EDIN & TIMOTHY J. NELSON, *DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY* 214 (2013) (describing mothers as acting as gatekeepers in accordance with legal and community norms); Huntington, *supra* note 13, at 173 (criticizing gatekeeping and favoring greater emphasis on shared custody for unmarried couples).

199 See Brinig & Allen, *supra* note 101, at 135–36.

200 See generally Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. REV. 2139 (2019) (arguing that nonmarital relationships today replicate the disadvantages associated with coverture in that domestic contributions outside of marriage are not recognized or valued).

201 See Harris, *supra* note 14, at 165–66.

202 See, e.g., Cynthia Grant Bowman, *How Should the Law Treat Couples Who Live Apart Together?*, 29 CHILD & FAM. L.Q. 335, 335–36 (2018).

203 See Antognini, *supra* note 200, at 2148–49 (describing the failure to protect lower-earning partners who contribute services).

B. *Reintegrating Economics and Culture*

Changing family norms may be seen to reflect long term economic changes without being reduced to self-interested financial calculations. Connecting economic with sociological analysis, in turn, requires taking seriously the evolution of family law and policy in terms of the growing class divisions in American life. This means recasting the debate in new terms, letting go of the older law-and-economics debate and limiting the SDT discourse to its more limited demographic terms. Instead, integrating the two discourses means more realistic analyses of the growing class divide in American family life. Such an analysis might focus on the following issues:

First, growing inequality increasingly separates the top of the income scale not just from the bottom, but also from the middle, complicating discussions about the role of marriage and gender. At the top of the economy, couples overwhelmingly do marry, and both dual-earner and single-earner relationships tend to endure.²⁰⁴ Nonetheless, the increasing hours for the most competitive positions in the economy, together with the enormous compensation packages available to the winners in these competitions, increasingly make elite families look more traditional than simply well off ones.²⁰⁵ These families, however, do not simply replicate historical patterns of Becker-type “specialization.” At one time, those who worked long hours made less *per hour* than those who worked less. Today, the payoff per hour for top earners has increased dramatically, making it much more difficult to sustain two-full-time-earner families with children at this level.²⁰⁶ In addition, there is intriguing evidence that employers, particularly large law firms, may discriminate against professional women from upper-income backgrounds in favor of women from working-class origins because the working class women do not have the same the opportunities to marry well and may therefore focus more intently on their careers even after having children.²⁰⁷ All of this suggests that the emerging family paradigms for those at the top of the socioeconomic spectrum may not be the same as (and may not have the same meaning even when they look similar to) the emerging models at other economic levels.

Second, empirical research about the disappearance of marriage at the bottom of the socioeconomic scale still fails to effectively model the interaction between disappearing male employment and relationship stability. After a half century, there is finally growing acceptance that the Moynihan report identified a far-reaching issue: the increasing lack of “key forms of socially rewarded status” for blue collar men.²⁰⁸ Andrew Cherlin’s 2014 book, *Labor’s Love Lost: The Rise and Fall of the Working-Class Family in America*, has

204 See AMATO ET AL., *supra* note 85.

205 See, e.g., Miller, *supra* note 64.

206 *Id.*

207 Lauren Rivera & András Tilcsik, *Research: How Subtle Class Cues Can Backfire on Your Resume*, HARV. BUS. REV. (Dec. 21, 2016), <https://hbr.org/2016/12/research-how-subtle-class-cues-can-backfire-on-your-resume>.

208 Massey & Sampson, *supra* note 39, at 13.

helped to refocus sociological attention on the connection between the loss of stable, good-paying jobs for working-class men and family dissolution.²⁰⁹

Still, research is badly lacking on the precise mechanisms that connect employment and family stability. While European feminists have argued that male failure to help out more within the household undermines relationship stability, masculinities theory suggests that male behavior and attractiveness involve not just employment or income per se, but socially rewarded status.²¹⁰ Both men and women continue to view male status in terms of relatively traditional measures such as income and employment.²¹¹ The loss of status-conferring male employment may accordingly undermine both traditional male contributions to the family and male willingness to assume more traditionally female tasks, at least to the extent that these tasks are associated with lower societal status.²¹² In addition, the loss of male employment often correlates with not just lower income, but changes in behavior including intimate-partner violence and substance abuse.²¹³ Understanding what is taking place within the family is not a matter of changing male or female roles considered in isolation, but rather involve complex questions about how they interact.²¹⁴

Missing from the economic studies, moreover, is consideration of how income stability, as opposed to unemployment or low income, affects relationship dissolution. Employment stability has declined steadily over the last

209 ANDREW J. CHERLIN, *LABOR'S LOVE LOST: THE RISE AND FALL OF THE WORKING-CLASS FAMILY IN AMERICA* (2014).

210 See *id.*; see also RICHARD WILKINSON & KATE PICKETT, *THE SPIRIT LEVEL: WHY GREATER EQUALITY MAKES SOCIETIES STRONGER* (2009) (suggesting that relative levels of inequality as well as loss of jobs may influence behavior).

