

THE DIVORCE BARGAIN: THE FATHERS’ RIGHTS MOVEMENT  
AND FAMILY INEQUALITIES

*Deborah Dinner*\*

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#### INTRODUCTION

THIS Article provides the first legal history of the fathers’ rights movement, filling a void in the scholarship on social movements, family law, and the welfare state. A burgeoning literature examines how feminists and gay rights activists fought to dismantle or to reconfigure marriage in the late twentieth century. We know little, however, about how heterosexual men shaped and were shaped by changing gender norms and family structures. This Article chronicles one important chapter of this missing history. It analyzes how middle-class white men responded to rising divorce rates by pursuing reform of divorce laws and welfare policies.<sup>1</sup> This history helps to explain how keystones of gender and class inequality—the gendered division of labor and privatization of dependency—persisted despite the advent of formal equality and sex neutrality within family law.

Through the mid-twentieth century, marriage structured middle-class men’s relationship to the state as well as to their wives. Men supported dependent children and wives in exchange for legal protection of male

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<sup>1</sup> A small sociological literature examines the present-day fathers’ rights movement but does not analyze the historical evolution of the movement. See, e.g., Jocelyn Elise Crowley, *Defiant Dads: Fathers’ Rights Activists in America* (2008); Michael Kimmel, *Angry White Men: American Masculinity at the End of an Era* 135–68 (2013); Michael A. Messner, *Politics of Masculinities: Men in Movements* 44–45 (1997).

familial authority.<sup>2</sup> The precise contours of this marital bargain had evolved over time. The common law of coverture gave “masters” of households multiple legal entitlements including exclusive sexual access to their wives, entitlement to their wives’ unpaid domestic labor, and control over their marital children.<sup>3</sup> Over the course of the nineteenth century, the rise of women’s property rights,<sup>4</sup> the advent of maternal custody presumptions,<sup>5</sup> and courts’ increasing willingness to promote individual rights within the family chipped away at gender hierarchy and promoted women’s autonomy within marriage.<sup>6</sup> The marital bargain, however, remained fundamentally intact into the mid-twentieth century.<sup>7</sup> Men continued to enjoy many of its socioeconomic rewards including, in particular, an unequal division of caregiving labor within marriage.<sup>8</sup>

In the late twentieth century, rising divorce rates and the no-fault revolution in divorce laws threatened the demise of the marital bargain. Its erosion posed dilemmas for fathers and the state as well as for women.

<sup>2</sup> See generally Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (2000) (arguing that marriage served public as well as private purposes and involved a political relationship between men and the state as well as a legal relationship between husbands and wives).

<sup>3</sup> 1 William Blackstone, *Commentaries* \*410 (listing the master-servant, husband-wife, and parent-child relationships as those central to private life).

<sup>4</sup> See Reva B. Siegel, *Home as Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor, 1850-1880*, 103 *Yale L.J.* 1073, 1084–85 (1994) (observing that the doctrine of “marital service” gave husbands ongoing rights in their wives’ labor beyond the passage of married women’s property acts and earnings statutes).

<sup>5</sup> See Mary Ann Mason, *From Father’s Property to Children’s Rights: The History of Child Custody in the United States* 61–62 (1994).

<sup>6</sup> See Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* 289–304 (1985) (discussing the rise of a “judicial patriarchy” that interfered with male household heads’ prerogatives to adjudicate individual rights within the family).

<sup>7</sup> For example, nineteenth-century statutes giving husbands entitlements in their wives’ sexuality endured in a majority of states into the late twentieth century. See, e.g., Prosser and Keaton on the Law of Torts § 124, at 918 (W. Page Keeton et al. eds., 5th ed. 1984) (discussing “alienation of affections” torts); Maria Pracher, *The Marital Rape Exemption: A Violation of a Woman’s Rights of Privacy*, 11 *Golden Gate U. L. Rev.* 717, 719–21 & nn.14–23 (1981) (surveying state statutes codifying marital rape exemptions).

<sup>8</sup> See Suzanne M. Bianchi & Sara B. Raley, *Time Allocation in Families*, in *Work, Family, Health, and Well-Being* 21 (Bianchi et al. eds., 2005) (showing that within heterosexual marriages women devoted proportionally more time to housework and childcare while men devoted more to market work); Pamela J. Smock & Mary Noonan, *Gender, Work, and Family Well-Being in the United States*, in *Work, Family, Health, and Well-Being*, supra, at 343, 350–53 (demonstrating that the gendered division of labor within the family results in a marriage premium for men and penalty for women).

Divorce deprived the state of a stable mechanism for privatizing children's dependence. Divorce also rendered men bereft of the socioeconomic rewards that had accompanied their marital status. Three possible solutions existed. First, the state could place the burden of support wholly on custodial parents (overwhelmingly mothers). For divorced men, this solution offered liberation from paternal financial responsibilities, but also denied them a potential mechanism by which to gain paternal visitation and custody rights. Second, the state could augment public support for children and caregiving parents. Fathers' rights activists, however, perceived this solution as a threat to marriage because it obviated the male breadwinner role entirely. Third, the state could coerce noncustodial parents (usually fathers) to provide support for children; it could achieve this objective via a stick—the child support enforcement apparatus—and a carrot—enhanced custody rights.

Beginning in the 1960s, fathers' rights activists, women's rights advocates, and federal and state legislators negotiated which of these legal arrangements to implement. By the mid-1980s, they had forged a new political compromise. Fathers' rights activists conceded ongoing child support obligations in exchange for greater protection of the father-child relationship upon divorce. This "divorce bargain" played a significant part in ending private family law's assignment of familial functions on the basis of sex. It facilitated shifts from sex-based alimony to sex-neutral spousal maintenance awards and from common law presumptions favoring maternal custody to state statutes recognizing joint custody. The divorce bargain simultaneously entrenched private rather than public responsibility for dependent children living within nonmarital families.<sup>9</sup>

The history uncovered in this Article offers a novel analysis of what scholars call the dual family law system.<sup>10</sup> The "private" family law sys-

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<sup>9</sup> The fathers' rights movement did not construct the divorce bargain singlehandedly, nor did it win all the terms it pursued. Many of the reforms that the movement pursued came to fruition because of the overlap between women's rights and fathers' rights advocacy and because of the convergence between these groups' goals and the state's interest in privatizing dependency. This Article saves a full history of the divorce bargain for a later project. By examining the critical role of the fathers' rights movement, it reveals the contours of this bargain and its consequences for persistent gender and class inequalities.

<sup>10</sup> See Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 16 *Stan. L. Rev.* 257, 257–58 (1964) (comparing the family law system that regulated the poor via administrative agencies with a system of family law regulating the economically self-sufficient via court adjudication). Scholars have since observed a "triple system of family law," recognizing the growth of a middle sector that neither con-

tem includes laws created and administered by courts that govern marital formation, parental obligations, and divorce. Because marriage tracks class lines, however, private family law largely regulates middle-class families.<sup>11</sup> A second, “public” family law system is composed of welfare state policies created by legislatures and implemented via administrative agencies.<sup>12</sup> The current literature assumes that the private and public family law systems operate in parallel. This Article challenges that assumption, showing instead that the private and public family law systems share intertwined historical trajectories. In the late twentieth century, the liberalization of private family law was inextricable from the neoliberal restructuring of the welfare state.

This Article’s original historical contribution provides insight into how the advent of sex neutrality within private family law has reinforced gender and class inequalities. Fathers’ rights activists advocated formal

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forms to the marital norms of more elite groups nor receives public assistance and, as a result, escapes some of the state scrutiny and intervention that accompanies such assistance. See June Carbone & Naomi Cahn, *The Triple System of Family Law*, 2013 Mich. St. L. Rev. 1185, 1189. Yet the emergence of this middle sector began in the mid-eighties, *id.* at 1199; it therefore postdates the historical scope of this Article.

<sup>11</sup> See generally June Carbone & Naomi Cahn, *Marriage Markets: How Inequality Is Remaking the American Family* (2014) (describing how macroeconomic changes have led to a significant gap in marriage rates between college educated and less educated Americans, as well as how this gap reproduces socioeconomic inequality).

<sup>12</sup> Public family law offers low-income families critical supports such as Temporary Aid to Needy Families, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended at 42 U.S.C. § 601 (2012)), and Medicaid, Pub. L. No. 89-97, 79 Stat. 286 (1965) (codified as amended as Title XIX of the Social Security Act, 42 U.S.C. §§ 1396–96u (2012)). This system, however, also disadvantages families which do not conform to dominant norms regarding who comprises a family and how families should function. For a discussion of how legal privileging of the marital relationship deepens gender inequality by withholding legal recognition of other relationship forms, see Martha Albertson Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* 164–66 (1995) (arguing that the allocation of social benefits on the basis of sexual relationships between adults rather than parent-child relationships harms unmarried mothers); Laura A. Rosenbury, *Friends with Benefits?*, 106 Mich. L. Rev. 189, 242 (2007) (arguing that the legal recognition of friendship could transform gender by disrupting existing patterns of care). On the use of child welfare and criminal laws to discipline low-income families and families of color, see, e.g., Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 Wm. & Mary L. Rev. 413, 508–38 (2005) (arguing against a child welfare exception to the Fourth Amendment); Melissa Murray, *Marriage as Punishment*, 112 Colum. L. Rev. 1, 64–65 (2012) (using the history of nineteenth-century seduction statutes to analyze the ways in which marriage has served as a means for the state to discipline sexuality); Jeannie Suk, *Criminal Law Comes Home*, 116 Yale L.J. 2, 8, 66–69 (2006) (arguing that misdemeanor domestic violence enforcement has increased public regulation of low-income women’s intimate relationships).

equality in divorce and child custody laws, yet never wholly relinquished their ideal of a marital bargain premised upon gender differentiation and hierarchy. They refrained from joining feminists or pro-feminist men's groups advocating an equal distribution of caregiving labor within marriage. Elements of the fathers' rights movement, moreover, actively opposed women's liberation from subordination within the family. By mandating formal equality in divorce laws, in the absence of a parallel transformation in the gendered division of labor within marriage, the divorce bargain deepened women's economic insecurity.<sup>13</sup> The legal history of the fathers' rights movement thus contributes to scholarship exposing the limits of sex neutrality under law as a means to realize substantive gender equality.<sup>14</sup>

In addition, this history shows that gender norms—specifically, nostalgia for the marital bargain—were salient within ideological opposition to state support for mothers and children. Like other liberal welfare states, the United States tilts strongly in the direction of private responsibility for social reproduction: the biological reproduction of the next generation along with the subsistence, socialization, education, and caregiving of existing generations.<sup>15</sup> In the seventies and eighties, the advent of neoliberal politics further undermined welfare state supports for families.<sup>16</sup> The history of the fathers' rights movement helps to show that the privatization of dependency was neither natural nor the result of economic imperatives alone. Instead, it derived political legitimacy from middle-class men's stake in legal regimes that made the provider role the mechanism by which these men enjoyed state protection for family relationships.<sup>17</sup>

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<sup>13</sup> See Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 *Calif. L. Rev.* 1373, 1483 n.401 (2000).

<sup>14</sup> See, e.g., Jill Elaine Hasday, *The Canon of Family Law*, 57 *Stan. L. Rev.* 825, 866–70 (2004) (arguing that gender neutrality in divorce laws has not led to substantive equality because of women's ongoing disproportionate responsibility for caregiving).

<sup>15</sup> See Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* 21, 33 (1990) (demonstrating that liberal welfare states provide less public support for social reproduction than do either corporatist-statist or social democratic welfare states); Barbara Laslett & Johanna Brenner, *Gender and Social Reproduction: Historical Perspectives*, 15 *Ann. Rev. Soc.* 381, 382–83 (1989) (defining “social reproduction”).

<sup>16</sup> See David Harvey, *A Brief History of Neoliberalism* 70–78 (2005) (describing neoliberal policies of minimal state involvement in the market and limited state responsibility for social welfare).

<sup>17</sup> This Article does not argue that the divorce bargain was the “but for” cause of welfare cutbacks in the late twentieth century. Rather, it shows how political backlash against wel-

This Article draws upon previously unexamined sources to analyze the ideology, grassroots organization, and legal advocacy of the fathers' rights movement.<sup>18</sup> The Article examines the mutually constitutive relationship between law and social movements.<sup>19</sup> Changes in family law and in welfare state policies shaped the goals and rights consciousness of the fathers' rights movement as much as the movement influenced external legal and political actors.

The narrative begins in the 1960s, when an incipient men's rights movement emerged in response to threats to the marital bargain. Part I discusses how men's rights theorists and activists sought to restore the marital bargain by reshaping both the private and public family law systems. Groups that called for divorce law reforms in the hope of rescuing faltering marriages formed the precursors to later fathers' rights groups.

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fare for mothers and children became part of fathers' rights activists' arguments for the liberalization of private family law. By securing the political consent of fathers' rights activists to child support (if not divorced men's fulfillment of these legal obligations in practice), furthermore, the divorce bargain bolstered private responsibility for dependency.

<sup>18</sup> In addition to legislative history archived at the California State Archives in Sacramento, this Article draws upon two previously unexamined archival collections. First, Richard F. Doyle has posted "Archives of Men's-Fathers' Movement" online. See Richard F. Doyle, Archives of Men's-Father's Movement, Men's Def., <http://www.mensdefense.org/Downloads/Archives%20of%20Mens-Fathers%20Movement.pdf> (last visited Jan. 20, 2016). Doyle notes that hard copies are available in the Changing Men Collections at Michigan State University ("MSU"). I found, however, that the organization of the hard copies at MSU differs from the organization of the online material. Accordingly, I refer hereinafter to material that I obtained from Doyle's online archive with the citation to "MFM Online" and the specific subcollection. The subcollection of documents from Men's Equality Now, International, is referred to as "MEN Int'l." Second, the Article draws on archival material, not available online, that I obtained directly from the Changing Men Collections at MSU. I refer to this material with citations to "CMC at MSU." To my knowledge, no published scholarship examines the sources in these MFM Online and CMC at MSU archival collections.

<sup>19</sup> Law and society scholarship is centrally concerned with the ways in which law shapes social movements and the ways in which social movements influence external legal change. See, e.g., Michael W. McCann, How Does Law Matter for Social Movements?, *in* *How Does Law Matter?* 76 (Bryan G. Garth & Austin Sarat eds., 1998) (arguing for a synthetic approach examining how law shapes consciousness within social movements as well as how these movements influence legal conventions); Austin Sarat & Thomas R. Kearns, Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life, *in* *Law in Everyday Life* 22 (Austin Sarat & Thomas R. Kearns eds., 1993) (arguing that law affects society from the "inside out, by providing the principal categories that make social life seem natural, normal, cohesive, and coherent"); Nicholas Pedriana, From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women's Movement in the 1960s, 111 *Am. J. Soc.* 1718 (2006) (discussing how shifting legal frames influenced the evolving objectives of the women's movement).

These early family law reformers also opposed welfare-state supports for poor mothers and children that they believed undermined marriage.

In the 1970s, fathers' rights groups emerged to challenge perceived biases within divorce and child custody laws. As the hope of restoring the marital bargain receded further into the distance, the fathers' rights movement began to argue that divorce should liberate men from the obligations of that earlier bargain. During this period, as Part II examines, fathers' rights groups proliferated at the local and state levels and began to shape legal contests in courts and state legislatures. The fathers' rights movement adopted liberal legal frames that became hegemonic in the late civil rights era—sex discrimination, sex neutrality, and equal treatment—to argue for the elimination of women's legal entitlements upon divorce. They challenged women's entitlement to alimony as well as common law doctrines that favored maternal custody. The turn to sex equality as a legal frame, however, catalyzed fault lines within the movement, generating disputes about the relationship of fathers' rights to the women's rights and men's rights movements.

Part III examines the role that the fathers' rights movement played in consolidating the divorce bargain during the 1980s. An increasingly coercive federal-state legal apparatus imposed child support obligations on divorced and never-married fathers. Fathers' rights activists contested this enforcement apparatus, but also used the state's interest in privatizing children's dependency to advance divorced men's custody rights. Activists reframed paternal custody rights as an incentive for men to pay child support. They forged alliances with sympathetic politicians, introducing and lobbying for state legislation that advanced their vision of the divorce bargain. This Part examines how fathers' rights activists campaigned for an early joint custody statute in California, which proved influential in catalyzing a joint custody revolution nationwide.

Part IV explores the legacies of the divorce bargain for gender and class relations today. The divorce bargain helped to catalyze an incomplete revolution in gender roles within middle-class families. The divorce bargain transformed middle-class divorced mothers into breadwinners and middle-class divorced fathers into caregivers. The bargain broadened the range of identities open to middle-class white men, from authoritarian patriarchs, to loving fathers, to diaper-toting daddies. Yet fathers' rights activists, in the 1980s and beyond, continued to debate the extent to which these new constructions of fatherhood should transform

masculinity. Their ambivalence highlights both the potential and the limits for active fathering and equal custody rights to disrupt gender roles.

The divorce bargain, furthermore, contributed to class-differentiated experiences of fatherhood. The bargain supported father-child relationships within middle class families but undermined these relationships within low-income families. Because low-income men are often financially incapable of meeting child support obligations, the legal enforcement of such obligations—backed by criminal penalties—drives these men away from their children.<sup>20</sup> Furthermore, child support debt contributes to the disproportionate incarceration of low-income men of color, depriving these fathers and their children of the opportunity for close relationships.<sup>21</sup>

The history of the fathers' rights movement is at once a liberation narrative and a story about the preservation of patriarchy within the family and the welfare state. It shows how middle-class men pursued a new bargain with the state that liberalized conceptions of middle-class fatherhood under law, while deepening women's economic insecurity upon divorce and jeopardizing father-child relationships within poor families. The history of fathers' rights advocacy for the divorce bargain, therefore, reminds us not to confuse liberalism with equality.

#### I. MOURNING THE LOSS OF THE MARITAL BARGAIN, 1960–1970

During the 1960s, a men's rights movement emerged in response to socioeconomic changes in the postwar period that challenged the marital bargain. Women's increasing labor-market participation undermined the gendered division of labor within families. The legalization of birth control and changing sexual norms threatened men's exclusive sexual access to their wives. Postwar women's rights activism yielded federal sex discrimination statutes, which in turn helped to energize feminist activism. These developments further severed a link between men's authority in the home and patriarchal legal doctrines that had persisted past the

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<sup>20</sup> See Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. Davis L. Rev. 991, 1014–16 (2006) (arguing that child support enforcement drives poor men underground and thereby discourages paternal bonding and caregiving).

<sup>21</sup> Genevieve LeBaron & Adrienne Roberts, *Confining Social Insecurity: Neoliberalism and the Rise of the 21<sup>st</sup> Century Debtors' Prison*, 8 Pol. & Gender 25, 43–44 (2012) (arguing that the criminalization of child support contributes to the incarceration of poor fathers and these men's debt accumulation).

days of coverture, albeit in diluted form. Most important, rising divorce rates threatened marriage itself.

Middle-class white men reacted in different ways to these changes. By the mid-1970s, small groups of men had organized in auxiliary support of the feminist movement.<sup>22</sup> Other men had joined a men's rights movement in express opposition to women's liberation. These activists argued that the social and legal construction of gender roles, far from subordinating women, oppressed men.<sup>23</sup> The origins of the men's rights movement, however, can be found a decade before it gained public notoriety. Although scholars have focused on men's rights activism in the 1970s, the movement actually began in the mid-1960s as a response to changing divorce practices.<sup>24</sup> Early men's rights activists argued that escalating divorce rates precipitated a decline in men's socioeconomic status. They laid the foundation for the fathers' rights movement that would blossom in the 1970s, and their thought illustrates the intertwining of fathers' rights with men's rights ideologies.

Men's rights theorists and activists in the mid- to late 1960s endeavored to reform both public and private family law with the aim of shoring up the marital bargain. They opposed welfare supports for mothers and children that served as substitutes for the male breadwinner role. At the same time, men's rights theorists argued for reforms of the fault-based divorce system, which they perceived as unjustly benefitting women and depriving men of their natural entitlements. Men's rights theorists used political concern about the rising costs of Aid to Families with Dependent Children ("AFDC") as the vehicle by which to advance reforms of divorce laws. A patriarchal understanding of marriage thus formed the crux of men's rights theory and advocacy respecting the dual family law system.

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<sup>22</sup> Messner, *supra* note 1, at 50–55.

<sup>23</sup> *Id.* at 41–44.

<sup>24</sup> Messner argues that the men's rights movement in the early- to mid-1970s emphasized the symmetry of men and women's oppression within a sexist society and embraced an anti-feminist stance by the late 1970s. *Id.* The archival research I performed, however, suggests a different trajectory: Men's rights activists evinced explicitly patriarchal ideology through the 1960s and into the early 1970s and began to adopt the language of sex neutrality by the mid-1970s.

*A. The Erosion of the Marital Bargain and the Emergence of the Men's Rights Movement*

In a 1965 treatise, men's rights theorist Charles Metz lamented the erosion of the marital bargain. Its waning had rendered "the domesticated average American male . . . a bland creature . . . little more than a reflection of Freud/Spock intoxication."<sup>25</sup> Metz himself refused to be domesticated. Rather than submit to what he perceived as an unjust divorce system, Metz gave up his freedom. He was jailed for eight years for failure to comply with child support orders.<sup>26</sup> While imprisoned, Metz wrote and published a divorce law treatise, which fueled the arguments of men's rights groups calling for family law reform.<sup>27</sup> These groups formed the precursors of later fathers' rights organizations. When Metz died in jail,<sup>28</sup> fathers' rights activists honored him as the forefather of the movement.

Leaders of the men's rights movement penned several theoretical treatises in the mid- to late 1960s addressing the topics of marriage and divorce. Among the most influential were Metz's *Divorce and Custody for Men*<sup>29</sup> and Stanley Rosenblatt's *The Divorce Racket*.<sup>30</sup> These books opposed feminism and articulated an ongoing commitment to a marital bargain premised upon differentiated gender roles and gender hierarchy. They affirmed a set of entitlements regarding the sexual division of labor, husbands' sexual control over wives, and patriarchy that had long defined the socioeconomic status of middle-class white men. At the same time, men's rights leaders also began to theorize how the state should regulate divorce. Thus men's rights theories about marriage shaped activists' nascent vision for the divorce bargain. Men's rights activists began to pursue the terms of a divorce bargain, motivated as much by the rupture in their relationship to their wives as by the loss of their children upon divorce.

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<sup>25</sup> Charles V. Metz, *Divorce and Custody for Men* 25 (1968) (referring to the famous psychoanalyst Sigmund Freud and the influential pediatrician Benjamin McLane Spock).

<sup>26</sup> Mary Beth Murphy, *Child Abuse, Custody Concern Fathers Alliance*, Milwaukee Sentinel, Aug. 18, 1980, at 12.

<sup>27</sup> Metz, *supra* note 25, at xv.

<sup>28</sup> Murphy, *supra* note 26, at 12.

<sup>29</sup> *Id.* at xii–xvi (arguing that the divorce system discriminates against men).

<sup>30</sup> Stanley Rosenblatt, *The Divorce Racket*, at i–ii (1969) (critiquing the divorce system and proposing reforms).

*1. Separate Spheres and Husbands' Entitlement to Wives' Unpaid Domestic Labor*

Men's rights theorists affirmed separate-spheres ideology—the notion that men belonged in the labor market and other public realms while women belonged in the domestic realm—in the face of economic trends that undermined it. The postwar period witnessed significant increases in women's labor-market participation.<sup>31</sup> In 1940, only 12.5 percent of married white women worked outside the home; by 1970, 38.5 percent did.<sup>32</sup> In addition to increasing women's economic independence, workforce participation opened new opportunities for both sexual and non-sexual forms of intimacy between men and women.<sup>33</sup> Women's employment did more than challenge gender roles within marriage. By increasing women's financial independence and broadening their social (and potentially sexual) interactions, it made divorce more of a possibility for greater numbers of women.<sup>34</sup>

Men's rights theorists argued that women's role should remain primarily that of a dependent caregiver and homemaker. The common historical assumption is that the advent of women's rights to equal employment opportunity prompted men's fears of labor market competition. Men's rights theorists, however, worried more about the threats that women's employment posed within the domestic sphere. By disrupting the gendered division of labor *between* breadwinner and homemaker, women's employment threatened to similarly disrupt the division of labor *within* the home. Charles Metz cautioned that the warning signs of a “crumbling marriage[]” included a “default in chores most generally associated with wives . . . . [W]hen you come home a little late

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<sup>31</sup> This trend occurred despite employers' discriminatory dismissal of women workers following World War II. See Ruth Milkman, *Gender at Work: The Dynamics of Job Segregation by Sex During World War II* 105–35 (1987) (discussing employer practices of firing women when male soldiers returned home).

<sup>32</sup> Claudia Goldin, *Understanding the Gender Gap: An Economic History of American Women* 17 & tbl.2.1 (1990).

<sup>33</sup> See Laura A. Rosenbury, *Work Wives*, 36 *Harv. J.L. & Gender* 345, 351–58 (2013) (exploring how relationships between men and women in white collar offices replicated the gendered hierarchy within marriage without the latter's corresponding legal protections).

<sup>34</sup> Divorce rates climbed from just over 2 divorces per 1,000 marriages in 1960 to approximately 3.5 divorces per 1,000 marriages in 1970. Charlene Wear Simmons, *Cal. Research Bureau, Divorce Rates in California and the United States (Selected Charts)*, in *Readings on No-Fault Divorce* 39, 39 (Mar. 1998).

in the evening and have to fix your own dinner . . . serious concern for your marriage is in order.”<sup>35</sup>

Men’s rights theorists, furthermore, feared that divorce monetized women’s domestic labor in ways that undermined the marital bargain. They averred that women should perform caregiving labor for love rather than for money. Metz critiqued a widely read article in *McCall’s Magazine*, which argued that in lieu of alimony divorced women should receive severance for past service as a domestic.<sup>36</sup> Metz rejected the notion of marriage as an economic partnership, in which women performed economically valuable domestic labor. He mused that an economic model of marriage replaced relations of love and affection with a crass financial calculus.<sup>37</sup>

Undeniably, however, socioeconomic change had undermined separate spheres ideology and men’s social entitlements to women’s unpaid domestic labor. Men’s rights theorists reflected on what these changes should mean for divorce laws. They argued that if women’s obligations to perform unpaid domestic labor ended at divorce, so should husbands’ obligations as breadwinners. Rosenblatt admonished men’s rights activists, “the fairer and gentler sex deserve an opportunity to show us what they can do on their own . . . If they’re going to fight us for jobs, let’s not hold the door open for them as they clean out our desks.”<sup>38</sup> As middle-class men witnessed the erosion of entitlement to their wives’ domestic labor, they argued that such change should also erode male breadwinner obligations.

## 2. *Exclusive and Perpetual Sexual Access to Wives*

Men’s rights theorists perceived women’s increased sexual and economic autonomy as a threat. The regulatory approval of the hormonal birth control pill in 1960<sup>39</sup> and the Supreme Court’s subsequent recogni-

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<sup>35</sup> Metz, *supra* note 25, at 27.

<sup>36</sup> *Id.* at 71–72.

<sup>37</sup> *Id.*

<sup>38</sup> Rosenblatt, *supra* note 30, at 144. Rosenblatt argued that alimony should be abolished in all marriages which lasted less than five years and which had not produced children, with some equitable exceptions. Yet he argued that the husband should have a “permanent obligation” to care for a longtime housewife who was not qualified for employment. *Id.* at 139–41. Rosenblatt thus evinced a continued belief in the marital bargain, even as he entertained the structure of a new divorce bargain that liberated men from its constraints.

<sup>39</sup> Elaine Tyler May, *America and the Pill: A History of Promise, Peril, and Liberation* 1 (2010).

tion of first married couples' and later individuals' constitutional rights to use contraception<sup>40</sup> promised women greater reproductive control and sexual autonomy.<sup>41</sup> Men responded to birth control in different ways. Articles in *Playboy* magazine exemplified the view that the pill would enable the sexual liberation of men.<sup>42</sup> For other men, however, the pill "undermine[d] a sense of masculine potency grounded in procreative power."<sup>43</sup> The pill threatened the marital bargain in several ways: by enhancing women's capacity to engage in heterosexual intercourse without the promise of marriage, by increasing women's freedom to pursue extramarital sex, and by mitigating women's economic dependence on their husbands through enhanced control over their reproductive capacity.

Theorists viewed divorce procedures as evidence that women's sexual liberation undermined social order. Within the fault-based system, the stylized ritual that had long played out in courtrooms across the country depicted women as victims and men as cruel husbands, adulterers, and deserters.<sup>44</sup> Men's rights theorists turned the prevailing narrative on its head, depicting men as the victims of sexually cunning women who cuckolded their husbands and then used their sexual charms to win in court. Stanley Rosenblatt explained that women appearing in divorce court made sure to appear "demure and neat and clean."<sup>45</sup> This veneer of sexual purity, he argued, enabled women to influence judges: "Many is the well endowed young lady whose low-cut dress has been instrumental in increasing an alimony award. Judges are just as susceptible to the well turned thigh and velvety smooth voice as are the lower order of males."<sup>46</sup> Within men's rights theory, the divorce court was a theater of husbands' emasculation.<sup>47</sup>

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<sup>40</sup> See *Eisenstadt v. Baird*, 405 U.S. 438, 446–55 (1972) (recognizing the right of individuals to use contraception under the Equal Protection Clause of the Fourteenth Amendment); *Griswold v. Connecticut*, 381 U.S. 479, 481–86 (1965) (recognizing the fundamental right of married couples to use contraception under the Due Process Clause of the Fourteenth Amendment).

<sup>41</sup> May, *supra* note 39, at 2–5.

<sup>42</sup> *Id.* at 59–63.

<sup>43</sup> *Id.* at 58.

<sup>44</sup> Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 Va. L. Rev. 1497, 1524 (2000).

<sup>45</sup> Rosenblatt, *supra* note 30, at 38.

<sup>46</sup> *Id.*

<sup>47</sup> Like liberal divorce reformers, Rosenblatt critiqued the location of family disputes in general courts. *Id.* at 18. "The adversary system of fighting spouses and fighting lawyers has

### 3. Patriarchy, Private and Public

Theorists' outrage at divorce stemmed from their belief that patriarchal authority within the home was the key to social stability and order. Men's rights theorists believed that patriarchal authority was especially important to appropriate child development. Metz depicted paternal authority as a form of law: "The training of children demands respect for family law."<sup>48</sup> Metz located juridical authority in the figure of the patriarch: "The father who is the head of a household is . . . the chief provider and defender of homes, [and] he is also the judge of the family court. Father is rightly the symbol of authority."<sup>49</sup>

Metz and Rosenblatt believed that fatherless families were the source of multiple social ills. Activists drew upon burgeoning literatures in the fields of social work and psychology discussing the effects of divorce on children. They focused their concern on boys' development of appropriate sexual orientation. Rosenblatt argued, "The incidence of homosexuality in boys brought up in a household devoid of a man is appallingly high, and it is extremely important for a boy to be able to identify with a father figure."<sup>50</sup>

Theorists further argued that the importance of paternal authority to child development justified fathers' custody rights at divorce. Men's rights and early fathers' rights theorists did not argue that fathers could perform the *mothering* function but rather that *fathering* was unique and critical to child development. While fathers loved their children with the same instinctual ferocity as their mothers did, a father's "nature" and experience made him "more capable of tempering the outward signs of his love with a demand for *earning* his love and affection."<sup>51</sup> Fathers held the capacity to instill not only love but also responsibility and appropriate social behavior in their children and, in particular, their sons.<sup>52</sup> Fathers' rights theorists thus argued for paternal custody rights on the basis of gender differentiation rather than gender neutrality.

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left more emotional and financial scars than can ever be removed by all the judicial wisdom of the ages." *Id.* at 17.

<sup>48</sup> Metz, *supra* note 25, at 103.

<sup>49</sup> *Id.* at 103–04.

<sup>50</sup> Rosenblatt, *supra* note 30, at 53.

<sup>51</sup> Metz, *supra* note 25, at 104.

<sup>52</sup> Furthermore, a stepfather could not serve the same function because he would likely favor his biological children and thus undermine the fragile identities of his stepchildren. Rosenblatt, *supra* note 30, at 58.

Metz and Rosenblatt likewise believed that mothers held primary responsibility for childrearing both within marriage and upon divorce. For example, Rosenblatt assumed that when children were very young and caring for them proved “a full time job,” the mother would assume that “duty.”<sup>53</sup> He concluded, “It is generally better for children to be cared for by their mother, who may be less than ideal, than by a stranger employed by the father.”<sup>54</sup> Likewise, Metz acknowledged that “some fathers . . . simply do not want to be bothered with their children.”<sup>55</sup> In Metz’s and Rosenblatt’s writings, maternal caregiving remained a duty and paternal caregiving a choice.<sup>56</sup> Fathers’ prerogative to care for their children or not represented an ongoing assertion of masculine privilege when society did not give mothers the same option.

The men’s rights perspective on divorce thus derived from anger at the loss of the socioeconomic status men had enjoyed in marriage. Men’s rights theorists argued that husbands’ loss upon divorce of an entitlement to their wives’ unpaid domestic labor justified the elimination of alimony within divorce laws. They attributed wives’ alleged sexual deception to the decline of separate spheres ideology. They argued for paternal custody rights on the basis of the social importance of fathers’ patriarchal authority in the home. Theories of gender hierarchical marriage, therefore, formed the blueprint for the divorce bargain as envisioned by men’s rights and fathers’ rights theorists.

*B. Men’s Rights Advocacy in the 1960s: Endeavoring to Restore the Marital Bargain*

Men’s rights theorists and early fathers’ rights activists in the mid-1960s endeavored to restore marriage as the lynchpin of the dual family law system. They opposed public assistance for low-income mothers and children, which they perceived as threatening marriage by displacing the male breadwinner role. They also joined other reformers in seeking to remedy a broken divorce system in an effort to realize dual goals: to

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<sup>53</sup> Id. at 144.

<sup>54</sup> Id. at 145.

<sup>55</sup> Metz, *supra* note 25, at 99.

<sup>56</sup> See Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 *UCLA L. Rev.* 1415, 1415–16 (1991) (describing how in the late twentieth century mothers lost rights to custody but did not experience any diminution in their obligations to provide care for their children, while fathers gained rights to custody if they chose to care but did not face any increase in their obligations of care).

save marriages and, when that was not possible, to forge a divorce bargain that affirmed men's entitlements in marriage. To this end, fathers' rights activists harnessed a broad political concern with the rising costs of public assistance. Thus the backlash against maternalist welfare policies was central to fathers' rights theories about the normative design of both public and private family law.

*1. Against "Father Substitutes": Reforming Public Family Law*

Men's rights activists intervened in a longstanding debate about the gendered design of the American welfare state. In the postbellum period, men's claims for veterans' benefits laid the foundation for a precocious paternalist welfare state. Unlike other western nations, however, the United States did not mature toward a full-fledged paternalist welfare state supporting male household heads' capacity to provide for their families.<sup>57</sup> Instead, Progressive era and New Deal reforms led to maternalist welfare state policies that offered assistance to mothers and children living outside of marriage.<sup>58</sup> The maternalist welfare state, however, preserved marriage as the normative site for resolving the dependence of children and mothers and, therefore, truncated the social citizenship of unmarried mothers.<sup>59</sup>

The mid-1960s ushered in a moment of historical flux and possibility in American welfare state politics. In 1966, welfare recipients formed the National Welfare Rights Organization ("NWRO").<sup>60</sup> The NWRO argued that the state had a responsibility to support unmarried mothers and

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<sup>57</sup> Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* 153–59 (1992).

<sup>58</sup> *Id.* at 311–320. During the 1910s and 1920s, reformers campaigned for mothers' pensions to provide state assistance to mothers who lacked the support of a male breadwinner. See Nancy F. Cott, *The Grounding of Modern Feminism* 126–27, 191 (1987); Linda Gordon, *Pitied but Not Entitled: Single Mothers and the History of Welfare 1890–1935*, at 37–39 (1994). These pensions adopted in several states served as the blueprint for Aid to Dependent Children ("ADC"), enacted as part of the Social Security Act of 1935. See Gordon, *supra*, at 1–4, 60–64, 289–91.

<sup>59</sup> The federal government administered universal entitlements premised on the male-breadwinner model, while states administered means- and morals-tested benefits to poor women and children. See Suzanne Mettler, *Dividing Citizens: Gender and Federalism in New Deal Public Policy*, at xi–xii, 1–27 (1998). Low benefit levels kept ADC recipients poor, and the program's discretionary character enabled administrators to systematically exclude women of color from benefits. See Gordon, *supra* note 58, at 276.

<sup>60</sup> Lizabeth Cohen, *A Consumers' Republic: The Politics of Mass Consumption in Postwar America* 378 (2003).

children at levels that would enable their full social citizenship.<sup>61</sup> Whereas feminists pursued laws that would facilitate women's equal participation in the public sphere, the NWRO campaigned for a reevaluation of women's caregiving labor within the home. The NWRO challenged low benefit levels and persistent racial bias in the administration of AFDC.<sup>62</sup> Welfare rights activists teamed with legal aid attorneys to pursue fair hearings in administrative tribunals.<sup>63</sup> Advocates won a series of constitutional decisions in the federal courts, which promoted racial equality and dignity within welfare administration.<sup>64</sup>

Men's rights theorists and early fathers' rights activists opposed the maternalist welfare policies advocated by the NWRO, arguing that "the (father-substitute) welfare empire" encouraged divorce.<sup>65</sup> They believed that AFDC served as "a device for the elimination of fathers. It underwrites divorce by guaranteeing survival to women if their former husband[s] can't, won't, or cease[] to play the role of sucker."<sup>66</sup> While welfare acted as an incentive to divorce, so too did divorce feed the expansion of the welfare bureaucracy by heightening women's need for public assistance.

<sup>61</sup> See *id.* at 372–82 (arguing that the NWRO channeled the aspirations of poor women of color to full social citizenship in the postwar affluent society).

<sup>62</sup> For histories of welfare rights activism and the challenge this activism posed to intersecting racial and gender oppression, see generally Felicia Kornbluh, *The Battle for Welfare Rights: Politics and Poverty in Modern America* (2007) (arguing that welfare recipients in the post-World War II era used rights discourses to mobilize a movement to expand New Deal conceptions of citizenship); Premilla Nadasen, *Welfare Warriors: The Welfare Rights Movement in the United States* (2005) (examining the liberal and radical dimensions of the welfare rights movement); Annelise Orleck, *Storming Caesars Palace: How Black Mothers Fought Their Own War on Poverty* (2005) (narrating the history of how poor, majority African-American welfare recipients in Las Vegas created a nonprofit community development corporation to provide services in their communities).

<sup>63</sup> See Frances Fox Piven & Richard A. Cloward, *Poor People's Movements: Why They Succeed, How They Fail* 291–94, 303, 317–18 (1979).

<sup>64</sup> See, e.g. *Goldberg v. Kelly*, 397 U.S. 254, 262–67 (1970) (recognizing a constitutional right on the part of welfare recipients to appeal welfare agency decisions involving a change in benefit levels); *Shapiro v. Thompson*, 394 U.S. 618, 629–31 (1969) (striking down residency requirements as a violation of the fundamental right to travel); *King v. Smith*, 392 U.S. 309, 333 (1968) (holding invalid "man-in-the-house" rules that prohibited mothers from receiving benefits if they were cohabiting with men who were not legally obligated to support the children).

<sup>65</sup> Memorandum from Am.'s Soc'y of Divorced Men, (n.d.), (on file with MFM Online, CADRE/NFCP Archives). "CADRE" refers to the Coalition Against Divorce Reform Elements, and "NCFP" denotes National Council for Family Preservation.

<sup>66</sup> R.F. Doyle, *The Rape of the Male* 133 (1976).

Men's rights and fathers' rights activists thus joined the backlash against maternalist welfare policies. They did not wield sufficient political influence to play a significant causal role in policy outcomes regarding federal welfare laws. U.S. welfare policy would have in all likelihood followed the same trajectory—involving only partial adoption of NWRO claims and an ultimate retreat from maternalism—in the absence of the men's rights movement. Examining the ways in which men's rights theorists interacted with broader political currents, however, provides insight into their political identities and objectives.

## 2. Against the “Divorce Mills”: Reforming Private Family Law

Men's rights activists focused on private family law reform, as well as welfare policy, as a potential mechanism to restore the marital bargain. They wielded considerably more influence in local and state debates about divorce reform than in the national debate about federal welfare policy. Indeed, the confluence of men's rights activism with overlapping reform agendas advanced by women's rights advocates, prominent attorneys and judges, and therapeutic professionals, produced legislative change. The first grassroots men's rights groups formed in California, amidst policy debates in that state concerned with fixing a broken fault-based divorce system. These groups—the precursors to fathers' rights groups that emerged in the 1970s—played a prominent role in advocating California's pioneering no-fault divorce law. This history challenges the dominant narrative that men supported no-fault divorce reform to gain liberation from marital responsibilities.<sup>67</sup> Instead, men's rights groups pursued divorce reform in an effort to stem rising divorce rates and save marriages.

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<sup>67</sup> This conclusion is implicit in two related narratives about marriage and divorce. The first suggests that women accept a greater proportion of the burdens of marriage to encourage men, who otherwise find single life a better bargain, to accept marital responsibilities. See Katherine T. Bartlett, *Saving the Family from the Reformers*, 31 U.C. Davis L. Rev. 809, 836–37 (1998) (describing the standard narrative about the marital bargain). The second suggests that no-fault divorce improves men's standard of living (and decreases women's financial well-being) by enabling men to abandon the provider role. See, e.g., Allen M. Parkman, *No Fault Divorce: What Went Wrong?* 82 (1992). But see Margaret F. Brinig & Douglas W. Allen, “These Boots Are Made for Walking”: Why Most Divorce Filers are Women, 2 Am. L. & Econ. Rev. 126, 129–30 (2000) (arguing that women have initiated the majority of divorces and suggesting this represents a rational choice).

As legal historian Lawrence Friedman describes, by the postwar period the divorce system was “rotting from within.”<sup>68</sup> Fault-based divorce doctrines required couples to collude, attorneys to lie, and judges to turn a blind eye to deceit. The image of marriage as a partnership, meanwhile, replaced that of marriage as a sacramental union, making exit more acceptable.<sup>69</sup> States endeavored to reestablish the integrity of the legal system. In the 1950s, state legislatures made cautious reforms of divorce laws, while keeping the fault-based system intact.<sup>70</sup>

In the 1960s, California assumed the vanguard of divorce reform. Men’s rights groups targeting family law reform emerged amidst foment about rising divorce rates in the state. In 1960, Ruben Kidd and George Partis founded Divorce Racket Busters in Sacramento.<sup>71</sup> The organization focused on combatting perceived unfair treatment of men in divorce settlements.<sup>72</sup> A few years later, the group changed its name to United States Divorce Reform, Inc. (“USDR”); fathers’ rights groups would later trace their origins to this organization.<sup>73</sup> In 1964, members of USDR participated in a series of four legislative hearings before the California Assembly. USDR activists played a prominent role in the hearings. They joined family law professors, psychiatrists, social scientists, judges, and civil servants in making proposals to strengthen family relations by rationalizing the divorce system.<sup>74</sup>

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<sup>68</sup> Friedman, *supra* note 44, at 1498.

<sup>69</sup> *Id.* at 1530.

<sup>70</sup> A leading study argues that divorce reform exemplified “routine” policymaking that was not responsive to social movements. See Herbert Jacob, *Silent Revolution: The Transformation of Divorce Law in the United States* 9–15 (1988). More conflict over gender norms than Jacob acknowledges, however, was at stake in no-fault divorce reform.

<sup>71</sup> Crowley, *supra* note 1, at 34.

<sup>72</sup> *Id.* The group’s members were people who had themselves divorced and were infuriated over “the unfair treatment” they received from attorneys and the courts. *Id.* Although Hoffman claimed that women comprised one-third of the L.A. chapter’s membership, all those members testifying were men. Proceedings on Domestic Relations Before the Assemb. Interim Comm. on Judiciary 66 (Cal. Oct. 8–9, 1964) [hereinafter Proceedings on Domestic Relations (Oct. 8–9, 1964)] (statement of Dr. Peter Hoffman) (on file with California State Archives, Los Angeles). Where it appears below, the abbreviation “Cal. State Archives” denotes the California State Archives.

<sup>73</sup> Crowley, *supra* note 1, at 34.

<sup>74</sup> For evidence that divorce reformers intended to strengthen family relations, see Proceedings on Domestic Relations Before the Assemb. Interim Comm. on Judiciary 12 (Cal. Jan. 8–9, 1964) [hereinafter Proceedings on Domestic Relations (Jan. 8–9, 1964)] (statement of Judge Roger Pfaff, Superior Court, Domestic Relations Conciliation Court) (on file with Cal. State Archives, Sacramento) (arguing that ninety percent of divorces might be avoided); *id.* at 270 (statement of Assemb. Pearce Young) (arguing that “antiquated legal machinery

USDR labeled courts “divorce mills,”<sup>75</sup> blaming tyrannical judges as well as conniving women and opportunistic attorneys for rising divorce rates.<sup>76</sup> Activists called for the impeachment of family court judges,<sup>77</sup> analogizing their anger to that of the American revolutionaries with the tyranny of the English king.<sup>78</sup> USDR’s critique of judicial power represented a modern response to the phenomenon legal historian Michael Grossberg terms “judicial patriarchy.”<sup>79</sup> In the nineteenth century, male judges began to exert power to intervene in families in ways that undermined the authority of individual male household heads.<sup>80</sup> Of particular significance, the judiciary transformed custody from a property right of fathers that could not be divested to a transferable right.<sup>81</sup> Over a century later, in the mid-1960s, fathers’ rights activists argued that judicial authority over divorce was illegitimate because it empowered women while interfering with the natural rights of male household heads.