211 See, e.g., Kristen Harknett & Arielle Kuperberg, *Education, Labor Markets, and the Retreat from Marriage*, 90 SOC. FORCES 41 (2011); Liana C. Sayer, et al., *She Left, He Left: How Employment and Satisfaction Affect Men's and Women's Decisions to Leave Marriages*, 116 AM. J. SOC. 6 (2011) (finding that male, but not female, employment affects marriage and divorce rates).

212 See Nock & Brinig, *supra* note 108, at 186; see also NANCY E. DOWD, *THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE* 13–73, 105–23 (2010); Nancy E. Dowd, *Asking the Man Question: Masculinities Analysis and Feminist Theory*, 33 HARV. J.L. & GENDER 415, 420 (2010); Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J.L. GENDER & SOC'Y 201, 239 (2008); Daniel Schneider, *Market Earnings and Household Work: New Tests of Gender Performance Theory*, 73 J. MARRIAGE & FAM. 845 (2011).

213 See, e.g., Clifford L. Broman et al., *The Impact of Unemployment on Families*, MICH. FAM. REV., Winter 1996, at 83 (describing impact of unemployment on family dynamics); Tony Dokoupil, *Lifestyle: Laid-Off Men Don't Do Dishes*, NEWSWEEK (Feb. 20, 2009), <http://www.newsweek.com/2009/02/20/men-will-be-men.html> (describing impact of unemployment on male behavior).

214 In *Marriage Markets*, Naomi Cahn and I argued that a major factor in that interaction was gender ratios—that is, the extent to which men outearn women in a given relationship market. CARBONE & CAHN, *supra* note 32. Since then, a new study has shown that the degree to which men outearn women in a given area predicts marriage rates. See Marianne Bertrand et al., *Gender Identity and Relative Income Within Households*, 130 Q.J. ECON. 571 (2015).

several decades for blue-collar men.²¹⁵ Standard economic theory suggests that firms with variable income require greater capital reserves than firms with more stable revenue.²¹⁶ Committed relationships typically involve intermingled finances and the couples' mutual commitment to each other to see their partners through bad times.²¹⁷ Yet, thirty-nine percent of Americans have reported that they would have difficulty covering a \$400 emergency expense; most would have to resort to borrowing.²¹⁸ For middle-class couples, dual incomes provide a cushion that helps the family weather one partner's loss of a job or reduction in income. In poor families, a commitment to take care of the partner may come out of the resources a parent sees as necessary to clothe, feed, and educate the children. An automobile accident, hospital stay, mounting fines from unpaid traffic tickets, or job loss can quickly wipe out a family's entire savings. In these circumstances, it is hardly surprising that working-class couples may want economic stability, including home ownership, paying off student debts, and secure transportation before they enter into a binding economic commitment like marriage.²¹⁹ Yet, relatively few studies explore the impact of income instability on relationship duration.²²⁰ The norms that may be evolving to address the lack of economic security may provide important feedback loops into the understanding of relationship terms.

215 See CARBONE & CAHN, *supra* note 32, at 97–101 (describing impact of male employment instability on relationships); Henry S. Farber, *Job Loss and the Decline in Job Security in the United States*, in LABOR IN THE NEW ECONOMY 223, 255 (Katharine G. Abraham et al. eds., 2010) (showing that “[r]ates of job loss are inversely related to education”).

216 See, e.g., Troy Adkins, *Optimal Use of Financial Leverage in a Corporate Capital Structure*, INVESTOPEDIA, <https://www.investopedia.com/articles/investing/111813/optimal-use-financial-leverage-corporate-capital-structure.asp> (last updated Apr. 4, 2019) (stating that “a company that exhibits high and relatively stable sales activity is in a better position to utilize financial leverage, as compared to a company that has lower and more volatile sales”).