USDR’s proposals overlapped with other divorce reformers, but also departed in significant ways. Herma Hill Kay, a professor of family law at the University of California at Berkeley, was the most respected reformer at the 1964 hearings. Kay made three major recommendations that set the agenda for reform. First, she advocated for the creation of a family court system featuring specialist judges with integrated jurisdic-

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makes reconciliations between husband and wife difficult if not impossible”). For discussion of the need to rationalize the divorce system, see Synopsis of Testimony, Hearings on Domestic Relations Before the Assemb. Interim Comm. on Judiciary S5–7 (Cal. Aug. 13–14, 1964) [hereinafter Hearings on Domestic Relations (Aug. 13–14, 1964)] (statement of Dr. Kingsley Davis) (on file with Cal. State Archives) (calling for enhancement of the state’s data collection on divorcing couples); *id.* at S8–9 (statement of Robert G. Webster); Proceedings on Domestic Relations (Jan. 8–9, 1964), *supra*, at 31 (statement of Judge Roger Pfaff) (proposing a marital education program); *id.* at 124 (statement of David Eitzen) (arguing that fault-based divorce caused individuals to “perjure their own integrity”).

<sup>75</sup> In the nineteenth century, “divorce mills” described states that reformed divorce laws to attract a kind of divorce-tourism business. Friedman, *supra* note 44, at 1503.

<sup>76</sup> USDR activists accused “money-sucking private attorneys,” Proceedings on Domestic Relations (Jan. 8–9, 1964), *supra* note 74, at 230 (statement of Frank Waltz), of taking divorcing men’s assets to divide them between themselves and the men’s ex-wives, *id.* at 224–25 (statement of Francis L. Harmon).

<sup>77</sup> *Id.* at 227 (statement of Dr. Sturm) (calling for the impeachment of Judge Pfaff, who presided over the Domestic Relations Court for the County of Los Angeles).

<sup>78</sup> Proceedings on Domestic Relations (Oct. 8–9, 1964), *supra* note 72, at 223–24 (statement of Francis L. Harmon).

<sup>79</sup> Grossberg, *supra* note 6, at 290–91.

<sup>80</sup> *Id.* at 289–304.

<sup>81</sup> See Susan B. Boyd, *Child Custody, Law, and Women’s Work 20–39* (2003) (making this point in the Canadian context).

tion over family matters.<sup>82</sup> Second, Kay argued for the elimination of fault-based grounds for divorce.<sup>83</sup> Kay argued that fault doctrines worsened the psychological wounds of divorce<sup>84</sup> and that no-fault reform would enable people to divorce in a more “humane fashion.”<sup>85</sup> Kay’s third recommendation was to remove fault from questions of property division, alimony, and custody at divorce.<sup>86</sup>

USDR echoed Kay’s call for the creation of specialized family courts and the elimination of fault doctrines. Like Kay, USDR activists opposed the adversarial character of the divorce process because of the harm it rendered to individuals and families.<sup>87</sup> USDR activist Paul J. Burchett argued that the law’s focus should not be on who is to blame for a failing marriage, but rather on the chance a marriage might be saved.<sup>88</sup> The courts should ask “whether a particular marriage is actually dead, still alive, or capable of resuscitation.”<sup>89</sup> USDR also joined Kay in calling for alternatives to adversarial courts, calling for the creation of

<sup>82</sup> They would help some couples to reconcile before they finalized the divorce and others to pass through the divorce process with less acrimony. Hearings on Domestic Relations (Aug. 13–14, 1964), *supra* note 74, at S71–73 (statement of Herma Hill Kay); Proceedings on Domestic Relations (Oct. 8–9, 1964), *supra* note 72, at 42–44 (statement of Herma Hill Kay); Proceedings on Domestic Relations (Jan. 8–9, 1964), *supra* note 74, at 221 (statement of Dr. A.D. Krems).

<sup>83</sup> California had four oft-utilized grounds for divorce: desertion, adultery, extreme cruelty, and neglect. In addition, rarely utilized grounds included habitual intemperance and conviction for a felony as well as “incurable insanity,” added by the legislature in 1941. Friedman, *supra* note 44, at 1518–19.

<sup>84</sup> Proceedings on Domestic Relations (Jan. 8–9, 1964), *supra* note 74, at 179–80 (statement of Herma Hill Kay).

<sup>85</sup> Proceedings on Domestic Relations (Oct. 8–9, 1964), *supra* note 72, at 38 (statement of Herma Hill Kay).

<sup>86</sup> Proceedings on Domestic Relations (Jan. 8–9, 1964), *supra* note 74, at 182–87 (statement of Herma Hill Kay). Kay was sensitive to gender-based power inequities in making reform recommendations. For example, she argued for a default presumption that married couples intended to purchase homes as community property rather than in joint tenancy. This default would avoid the problem of courts treating homes as separate property (in most cases, the husbands’ property) at divorce. See Hearings on Domestic Relations (Aug. 13–14, 1964), *supra* note 74, at S27–32 (statement of Herma Hill Kay).

<sup>87</sup> See, e.g., Proceedings on Domestic Relations (Jan. 8–9, 1964), *supra* note 74, at 207 (statement of Dr. Peter Hoffmann, Chairman, Legis. Comm., USDR); *id.* at 221–22 (statement of Paul J. Burchett).

<sup>88</sup> Burchett, an assistant professor of engineering at Pasadena City College, visited eleven countries interviewing legal officials about family law. He concluded that the United States was an outlier in making divorce an adversarial procedure. Proceedings on Domestic Relations (Oct. 8–9, 1964), *supra* note 72, at 54 (statement of Paul J. Burchett).

<sup>89</sup> Proceedings on Domestic Relations (Jan. 8–9, 1964), *supra* note 74, at 221 (statement of Paul J. Burchett).

“Family Centers.”<sup>90</sup> These would operate as hybrid adjudicative-therapeutic institutions. The Family Centers’ staff would include psychologists, clergy, tax consultants, and other professionals who would assist in uncovering and redressing the “causes of . . . marital unhappiness.”<sup>91</sup>

Although USDR activists’ first priority was saving marriages, they also made nascent arguments for the divorce bargain. The first premise of this bargain was that men should not have to pay their ex-wives alimony upon divorce. The views of USDR activists thus differed markedly from those of Kay and other reformers who wanted to enhance courts’ capacities to enforce alimony orders via the contempt power.<sup>92</sup> Unlike Kay, USDR did not believe that the gendered division of labor within marriage should determine the respective responsibilities of former spouses upon divorce. Instead, USDR activists argued alimony provided women an incentive to divorce by offering them a “profit” for doing so.<sup>93</sup> Furthermore, USDR argued, most divorced men could not afford to pay alimony.<sup>94</sup> USDR thus prefigured an argument later elaborated upon by Metz and Rosenblatt: that because men held an entitlement to women’s labor within marriage, the loss of that benefit should mean that men no longer had to support women upon divorce.

USDR activists conceded the legitimacy of divorced men’s financial obligations to their children, as opposed to their ex-wives. But they argued that in exchange for child support payments, a father should have an “inalienable right to share in his children’s upbringing, to experience the pleasure and happiness of watching them grow up.”<sup>95</sup> USDR activists believed that common law doctrines, which favored maternal custody, were unjust because they interfered with fathers’ natural rights. One activist told the California legislature that “the father is the head of his family and he can’t be taken away from his children or his children tak-

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<sup>90</sup> *Id.* at 207 (statement of Dr. Peter Hoffman); see also *id.* at 247 (statement of Phil Chain); *id.* at 237 (statement of Mil Schluter).

<sup>91</sup> *Id.* at 207–08 (statement of Dr. Peter Hoffman).

<sup>92</sup> Proceedings on Domestic Relations Before the Assemb. Interim Comm. on Judiciary 11–13 (Cal. Sept. 30, 1964) (on file with Cal. State Archives) (statement of Herma Hill Kay); Proceedings on Domestic Relations (Jan. 8–9, 1964), *supra* note 74, at 199 (statement of Lester E. Olson, Member, Family Law Comm., L.A. Cty. Bar Ass’n, and Member, Family Law Section, Am. Bar Ass’n).

<sup>93</sup> Proceedings on Domestic Relations (Jan. 8–9, 1964), *supra* note 74, at 248 (statement of Marvin Gart); *id.* at 230 (statement of Wallace R. Kennedy).

<sup>94</sup> See, e.g., *id.* at 228 (statement of Edward J. Pappas).

<sup>95</sup> *Id.* at 210 (statement of Dr. Peter Hoffman).

en away from him.”<sup>96</sup> So long as fathers met their obligations, he concluded, the state had “no right to intercede between father and children.”<sup>97</sup> Conversely, when a father was “shut out of his children’s lives as if a stranger, first by a custody ruling, then by violation of visitation,” he should not have to pay child support.<sup>98</sup>

USDR deployed a pervasive political anxiety about escalating welfare costs in California to advance their vision of the divorce bargain. USDR Legislative Committee Chairman Peter Hoffmann testified that fathers’ default on child support payments drove needy mothers to appeal for public assistance.<sup>99</sup> Hoffman further argued that enhanced legal protection of fathers’ “contact[]” rights with their children would serve as an incentive for men to meet child support obligations.<sup>100</sup> Hoffmann thus offered the California legislature a syllogism with political appeal: Fathers’ paternal contact rights led to greater child support enforcement; child support kept women and children off welfare; therefore, the legislature should promote fathers’ rights to reduce welfare rolls.

Ultimately, the California legislature liberalized divorce law without setting in place the reforms that Kay and USDR alike supported as therapeutic interventions in faltering marriages. The Family Law Act, passed in June 1969, eliminated fault as grounds for divorce and also eliminated fault from rules governing property division, alimony, and custody.<sup>101</sup> The Act, however, did not implement reformers’ proposed specialized family courts. By this time, Governor Ronald Reagan had entered office and a new era of fiscal conservatism had swept the government. Family courts—never mind “Family Centers” with a costly auxiliary staff and therapeutic mandate—appeared too expensive a reform. The Act also departed from the views of Kay and other liberal reformers by narrowing a proposal for an equitable exception to the equal division of community property and by explicitly directing judges to consider spouses’ capacities to engage in paid work.<sup>102</sup> Thus the final legislation adopted the proposals of reformers that advanced formal equality under law, without adopting the proposals that would have in-

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<sup>96</sup> Id. at 233 (statement of Dr. Frank Waltz).

<sup>97</sup> Id.

<sup>98</sup> Id. at 210–11 (statement of Dr. Peter Hoffman).

<sup>99</sup> Id.

<sup>100</sup> Id.

<sup>101</sup> Family Law Act, ch. 1608, §§ 1–8, 1969 Cal. Stat. 3312, 3312–14.

<sup>102</sup> Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. Cin. L. Rev. 1, 42–43 (1987).

tervened therapeutically in marriages and protected divorced women by accounting for the economic dependence of wives and mothers within marriage.

Following the enactment of the first no-fault divorce law in California, the National Conference of Commissioners on Uniform State Laws took up the mantle of divorce reform.<sup>103</sup> By 1974, forty-five states had legislated no-fault divorce.<sup>104</sup> These laws contained the seeds of the divorce bargain articulated by USDR: liberal conceptions of gender in private family law coupled with an intensification of commitment to private financial responsibility for dependent children.

Men's rights advocacy for no-fault divorce sheds light on a scholarly debate about the character of the fault-based divorce system. Some scholars argue that fault-based divorce better protected women from economic hardship at divorce. Husbands had to solicit their wives' cooperation to obtain divorces and, therefore, conceded property and custody settlements more favorable to women.<sup>105</sup> Others, however, argue that fault-based divorce trapped women in unhappy and sometimes violent marriages.<sup>106</sup> Those women who initiated divorces or who did not conform to middle-class gender and sexual norms, moreover, faced penalties as the "at-fault" plaintiffs in divorce proceedings.<sup>107</sup>

Men's rights advocacy regarding divorce reforms supports aspects of both accounts, while also complicating each narrative. This history supports the view that fault-based divorce offered women concrete material advantages. Men's rights groups understood that fault-based divorce enabled women to construct narratives about marital fault that advantaged

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<sup>103</sup> Jacob, *supra* note 70, at 62, 69, 75–78.

<sup>104</sup> *Id.* at 80.

<sup>105</sup> See Lenore J. Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America*, at x, 323, 355–56 (1985) (arguing that no-fault divorce brought greater economic freedom for men, whose living standards improved, and greater economic vulnerability for women); Martha Albertson Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform 18–20* (1991).

<sup>106</sup> See Carbone & Cahn, *supra* note 11, at 112–13; see also Betsey Stevenson & Justin Wolfers, *Bargaining in the Shadow of the Law: Divorce Laws and Family Distress*, 121 *Q.J. Econ.* 267, 269 (2006) (arguing that divorce reform produced a thirty percent decline in domestic violence and a significant drop in women's suicide rates). Women experienced both of these accounts as true in the complicated reality of their lives. See Terry Arendell, *Mothers and Divorce: Legal, Economic, and Social Problems* 20–41, 76–79, 145–49 (1986) (explaining that divorced women in California experienced a sense of personal growth and greater self-determination as well as increased financial hardship).

<sup>107</sup> Marygold S. Melli, *Constructing a Social Problem: The Post-Divorce Plight of Women and Children*, 11 *Am. B. Found. Res. J.*, 759, 759–72 (1986).

wives at divorce. While scholars have recognized that fault-based divorce protected women who were economically disadvantaged by both the gendered division of labor and employment discrimination, men's rights activists believed that this system deprived husbands of natural entitlements to houses, children, and property. Fault-based divorce thus posed psychosocial and not purely economic injuries to men; scholars' attention to the way in which fault-based divorce trapped women has overlooked many men's experience of divorce as injury. Men's rights activists understood divorce law in practice—the manipulation of formal rules, rising divorce rates, and an acrimonious adversarial process—as a major source in their loss of social status and welfare. They engaged in divorce reform to try to restore the marital bargain and, when impossible, to obtain a better bargain for themselves upon divorce.

Yet, as Part II demonstrates, no-fault divorce also brought consequences that men's rights activists did not anticipate and which they found deeply troubling. In the wake of reform, men's rights and fathers' rights groups discovered that no-fault divorce did not save marriages, but rather facilitated women's exit and thereby left even "innocent" men bereft of marriage's advantages.<sup>108</sup> Scholars debate whether the primary effect of no-fault divorce was to reduce the economic security of mothers and children, or to facilitate women's autonomy in ways positive for their well-being.<sup>109</sup> Examining the no-fault regime from the perspective of fathers' rights activists shows that divorce reform did indeed offer a measure of economic liberation for men. But it also did little to remedy a profound socio-emotional loss that accompanied divorce: the severing of the paternal-child relationship. Not until the divorce bargain consolidated in the 1980s would middle-class men realize a family-law regime that best served their interests upon divorce.

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<sup>108</sup> See *infra* notes 219–21 and accompanying text.

<sup>109</sup> Compare Weitzman, *supra* note 105, at 323 (arguing that divorce reduced women's economic well-being), and Fineman, *supra* note 105, at 36–52 (arguing that the focus on equality as an organizing concept in no-fault divorce obscures women's socioeconomic roles during marriage and their financial needs at divorce), with Carbone & Cahn, *supra* note 11, at 112–13 (arguing that no-fault divorce made it easier for women to leave unsatisfying or abusive marriages and also contributed to the dismantling of a model of marriage that enforced women's economic dependence on men).

## II. SEEKING LIBERATION FROM THE MARITAL BARGAIN IN THE DIVORCE BARGAIN, 1971–1978

In the early 1970s, the no-fault divorce revolution accelerated and the hope of restoring the marital bargain receded farther into the distance. The fathers' rights movement evolved in response to this changed legal landscape; in lieu of saving traditional marriage, it endeavored to improve men's socioeconomic status after divorce. Instead of imagining divorced fathers as domesticated "boob[s],"<sup>110</sup> activists imagined that these men would form the vanguard of men's liberation. Rather than seeking to restore men as patriarchs, fathers' rights activists focused on liberating men from the burdensome elements of the marital bargain that persisted past divorce.

A divorce bargain that liberated men from male breadwinner responsibilities held particular appeal in the 1970s, as the nation transitioned from postwar affluence to relative scarcity. Many fathers' rights activists in the 1970s were downwardly mobile, feeling the pinch of recession, inflation, and layoffs.<sup>111</sup> Their articulation of the divorce bargain in this period shows how some men reacted to an increasingly precarious middle-class status by eschewing the family-wage ideal and developing an ideology of male liberation.<sup>112</sup>

As this Part shows, fathers' rights activists used liberal legal frames that became hegemonic in the civil rights era—antidiscrimination, neutrality, and formal equal treatment—to advance the divorce bargain.<sup>113</sup> They used these frames to erode what they perceived as women's unjustified privileges at divorce: alimony and common law presumptions favoring maternal custody. The turn to sex discrimination and formal equality as legal frames, however, catalyzed fault lines within the movement. Some activists argued for an alliance with women's liberation in pursuit of fathers' rights. Others continued to conceptualize fa-

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<sup>110</sup> Rosenblatt, *supra* note 30, at 47–48.

<sup>111</sup> Thomas Borstelmann, *The 1970s: A New Global History from Civil Rights to Economic Inequality* 122 (2012).

<sup>112</sup> For an argument that men's liberation in the 1970s offered a means to articulate a male revolt against the breadwinner role in a politically palatable language, see Barbara Ehrenreich, *The Hearts of Men: American Dreams and the Flight from Commitment* 117–19 (1983).

<sup>113</sup> Law and society scholars have recently demonstrated the importance of legal framing processes to social movements' efficacy in institutionalizing new legal norms. See, e.g., Pedriana, *supra* note 19, at 1718–20, 1754 (analyzing the shift in the framing of the women's movement from protection to equality).

thers' rights to form the core of a men's rights movement that would counteract women's liberation.

*A. "Disintegration and Splintering": The Proliferation of Local Fathers' Rights Activism and the Failure of a National Movement*

While scholars often focus on national mobilization to change federal law, the history of the fathers' rights movements requires attention to local mobilization to change state regulation of family law. Fathers' rights activists used a variety of banal yet effective techniques to pursue legal reform. They shared legal knowledge, developed attorney referral networks, and deployed the media to advance their cause.

In the early to mid-1970s, fathers' rights groups functioned primarily as support networks for divorcing men. They offered counseling regarding the effects of divorce on men's business affairs, from their jobs to their medical insurance. They similarly addressed the social dimensions of divorce, instructing men on how to maintain personal friendships and relationships with children following divorce.<sup>114</sup>

In addition, fathers' rights groups helped men to manage their divorce cases. They conducted pro se trainings.<sup>115</sup> They taught men how to gather evidence to assist in the development of their cases. The groups monitored case law and circulated compendia of annotated citations related to child support and custody.<sup>116</sup> These resources kept costs down for fathers who might not otherwise have litigated their cases; one group reportedly lowered the average cost of members' divorces from the market rate of \$2,500 to between \$500 and \$750.<sup>117</sup>

Fathers' rights groups also forged alliances with sympathetic attorneys. Fathers' rights groups maintained lists of attorneys who provided capable services to divorcing men at reasonable costs. In turn, these lawyers would rely on fathers' rights groups for assistance in assembling

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<sup>114</sup> Letter from Gene Austin to Richard Doyle 2 (May 20, 1971) (on file with CMC at MSU, Richard F. Doyle Papers, Box #2, Folder: Missouri Council on Family Law).

<sup>115</sup> *Id.*

<sup>116</sup> See e.g., *Untitled Compilation of Cases Upholding a Maternal Custody Preference* (n.d.) (on file with CMC at MSU, Richard F. Doyle Papers, Box #1, Folder: Child Custody); *Decisions-Good* (n.d.) (on file with CMC at MSU, Richard F. Doyle Papers, Box #1, Folder: Child Support) (tracking New York cases from 1976 to 1978 regarding alimony, child support, and other topics).

<sup>117</sup> Letter from Gene Austin to George Partis & Stanley Tucker (Mar. 13, 1971) (on file with CMC at MSU, Richard F. Doyle Papers, Box #2, Folder: Missouri Council on Family Law).

materials which might aid clients, such as psychological authority on the importance of the paternal relationship.<sup>118</sup> Fathers' rights groups thereby simultaneously fueled the practices of an emerging field of male-friendly divorce attorneys and cultivated a source of support for divorcing men.

Local fathers' rights activists also endeavored to change state law through strategic litigation. For example, Rudy Johnson, an Alaska activist who would later become a leader in the national fathers' rights movement, spent at least \$25,000 challenging the "tender years doctrine" that maternal custody served the best interests of a young child.<sup>119</sup> Johnson tied the importance of paternal custody rights to child welfare, arguing that divorce contributed to juvenile delinquency and argued that legal reform should ideally seek to preserve family unity. When that was impossible, Johnson argued, the law should enforce fathers' right to show that custody would serve a child's best interests.<sup>120</sup> He took his case all the way to the Alaska Supreme Court, hoping for a decision that would "further strengthen the rights of children by whittling away at the biases in the minds of so many judges and social workers."<sup>121</sup>

In addition to pursuing formal legal change, local activists sought to use media to change public opinion. Some advocated consumer boycotts targeting television stations that expressed hostility to fathers' rights.<sup>122</sup> Activists also endeavored to mainstream their viewpoints by appearing on television and radio.<sup>123</sup> Those with more professional status, such as Daniel Amneus, an English professor at California State University, Los

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<sup>118</sup> See, e.g., Letter from John David Sullivan, March, March, Sullivan & Myatt, to Men's Rights Ass'n (Mar. 4, 1974) (requesting citations to psychological or psychiatric authority); Letter from D.J. Kenney to John David Sullivan (Mar. 12, 1974) (providing two citations). Both documents are on file with CMC at MSU, Richard F. Doyle Papers, Box #1, Folder: Child Custody.

<sup>119</sup> Letter from Rudy Johnson to Peter Kalamarides 3 (Dec. 5, 1975) (on file with CMC at MSU, Richard F. Doyle Papers, Box #1, Folder: Child Custody).

<sup>120</sup> *Id.* at 1–5.

<sup>121</sup> *Id.* at 4.

<sup>122</sup> Letter from Gene Austin, Chairman, Mo. Council on Family Law, to "Gentlemen" (n.d.) (on file with CMC at MSU, Richard F. Doyle Papers, Box #2, Folder: Missouri Council on Family Law).

<sup>123</sup> Letter from Gene Austin to Richard Doyle (Feb. 3, 1974) (on file with CMC at MSU, Richard F. Doyle Papers, Box #2, Folder: Missouri Council on Family Law).

Angeles, achieved considerable success reaching radio and television audiences.<sup>124</sup>

When advocacy and litigation did not produce change, some fathers' rights activists engaged in extralegal action. The archival record contains repeated references in the early to mid-1970s to a practice that fathers' rights activists called "child snatching."<sup>125</sup> Divorced men often requested assistance from fathers' rights groups in taking physical custody of their children, either in violation of judicial orders or to enforce them in an extralegal manner.<sup>126</sup> Eugene Austin, founder of the Missouri Council on Family Law, a radical divorced fathers group that went "underground" with several hundred members, was perhaps the most notorious proponent of such action. Austin admitted to "stealing more than 400 children from their mothers, and sometimes from their fathers."<sup>127</sup>

Austin reported that he hoped widespread adoption of the Uniform Child Custody Jurisdiction Act would obviate the need to engage in "snatching."<sup>128</sup> The American Bar Association approved the Act in 1968, which would require the states to respect each other's custody orders. As of the early 1970s, however, only eight states had adopted the Act.<sup>129</sup> Even in those jurisdictions, many judges ignored it.<sup>130</sup> As a consequence, a divorced parent who moved to a different state could take her children, in violation of the originating state's custody order, with legal impunity. Reputable family law scholars disagreed with Austin's tactics but conceded that he brought gaps in the law "to the public attention."<sup>131</sup>

Some fathers' rights activists aspired to a national organization that would enhance the political credibility of the fathers' rights movement. In February 1971, the Coalition Against Divorce Reform Elements

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<sup>124</sup> See Letter from Dan Amneus to Richard & Ritzzy Doyle (Oct. 19, 1976) (on file with CMC at MSU, Richard F. Doyle Papers, Box #1, Folder: Amneus, Daniel) (describing weekly talk radio show and two appearances in January 1977 on a television show reaching forty percent of the nation's households).

<sup>125</sup> Letter from Gene Austin to Richard Doyle, *supra* note 123.

<sup>126</sup> See, e.g., Letter from Robert E. Hintz to Richard F. Doyle (Nov. 20, 1976) (on file with CMC at MSU, Richard F. Doyle Papers, Box #1, Folder: Child Custody) (requesting assistance for a case in which a father had taken children from their mothers' home).

<sup>127</sup> George Newman, Mean Gene: America's Most Successful Kidnapper, *St. Paul Sunday Pioneer Press* (n.d.), at 1 (on file with CMC at MSU, Richard F. Doyle Papers, Box #2, Folder: Missouri Council on Family Law).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* (internal quotation marks omitted).

(“CADRE”) held its first convention in Elgin, Illinois. The convention included representatives of several divorced men’s groups located in Illinois, Minnesota, and Wisconsin.<sup>132</sup> The organization’s second convention in the spring of 1971 had broader geographic representation extending to Missouri, Michigan, Massachusetts, and Pennsylvania. At this convention, delegates decided to rename CADRE the National Council for Family Preservation (“NCFP”). The NCFP stated that it “would try to unify the movement without controlling it.”<sup>133</sup>

The idea of a national movement, however, fit awkwardly with a federalist system that invested states with authority over divorce laws. CADRE and the NCFP succeeded in briefly galvanizing a national fathers’ rights movement, but they quickly dissolved. Member groups’ strong desire for local autonomy,<sup>134</sup> a lack of effective leadership,<sup>135</sup> interpersonal disputes among activists,<sup>136</sup> divisions over whether to pursue

<sup>132</sup> William F. Cariveau, Minn. Divorce Justice League, A Report on the Opening Session of the C.A.D.R.E. Convention 1–2 (Feb. 17, 1971) [hereinafter Report from MDJL] (on file with MFM Online, CADRE/NCFP).

<sup>133</sup> Charles L. VanDuzee, Secretary-Treasurer, NCFP, Minutes from the Second CADRE Convention 2–3 (Apr. 17, 1971) (on file with MFM Online, CADRE/NCFP).

<sup>134</sup> See Letter from Richard F. Doyle, Coordinator, CADRE, to Divorce Reform Organizations (Jan. 26, 1971) (expressing frustration at “isolationism”); Letter from Dave Christopherson to Richard Doyle (Apr. 29, 1971) (expressing pessimism that the NCFP would unify the fathers’ rights movement); Letter from Richard F. Doyle to Dave Christopherson (n.d.) (seeking membership list from local activist group); Letter from Dave Christopherson to Richard Doyle (May 23, 1971) (addressing Doyle’s request for member lists); Memorandum (n.d.) (expressing continued concern over membership lists). All documents are on file with MFM Online, CADRE/NCFP.

<sup>135</sup> See Letter from William F. Cariveau to Richard F. Doyle (Mar. 2, 1971) (relating members’ concern that CADRE would either be a “Charlie Metz enterprise” or dominated by Doyle); Letter from George F. Doppler, Reg’l Dir., USDR, to Richard F. Doyle (Apr. 20, 1971) (suggesting Doyle exclude “problem makers” from the board); Letter from Charles L. Van Duzee to Larry Siegler (June 21, 1971) (relating that activists viewed Doyle as an incompetent leader); Report from MDJL, *supra* note 132, at 3–4 (expressing concern that CADRE would be a “one man organization”). All documents are on file with MFM Online, CADRE/NCFP.

<sup>136</sup> See, e.g., Letter from Richard F. Doyle to “Jay” (Feb. 25, 1971) (referring to fellow activist Nat Denman as the “Mass. mad man”); Letter from Richard F. Doyle to William Cariveau (Feb. 23, 1971) (characterizing Denman as “afflicted with the ‘bushmaster syndrome’”); Letter from Jay Burchett with Handwritten Notation by Richard F. Doyle (Apr. 24, 1971) (describing Denman’s accusation that Jay Burchett was homosexual); Letter from Jay Burchett to Richard Doyle (May 11, 1971) (describing fallout from the Denman-Burchett dispute); Letter from Richard F. Doyle to Jay Burchett (May 3, 1971) (same); Memorandum from Richard F. Doyle to “Selected Recipients,” on Funding, Defection, Housecleaning, Unity (n.d.) (same). All documents are on file with MFM Online, CADRE/NCFP.

radical or reformist tactics,<sup>137</sup> and lack of funding<sup>138</sup> plagued attempts at national coordination.

*B. Sex Equality and the End of Feminine “Privileges” and Masculine Obligations*

By the early 1970s, as the principle of sex equality under law took hold, many fathers’ rights activists began to explore what this might mean for them. Activists harnessed the ideals of formal equality and liberalized gender roles to better men’s bargaining position at divorce. They argued that the advent of sex equality as a principle of family law should mean an end to women’s legal privileges at divorce and, accordingly, to discrimination against men.

*1. Alimony*

Activists argued that the advent of legal prohibitions on employment discrimination on the basis of sex should likewise herald sex neutrality and formal equality at divorce. America’s Society for Divorced Men (“ASDM”), an organization that Charles Metz had earlier founded in Elgin, Illinois, conceded that “[i]ndividual ability and merit,” not sex, “should be the criterion” for hiring.<sup>139</sup> Equal employment opportunity should likewise lead women to eschew “their special priviledges [sic], chivalry, etc.”<sup>140</sup> Fathers’ rights activists argued for an end to alimony.<sup>141</sup> They did not relinquish, however, their nostalgia for marriage “premised on female dependence, lifetime expectations, fidelity and mutual economic advantage.”<sup>142</sup> Activists continued to subscribe to a marital bar-

<sup>137</sup> Compare Letter from Lou J. Filczer (n.d.) (arguing that the fathers’ rights movement should take its lessons from the “black movement” and use “militancy, rioting [and] demonstrating” to catalyze change), with Letter from Charles Van Duzee to Richard F. Doyle (May 20, 1971) (arguing that lobbying in a restrained and disciplined manner would prove most effective). Both documents are on file with MFM Online, CADRE/NCFP.

<sup>138</sup> See, e.g., Letter from Richard F. Doyle to Charles Van Duzee (May 10, 1971) (complaining that members were trying to “nickel and dime” NCFP); Letter from David Christopherson to Richard Doyle (May 16, 1971) (alluding to arguments over finances); Letter from William F. Cariveau, President, MDJL, to Richard F. Doyle (May 19, 1971) (accusing Doyle of profiteering); Letter from Charles L. Vanduzee to Richard F. Doyle (n.d.) (attributing the failure of NCFP in part to its incapacity to surmount financial difficulties). All documents are on file with MFM Online, CADRE/NCFP.

<sup>139</sup> Memorandum from Am.’s Soc’y for Divorced Men, *supra* note 65.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> Doyle, *supra* note 66, at 65.

gain premised on women's economic dependence while arguing that women should exert economic independence at divorce.

In the early 1970s, activists were silent about a policy alternative to the elimination of alimony: sex-neutral alimony. Their silence likely stemmed from their recognition that alimony awards allocated on the basis of caregiving responsibilities during marriage would in most cases favor women. Activists preferred a sex-neutral rule that eliminated breadwinner obligations (no alimony) to one that took account of differentiated economic roles during marriage (alimony to the dependent spouse).<sup>143</sup> Activists' silence also suggests the difficulty they had imagining men as dependents. Even as fathers' rights activists called for fluidity in gender roles at divorce, they continued to conceptualize marriage according to a gendered division of labor.<sup>144</sup> By the mid-1970s, however, some activists' thinking on alimony had changed. Prominent activist Charles VanDuzee remembered that when he first became involved in the movement he "was ADAMANT that alimony must go. Anyone who said differently was obviously a scatter-brain radical who should be summarily shot!"<sup>145</sup> By the mid-1970s, however, VanDuzee supported "the retention of the possibility of alimony, with the proviso that it could go either way."<sup>146</sup> Fathers' rights activists also began to endorse the viewpoint gaining currency in the larger legal community that temporary spousal support for education and job training of an unemployed ex-spouse should replace alimony.<sup>147</sup> In the 1979 case of *Orr v. Orr*, the Supreme Court held that an Alabama statute providing for sex-based alimony awards violated the Equal Protection Clause;<sup>148</sup> the decision helped to shift the debate within the movement in favor of sex-neutral alimony.

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<sup>143</sup> See supra notes 139–41 and accompanying text.

<sup>144</sup> See supra note 142 and accompanying text.

<sup>145</sup> Letter from Charles L. VanDuzee to Richard Doyle (May 18, 1977) (on file with MFM Online, MEN Int'l).

<sup>146</sup> Id.

<sup>147</sup> Men's Equality Coalition Gathers, Daily Reflector, June 23, 1978 (on file with MFM Online, MEN Int'l) (referencing a keynote address at a St. Paul meeting given by Ken Lewis, a professor of social work at East Carolina University in Greenville, North Carolina).

<sup>148</sup> 440 U.S. 268, 281–83 (1979).

## 2. *Child Custody*

Fathers' rights activists also deployed the frame of sex equality under law to argue for paternal custody rights. Two factors—state policy and fathers' socio-emotional needs—motivated fathers' rights activism regarding custody. First, as growing legal coercion made child support obligations inescapable, activists focused on achieving legal reforms that would secure corresponding custody rights. Second, a relational motivation led fathers' rights activists to argue for paternal custody rights. Fathers' rights activists tolerated the loss of exclusive sexual access to their wives and their wives' domestic labor, but they could not sustain the loss of their children at divorce.

Since the inception of the movement, fathers' rights activists faced an ever-tightening child support enforcement regime. Congressional amendments to the Social Security Act in 1975 created the Federal Child Support Enforcement Program, which supervised the collection of monies from fathers to reimburse states for welfare expenditures.<sup>149</sup> That year also marked a consolidation of child support caseloads for the first time in history.<sup>150</sup> Previously, state administrative agencies had handled the child support cases for families receiving AFDC benefits and state court judges resolved child support issues for families not receiving them.<sup>151</sup> After 1975, state administrative agencies processed both welfare and non-welfare child support cases.<sup>152</sup>

Fathers' rights activists viewed the increasing federalization of child support enforcement as encroaching on privacy and civil liberties. They characterized the 1975 amendment to the Social Security Act as “unashamedly authoritarian.”<sup>153</sup> The amendment transformed the Internal Revenue Service into a “national ‘collection agency.’”<sup>154</sup> It elevated nonsupport from a civil matter adjudicated by the states to a federal offense overseen by “a national police organization, delving into the pri-

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<sup>149</sup> See Memorandum from Dep't of Health, Educ. & Welfare to State Adm'rs and Other Interested Orgs. & Agencies (Jan. 29, 1975) (on file with CMC at MSU, Richard F. Doyle Papers, Box #1, Folder: Child Support).

<sup>150</sup> Jocelyn Elise Crowley, *The Politics of Child Support in America* 41 (2003).

<sup>151</sup> *Id.*

<sup>152</sup> See *id.* at 41–43, 131–34 (explaining that participation in the program was not mandatory for mothers and children not receiving AFDC, yet these families increasingly participated in the program when they found the courts ineffective in enforcing child support orders).

<sup>153</sup> Memorandum from Tim Graham (n.d.) (on file with CMC at MSU, Richard Doyle Box #1, Folder: Child Support).

<sup>154</sup> *Id.*

vate affairs of American citizens.”<sup>155</sup> Twenty-five divorced fathers’ groups wrote a joint letter to Casper Weinberger, Secretary of the Department of Health, Education and Welfare, opposing the 1975 amendment.<sup>156</sup> The letter argued that child support orders were “unconstitutional” because they denied divorced men “rights of due process, right to trial by jury . . . and equal protection.”<sup>157</sup>

In the 1970s, fathers’ rights activists did not deploy child support obligations as a justification for paternal custody rights. Instead, they sought total liberation from these obligations and refused to concede their legitimacy. Not until the 1980s would fathers’ rights activists return to and build upon the argument first articulated by USDR in 1964: that paternal contact rights with their children would promote compliance with child support orders. Nonetheless, the expansion of a federal-state child support enforcement apparatus was a causal factor in growing advocacy for paternal custody rights. Fathers’ rights activists pursued reforms that would enable divorced men to experience the rewards as well as the responsibilities of fatherhood.<sup>158</sup>

Advocacy for paternal custody rights in the 1970s challenged the construction of fatherhood in terms of breadwinning alone. Instead, activists developed an affective model of fatherhood that highlighted the profound emotional, even existential, dimensions of fatherhood. A press release for a fathers’ rights group stated, “The right to be a father to our children is very precious to us and we suffer terribly from the loss of the most intimate creation we may ever experience.”<sup>159</sup> Such statements represented more than rhetorical flourish. The evidence suggests that fathers’ rights activists genuinely desired closer relationships with their children following divorce. Activists critiqued the legal system for reducing fathers to “cash register[s]” and argued that fathers might also serve as caregivers.<sup>160</sup>

Activists argued that the tender years’ presumption coupled with judicial bias against fathers resulted in discrimination against men. In their

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<sup>155</sup> *Id.*

<sup>156</sup> Letter from George F. Doppler, Coordinator, Nat’l Council of Marriage & Divorce Law Reform & Justice Orgs., to Hon. Casper W. Weinberger, Sec’y, Dep’t of Health, Educ. & Welfare (Mar. 21, 1975) (on file with CMC at MSU, Richard Doyle Box #1, Folder: Child Support).

<sup>157</sup> *Id.*

<sup>158</sup> See *infra* notes 216–31 and accompanying text.

<sup>159</sup> Press Release, MEN Int’l (n.d.) (on file with MFM Online, MEN Int’l).

<sup>160</sup> *Id.* (internal quotation marks omitted).

view, the fact that only three percent of fathers received physical custody of their children upon divorce established prima facie proof of sex discrimination.<sup>161</sup> America's Society for Divorced Men contended that custody, like employment opportunity, should be based upon individual merit. "If a divorcing husband is a better person than his wife, custody should be awarded to him."<sup>162</sup> Activists analogized the severing of father-child ties upon divorce to slavery, using charged rhetoric to express the depth of the loss they felt. Activist Carlo Abbruzzese claimed, "It is hard to believe that the [slave] traders were routinely selling members of the same family to different slave owners . . . . [T]oday . . . a modernized form of slavery and genocide is still practiced, aided, abetted and encouraged by the Laws and by the Judges of the Domestic Courts . . . ."<sup>163</sup> Fathers' rights activists decried the use of state power to render families asunder, lambasting family law as a form of modern-day "slavery."<sup>164</sup>

In advocating for formal equal treatment in the law of divorce, fathers' rights activists both drew upon and influenced broader trends in family law.<sup>165</sup> Feminists also challenged the tender years' doctrine but for different reasons than did fathers' rights activists. Feminists argued that the presumption entrenched gender ideologies that maintained mothers' primary responsibility for caregiving.<sup>166</sup> Whereas fathers'

<sup>161</sup> Letter from Carlo E. Abbruzzese, Chairman, Family Law Action Council, to the President of the United States (n.d.) (on file with MFM Online, MEN Int'l).

<sup>162</sup> Memorandum from Am.'s Soc'y for Divorced Men, supra note 65.

<sup>163</sup> Letter from Carlo E. Abbruzzese, MEN Int'l, to Editor (June 14, 1977) (on file with MFM Online, MEN Int'l).

<sup>164</sup> Letter from Carlo E. Abbruzzese, Chairman, Family Law Action Council, to the President of the United States, supra note 161 (comparing the United States to fascist and communist regimes and stating that "no physical torture can be compared to the barbaric torture of depriving a father . . . of his God-given rights to parenthood").

<sup>165</sup> By the mid-1970s, a developing consensus in the law review literature consolidated in favor of discarding the tender years' presumption. See, e.g., Jennie D. Behles & Daniel J. Behles, Equal Rights in Divorce and Separation, 3 N.M. L. Rev. 118, 132-33 (1973) ("The very social forces which [gave] rise to the agitation for an Equal Rights Amendment . . . dissolved many of the differences between the father and the mother which once made the preference for the mother justifiable."); Henry H. Foster & Doris Jonas Freed, Life with Father: 1978, 11 Fam. L.Q. 321, 341-42 (1978) (arguing for sex-neutral custody law); Ralph J. Podell et al., Custody—To Which Parent?, 56 Marq. L. Rev. 51, 53 (1972) (arguing that the tender years' presumption was "unfounded because it fail[ed] to project the family unit into the post-divorce reality where the mother must assume both a mother's and a father's role"); Allan Roth, The Tender Years Presumption in Child Custody Disputes, 15 J. Fam. L. 423, 425, 438-41 (1977) (critiquing the tender years' presumption).

<sup>166</sup> Mason, supra note 5, at 123-27 (discussing the role of feminist ideology and rhetoric in the challenge to the tender years' doctrine).

rights activists argued that sex-based custody laws discriminated against men, feminist activists emphasized the ways in which they reflected and reinforced a gendered division of labor.

The overlapping goals of fathers' rights and feminist legal activism in the early 1970s proved influential in state legislatures. The Uniform Marriage and Divorce Act ("UMDA") outlined the factors to be considered in awarding custody in the best interests of the child, excluding any mention of the sex of the custodian.<sup>167</sup> The UMDA stood for the proposition that gender had little legal relevance for the parent-child relationship.

Several states amended their domestic relations statutes to eliminate maternal custody preferences. Prior to the drafting of the UMDA in 1970, at least six states had revised their domestic relations statutes to make custody determinations formally sex neutral.<sup>168</sup> By the decade's close, a total of twenty-one states had abandoned any maternal custody preference.<sup>169</sup> Commenting on the Nebraska legislature's unanimous passage of a law mandating sex neutrality in child custody, Eugene Austin remarked that "it serves as a good example of what happens when the men and women go in together and ask for something. Not as a single combined voice . . . rather, two separate voices asking for the same thing."<sup>170</sup>

Developments in constitutional law reinforced the trend toward formal equality within family law. In 1973, a New York Family Court became the first court to declare the tender years' presumption unconstitutional. The decision in *State ex rel. Watts v. Watts*<sup>171</sup> noted that the tender years' presumption<sup>172</sup> was in tension with U.S. Supreme Court jurisprudence under the Due Process and Equal Protection Clauses of the

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<sup>167</sup> Unif. Marriage & Divorce Act § 402, 9A pt. II U.L.A. 282 (1998). A Commissioners' Note, however, observed that this rule of sex neutrality was consistent with traditional preferences for the mother as a custodian of a young child, when all other factors were equal. *Id.*

<sup>168</sup> These states included Kansas via constitutional provision in 1859, Oregon in 1880, Pennsylvania in 1895, Missouri in 1952, Alabama in 1959, and Hawaii in 1968. Roth, *supra* note 165, at 429–31 & nn.24, 29–32.

<sup>169</sup> *Id.* at 429–31 & nn.24, 28–32. Despite the existence of statutes mandating sex neutrality, however, many courts continued to apply the tender years' presumption. *Id.* at 432–38.

<sup>170</sup> Letter from Eugene Austin, Chairman, Mo. Council on Family Law (May 7, 1971) (on file with CMC at MSU, Richard F. Doyle Papers, Box #2, Folder: Missouri Council on Family Law).

<sup>171</sup> 350 N.Y.S.2d 285 (N.Y. Fam. Ct. 1973).

<sup>172</sup> Although New York custody law had been formally sex neutral, the courts still applied the tender years' presumption in practice. *Id.* at 287.

Fourteenth Amendment.<sup>173</sup> The *Watts* court concluded that because the tender years' presumption did not serve a compelling state interest in children's welfare, it amounted to unconstitutional discrimination against fathers seeking custody.<sup>174</sup> In reaching this conclusion, the court questioned the gender stereotypes that underpinned the doctrine.<sup>175</sup> The court cited social science countering the idea that any mother-child separation was harmful to children<sup>176</sup> and supporting the notion that fathers were equally capable of performing childrearing functions.<sup>177</sup> The *Watts* opinion would remain the strongest judicial statement against the tender years' doctrine, influencing subsequent court opinions across the country.<sup>178</sup> By the mid-1970s, the private family law system began to resemble the vision of sex neutrality embraced by both the fathers' rights movement and elements of the feminist movement.

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<sup>173</sup> Specifically, the court cited decisions treating parents' childrearing interests as fundamental rights and applying heightened scrutiny to sex classifications under law. *Id.* at 290–91.

<sup>174</sup> *Id.* at 291.

<sup>175</sup> *Id.* at 288–89 (“The simple fact of being a mother does not, by itself, indicate a capacity or willingness to render a quality of care different from that which the father can provide.”).

<sup>176</sup> *Id.* at 289–90 (quoting Margaret Mead, *Some Theoretical Considerations of the Problem of Mother-Child Separation*, 24 *Am. J. Orthopsychiatry* 471, 477 (1954)).

<sup>177</sup> *Id.* at 289–90 (“Studies of maternal deprivation have shown that the essential experience for the child is that of mothering—the warmth, consistency and continuity of the relationship rather than the sex of the individual who is performing the mothering function.”).