217 See Fenaba R. Addo & Sharon Sassler, *Financial Arrangements and Relationship Quality in Low-Income Couples*, 59 FAM. REL. 408, 411 (2010) (finding that married couples are more likely than unmarried couples to pool income).

218 BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2018, at 2 (2019).

219 CHERLIN, *supra* note 27, at 140–41.

220 See, e.g., *Healthy Relationships and Financial Stability—Project Page*, U.S. DEP’T HEALTH & HUM. SERVS. (Jan. 22, 2009), <https://aspe.hhs.gov/healthy-relationships-and-financial-stability-project-page> (observing that “[f]inancial hardship and instability can foster conflict and seriously impact the stability of a couples [sic] relationship as well as their finances, especially when there are no rainy-day funds and little knowledge of where to turn for help”); Heather D. Hill et al., *An Introduction to Household Economic Instability and Social Policy*, 91 SOC. SERV. REV. 371 (2017) (identifying work in the social sciences focusing on the impact of economic instability, but with limited examination of the impact on family instability as opposed to the impact of family instability on economic security); Alexandra Killewald, *Money, Work, and Marital Stability: Assessing Change in the Gendered Determinants of Divorce*, 81 AM. SOC. REV. 696, 696 (2016) (finding that male unemployment, but not female unemployment or income declines, correlates with higher divorce rates).

Third, empirical work on repartnering is beginning to change our understanding of family dynamics. Cherlin reports, for example, that white women with a high school but not a college degree have a larger number of cohabiting partners than any other group.²²¹ These relationships often involve marriage, divorce, and then repartnering, and the patterns make determinations of parental responsibility more difficult. Naomi Cahn and I have argued that an increasing number of states recognize more than two adults playing parental roles, but family law has yet to determine whether gamete donors, stepparents, and other live-in partners should all be accorded the same status.²²² The meaning of these relationships may well differ in different communities. Sociological research does emphasize the role of multipartner fertility in undermining family stability and children's well-being. That research, however, has yet to be fully integrated into the legal issues surrounding parentage and custody, which remains overwhelmingly tied to a two-parent model.

C. *Identifying Partnerships That Should Not Last*

Finally, a new body of empirical work is changing our understanding of the poorest families, through the creation of new databases that capture relationships that may exist outside of formal legal statuses.²²³ Sara McLanahan's work on fragile families initially changed our images of unmarried families. By following unmarried women from the time they gave birth, McLanahan showed the changing nature of these families. While at one time, most unmarried mothers raised children without the fathers' involvement, McLanahan showed that in fact the majority of unmarried mothers were in an intimate relationship with the fathers at the time of the child's birth, and the majority of the fathers remained involved in the child's life, though the relationships did not typically last.²²⁴

221 Andrew J. Cherlin, *Between Poor and Prosperous: Do the Family Patterns of Moderately Educated Americans Deserve a Closer Look?*, in *SOCIAL CLASS AND CHANGING FAMILIES IN AN UNEQUAL AMERICA* 68, 82 (Marcia J. Carlson & Paula England eds., 2011).

222 See generally June Carbone & Naomi Cahn, *Parents, Babies, and More Parents*, 92 *CHIKENT L. REV.* 9 (2017) (arguing that there is increasing pressure to recognize more than two parents without agreement on whether all adults playing parental roles should be accorded equal status).

223 See Margaret F. Brinig, *Racial and Gender Justice in the Child Welfare and Child Support Systems*, 35 *LAW & INEQ.* 199, 199–200 (2017) (observing that it has been more difficult for empiricists to study unmarried relationships and that “[a] problem from a data perspective is that [in unmarried relationships] the separations themselves do not require a legal process before a new relationship begins, and that even where the legal system does get involved, any records are likely to be confidential” (footnote omitted)).

224 See Sharon H. Bzostek et al., *Mothers' Repartnering After a Nonmarital Birth*, 90 *SOC. FORCES* 817, 826 (2012) (“At the time of the child's birth, slightly over half of all unmarried mothers were living with the child's father, around 30 percent were dating the child's father, and just under one-fifth were not romantically involved with the child's father. Five years later, 38 percent of mothers were living with the focal child's father (about 55 per-

Today, Professor Jennifer Barber of Michigan is creating a new database tracking the trajectories of young women before they bear children. Her work, which involves tracking a large group of young women in Flint, Michigan, through the creation of weekly diaries, is shedding new light on why women become pregnant, showing, for example, that intimate-partner violence plays a significant role in the pregnancies, and that the characteristics of the male partners, rather than the women's characteristics, is a major factor in determining which women will become pregnant.²²⁵ This work, in turn, suggests that the circumstances of the pregnancies, which include patterns of contraceptive use influenced by the incidence of violence, may affect relationship trajectories, with the more violent men both being more likely to father children and less likely to be good bets for continuing involvement with the resulting children than less violent partners.²²⁶