<sup>178</sup> Some courts followed *Watts* to invalidate the tender years' presumption, but without explicitly ruling the doctrine unconstitutional. See, e.g., *In re Marriage of Bowen*, 219 N.W.2d 683, 688 (Iowa 1974) (declining to decide the constitutional issue after deciding that “[m]odern redefinition and adjustment of traditional parental roles” meant that the tender years' presumption was no longer justified); *Johnson v. Johnson*, 564 P.2d 71, 75 (Alaska 1977) (same); see also *Bazemore v. Davis*, 394 A.2d 1377, 1381, 1383 (D.C. 1978) (noting that “mothering” should be distinguished from the status of the biological “mother” and holding that courts must determine a child's best interest based on the case's facts “without resort to the crutch of a presumption”). A handful of other courts followed *Watts* by holding that the tender years' presumption violated state constitutions or the U.S. Constitution. See *Pusey v. Pusey*, 728 P.2d 117, 119–20 (Utah 1986) (describing the tender years' presumption as constitutionally infirm under the Fourteenth Amendment and the Utah Constitution and disavowing the use of the presumption); *Ex parte Devine*, 398 So. 2d 686, 695 (Ala. 1981) (holding the tender years' presumption unconstitutional); *In re Switalla*, 408 N.E.2d 1139, 1143 (Ill. App. Ct. 1980) (noting that the state no longer recognized any tender years' presumption and that the state constitution provides for equal protection based on sex); *Commonwealth ex rel. Spriggs v. Carson*, 368 A.2d 635, 639–40 (Pa. 1977) (holding that the doctrine was “predicated upon . . . stereotypic roles of men and women” and offended the Equal Rights Amendment to the Pennsylvania Constitution).

*C. “Discrimination and Emasculation”: Sex Equality and Fault Lines in the Movement*

The discourse of sex discrimination and formal equality that fathers’ rights activists wielded during the early 1970s provoked an ideological crisis within the movement. If breadwinning no longer defined masculinity, what was left of manhood? If the state was neutral between the sexes, how might law recognize men’s unique role within the family? These questions divided activists in the late 1970s, even as the leaders of fathers’ rights groups once again tried to unite within an umbrella organization called Men’s Equality Now, International (“MEN”).<sup>179</sup>

Disagreement within MEN centered on two related dilemmas: whether to pursue fathers’ rights specifically or men’s rights more broadly, and what the movement’s relationship should be to women’s liberation. Some activists argued for a narrow focus on fathers’ rights and an alliance with the women’s liberation movement in pursuit of sex neutrality in private family law.<sup>180</sup> This wing viewed advocacy for men’s rights, such as opposition to selective service regulations, as diluting efforts to reform child support and custody laws. They worried that a movement dedicated to men’s rights threatened to alienate potential supporters.<sup>181</sup>

These activists believed that substantial overlap existed between their own goals and those of women’s liberation organizations such as the National Organization for Women (“NOW”).<sup>182</sup> In their view, fathers’ rights and women’s rights activists alike were working toward a conception of sex equality premised on sex neutrality. Like many feminists, these fathers’ rights activists argued that the law should not reinforce

<sup>179</sup> See Letter from George Doppler, Coordinator, Nat’l Council of Marriage & Divorce Law Reform & Justice Orgs., to Richard F. Doyle, Men’s Rights Ass’n (Feb. 15, 1977) (on file with MFM Online, MEN Int’l) (describing dissent over name change from George Doppler, who wanted to keep the name of a preexisting coalition, the National Council of Marriage and Divorce Law Reform and Justice Organizations); Memorandum from Richard F. Doyle, Chairman, MEN Int’l, to Temporary Members and Supporters, MEN Int’l (May 18, 1977) (on file with MFM Online, MEN Int’l) (describing February 1977 meeting to form a new organization).

<sup>180</sup> Richard Doyle, Chairman, MEN Int’l, Address to National Congress for Men (June 13, 1981) (on file with MFM Online, MEN Int’l).

<sup>181</sup> Activists talked about the need to attract women members to the movement and to “include children and families in our goal” as well as fathers’ rights. MEN Int’l, Minutes of Coalition Meeting (Feb. 5–6, 1977) (on file with MFM Online, MEN Int’l) (discussing the need to attract women members to the movement and to set a “professional, not militant” tone).

<sup>182</sup> Letter from Rod Billings, United Fathers Org. of Am., to R.F. Doyle, Chairman, MEN Int’l (Mar. 1, 1977) (on file with MFM Online, MEN Int’l).

sex-role stereotypes. Both parents should be able to exercise custody rights over their children; both parents should provide child support; both ex-husbands and ex-wives should provide temporary financial support to unemployed spouses.<sup>183</sup>

In arguing for formal equality, however, this wing of the movement stopped short of challenging the gendered division of labor within the family. Activists' call for sex neutrality suggested that the law should remain indifferent to the allegedly private ordering of gender roles within the family and labor market. Thus, while espousing a potential alliance with women's liberation, this wing of the fathers' rights movement did not join feminists in calling for legal entitlements that would transform caregiving labor within marriage.

A second wing of the movement, which coalesced in the Men's Rights Association, argued that fathers' rights advocacy formed a central part of a broader struggle for men's rights. Following Charles Metz's death,<sup>184</sup> Richard Doyle rose to prominence as the leader of this wing.<sup>185</sup> A former air traffic controller who had lost his job, Doyle was a St. Paul, Minnesota-based activist. He exemplified the personal anger that many fathers' rights activists expressed as well as the misogynistic rhetoric and behavior that some activists adopted.<sup>186</sup> Doyle had returned home from the Korean War in 1956 to find his wife allegedly engaged in an extramarital affair.<sup>187</sup> Doyle linked the loss of his authority in the home to the violation of democracy abroad. He felt doubly betrayed by his ex-wife and the legal system that awarded her custody over their three chil-

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<sup>183</sup> See, e.g., Announcing a Panel Discussion on Joint Custody (Mar. 1977) (on file with CMC at MSU, Richard Doyle Box #1, Folder: Child Custody); Clint Jones, Advantages of Joint Custody (n.d.) (on file with CMC at MSU, Richard F. Doyle Papers, Box #1, Folder: Child Custody); Untitled Memorandum on Joint Custody (n.d.) (on file with CMC at MSU, Richard Doyle Box #2, Folder: Joint Custody).

<sup>184</sup> See Letter from William F. Cariveau, President, Minn. Divorce Justice League, to Richard F. Doyle (Mar. 30, 1971) (on file with CMC at MSU, Richard F. Doyle Papers, Box #2, Folder: Minnesota Divorce Justice League).

<sup>185</sup> Robert D. Harris, *Morality in Divorce 2* (n.d.) (unpublished manuscript, on file with CMC at MSU, Richard F. Doyle Papers, Box #2, Folder: Men's Rights).

<sup>186</sup> When his wife told him she would "still get the kids" no matter how he portrayed her sexual morality in court, Doyle "g[ave] her a black eye." Richard Doyle, 'Oppressed' Man Seeks Alimony Lib, *Moneysworth*, Mar. 17, 1975 (internal quotation marks omitted) (on file with CMC at MSU, Richard F. Doyle Box #1, No Folder, Unprocessed Materials).

<sup>187</sup> *Id.*

dren as well as the family house.<sup>188</sup> Doyle, however, was happily remarried by the early 1970s.<sup>189</sup>

In 1976, Doyle published a book called *The Rape of the Male* that became an influential, albeit controversial text within the fathers' rights movement. The book deployed the concept of sex discrimination to argue for men's rights. Doyle argued that men suffered discrimination within family law, the labor market, and the criminal justice system.<sup>190</sup> He connected judicial deprivation of fathers' rights to the maternalist welfare state's marginalization of men, the displacement of male by female workers under affirmative action policies, and the vastly disproportionate imprisonment of men.<sup>191</sup>

Richard Doyle argued that "discrimination" against men in the public sphere and "emasculat[i]on" of men in the realm of the private family constituted "two banes of the male sex . . . interrelated and inseparable."<sup>192</sup> Doyle thought that activists should concentrate "the bulk of [their] lobbying on family rights."<sup>193</sup> But activists also needed to fight against affirmative action for women in the labor market, against false rape and sexual abuse charges, and against all forms of legal coercion that deprived men of their masculinity.<sup>194</sup> These activists viewed fathers' rights as the most significant but not the only goal necessary to the achievement of a revitalized masculinity.

Doyle and fellow activists in favor of linking fathers' to men's rights positioned themselves in strenuous opposition to the women's liberation movement.<sup>195</sup> They agreed that for strategic reasons the movement needed to diminish and tone down its critique of the women's movement.<sup>196</sup>

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<sup>188</sup> Id.

<sup>189</sup> Doyle, *supra* note 66, at 7–13.

<sup>190</sup> See id. at 80–110 (describing sex discrimination against men in the family law system); id. at 149–70 (blaming attorneys and the courts).

<sup>191</sup> See id. at 113–14, 122–36, 178.

<sup>192</sup> Richard F. Doyle, *Solidarity* (n.d.) (on file with MFM Online, MEN Int'l).

<sup>193</sup> Fourth National NCM Convention in Arlington Virginia, *Legal Beagle: A Family Law Reform Newsletter*, Aug. 1985, at 9–10 [hereinafter *Legal Beagle*] (on file with MFM Online, MEN Int'l).

<sup>194</sup> See, e.g., Doyle, *supra* note 66, at 113–19, 125–26; Men's Rights Ass'n, *Position Paper* (n.d.) (on file with MFM Online, MEN Int'l).

<sup>195</sup> Doyle, *supra* note 66, at 175–82; Letter from Brian C. Smith to Richard Doyle (Aug. 16, 1978) (on file with MFM Online, MEN Int'l).

<sup>196</sup> See, e.g., Letter from Richard F. Doyle, President & Bd. Chairman, MEN Int'l, to Board Members and Prospective Board Members, MEN Int'l (Mar. 7, 1977) (on file with MFM Online, MEN Int'l) (recommending that future editorials focus 50% on divorce re-

Nonetheless, they remained committed to the view that women's liberation had made men "unsure of themselves and the roles they are supposed to play."<sup>197</sup> The destabilization of gender roles made men "effeminate" and women more "masculine."<sup>198</sup> These activists argued for formal equal treatment in family law, employment law, and criminal law not as a means to deconstruct gender hierarchies but rather as a device "for the preservation of masculinity and femininity."<sup>199</sup>

Both wings of the fathers' rights movement, however, remained united in their commitment to reform of divorce and child custody laws. MEN sought to locate fathers' rights in textual provisions of the Constitution. In the spring of 1977, MEN wrote to the U.S. Attorney General alleging that the states' divorce laws were unconstitutional.<sup>200</sup> Echoing the language of the Declaration of Independence, the letter argued that the states deprived men of their "rights to life, liberty and pursuit of happiness, as expressed in the fulfillment of his unique role of 'fatherhood.'"<sup>201</sup> MEN argued that the relationship of father and child was a "privilege" of citizenship protected by the Privileges and Immunities Clause of the Fourteenth Amendment. Consequently, the states had an obligation to treat the paternal relationship as equal to the maternal relationship.<sup>202</sup> Last, the letter argued that the right to raise one's children was a fundamental right more important than even the right to property.<sup>203</sup>

The divisions within the fathers' rights movement deepened as it entered the 1980s. Activists committed to a singular fathers' rights agenda

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form, "40% information on boosting the male in other areas," and 10% on miscellaneous items).

<sup>197</sup> Paul Chapple, MEN Mans the Trenches to Combat Women's Lib, Register, Feb. 11, 1977, at B1 (on file with MFM Online, MEN Int'l).

<sup>198</sup> Letter from Clint Jones, Publicity Chairman, MEN Int'l, to Gentlemen (Feb. 1977) (on file with MFM Online, MEN Int'l).

<sup>199</sup> Chapple, supra note 197; Men's Equality Now Is New National Coalition (on file with MFM Online, MEN Int'l).

<sup>200</sup> See Letter from Clint Jones, Publicity Chairman, MEN Int'l, to Attorney General (Mar. 14, 1977) (on file with MFM Online, MEN Int'l).

<sup>201</sup> Id.

<sup>202</sup> Id. The argument did not take account of the *Slaughter-House Cases*, 83 U.S. 36, 74 (1873), which restricted the privileges and immunities protected by the Fourteenth Amendment to a narrow list of privileges and immunities guaranteed by federal rather than state citizenship.

<sup>203</sup> Jones, supra note 200 (citing *Stanley v. Illinois*, 605 U.S. 645 (1972) (striking down as a violation of equal protection an Illinois law that made the children of unmarried fathers wards of the State when their mothers died)).

consolidated the divorce bargain while maintaining a loose and complex connection with activists seeking broader men's rights.

### III. CONSOLIDATING THE DIVORCE BARGAIN, 1979–1988

During the early 1980s, the divorce bargain consolidated in the crucible of debate between fathers' rights activists, women's rights activists, and federal and state legislators. As backlash against maternalist welfare policies deepened in this period, federal and state legislators' primary interest was in finding a mechanism other than public assistance to provide for children living outside marriage. Fathers' rights activists never actively advocated and, indeed, had long resisted the first prong of the divorce bargain: paternal responsibility for child support. But by the mid-1980s they conceded that obligation as a mechanism to augment paternal custody rights. A new generation of fathers' rights leaders, with more secure footing in the middle class, used the state interest in privatizing children's dependency to advocate joint custody. Fathers' rights activism was instrumental in fueling a transformation in state laws from sole custody to joint custody. This reform enabled middle-class men to capture a primary socio-emotional reward of marriage: close relationships with their children.

The pace of change was dramatic. In the late 1970s, the prevailing doctrine was that the best interests of the child would be served by awarding sole custody to the parent who had served as the primary caretaker. By the mid-1980s, nearly two-thirds of states recognized that joint custody could sometimes be in the best interests of the child. Between 1979 and 1982, twenty-one states passed joint custody statutes; these ranged in the strength of their preference from merely making joint custody an option available to the court to a presumption in favor of it.<sup>204</sup> By 1984, thirty-two states recognized joint custody in some form,<sup>205</sup> and several more states followed suit in the late 1980s.<sup>206</sup> Many of these statutes went beyond legal recognition to create a presumption that joint

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<sup>204</sup> Joanne Schulman & Valerie Pitt, *Second Thoughts on Joint Child Custody: Analysis of Legislation and Its Implications for Women and Children*, 12 *Golden Gate U. L. Rev.* 539, 545–56, 572–73 app. A (1982).

<sup>205</sup> Jeff Atkinson, *Criteria for Deciding Child Custody in the Trial and Appellate Courts*, 18 *Fam. L.Q.* 1, 36 (1984); *Joint Custody Statutes and Judicial Interpretations*, in *Joint Custody and Shared Parenting* 297 app. A (Jay Folberg ed., 2d ed. 1991).

<sup>206</sup> Judith Bond Jennison, *The Search for Equality in a Woman's World: Fathers' Rights to Child Custody*, 43 *Rutgers L. Rev.* 1141, 1147–48 (1991).

custody served the best interests of the child.<sup>207</sup> A study by political scientist Herbert Jacob surveyed twenty-six states that passed joint custody statutes; fathers' rights groups campaigned actively in fourteen of them.<sup>208</sup>

This Part analyzes fathers' rights advocacy for a joint custody statute in California, which offers a particularly apt case study for examining the critical role activists played nationwide. The California statute was the nation's first joint custody statute, and it proved influential in the diffusion of the joint custody concept. Fathers' rights activists helped drive custody reform via three mechanisms. First, they formed alliances with sympathetic state legislators, linking grassroots activism to targeted legislative campaigns. Second, activists framed joint custody in political discourse as an incentive for men to privatize responsibility for dependent children. Third, activists connected the ideals of sex neutrality and equal treatment to another liberal legal frame: child welfare. Activists argued that joint custody promoted children's rights and healthy child development in addition to fathers' rights. Fathers' rights activists thus effectively deployed political discourses wielded in different ways and for different reasons by women's rights advocates and social scientists. The confluence of these groups' advocacy proved a powerful impetus to legislative change.

The divorce bargain, although it was a deal struck between men and the state, also held profound implications for bargaining between men and women at divorce.<sup>209</sup> Both fathers' rights and women's rights activ-

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<sup>207</sup> *Id.* at 1152 & n.63.

<sup>208</sup> Jacob, *supra* note 70, at 137–39.

<sup>209</sup> This Article remedies an oversight in the literature on intrafamilial bargaining by showing how the political bargain that divorced men struck with the state shaped the private bargaining between men and women at divorce. Legal scholarship recognizes that default legal rules structure private bargaining, including between couples during marriage and at divorce. The literature, however, has overlooked the relationship between the interpersonal bargains that take place at divorce and the political bargains that shape welfare state structures. See *id.*; see also Mary Anne Case, *Enforcing Bargains in an Ongoing Marriage*, 35 *Wash. U. J.L. & Pol'y* 225, 227 (2011) (analyzing the possibility of judicial enforcement of marital bargains); Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 *Va. L. Rev.* 1225, 1270–80 (1998) (analyzing just distribution of the “surplus from the marital bargain”); Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 *Mo. L. Rev.* 21, 43–44 (1994) (describing the economic rights of spouses as deriving from an implicit bargain in which a married couple agrees to share the economic production of the marriage). For an exception to the scholarship's private law focus that analyzes the intersection of public law regulatory regimes with “private” bargaining among family members, see Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 *Col-*

ists believed that joint custody statutes comported with changing gender roles. Women's rights activists and fathers' rights activists, however, differed significantly in how they envisioned the design and operation of joint custody statutes. Fathers' rights activists supported strong presumptions in favor of joint custody at the state level, coupled with minimal federal involvement in child support. By contrast, women's rights activists supported joint custody statutes only when parents agreed to this arrangement, and insisted on a powerful federal child support enforcement apparatus. The divorce bargain as manifested in both state and federal legislation did not fully realize the reform objectives of either fathers' rights or women's rights advocates. But it did enshrine a political principle that neither group challenged: private responsibility for dependency.<sup>210</sup>

#### *A. The Joint Custody Revolution*

Fathers' rights activists viewed the conservative ascendancy in the Reagan era as a novel opportunity to engage the state. In the spring of 1979, James Cook exhorted divorced men to fight for a joint custody bill pending in the California legislature.<sup>211</sup> Cook represented a new generation of leadership in the fathers' rights movement. He was a fifty-six year old building industry lobbyist from Los Angeles and enjoyed a higher income and social status than had preceding movement leaders.<sup>212</sup> Cook's socioeconomic status enabled him to re-embrace paternal breadwinner responsibilities, so long as the law guaranteed reciprocal paternal custody rights. Although Cook's motivation lay in personal ex-

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um. L. Rev. 1955, 1959–64, 1998–2032 (2010) (using partnership theory to examine how a regulatory regime might accommodate polygamy's multiplicity while addressing the power disparities it engenders at divorce).

<sup>210</sup> Suzanne Kahn explains that keeping middle-class women off of AFDC was a central goal of feminist divorce reformers by the mid-1970s. Kahn argues that for these reformers divorce insurance represented a middle ground between dependence wholly privatized within an intact marital family and reliance on maternalist welfare programs. See Suzanne Kahn, *Divorce and the Politics of the Social Welfare Regime* 34–35 (2015) (unpublished Ph.D. dissertation, Columbia University) (on file with author).

<sup>211</sup> Letter from James A. Cook to Member of the Senate Judiciary Committee (Apr. 17, 1979) (on file with Cal. State Archives); *Will You Do Something Effective, Simple, Succinct?* (May 1979) (on file with Cal. State Archives).

<sup>212</sup> Sue Ellen Jares, *Will Joint Custody End the Divorce Tug-of-War? Yes, Hopes One Weekend Dad*, *People*, Oct. 20, 1980, at 139, <http://www.people.com/people/archive/article/0,,20077684,00.html>, archived at <https://archive.is/MPt96>.

periences with divorce like that of the leaders that preceded him,<sup>213</sup> he did not express the same vitriolic anger toward women.

Cook portrayed political action as a new source of masculinity. “Take pride,” he beseeched, “get vigor: convert your anxieties into actions your children can admire.”<sup>214</sup> Activists worried that the legislative campaign Cook urged would prove “just another hoax,” yet they took up his challenge.<sup>215</sup> Together, grassroots activists, well-connected leaders, and state legislators catalyzed the enactment of the nation’s first joint custody statute in California.

### *1. From Sole Custody to Joint Custody*

Fathers’ rights activists in the early eighties defined joint custody as a crucial component of the divorce bargain. Activists argued that no-fault divorce had an unintended consequence: Fathers who would not have been at fault under the prior legal regime were nonetheless losing relationships with their children because of the persistence of a sole custody regime.<sup>216</sup> These fathers, activists alleged, had committed none of the faults that might have justified their divorce in an earlier era.<sup>217</sup> They nonetheless confronted “the involuntary divorce of a child.”<sup>218</sup> Activists spoke about fathers’ pain at losing their children to divorce.<sup>219</sup> “It has been my feeling,” an activist explained, “that we are as fathers non-persons to our children. We are only good for our moneys. We have virtually no legal right to our childrens [sic] welfare.”<sup>220</sup> Activists pursued

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<sup>213</sup> In 1974, Cook lost custody of his son, then eight years old, in a divorce action. *Id.*

<sup>214</sup> Alert, Trouble on the Horizon (n.d.) (on file with Cal. State Archives).

<sup>215</sup> Hearing on A.B. 1480 Before the Sen. Judiciary Comm., Endorsement of A.B. 1480 (Cal. May 9, 1979) (statement of James A. Cook) [hereinafter Testimony of James A. Cook] (on file with Cal. State Archives) (endorsing A.B. 1480).

<sup>216</sup> *Id.* at 2.

<sup>217</sup> *Id.*

<sup>218</sup> L. Young, Assemb. Comm. on Judiciary, Bill Digest, A.B. 1480, at 8 (as amended May 14, 1979) [hereinafter Bill Digest] (on file with Cal. State Archives).

<sup>219</sup> See, e.g., Letter from Robert Densmore Brill to Governor Edmund G. Brown, Jr., 3 (June 30, 1979) (on file with Cal. State Archives) (discussing the loss of his daughter when his ex-wife moved long distance).

<sup>220</sup> Letter from Carl A. Bruaw to Assemblymen and women (May 21, 1979) (on file with Cal. State Archives).

legal reforms to restore fathers' right "to an emotional relationship" unique to parenting.<sup>221</sup>

Unlike their predecessors in the 1970s, however, activists in the early 1980s argued for a new concept—joint custody—rather than sole paternal custody.<sup>222</sup> This shift also signaled a new definition of sex equality in child custody law. Equality would mean shared custodial responsibility and rights between parents, rather than legal neutrality as to which an individual parent gained total custody. California's status as a community property state, which divided marital property 50/50 at divorce, facilitated this shift. Activists argued that law reform should make shared custody the default expectation upon divorce just as the law required equal division of community property.<sup>223</sup>

Shared custody also required a commitment to the elimination of judicial bias regarding both mothers and fathers. Instead of presenting mothers as irresponsible parents and fathers as responsible, as many fathers' rights activists had done in the 1970s, joint custody activists in the early 1980s argued for judicial respect of both parents' roles in child rearing. James Cook, for example, publicly opposed gender stereotypes that led judges both to characterize some mothers as "unstable or promiscuous"<sup>224</sup> and to treat most fathers as merely weekend visitors.<sup>225</sup>

Contrary to what some commentators have assumed,<sup>226</sup> fathers' rights activists did not seek joint custody merely to mitigate child support payments or to exert control over their former wives. Considerable evidence exists demonstrating that activists sincerely wanted divorced fa-

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<sup>221</sup> Press Release, N.Y. State League for Equal Justice & Human Rights in Legal Separation and Divorce (n.d.) (on file with CMC at MSU, Richard F. Doyle Papers, Box #1, Folder: Child Custody).

<sup>222</sup> Some activists argued that the movement should focus on achieving sole paternal custody. See Men's Rights Ass'n, Position Paper, *supra* note 194. Others, however, opposed sole paternal custody. On a strategic level, these activists believed it unlikely that courts would ever implement sole custody in favor of fathers. On an ideological level, they believed "there would be little point in actions which would merely shift the deprivation of parental rights from fathers to mothers." Untitled Memorandum, *supra* note 183.

<sup>223</sup> Analysis of SB 477, Child Custody (n.d.) (on file with Cal. State Archives).

<sup>224</sup> Jares, *supra* note 212.

<sup>225</sup> *Id.*

<sup>226</sup> See Subsection III.A.3 for discussion of commentary arguing that fathers' rights activists desired equal control over the major decisions affecting their children and thus, in no small part, over their former wives, without day-to-day caregiving responsibilities.

thers to play greater caregiving roles in their children's daily lives.<sup>227</sup> Nor did fathers' rights activists seek to obtain legal control over children without responsibility for their care. Leaders of the movement defined joint custody to mean both equal physical and legal custody.<sup>228</sup>

Some women's rights activists supported joint custody on the grounds that it advanced sex equality under law.<sup>229</sup> Women's rights activism for equality, particularly in the labor market, fostered a legal and political climate hospitable to fathers' rights claims for joint custody.<sup>230</sup> In addition, joint custody would help to promote a more equitable division of caregiving labor between the sexes. Boalt Hall Law Professor Herma Hill Kay, who had spearheaded the campaign for no-fault divorce reform fifteen years earlier, now argued that joint custody promoted sex equality as well as child welfare. Joint custody advanced the goals of fathers pursuing equality, children seeking association with both parents after divorce, and mothers "seeking to share the burden of child care."<sup>231</sup>

## *2. Social Science and the Child Welfare Argument*

Fathers' rights activists built the case for joint custody by drawing upon an evolving social science literature concerning child welfare. In the late seventies, social scientists began to argue for the importance of paternal custody to child development and familial health following divorce. A sociological study showed that divorced men who obtained partial custody evinced healthier attitudes about themselves and about

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<sup>227</sup> This is not to deny that some divorced men have since used joint custody statutes, and even demands for sole custody, as leverage to bargain down child support payments or negotiate more favorable property settlements.

<sup>228</sup> See, e.g., James A. Cook, *Modern Definitions of Joint Custody* (May 10, 1979) [hereinafter *Cook, Modern Definitions*] (on file with Cal. State Archives); Letter from Mr. and Mrs. Theodore Drew to Senator Jerry Smith (Aug. 13, 1979) (on file with Cal. State Archives).

<sup>229</sup> See, e.g., Barbara Shelly, *DeCrow Airs Support for Equal Parental Rights, Post-Standard* (Nov. 21, 1980) (on file with CMC at MSU, Congress for Men Vertical File (CMVF), *Joint Custody*) (describing the statement of a past NOW president that she agreed with the campaign of Equal Rights for Fathers of New York State for joint custody); Letter from Harriett Buhai, Member, Legislative Comm., Women Lawyers' Ass'n of L.A., to Chairman & Members, Assemb. Judiciary Comm. (June 4, 1979) [hereinafter *Buhai Letter*] (on file with Cal. State Archives).

<sup>230</sup> Mason, *supra* note 5, at 124–25.

<sup>231</sup> Nancy K. Lemon, *Joint Custody as a Statutory Presumption: California's New Civil Code Sections 4600 and 4600.5*, 11 *Golden Gate U. L. Rev.* 485, 497 & n.66 (1981).

women's role in child rearing than did men lacking custody.<sup>232</sup> The famous pediatrician Benjamin Spock emphasized the importance of a close father-child relationship to children and men alike.<sup>233</sup>

In 1979, Mel Roman, a psychology professor at Albert Einstein College of Medicine, and William Haddad, a former director of the Peace Corps, drew on this literature to write a popular tract, *The Disposable Parent: The Case for Joint Custody*. Divorced noncustodial fathers themselves, Roman and Haddad became the most prominent national advocates for joint custody in popular culture.<sup>234</sup> Their highly influential book quickly trumped a 1973 book by Joseph Goldstein, Anna Freud, and Albert J. Solnit, *Beyond the Best Interests of the Child*, which had earlier argued that the stability of a primary relationship with a single parent was most important to child development.<sup>235</sup> By 1979 joint custody appeared a “reasonable solution[,]”<sup>236</sup> when only a few years earlier it was virtually unrecognized by the courts.

Fathers' rights activists leveraged the social science knowledge popularized by Roman and Haddad, among others. They argued that fathers' active presence in their children's lives contributed to healthy child development. The New York State League for Equal Justice and Human Rights in Legal Separation and Divorce argued that sole custody deprived children of their “human right to emotional, intellectual, spiritual and social nurturance by [one] parent.”<sup>237</sup> A group called Divorce AID, Inc., argued that joint custody would, by contrast, improve children's well-being by enabling them to receive greater parental affection and by avoiding the need for children to choose between loyalties to each of their parents.<sup>238</sup> Fathers' rights activists thus coupled the sex discrimina-

<sup>232</sup> See, e.g., Jeanne Lesem, A Sense of Adequacy: Child Custody Can Benefit the Father, L.A. Times, Dec. 3, 1978, at J12.

<sup>233</sup> Benjamin Spock, Joint Custody and the Father's Role, Redbook, Oct. 1979, at 77 (on file with CMC at MSU, Richard Doyle Box #1, Folder: Child Custody).

<sup>234</sup> See Sally Abrahms, The Joint-Custody Controversy, N.Y. Mag., June 18, 1979, at 61.

<sup>235</sup> Id. For an example of how *The Disposable Parent* came to trump *Beyond the Best Interests of the Child* in popular culture, see One Child, Two Homes, Time, Jan. 29, 1979, <http://content.time.com/time/magazine/article/0,9171,912328,00.html>, archived at <https://archive.is/oEgak>.

<sup>236</sup> Loretta Kuklinsky Huerta, Joint Custody: Co-Parenting After Divorce, L.A. Times, Jan. 30, 1989, at E1 (describing a two-day conference at the University of Southern California on “The Divorcing Family” at which no participant objected to the concept of joint custody).

<sup>237</sup> Press Release, supra note 221, at 1.

<sup>238</sup> Jones, supra note 183.

tion frame, which they had deployed since the early 1970s, with a new emphasis on child welfare.

### 3. *Privatized Dependency*

Fathers' rights activists campaigned for joint custody by linking arguments about sex equality and child welfare to the state's interest in privatizing dependence. The lynchpin of activists' arguments was that joint custody would enroll both parents in supporting their children financially. This argument had two parts. To begin, activists argued that legal reforms enabling fathers to fulfill caregiving roles through joint custody would also enable mothers to fulfill breadwinning roles.<sup>239</sup> Because parents would share childcare responsibilities, the parent who would otherwise serve as sole custodian (usually the mother) would have more time to devote to a job. Therefore, she would be able to support her child alongside the traditionally noncustodial parent. Fathers' rights activists argued that joint custody, and mothers' consequent greater ability to support themselves and their children, would mean the state would have to pay lower welfare costs.<sup>240</sup>

In addition, fathers' rights activists and politicians alike argued that joint custody would function as an incentive for men to fulfill child support obligations.<sup>241</sup> In March 1979, state Senator Jerry Smith of Santa Clara County introduced a joint custody bill.<sup>242</sup> Smith justified Senate Bill 477 ("SB 477") using the same arguments in favor of joint custody that fathers' rights activists wielded. Judicial bias in favor of maternal

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<sup>239</sup> Prominent family law scholars likewise argued that sole custody no longer made sense given changing gender roles, when more than half of mothers worked outside the home and many fathers had "flexible work schedules in and outside the home." Henry H. Foster & Doris Jonas Freed, *N.Y. L.J.* 27 (1979) (compiling articles from November and December 1978) (on file with Cal. State Archives); see also Constance R. Ahrons, *The Coparental Divorce: Preliminary Research Findings and Policy Implications* 15 (rev. Dec. 1978) (conference paper, Annual Meeting, Nat'l Council on Family Relations) (arguing that women's liberation was leading women to define themselves by roles other than motherhood and, conversely men to grow increasingly active in parenthood) (on file with Cal. State Archives).

<sup>240</sup> See, e.g., Letter from Clint Jones to Members, Cal. Assemb. Judiciary Comm. (May 12, 1979) (on file with Cal. State Archives).

<sup>241</sup> See, e.g., Jones, *supra* note 183; Press Release, Smith Introduces Bill to Allow Joint Custody of Children (Mar. 1, 1979); see also Letter from James A. Cook, President, The Joint Custody Ass'n, to Members, U.S. Senate (Mar. 30, 1984) [hereinafter Letter from James A. Cook] (on file with CMC at MSU, CMVF, Joint Custody) (arguing that "the most equitable way to collect child support is through joint custody").

<sup>242</sup> Lemon, *supra* note 231, at 491.

custody deprived fathers of the opportunity for custody,<sup>243</sup> and SB 477 would invest joint custody with “equal dignity” to sole custody.<sup>244</sup> Furthermore, SB 477 would “encourage fathers to pay children support because they would not be excluded from control over their children’s upbringing.”<sup>245</sup> Thus Smith made explicit the state’s interest in joint custody as a means to privatize support for children.

#### *4. Fathers’ Rights, Women’s Rights, and Bargaining at Divorce*

Women’s rights activists joined fathers’ rights activists in advocating joint custody legislation in California. But these two constituencies argued vociferously about which of two competing bills should become law. The California Women Lawyers Association and the Women Lawyers Association of Los Angeles both endorsed SB 477.<sup>246</sup> Other prominent supporters included the staff of the L.A. Conciliation Court counseling service, a superior court judge, leading divorce attorneys, and the Chair of the Custody Subcommittee of the San Francisco Bar Association Family Law Section.<sup>247</sup>

In response to SB 477, however, James Cook authored alternative legislation.<sup>248</sup> Cook circulated his proposed language in search of a legislative sponsor.<sup>249</sup> He found a willing partner in Assemblyman Chuck Imbrecht, who had recently gone through his own bitter divorce.<sup>250</sup> In March 1979, only four weeks after the introduction of SB 477, Imbrecht introduced Assembly Bill 1480 (“AB 1480”).<sup>251</sup> AB 1480 quickly garnered the support of Equal Rights for Fathers, USDR, MEN Internation-

<sup>243</sup> S.B. 477 as Amended (Apr. 16, 1979) (on file with Cal. State Archives).

<sup>244</sup> Letter from Senator Jerry Smith to Governor Edmund P. Brown, Jr. (June 22, 1979) (on file with Cal. State Archives).

<sup>245</sup> Press Release, supra note 241; see also Joint Custody: Hearing on S.B. 477 Before the Assemb. Judiciary Comm. (Cal. 1979) (statement for the record by Arthur M. Bodin, Ph.D) (on file with Cal. State Archives) (arguing that S.B. 477 would lead to greater compliance with child support orders and would also reduce child kidnappings).

<sup>246</sup> See Untitled Document Listing Support and Opposition to S.B. 477 (n.d.) [hereinafter Untitled Document] (on file with Cal. State Archives). These organizations initially took no position on S.B. 477 but later advocated this bill over alternative legislation. See Buhai Letter, supra note 229.

<sup>247</sup> Id.

<sup>248</sup> Bill Digest, supra note 218, at 1.

<sup>249</sup> Letter from James A. Cook to Assemblyman Imbrecht (Feb. 8, 1979) (on file with Cal. State Archives); Letter from James A. Cook to J. Anthony Kline (May 15, 1979) (on file with Cal. State Archives).

<sup>250</sup> Thanks to Michael Wald for this insight regarding Assemblyman Imbrecht.

<sup>251</sup> Lemon, supra note 231, at 504–05.

al, and a host of other fathers' rights groups, as well as the California Trial Lawyers Association.<sup>252</sup>

The most important point of disagreement between fathers' rights and women's rights activists regarded the strength of the presumption in favor of joint custody. Women's rights activists supported SB 477 because it established a legislative presumption in favor of joint custody only when both parents agreed to this arrangement.<sup>253</sup> They argued that joint custody would work well only when parents demonstrated the capacity for cooperation.<sup>254</sup> Furthermore, they argued that an absolute presumption would unjustly force an unwilling parent into an ongoing personal relationship with her former spouse.<sup>255</sup> Whereas fathers' rights activists depicted a strong legislative presumption in favor of joint custody as a balm that would soothe the conflict between parents, women's rights advocates predicted it would lead to increased litigation and parental kidnappings.<sup>256</sup> Thus women's rights activists never favored formal equality as an abstract principle and were, instead, always concerned about the effects of equal treatment on women's bargaining power and children's welfare.<sup>257</sup>

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<sup>252</sup> Senate Comm. on Judiciary, *Child Custody Awards—Joint Custody* (n.d.) (on file with Cal. State Archives). Other fathers' rights groups supporting A.B. 1480 included the Family Law Action Council; National Council of Marriage and Divorce Law Reform; United Fathers Organization of America, Inc.; American Divorce Association for Men; Divorce Aid Inc.; Fathers Unified for Equal Rights; Co-Parents International; and Texas Fathers for Equal Rights. See Bill Digest, *supra* note 218, at 5.

<sup>253</sup> See Letter from Herma Hill Kay to Steven P. Belzer (Mar. 15, 1979) (on file with Cal. State Archives) (lobbying for a redrafting of SB 477 to require a presumption favoring joining only when both parents had agreed in writing or in open court to a joint custody plan); Letter from Wendy Buchen, Legislative Chair, Family Serv. Council of Cal., to Governor Edmund G. Brown, Jr. (June 21, 1979) (on file with Cal. State Archives) (arguing that there should be a presumption that joint custody is in the best interests of the child when both parents agree to it).

<sup>254</sup> Buchen, *supra* note 253; Hearing on A.B. 1480 Before Senate Judiciary Comm., at 1 (Cal. Aug. 21, 1979) (statement of Prof. Carol Bruch, Univ. of Cal., Davis, Sch. of Law) (on file with Cal. State Archives).

<sup>255</sup> Hearing on S.B. 477 Before the Assemb. Comm. on Judiciary 1 (Cal. June 6, 1979) (statement of Prof. Brigitte M. Bodenheimer) (on file with Cal. State Archives) ("The interest of the child does not justify such compulsion.").

<sup>256</sup> *Id.* at 2.

<sup>257</sup> For a nuanced discussion of the range of feminist proposal regarding divorce, all of which departed from a strict commitment to formal equality, see Kahn, *supra* note 210, ch.1.

Fathers' rights activists, by contrast, fought for a legislative presumption that joint custody served the best interest of the child *in all cases*.<sup>258</sup> Fathers' rights activists opposed SB 477 because they thought the bill did not contain a sufficiently strong presumption in favor of joint custody.<sup>259</sup> They endorsed AB 1480 because it made joint custody the first preference of the state of California, regardless of parental agreement.<sup>260</sup> In addition, AB 1480 required judges to give reasons for the denial of one parent's request for a joint custody order, as well as reasons for the modification or termination of a joint custody order (unless agreed to by both parents).<sup>261</sup>

Fathers' rights activists recognized that the strong legislative presumption for joint custody contained in AB 1480 would improve the bargaining position of fathers at divorce. A presumption that operated only upon mutual agreement, such as that contained in SB 477, would, by contrast, give more bargaining power to divorcing mothers. It would allow the parent who had a good chance at sole custody (usually the mother) "to veto the . . . preference of a parent seeking joint custody."<sup>262</sup>

The degree of strength in the presumption also posed financial implications. SB 477 would enable women to bargain for higher child support payments in exchange for a shared custody arrangement.<sup>263</sup> A strong presumption in AB 1480, by contrast, would eliminate the "potential for extortion by capturing single-parent custody as a source of support in-

<sup>258</sup> Letter from Rod Bivings, United Fathers Org. of Am., to Richard Doyle (Mar. 1, 1977) (MFM Online, MEN International).

<sup>259</sup> Letter from James A. Cook to Allen Sumner 1 (June 24, 1979) [hereinafter Letter from Cook to Sumner] (on file with Cal. State Archives); Untitled Document, *supra* note 246.

<sup>260</sup> Memorandum from Chuck Imbrecht to Members of Assemb. & Senate (Apr. 6, 1979) (on file with Cal. State Archives).

<sup>261</sup> Senate Comm. on Judiciary, *supra* note 252. S.B. 477, by contrast, required judges to provide a written justification for a joint custody order unless both parents agreed to it. Fathers' rights activists argued that such a requirement was unfair, in the absence of a parallel requirement that judges provide a written justification of sole custody orders. Analysis of S.B. 477, *supra* note 223.

<sup>262</sup> Bill Digest, *supra* note 218, at 9; see also Statement of John R. Alexander, Comm'r, Super. Ct. of the State of Cal. for the Cnty. of L.A. (June 26, 1979) (on file with Cal. State Archives) (arguing that S.B. 477 would allow "a capricious, spiteful refusal to agree . . . [to] thwart the implementation" of a "beneficial" joint custody plan).

<sup>263</sup> The Women Lawyers' Association of Los Angeles argued, conversely, that AB 1480's strong presumption in favor of joint custody would force mothers to trade away child support to maintain sole custody. Letter from Cook to Sumner, *supra* note 259; Buhai Letter, *supra* note 229.

come.”<sup>264</sup> It would also mitigate the need of fathers to pursue extended and expensive litigation to gain equal custody.<sup>265</sup>

Framing the bill from the perspective of fathers’ bargaining interests at divorce enabled fathers’ rights activists to portray its supporters as cooperative and its opponents as obstructionist.<sup>266</sup> Ironically, activists also argued for AB 1480 by suggesting that it would diminish kidnapping. Implicitly recalling earlier activities by activists such as Eugene Austin, they used the threat of extralegal action to catalyze formal legal change.<sup>267</sup>

In addition to the relative strength of each bill’s presumption in favor of joint custody, AB 1480 and SB 477 differed in another key respect. AB 1480 explicitly defined “joint custody” to mean joint legal and physical custody, whereas SB 477 only allowed for this as one interpretation.<sup>268</sup> Cook explained that most fathers’ rights activists did not consider joint legal custody alone to be “real” joint custody.<sup>269</sup> In that case, a father would have “legal liability” for his child, “but no opportunity for shared physical presence that might otherwise moderate . . . the . . . ensuing responsibility that occurs.”<sup>270</sup> Women’s rights activists disputed the motives of fathers’ rights activists, suggesting that they wanted joint legal custody without the day-to-day responsibility of

<sup>264</sup> Bill Digest, *supra* note 218, at 8; see also Motivation (n.d.) (“Individuals preoccupied with the leverage potential for extortion, if the opposite loving parent and child can be separated, are fascinated with the negotiatory potential in sole parent custody.”) (on file with Cal. State Archives).

<sup>265</sup> See Letter from James A. Cook to J. Anthony Kline, *supra* note 249; Letter from Gerald A. McBreen, Nat’l Coordinator, Wash. Chapter, U.S. Divorce Reform, to Jerry Smith, Chairman, Senate Comm. on Judiciary (July 11, 1979) (on file with Cal. State Archives) (“AB 1480 makes Joint Custody available without needless litigation.”); see also Testimony of James A. Cook, *supra* note 215, at 5 (“AB 1480 is the poor family’s opportunity for joint custody rather than merely the wealthy’s . . .”).

<sup>266</sup> Lemon, *supra* note 231, at 528.

<sup>267</sup> See, e.g., Letter from Clint Jones, *supra* note 240 (arguing that A.B. 1480 would prevent “child stealing . . . caused by interference with the natural role of parenting which all human beings have a right and need for”); Letter from George Partis to Jack R. Fenton (May 3, 1979) (on file with Cal. State Archives) (arguing that joint custody was necessary to prevent child kidnapping and murders by noncustodial parents).

<sup>268</sup> Lemon, *supra* note 231, at 505–06.

<sup>269</sup> Cook, *Modern Definitions*, *supra* note 228.

<sup>270</sup> *Id.*; see also Lemon, *supra* note 231, at 516–17 (quoting Letter from James Cook to Supporters (Mar. 11, 1980) (opposing joint legal custody without joint physical custody)); *id.* at 502 (citing the testimony of William Green of Equal Rights for Fathers who opposed legal without physical custody for fathers).

joint physical custody.<sup>271</sup> But the endorsement of AB 1480 by fathers' rights activists suggests many were sincerely interested in the rewards as well as the responsibilities of daily caregiving.

Ultimately, both fathers' rights and women's rights activists had to compromise; however, the former won most of their demands. Mobilization by fathers' rights activists in favor of AB 1480 forced legislators to make concessions. The legislature amended SB 477 to require judges to give a reason for denial of joint custody.<sup>272</sup> That concession won the support of Cook and his organization, Equal Rights for Fathers, for the bill.<sup>273</sup> But USDR continued to oppose SB 477.<sup>274</sup> SB 477 nonetheless passed, and Governor Edmund Brown signed SB 477 into law on July 3, 1979.<sup>275</sup>

Only two months later, however, AB 1480 passed both houses of the state legislature.<sup>276</sup> AB 1480, therefore, superseded SB 477 and became the nation's first statute establishing a strong preference in favor of joint custody. This preference arose from the interaction of several provisions of the bill. The statute's preamble declared, "it is the public policy of this state to assure minor children of frequent and continuing contact with both parents[,] . . . and . . . it is necessary to encourage parents to share the rights and responsibilities of child rearing."<sup>277</sup>

To this end, California was the first state in the nation to incorporate a presumption that joint custody served the best interests of the child when both parents agreed to that arrangement.<sup>278</sup> Moreover, if the judge declined to order joint custody in such cases, he or she had to provide written reasons for doing so.<sup>279</sup> In addition, the statute contained a "friendly

<sup>271</sup> Buhai Letter, *supra* note 229.

<sup>272</sup> Lemon, *supra* note 231, at 498–99; Memorandum from Demos A. Kuchulis to Assemb. Chuck Imbrecht (n.d.) (on file with Cal. State Archives).

<sup>273</sup> Lemon, *supra* note 231, at 502.

<sup>274</sup> Enrolled Bill Memorandum to the Governor, SB 477, July 2, 1979 (on file with Cal. State Archives); see also Allen Sumner, Enrolled Bill Report: S.B. 477 (July 2, 1979) (on file with Cal. State Archives) (describing "a highly vocal coalition" of fathers' rights activists opposed to SB 477).