Professor Brinig's recent work intersects with Barber's as she has relied on court records to create a more detailed picture of families involved in child support and custody litigation. While much of her work validates earlier findings about the relationship between visitation and support, her most disturbing findings concern the role of domestic violence.²²⁷ Intimate-partner violence allegations, which disproportionately occur in cases involving poorer, unmarried parents, make it more difficult for parents to resolve disputes on their own, and the courts end up second guessing parental decisions to limit contact between the nonresidential parent and the child.²²⁸ Brinig observes that the results in these cases contrast with those involving better-off couples, who enjoy more control over decisions to bring or continue litigation.²²⁹ These findings complement other work that shows that custodial parents without child support orders overwhelmingly chose not to seek formal orders, either because they were already receiving support within a cooperative relationship or because they did not want ongoing contact with the other parent.²³⁰

cent of those who were cohabiting at birth still lived together), and just over 30 percent were romantically involved with a new partner . . .”).

225 See Jennifer S. Barber et al., *The Relationship Context of Young Pregnancies*, 35 LAW & INEQ. 175 (2017) [hereinafter Barber, *The Relationship Context*]; Jennifer S. Barber et al., *The Dynamics of Intimate Partner Violence and the Risk of Pregnancy During the Transition to Adulthood*, 83 AM. SOC. REV. 1020 (2018); Yasamin Kusunoki et al., *Black-White Differences in Sex and Contraceptive Use Among Young Women*, 53 DEMOGRAPHY 1399, 1403 (2016) (stating that low-income women are more likely to experience intimate-partner violence).

226 See Barber, *The Relationship Context*, *supra* note 225.

227 Margaret F. Brinig, *Chickens and Eggs: Does Custody Move Support, or Vice-Versa?*, 29 J. AM. ACAD. MATRIM. LAW. 269, 295 (2017). See generally Margaret F. Brinig & Marsha Garrison, *Invisible Prison: Pathways and Prevention*, 95 NOTRE DAME L. REV. 1439 (2020).

228 Brinig, *supra* note 227, at 295.

229 See *id.*

230 See, e.g., TIMOTHY S. GRALL, U.S. DEP'T OF COMMERCE, *CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2009* (2011); Esther Wattenberg, *Paternity Actions and Young Fathers*, in *YOUNG UNWED FATHERS: CHANGING ROLES AND EMERGING POLICIES* 213, 221, 226–27 (Robert I. Lerman & Theodora J. Ooms eds., 1993).

In a second piece, Brinig uses court records to comment on the relationship findings in Barber's work.²³¹ She finds an incidence of postpaternity domestic violence comparable to the levels of violence in Barber's study, but finds further that the violence correlates with child support enforcement, and to racial differences between the parents, particularly where "the mother was White and the father Black or Hispanic."²³²

Taken together, studies like McLanahan's, Barber's and Brinig's are beginning to present a new portrait of relationship decisions and parenting. They address what has been a critical missing piece in the empirical study of family: the assembly of detailed databases making it possible to study less traditional families. These new databases may then create new discourses shaped by the nature of the empirical findings themselves rather than the imposition of theoretical models that do not reflect the empirical results.²³³ The results offer a model for a new, more productive era of family law research.

CONCLUSION

Empirical research in family law has been most productive when it does not just provide findings but influences the collection of data and the nature of the questions asked. The interpretation of the results that emerge then depends on the sophistication of the discourse in which the interpretation is embedded.

Today's families—and their intersection with the legal system—have become more diverse, complicating the mechanics and the interpretations of empirical work. Professor Brinig, throughout her career, has contributed to construction of more robust data, the integration of economic and legal analysis, and the resistance to the excessively reductionist analysis associated with the early economic analysis of the family. Her work provides a model for empiricists, as it appropriately complicates consideration of the role of race, class, gender, and violence in the construction and interpretation of family law findings. The result has enriched the discourses that take empirical work seriously and points the way to more productive future research.

231 Brinig, *supra* note 223, at 214–15.

232 *Id.* at 215.

233 See also Bowman, *supra* note 202, whose empirical work on "living apart together" has brought attention to an otherwise invisible group.