<sup>275</sup> SB 477 would become effective on January 1, 1980, unless superseded. Lemon, *supra* note 231, at 503–04.

<sup>276</sup> A.B. 1480, 1979–1980 Reg. Sess., at 933 (Cal. 1979) (on file with Cal. State Archives).

<sup>277</sup> Law of Sep. 22, 1979, ch. 915, § 1, 1979 Cal. Stat. 3149, 3149 (amended 1983).

<sup>278</sup> *Id.* at 3150 ("There shall be a presumption, affecting the burden of proof, that joint custody is in the best interests of a minor child . . ."); Schulman & Pitt, *supra* note 204, at 551 n.67.

<sup>279</sup> Law of Sep. 22, 1979, ch. 915, § 4600.5(a), 1979 Cal. Stat. 3149, 3150–51. This strengthened the presumption in favor of joint custody in relevant cases.

parent” provision that required the court, in awarding sole custody, to consider which parent would “cooperate” with the noncustodial parent and allow him or her “frequent and continuous contact” with the child.<sup>280</sup> Together, these two provisions amounted to what legal scholars contemporarily observed as “an implied joint custody presumption in all cases.”<sup>281</sup> If a mother desired sole legal and physical custody, she risked the court’s perception of her as a parent hostile to the father’s interest in custody. She therefore faced a powerful incentive to agree to a father’s interest in joint custody, triggering the formal presumption. Fathers’ rights activists had played a critical role in achieving not only joint custody legislation, but also a bill that favored men’s bargaining position at divorce.<sup>282</sup> In 1983, the legislature further strengthened fathers’ rights by requiring a judge to provide written reasons for the grant or denial of joint custody whenever they were requested, even by one party.<sup>283</sup>

The final bill, however, distinguished between legal and physical custody. It suggested that in cases of legal joint custody, “physical custody shall be shared by the parents in such a way as to assure the child or children of frequent and continuing contact with both parents.”<sup>284</sup> Yet it gave judges the discretion to award joint legal custody without joint physical custody.<sup>285</sup> Indeed, during the 1980s, California judges awarded joint legal custody in seventy-nine percent of divorce cases, although the child lived full-time with the mother in two-thirds of those cases.<sup>286</sup> These results imposed the burdens of daily caregiving on mothers, while nonetheless giving fathers the right to control these women’s childrearing decisions. But it is important to remember, too, that these judicial orders also departed from the vision of fathers’ rights activists such as James Cook, who desired not merely control over but also direct caregiving relationships with their children.

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<sup>280</sup> *Id.* § 4600(a).

<sup>281</sup> Schulman & Pitt, *supra* note 204, at 552.

<sup>282</sup> The final version of the bill reflected some amount of compromise on the part of fathers’ rights activists. It did not include a formal presumption favoring joint custody in all instances. The bill also did not include an evidentiary standard advocated by Cook that would require “conclusive proof” to modify or terminate a joint custody order. Memorandum from Steven P. Belzer to Sen. Jerry Smith on A.B. 1480, at 2 (n.d.) (on file with Cal. State Archives) (arguing that Cook’s proposed standard was “too strong”).

<sup>283</sup> Law of July 16, 1983, ch. 304, § 1, 1983 Cal. Stat. 892, 892 (amending § 4600.5(c)).

<sup>284</sup> Law of Sep. 22, 1979, § 4600.5(a), 1979 Cal. Stat. 3149, 3150.

<sup>285</sup> *Id.*

<sup>286</sup> June Carbone, *The Missing Piece of the Custody Puzzle: Creating a New Model of Parental Partnership*, 39 *Santa Clara L. Rev.* 1091, 1114 (1999).

California's joint custody bill galvanized reforms across the country. Within three years, every state had considered joint custody legislation, and thirty had enacted statutes recognizing this custody arrangement.<sup>287</sup> By 1989, of the thirty-three states that had enacted statutes recognizing joint custody, thirteen included "preferences" or "rebuttable presumptions" in favor of joint custody.<sup>288</sup> These statutes generally limited the presumption formally to instances of agreement between the parties, but also included friendly parent provisions that in effect broadened that presumption.<sup>289</sup>

### *B. The Federalization of Child Support Enforcement*

By the early 1980s, divorced women activists, fiscal conservatives, and social conservatives shared overlapping interests in the divorce bargain. These groups shared a commitment to privatizing responsibility for dependent children, although their reasons differed. Grassroots organizations of divorced mothers, left economically insecure upon the dissolution of their marriages, believed that their former husbands, and not the state, should serve as a source of ongoing economic support.<sup>290</sup> They campaigned for federal-state cooperation in child support enforcement schemes of increasing bureaucratic scope and technological sophistication. Fiscal conservatives, meanwhile, grew increasingly concerned about the expense AFDC posed to federal and state budgets. They, too,

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<sup>287</sup> *Id.* at 1111.

<sup>288</sup> The Joint Custody Ass'n, *Joint Custody; Alive, Well, Thriving* (n.d.) (on file with CMC at MSU, Changing Men Collections Joint Custody Vertical File).

<sup>289</sup> Schulman & Pitt, *supra* note 204, at 552. Different states' legislation fell into four types: (1) providing the judge broad discretion to order joint custody; (2) providing for joint custody only when parties agreed; (3) providing the judge discretion to order joint custody upon the request of one party; and (4) establishing a preference or presumption in favor of joint custody. *Id.* at 546.

<sup>290</sup> Grassroots child support activists and their organizations included Patricia Kelly, president and cofounder of Kids in Need Deserve Equal Rights; Bettianne Welch and Gerald A. Cannizzaro of For Our Children's Unpaid Support, in Virginia; Fran Mattera of For Our Children and Us, Inc., in Long Island; Elaine M. Fromm of the Organization for the Enforcement of Child Support; and Geraldine Jensen, of the Association for Children for Enforcement of Support, in Toledo, Ohio. Crowley, *supra* note 1, at 78-79; Crowley, *supra* note 150, at 145.

saw breadwinning men as a solution. Social conservatives worried about the implications of rising welfare rolls for the demise of marriage.<sup>291</sup>

Political momentum built toward the passage in Congress of the Child Support Enforcement Amendments Act of 1984. The Act would expand a federal-state child support enforcement apparatus from fathers of children on welfare to all parents subject to child support orders. The legislation set forth a federal funding scheme as an incentive to states to enforce child support.

Fathers' rights groups mobilized to shape the legislation in accord with their vision of the divorce bargain. The political momentum toward federal child support legislation made total resistance impossible. Leading fathers' rights activists conceded the legitimacy of the concept of child support enforcement. Still, they argued that enforcement of child support obligations should depend on enforcement of fathers' contact rights respecting their children.

The testimony of fathers' rights activists in January 1984 congressional hearings marked the first time that the movement took part in the federal legislative process. Ken Pangborn, President of Men's Equality Now, International, sounded quite different from former MEN leader Doyle when he testified: "Contrary to the popular belief, there are millions and millions of fathers out there who want to pay child support."<sup>292</sup> Yet divorced fathers did not come to that position solely out of their own sense of responsibility; the movement's evolving stance on child support also reflected accommodation to political realities. Thus, MEN conceded in a written statement, "We have no illusions, we know that this legislation will pass. There is no hope of preventing it."<sup>293</sup> Fathers' rights activists determined it would be fruitless to contest child support obligations entirely and instead "offer[ed] views . . . [to] 'improve'" the Act.<sup>294</sup>

Activists targeted their recommendations in ways that reinforced their own interests in the divorce bargain. First, they argued for policy design that would differentiate child support from alimony funds, expressing concern that mothers would divert child support payments to improve

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<sup>291</sup> Between 1962 and 1980, the welfare rolls increased from 924,000 to 3.3 million persons. The expense of AFDC increased from \$3.7 billion to \$14 billion in constant dollars. See Crowley, *supra* note 150, at 101.

<sup>292</sup> Child Support Enforcement Program Reform Proposals: Hearings Before the Sen. Comm. on Fin., 98th Cong. 245 (1984) [hereinafter Child Support Hearings] (statement of Kenneth R. Pangborn).

<sup>293</sup> *Id.* at 274 (written testimony of MEN International, Inc.).

<sup>294</sup> *Id.* at 266.

their own living standards.<sup>295</sup> Activists' preoccupation with establishing a bright line between child support and alimony exposed anxiety about evolving sexual norms. James Cook suggested, albeit cautiously, that alimony exacerbated women's flight from "commitment"<sup>296</sup> by giving them an alternative "option" other than marital fidelity and maternal devotion.<sup>297</sup> Other activists used more explicit language. MEN described alimony as the mechanism that transformed marriage into a meretricious relationship: "little more than a legitimized delayed prostitution fee."<sup>298</sup> Veteran fathers' rights activist George Doppler blamed women for giving "sexual favors" that led to the growth in single-family households and burdened men with support payments.<sup>299</sup> Thus, even as activists conceded child support obligations, they continued to construct women as sexually immoral.

Second, fathers' rights activists argued that the Enforcement Amendments should link fathers' child support obligations to reciprocal visitation and custody rights. Fathers' rights activists believed that the divorce bargain should contain mutually dependent promises. They contended that mothers' obligation to facilitate fathers' contact with their children, like child support, persisted beyond marriage as a crucial component of the divorce bargain.<sup>300</sup> MEN urged Congress to require states to enforce visitation orders with the same vigilance they did child support orders.<sup>301</sup> James Cook campaigned for a provision that would condition states' receipt of federal enforcement funds on the enactment of joint custody laws.<sup>302</sup> Women's rights activists, by contrast, viewed the divorce bargain as containing separate and independent promises. They agreed that

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<sup>295</sup> Id. at 270.

<sup>296</sup> Id. at 299 (statement of James A. Cook).

<sup>297</sup> Id.

<sup>298</sup> Id. at 272 (written testimony of MEN International, Inc.).

<sup>299</sup> Id. at 440 (written statement of George Doppler).

<sup>300</sup> See id. at 270 (written testimony of MEN International, Inc.) (suggesting that fathers' payment of child support and mothers' facilitation of visitation are reciprocal obligations); see also Letter from James A. Cook, *supra* note 241; Letter from James A. Cook, President, The Joint Custody Ass'n, to Members of the U.S. Senate 2 (Mar. 30, 1984) [hereinafter Cook Letter to Senate] (on file with CMC at MSU) (arguing for enforcement of visitation rights as well as child support obligations).

<sup>301</sup> Child Support Hearings, *supra* note 292, at 249.

<sup>302</sup> See Cook Letter to Senate, *supra* note 300, at 1 (arguing that "the most equitable way to collect child support is through joint custody . . . [but] legislators wish to deal with a symptom (non-payment) rather than with the cure") (on file with CMC at MSU, Changing Men Collections Joint Custody Vertical File).

divorced mothers should comply with visitation orders, but opposed making child support obligations dependent on visitation rights.<sup>303</sup>

The version of the legislation passed by Congress represented a greater victory for women's rights groups than fathers' rights groups. The federal Child Support Amendments established an array of child support enforcement mechanisms. These included garnishment of men's wages to fulfill child support orders; withholding federal tax refunds from delinquent noncustodial parents; requirements that mothers receiving AFDC help states identify paternity of their children as a condition of assistance; and the formation of a national database to increase child support enforcement across state lines. Child support scholar Elise Crowley identified the 1984 Act as an important step in the development of a "well-oiled machine of legal compulsion."<sup>304</sup> The law, however, did not tie child support responsibilities to reciprocal visitation and custody rights, though the states continued to move in the direction of joint custody. Thus federal law intensified child support enforcement, while state law enhanced paternal custody rights.

In the wake of the 1984 legislation, fathers' rights activists used the political connection between child support enforcement and welfare to argue for custody rights. The image of the "deadbeat dad" formed the counterpart in the Reagan era to that of the "welfare queen." Fathers' rights activists both critiqued the political discourse about "deadbeat dads" and deployed it to their own ends. They argued that the fathers accused of irresponsibility toward their children were often not to blame. Instead, they were the victims of divorced mothers and a biased legal system that deprived fathers of visitation and custody rights. Activists explained, "Once you rob someone of the rewards of parenthood (the warmth of a family, the continual experience of a child's growth, the input of one's values, etc.), you rob them of their sense of duty."<sup>305</sup> Just as a mother asked to wash, clean, and cook for a child over whom she had no decision-making control or daily contact would soon "lose [her] motivation . . . and 'default,'" so did men facing the inverse situation.<sup>306</sup>

Yet fathers' rights activists did not only seek to excuse "deadbeat dads," they also used this image to advocate for joint custody. They ar-

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<sup>303</sup> Child Support Hearings, *supra* note 292, at 9 (statement of Rep. Barbara Kennelly); *id.* at 19 (statement of Sen. Nancy Kassebaum).

<sup>304</sup> Crowley, *supra* note 150, at 51.

<sup>305</sup> Legal Beagle, *supra* note 193, at 3-4 (MFM Online, Subsequent Unity Efforts).

<sup>306</sup> *Id.*

gued that when fathers had access to a shared custody arrangement they showed about a ninety percent compliance rate with child support orders.<sup>307</sup> They further argued that the law should treat the obligation of a mother to provide a father access to his children in the same manner as they treated the obligation to pay support. Thus “parenting arrearages” should receive the same treatment as “money arrearages.”<sup>308</sup>

Fathers’ rights activists conceptualized child support as a private rather than public obligation. Activists viewed child support as a bargain between themselves and their ex-wives. They agreed to privatize dependence in exchange for custody rights and called upon the state to facilitate this bargain. Yet they resented the use of child support funds under the 1984 legislation to reimburse state governments for welfare payments. “When [an] ex-wife divorces and goes on welfare,” a family reform newsletter explained, “federal laws require her to sign her support rights over to the welfare department. . . . [S]he . . . assigns a replacement paternal functionary in the . . . Federal government with defacto [sic] rights to [her ex-husband’s] assets and earning power.”<sup>309</sup> Even as the fathers’ rights movement fought for an activist state that would enhance their custody rights within the divorce bargain, they continued to subscribe to conceptions of familial privacy that underpinned minimal welfare state supports for mothers and children.

#### IV. THE LEGACIES OF THE DIVORCE BARGAIN

The bargain catalyzed an incomplete revolution in gender roles within middle-class families, while deepening financial insecurity for low-income families and injuring father-child relationships within those families. The divorce bargain enabled middle-class men to recapture a primary reward of the marital bargain—a close relationship with their children. In liberalizing divorce and child custody laws, the divorce bargain constructed divorced fathers as potential caregivers and divorced mothers as presumptive breadwinners. The fathers’ rights movement, however, did not challenge the gendered division of labor within marriage; indeed, many activists continued to view gender hierarchy as natural and desirable. By making divorce laws sex neutral without fully transform-

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<sup>307</sup> Fathers’ Unity Convention, Gaithersburg, Maryland, May 3–4, 1985, Report of Seminar on Child Support 8 (MFM Online, Subsequent Unity Efforts).

<sup>308</sup> *Id.* at 9.

<sup>309</sup> *Id.*

ing gender roles within marriage, the divorce bargain deepened the economic insecurity of poor mothers and children.

While broadening the range of identities available to middle-class men, the divorce bargain hindered expansive conceptions of fatherhood within poor families. Tying paternal responsibilities to paternal rewards advanced middle-class men's caregiving interests. But this reciprocal conception of fathers' rights undermined poor men's capacity to experience fatherhood as a relationship defined by caregiving rather than breadwinning. Child support enforcement represents broader neoliberal trends: private responsibility for child welfare and families' turn to debt to meet the gaps created by cutbacks in social welfare. Yet child support obligations drive low-income men away from their children rather than supporting paternal relationships. Ultimately, the divorce bargain never disrupted the state structures that make marriage, rather than state support, the primary means for supporting dependent children. The persistence of the marital ideal, which shaped the ideologies of the fathers' rights movement and left an indelible imprint on the divorce bargain, only deepens the economic insecurity of low-income families.

*A. The Law of Marital Dissolution and Gender Roles Within Middle-Class Families*

The divorce bargain expanded the masculine identities available to middle-class white men under law. In the 1960s, fathers' rights activists conceived of themselves as authoritarian patriarchs who enforced "family law" within the domestic sphere.<sup>310</sup> In the 1970s, activists began to emphasize the affective dimensions of fatherhood and argued that men could relate to their children as loving fathers rather than just "cash registers."<sup>311</sup> By the 1980s, many fathers' rights activists began to understand themselves as daily caregivers for their children. Joint custody advocates insisted that fathers should fulfill daily caregiving roles in their children's lives.<sup>312</sup> They demanded legal change that would facilitate their ability to parent in a richer and more sustained manner than possible when acting in the role of "weekend visitor."<sup>313</sup>

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<sup>310</sup> See supra notes 48–49 and accompanying text.

<sup>311</sup> See supra notes 159–60 and accompanying text.

<sup>312</sup> Letter from David L. Levy to Richard F. Doyle 1 (Feb. 8, 1986) (MFM Online, Subsequent Unity Efforts).

<sup>313</sup> See supra note 225 and accompanying text.

The fathers' rights movement, however, never wholly shed its adherence to conceptions of gender differentiation and hierarchy within marriage. Throughout its history, fathers' rights activism was inextricably intertwined with the larger men's rights movement that sought to recover male privileges associated with the marital bargain. By the mid-1980s, the tensions between the new, more expansive conceptions of masculinity and older, more constrained conceptions had triggered splits in the movement. If men were caregivers like women, then what preserved the unique characteristics of fatherhood? Activists debated the answer to this question in the context of intensifying cultural and political activism for gay and lesbian rights as well as feminist demands for parental accommodation.

Fathers' rights activists in the mid-1980s assumed a conflicted stance on homosexuality and, in particular, the custody rights of gay fathers. In the 1960s, fathers' rights theorists had vilified homosexuality without any reservation. By the mid-1980s, some fathers' rights activists embraced equal custody rights for gay fathers.<sup>314</sup> Yet such support for gay fathers' rights led others within the movement to accuse it of "advocat[ing] homosexuality . . . and . . . little else."<sup>315</sup> The criticism prompted Richard Doyle to urge "vigilan[ce]" against "an invasion by the homosexual element and/or their apologists."<sup>316</sup> Heterosexual fathers' rights activists walked a fine line between advocating formal equality for gay fathers and a profound fear of what such legal recognition might mean for masculinity.

Fathers' rights activists also disputed whether to ally with women's rights activists advocating greater public entitlements for parents. Doyle bemoaned that "those who make big noises fighting for such silly things as diaper changing facilities at airports demean[e]d" the fathers' rights movement.<sup>317</sup> He worried that activists "little different than male feminists" were sowing a path to sex equality that sacrificed men's masculin-

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<sup>314</sup> According to Doyle, many fathers' rights groups "help[ed] homosexual men in their custody and other civil rights battles," even as they refrained from endorsing homosexuality. *Legal Beagle*, supra note 193, at 10.

<sup>315</sup> *Id.*

<sup>316</sup> Richard Doyle, Open Letter to the Men's Movement, *Legal Beagle: A Family Reform Newsletter*, Feb. 1986, at 2 (on file with MFM Online, Subsequent Unity Efforts) (reasoning that homosexuals were not truly "of" the masculine gender and thus had no legitimate authority to join a movement advancing men's interests).

<sup>317</sup> *Id.*

ity.<sup>318</sup> Children's Rights Center founder David Levy, however, criticized Doyle for alienating potential allies.<sup>319</sup> The seemingly mundane topic of diapers held deep importance. It demonstrated the ways in which, by adopting the legal frame of sex equality and advocating joint custody, the fathers' rights movement had changed middle-class men's gender identity.

Ultimately, the divorce bargain posed an ambivalent legacy for gender equality within middle-class families. By promoting joint custody as well as sex-neutral spousal maintenance, it offered an opportunity for divorced mothers and fathers to share childrearing and breadwinning. The bargain also gave divorced fathers the chance to reap more of the emotional rewards of childrearing. Therefore, the bargain liberalized gender roles within divorced families, offering a model of a more egalitarian family structure.

Liberalizing gender roles at divorce, however, veiled rather than deconstructed the gendered division of labor within marriage. Minimizing male alimony obligations produced considerable economic hardship for women and children upon divorce.<sup>320</sup> Mothers who had served as primary caregivers during marriage had often reduced their investments in human capital as a consequence. Therefore, they suffered a competitive disadvantage when divorce forced them to reenter the labor market.<sup>321</sup> In sum, sex neutrality in the law of marital dissolution failed to realize substantive gender equality but rather exacerbated economic inequality between men and women.

In the late 1980s, feminist legal theorists reevaluated the interaction between women's rights advocacy, fathers' rights activism, and trends toward sex equality in family law. Some feminist theorists developed a

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<sup>318</sup> Id. ("These people would liberate us alright, *from our manhood.*").

<sup>319</sup> Letter from David L. Levy to Richard F. Doyle, *supra* note 312, at 1 (referencing Karen De Crow, the president of NOW from 1974 to 1977, who had since taken a political stance in favor of the fathers' rights movement).

<sup>320</sup> See Weitzman, *supra* note 105, at 355. Although scholars later questioned Weitzman's statistics, scholarship has also reaffirmed the broad claim about the differential consequences of divorce for men and women. Compare Saul D. Hoffman & Greg J. Duncan, What Are the Economic Consequences of Divorce?, 25 *Demography* 641, 641 (1988) (questioning the magnitude of Weitzman's findings), with Rosalyn B. Bell, Alimony and the Financially Dependent Spouse in Montgomery County, Maryland, 22 *Fam. L.Q.* 225, 284 chart 6 (1988) (showing a significant disparity in post-divorce per capita income between men and women).

<sup>321</sup> See Weitzman, *supra* note 105, at 204–07 (discussing the difficulties of longtime housewives in finding employment after divorce and the reasons why they are often underemployed).

three-pronged critique of the joint custody revolution. First, they argued that the joint custody regime devalued women's caregiving labor. Martha Fineman famously wrote that joint custody "neutered" mothers of their difference.<sup>322</sup> Formal equality in custody law veiled the reality that mothers performed most of the caregiving of children, experiencing the rewards and burdens of that labor to a far greater extent than did fathers.<sup>323</sup> Mary Becker built upon Fineman's work, arguing that joint custody ignored the reproductive labor of women—pregnancy, childbirth, and breastfeeding—as well as the greater emotional labor that mothers, compared to fathers, invested in childrearing.<sup>324</sup>

Second, feminist theorists argued that the advent of joint custody preferences undermined mothers' bargaining power at divorce. In an influential 1979 law review article, Robert Mnookin argued that a sex-neutral custody standard created an incentive for the parent with a greater socio-emotional attachment to her child to trade away child support obligations and property entitlements to avoid trial.<sup>325</sup> Extending Mnookin's critique, feminist theorists argued that judicial bias compounded these bargaining effects. When guided by a sex-neutral custody standard, judges favored fathers. Judges rewarded men's greater earning power, but viewed working mothers as shirking their parental responsibilities.<sup>326</sup> Joint custody, furthermore, increased the capacity for men to engage in "custody blackmail."<sup>327</sup> A mother might agree to joint custody, even when it did not serve her child's best interests, out of fear of losing total custody of the child at trial.<sup>328</sup>

Third, feminist scholars argued that formal equality in custody law reinforced men's control over women and children after divorce.<sup>329</sup> Joint legal custody gave men rights of surveillance over the mothers of their

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<sup>322</sup> Martha Albertson Fineman, *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies* 70, 75 (1995).

<sup>323</sup> See *id.* at 87–89; Martha Albertson Fineman, *The Neutered Mother*, 46 *U. Miami L. Rev.* 653, 655 (1992).

<sup>324</sup> Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 *S. Cal. Rev. L. & Women's Stud.* 133, 142–53 (1992).

<sup>325</sup> Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *Yale L.J.* 950, 978–79 (1979) (using divorce as a case study to demonstrate that legal default rules influence bargaining outside formal legal forums).

<sup>326</sup> See Rena K. Uviller, *Fathers' Rights and Feminism: The Maternal Presumption Revisited*, 1 *Harv. Women's L.J.* 107, 122 (1978).

<sup>327</sup> See Mary Ann Mason, *Motherhood v. Equal Treatment*, 29 *J. Fam. L.* 1, 26–27 (1990).

<sup>328</sup> Schulman & Pitt, *supra* note 204, at 550–51.

<sup>329</sup> Fineman, *supra* note 105, at 89, 96 (1991).

children.<sup>330</sup> Such control was especially troubling in the context of sexual violence, spousal and child abuse, and threats of legal intimidation.<sup>331</sup> Joint legal custody in the absence of truly equal physical custody, furthermore, gave men authority in decision making regarding their children, while women continued to bear disproportionate responsibility for caregiving.

Writing in the European context, Selma Sevenhuijsen recognized the feminist critique of formal equality in family law as itself historically constituted. The shift in the 1980s to arguing for mothers' rights represented a political defense against the "patriarchal reconstruction."<sup>332</sup> Yet the portrayal of mothers as superior nurturers and of fathers as "lusting for power," Sevenhuijsen argued, also represented "a concession to traditionalism."<sup>333</sup> Criticism of joint custody formed part of a broader critique among feminist legal theorists in the 1980s about what they perceived as an earlier generation of feminist reformers' mistaken focus on same treatment.<sup>334</sup>

Legal historians today, however, demonstrate that feminist legal activism in the late 1960s and 1970s encompassed a far broader agenda than formal equality.<sup>335</sup> Feminist activists attempted to deconstruct gen-

<sup>330</sup> Selma Sevenhuijsen, *Fatherhood and the Political Theory of Rights: Theoretical Perspectives of Feminism*, 14 *Int'l J. Soc. L.* 329, 337 (1986).

<sup>331</sup> *Id.* In the mid-1980s, the issues of child abuse and domestic violence became central to debates whether fathers' rights advanced sex equality and child welfare or harmed mothers and children. See Michele A. Adams, *Framing Contests in Child Custody Disputes: Parental Alienation Syndrome, Child Abuse, Gender, and Fathers' Rights*, 40 *Fam. L.Q.* 315, 324–32 (2006) (describing the development in 1985 of a theory of "parental alienation syndrome" and its subsequent adoption by fathers' rights activists as a counter-frame to that of child abuse alleged by mothers).

<sup>332</sup> Sevenhuijsen, *supra* note 330, at 336.

<sup>333</sup> *Id.*

<sup>334</sup> The literature argued that liberal feminist reformers had pursued formal equality that, when overlaid upon structures of inequality, entrenched women's subordination. Formal equality overlaid upon the gendered division of labor and discrimination against women in the labor market could never realize substantive equality, except for the most privileged classes of women, and even operated to worsen women's socioeconomic status. See Fineman, *supra* note 105, at 36–52 (arguing that liberal feminists had pursued formal equal treatment that, when overlaid on material inequalities, deepened women's economic vulnerability at divorce).

<sup>335</sup> See Serena Mayeri, *Reasoning from Race: Feminism, Law, and the Civil Rights Revolution* 6–7 (2011) (arguing that feminists' "intersectional" vision of race and sex equality, in the course of specific legal battles, yielded a "more limited version of legal equality, largely divorced from race and reproduction"); Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 *Harv. C.R.-C.L. L. Rev.* 415, 417–19 (2011) (arguing that feminists in the late twentieth century endeavored to shift responsibility for the

der roles not only by pursuing sex neutrality under law but also by pursuing affirmative state entitlements to universal childcare, paid parental leave, and broader social insurance systems.<sup>336</sup> The narrowing of the feminist legal agenda resulted from oppositional economic, political, and social forces rather than from inherent ideological limitations.<sup>337</sup> This broader historical view of feminist legal activism suggests that we should likewise rethink feminist advocacy for joint custody. This Article has shown that feminists pursued legal recognition of joint custody only when both parents agreed to this form of custody arrangement. Such reforms would have minimized the concerns about custody and male control and violence that theorists subsequently voiced.

Similarly, historical analysis offers a richer picture of fathers' rights activism than that painted by the feminist theory that followed in the wake of the divorce bargain. This history shows us that fathers' rights activism represented at once subversion of traditional gender norms and the reassertion of patriarchy. Fathers' rights activists helped to make caregiving and not only breadwinning central to the definition of middle-class fatherhood. To the extent that fathers' rights activists sought to take responsibility for the daily custodial care of their dependent children, they engaged in what Laura Kessler has termed "transgressive caregiving."<sup>338</sup> Some activists, of course, might have pursued joint physical custody of their children but then expected second wives to undertake the bulk of caregiving responsibilities, or allowed their children's biological mothers to retain physical custody *de facto*. An empirical analysis of fathers' rights activists' caregiving patterns following divorce lies beyond the scope of this Article. Yet the available evidence gleaned from comprehensive research into the movements' archival record suggests that fathers' rights activists genuinely pursued both the rewards and responsibilities of caring for their children.

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costs of reproduction from the private family to the larger society); Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. Rev. 83, 86, 88 (2010) (arguing that Ruth Bader Ginsburg's legal vision encompassed a broad challenge to sex-role stereotypes).

<sup>336</sup> See Dinner, *supra* note 335, at 442–43.

<sup>337</sup> See, e.g., Deborah Dinner, *Strange Bedfellows at Work: Neomaternalism in the Making of Sex Discrimination Law*, 91 Wash. U. L. Rev. 453, 454 (2014) (arguing that market conservatism and social conservatism constrained feminists' vision for equality for pregnant workers).

<sup>338</sup> Laura T. Kessler, *Transgressive Caregiving*, 33 Fla. St. U. L. Rev. 1, 44–49 (2005) (arguing that men who engage in carework within the family resist the family-wage ideal and patriarchal family structures).

For the reasons articulated by feminist theorists in the 1980s and 1990s, however, fathers' rights advocacy also maintained core elements of patriarchy. By failing to account for the gendered division of labor within marriage, fathers' rights activism devalued women's caregiving labor, diminished mothers' bargaining position at divorce, enabled men's continuing control over ex-spouses, and deepened economic inequality between men and women at divorce. Indeed, most elements of the movement evolved in ensuing decades toward extreme antifeminist and misogynist positions, often arguing that women manipulated accusations of domestic violence and child abuse to advance their custody and property interests at divorce.<sup>339</sup> How can we account for the apparent paradox created by the divorce bargain—its simultaneous commitments to equality under law and patriarchy? In part, a historical perspective simply demonstrates the complexities of social and legal change, which is never one-dimensional in its consequences. Fathers' rights activism represented both a liberation movement for men and a conservative backlash against feminism, women's labor-market participation, and rising divorce rates. It simultaneously advanced liberal legal reforms and sought to recapture privileges men had earlier enjoyed within a legal regime that enforced formal gender hierarchy.

Yet the paradox of the divorce bargain also encourages family law scholars today to imagine the contours of a different, hypothetical fathers' rights movement. What socioeconomic changes would have resulted from a fathers' rights movement that pursued both the liberalization of gender roles upon divorce and greater public responsibility for social reproduction? Such fathers' rights activism would have overlapped with a broader range of feminist activism not only in the pursuit of sex neutrality under law but also in the pursuit of affirmative welfare-state entitlements. Federal and state legislation that realized these broader goals would have disrupted the gendered division of labor within marriage. Accordingly, sex neutrality within divorce and child custody laws might have further transformed gender roles without entrenching socioeconomic inequality between women and men. But the gender ideologies of the fathers' rights movement, which never repudiated the hierar-

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<sup>339</sup> See Kelly Allison Behre, *Digging Beneath the Equality Language: The Influence of the Fathers' Rights Movement on Intimate Partner Violence Public Policy Debates and Family Law Reform*, 21 *Wm. & Mary J. Women & L.* 525, 534–45 (2015) (describing how fathers' rights groups use a rhetoric of gender symmetry to undermine women's allegations of intimate partner violence).

chical marital bargain, led it to oppose public responsibility for social reproduction.

### *B. Welfare State Structures and Poor Families*

Although the divorce bargain did not apply by its own terms to never-married parents and their children, it nevertheless shaped the welfare state structures regulating these families.<sup>340</sup> The divorce bargain affirmed child support, rather than public assistance, as the normative source of provisioning for children outside of intact marriages. Accordingly, the bargain helped to legitimize cutbacks in welfare supports for mothers and children.<sup>341</sup> It also legitimized a federal-state child support enforcement apparatus that seeks to coerce low-income men, in particular, to assume economic responsibility for their biological children.

An extensive literature demonstrates that the lack of public support for families contributes to economic insecurity and poverty among mothers and children.<sup>342</sup> So long as dependence on breadwinning males remains normative, dependence on the state remains stigmatized. Law keeps state supports for poor mothers and their children at levels purposefully designed *not* to lift women and children out of poverty.

A more nascent literature has also begun to explore the ways in which private responsibility for dependence affects low-income fathers as well as mothers and children. Child support enforcement imposes a middle-

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<sup>340</sup> As increasing numbers of children are born outside marriage, the laws and policies regulating unmarried families are the subject of renewed scholarly attention. See generally Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 *Stan. L. Rev.* 167, 172–73 (2015) (arguing that private family law hurts relationships within nonmarital families and that family law should instead promote coparenting by nonmarried, biological parents); Serena Mayeri, *Foundling Fathers: (Non)-Marriage and Parental Rights in the Age of Equality*, 125 *Yale L.J.* (forthcoming 2016) (examining the process by which unmarried fathers' rights moved from the cutting-edge of equal protection doctrine to a position outside constitutional law).

<sup>341</sup> My argument is not that the divorce bargain played a causal role in the backlash against the maternalist welfare state. Instead, I am arguing that the bargain represented one of the consequences of this backlash and also legitimized welfare cutbacks by providing (in theory, at least) an alternative means of support for dependent children.

<sup>342</sup> See, e.g., Maxine Eichner, *The Supportive State: Families, Government, and America's Political Ideals* (2010); Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (2004); Linda C. McClain, *The Place of Families: Fostering Capacity, Equality, and Responsibility* (2006); Marcia J. Carlson et al., *Coparenting and Nonresident Fathers' Involvement with Young Children After a Nonmarital Birth*, 45 *Demography* 461, 473–74 (2008), *cited in* Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 *Stan. L. Rev.* 167 (2015).

class breadwinner model on poor and working-class fathers. As legal scholars, including Solangel Maldonado, Ann Cammett, and Leslie Harris observe, this system harms rather than nurtures paternal-child relationships in low-income families and contributes to poor men's economic insecurity. The majority of men who do not comply with formal child support orders cannot afford to do so. Many noncompliant fathers lack consistent, well-paying employment. Men with incomes less than \$10,000 comprise half of all obligors and owe 70% of all arrears.<sup>343</sup> Although cultural and policy discourses stigmatize poor and never-married fathers—disproportionately men of color—as “deadbeat dads,” in reality these fathers are “deadbroke.”<sup>344</sup>

Empirical studies demonstrate that low-income fathers who do not comply with child support orders nevertheless contribute to the household economies of mothers and to their children's upbringing.<sup>345</sup> The most comprehensive recent study suggests that 35% of poor, nonresident fathers offer informal cash payments to their children's mothers outside of formal child support mechanisms, and 44% offer in-kind support.<sup>346</sup> For example, they may contribute diapers, toys, or clothing. These objects carry symbolic significance as gifts and also provide an opportunity to combine gift giving with a visit to the child.<sup>347</sup> Many low-income fathers also engage in parenting activities such as taking children to and from school and doctors' appointments.<sup>348</sup>

Low-income African American fathers, in particular, spend significant time caring for their children. Indeed, civil rights scholar Dorothy Roberts suggests that these men belie the stereotype that they are “absent fathers,” offering their children more emotional and social support, on average, than middle-class white fathers.<sup>349</sup> Empirical data confirm that nonresidential black fathers are more involved with their children than nonresidential white or Latino fathers.<sup>350</sup> Among never-married

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<sup>343</sup> Leslie Harris, *Questioning Child Support Enforcement for Poor Families*, 45 *Fam. L.Q.* 157, 164 (2011).

<sup>344</sup> Ann Cammett, *Deadbeats, Deadbroke, and Prisoners*, 18 *Geo. J. Poverty L. & Pol'y* 127, 130 (2011); Maldonado, *supra* note 20, at 994–95, 1000–01, 1003–04.

<sup>345</sup> Harris, *supra* note 343, at 164; Maldonado, *supra* note 20, at 995–96.

<sup>346</sup> Harris, *supra* note 343, at 164.

<sup>347</sup> Maldonado, *supra* note 20, at 1004–06.

<sup>348</sup> *Id.* at 1006–07.

<sup>349</sup> See Dorothy Roberts, *The Absent Black Father*, in *Lost Fathers: The Politics of Fatherhood* 145, 153 (Cynthia R. Daniels ed., 1998).

<sup>350</sup> Carlson, *supra* note 342, at 473–74.

parents, mothers serve as what sociologist Kathy Edin describes as “gatekeepers” for fathers’ access to their children.<sup>351</sup> Unwed African American fathers show better capacity to negotiate relationships with their children’s mothers following a breakup and are thus able to maintain closer relationships with their children.<sup>352</sup>

Child support enforcement mechanisms, however, ignore low-income fathers’ contributions to childrearing and, furthermore, injure existing paternal-child relationships.<sup>353</sup> Criminal enforcement of child support may drive poor fathers into hiding because of the risk of incarceration; such policies thereby discourage paternal-child contact.<sup>354</sup> In addition, poor fathers forced to make formal child support payments will no longer be able to afford the in-kind contributions that lead to more frequent visits and greater paternal involvement.<sup>355</sup> Last, enforcement mechanisms that require women to cooperate with state welfare agencies as a condition of receiving benefits generate conflict between mothers and fathers that interferes with father-child contact.<sup>356</sup>

The child support system, in sum, is entrenched in neoliberal trends toward welfare cutbacks, growing debt among low-income families, and the rise of the carceral state. Political economists Genevieve LeBaron and Adrienne Roberts argue that various debt mechanisms—including mortgage, health care, and credit card debt—have arisen to contain and manage the crisis in social reproduction ensuing from retrenchment of welfare and social insurance systems. The use of debt to finance daily living needs and maintain families’ standard of living, in turn, has contributed to the growth of a carceral state.<sup>357</sup> More than one-third of U.S. states allow creditors to jail persons owing debt. Between 2010 and 2012, judges granted more than 5,000 warrants to jail debtors, the majority of whom owed small debts between \$200 and \$4,000.<sup>358</sup> Debtors ow-

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<sup>351</sup> Kathryn Edin & Timothy J. Nelson, *Doing the Best I Can: Fatherhood in the Inner City* 169, 207–08 (2013).

<sup>352</sup> See *id.* at 215.

<sup>353</sup> Recognizing the detrimental effects of enforcement on father-child relationships, the Office of Child Support Enforcement has recently begun to develop more positive ways to engage fathers and support their involvement with their children. Huntington, *supra* note 340, at 229–30.

<sup>354</sup> Maldonado, *supra* note 20, at 1014.

<sup>355</sup> *Id.* at 1013.

<sup>356</sup> *Id.* at 1015.

<sup>357</sup> Genevieve LeBaron & Adrienne Roberts, *Confining Social Insecurity: Neoliberalism and the Rise of the 21st Century Debtors’ Prison*, 8 *Pol. & Gender* 25, 26–28 (2012).

<sup>358</sup> *Id.* at 41.

ing child support arrears account for a non-negligible proportion of men jailed as a result of their debt.<sup>359</sup> Child support obligations also force low-skilled fathers into the underground economy to earn greater income, which can additionally lead to greater incarceration rates.<sup>360</sup> While in jail, fathers continue to accrue child support debt, which cannot be discharged retroactively by courts.<sup>361</sup> In some states, incarceration also does not justify prospective modification in child support obligations.<sup>362</sup> In sum, by reinforcing the political legitimacy of child support enforcement as a condition of the reform in child custody laws, the divorce bargain advanced the caregiving interests of middle-class fathers at the expense of the caregiving interests and socioeconomic security of poor fathers.

The divorce bargain ultimately fortified core dimensions of the marital bargain. Both bargains made private breadwinning the normative source of provisioning for dependent children. Economic support remained the mechanism by which middle-class men accessed state protection for familial relationships. Yet this arrangement left low-income families with minimal state protections for paternal-child relationships and simultaneously without robust mechanisms of support for mothers caring for dependent children.

Indeed, by helping to foreclose a more robust maternalist welfare state, the divorce bargain also laid a building block for the reforms of the mid-1990s that further dismantled maternalist welfare programs.<sup>363</sup> Because the divorce bargain had preserved private responsibility for dependence, it was not too far a leap from the divorce bargain to renewed advocacy for marriage as an antipoverty solution.<sup>364</sup> In the mid-1990s, social conservatives revitalized the ideal of the marital bargain and attempted to impose this familial structure on low-income families as an economic as well as a social strategy. They attributed social decline, in-

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<sup>359</sup> For example, failure to meet debt obligations arising from court or supervision fees, victim restitution, and child support accounts for twelve percent of probation revocations. *Id.* at 43.

<sup>360</sup> Cammett, *supra* note 344, at 146–47.

<sup>361</sup> Half of all inmates have open child support orders. *Id.* at 148–50.

<sup>362</sup> *Id.* at 15–52.

<sup>363</sup> See Linda C. McClain, *Federal Family Policy and Family Values from Clinton to Obama, 1992–2012 and Beyond*, 2013 *Mich. St. L. Rev.* 1621, 1638–46.

<sup>364</sup> See Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 *Calif. L. Rev.* 1647, 1649–50, 1674–75 (2005).

cluding so-called welfare dependence, to the “divorce culture” and advocated the restoration of the marital bargain as a cure for a sick society.<sup>365</sup>

Social conservative advocacy for marriage in the mid-1990s represented both departure from and continuity with fathers’ rights advocacy. Whereas the fathers’ rights movement premised the divorce bargain on the liberalization of gender roles at divorce, conservatives advocated a return to marriage defined by biologically essentialist gender roles.<sup>366</sup> At the same time, however, the social conservative narrative of the mid-1990s built on the links that the fathers’ rights movement forged between paternal presence, child development, sexual morality, and social stability.<sup>367</sup> Likewise, the connections which fathers’ rights activists drew between sexual morality and the marital bargain also laid the groundwork for arguments that fatherhood within heterosexual marriage channeled male sexual energies and disciplined men who would otherwise cause social disruption.<sup>368</sup> While the divorce bargain helped to catalyze a transformation in the private family law system, it ultimately reinforced a public family law system that disadvantages nonmarital families.

#### CONCLUSION

The divorce bargain reconstructed the dual family-law system in the late twentieth century by contributing to neoliberal trends in welfare state policy. The erosion of the marital bargain produced two interrelated crises: It left the state wrestling with the question of how to privatize the dependence of mothers and children, and it left divorced men struggling to redefine their relationship to the state. Over the course of the

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<sup>365</sup> See David Blankenhorn, *Fatherless America: Confronting Our Most Urgent Social Problem* (1995); David Popenoe, *Life Without Father: Compelling New Evidence that Fatherhood and Marriage Are Indispensable for the Good of Children and Society* 13–15 (1996).

<sup>366</sup> They subscribed to a bio-evolutionary model in which women cared for their children naturally. See Blankenhorn, *supra* note 365, at 54–55, 215–17. They also suggested that law and social persuasion had to coerce men into taking financial responsibility for their offspring. *Id.* at 124–47; Popenoe, *supra* note 365, at 32.

<sup>367</sup> See Blankenhorn, *supra* note 365, at 25–48. See generally Popenoe, *supra* note 365, at 164–90 (arguing that evolution has instilled men with both an inherent capacity to father and with a tendency toward promiscuity and that, as a result, marriage is necessary to encourage paternal investment in children).

<sup>368</sup> See Blankenhorn, *supra* note 365, at 171–84; Popenoe, *supra* note 365, at 109–38.

1970s and 1980s, a federal-state child support enforcement apparatus developed with the goal of reprivatizing the dependence of children living outside the marital bargain. The child support enforcement apparatus helped to fuel fathers' rights activism for legal reforms that would guarantee the rewards of fatherhood along with its responsibilities. Activists, in turn, deployed a political interest in child support to argue for child custody reforms. From the 1960s to the 1980s, the fathers' rights movement negotiated the divorce bargain in conflict and collaboration with women's rights activists and federal and state legislators.

By the close of the Reagan era, the divorce bargain recaptured a structural dynamic at the core of the marital bargain. Middle-class men promised to privatize dependence in exchange for legal protection of "private" relationships. This new bargain aligned divorce and child custody laws with principles of sex neutrality and formal equality. It replaced sex-specific alimony with more limited, sex-neutral spousal maintenance; and it substituted legislative presumptions favoring joint custody for common law presumptions favoring maternal custody. Yet the liberalization of gender roles upon divorce did little to disrupt gender hierarchy within marriage. The fathers' rights movement modeled a commitment to active fatherhood defined by caregiving as well as breadwinning. Throughout its history, however, elements of the movement valorized a marital bargain premised on gender hierarchy and, accordingly, the fathers' rights movement never joined feminists in seeking a transformation in the gendered division of labor within marriage.

The divorce bargain, furthermore, liberalized gender roles within private family law by reinforcing trends within public family law toward minimal state support for families. The divorce bargain, therefore, contributed to class-differentiated experiences of fatherhood. It advanced middle-class men's caregiving interests, transforming middle-class fathers from authoritarian patriarchs to loving caregivers. The divorce bargain, however, constrained the capacity for poor men to place caregiving at the heart of fatherhood. It also deepened the insecurity of low-income families by making support for dependent children the responsibility, not of the state, but of parents who themselves faced increasingly precarious financial conditions. This history suggests that efforts to liberalize private family law will not disrupt gender and class inequalities unless they also transform public family law.