

Abolishing the Family

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Family law scholarship is replete with calls for reform. Yet inequalities based on gender, race, and class within and across families remain intractable. What if, instead of reforming the family, we abolish it?

Abolishing the family might sound like a startling idea from a family law perspective, especially after decades of efforts by family law scholars and reformers to expand the legal understanding of “family.” But the proposal is hardly new. In this Article, we lay the groundwork for integrating family abolitionist ideas, which have until now mostly surfaced in disciplines outside of law, into family law scholarship.

While family abolition in many ways represents a radical departure from current family law approaches, we show that abolitionist thinking is not wholly unprecedented even in this setting. Our analysis provides a taxonomy synthesizing legal and non-legal critiques that strike at core features of the family. In particular, we identify five theoretical models that we discover in the existing literature and that we argue provide different paths towards family abolition. We call these models: the direct compensation model, the communal care model, the friendship model, the disaggregation model, and the statist model. Each model envisions a world in which law does not maintain the family’s narrowly defined status as a distinctive entity meriting special rules. We then operationalize these models and consider how each might respond to various family law problems we highlight, all of which focus on care—who performs it, who receives it, and how it is valued. We conclude this application of the models by exploring what they might mean for one of family law’s quintessential functions: divorce.

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Engaging in an abolitionist, as opposed to reformist, project provides a way to address problems in family law that have proven intransigent. It also reveals why reforms have been so difficult to implement—because they upset core pillars of how “the family” has been defined. To be clear, we are not advocating for any particular path to accomplish family abolition. Instead, we seek to dismantle the veneer of inevitability and appeals to nature that couch discussions of both the family and family law. Ultimately, this Article aims to expand conversations about family law to include family abolition and, in turn, to broaden conversations about family abolition to include family law.

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“Family abolition does not expect a state of perfect, uninterrupted, universal happiness. Rather, I would ask you to flip the script and consider that it is the family that is unrealistic and utopian.”¹

“To abolish the family is to free our capacity to care for each other.”²

* * *

INTRODUCTION

Families are not rocks. They are not found objects in the world, despite the many ways that discussions tend to naturalize their existence. While the family is often presented as the pre-political and transhistorical “foundation of society and civilization,”³ the family as we conceptualize it today is a legal construction.⁴ As family law scholars have noted, this construction has perpetuated hierarchies and limited autonomy across a number of different axes, including race, gender, and age—and these problems remain intractable.⁵

So, what if, instead of reforming the family, we abolish it?

Abolishing the family might sound like a startling idea for a family law analysis, especially after decades of efforts to expand the legal understanding of “family,”⁶ but the proposal is hardly new. Family abolition has had a place in some strands of Marxist theory, which understands the family

¹ SOPHIE LEWIS, *ABOLISH THE FAMILY: A MANIFESTO FOR CARE AND LIBERATION* 17 (2022) (emphasis omitted).

² M.E. O'BRIEN, *FAMILY ABOLITION: CAPITALISM AND THE COMMUNIZING OF CARE* 57 (2023).

³ *Seidenberg v. Seidenberg*, 225 F.2d 545, 549 (D.C. Cir. 1955). *See also* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 16 (Dec. 10, 1948) (“The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (In marriage, “[w]e deal with a right of privacy older than the Bill of Rights—older than our parties, older than our school systems.”); *Obergefell v. Hodges*, 576 U.S. 644, 657 (2015) (“The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations.”).

⁴ *See* MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 208 (2004) (“The family is an interactive and dynamic public institution that has been assigned an historic role that is essential to society.”); *see also* MICHÈLE BARRETT & MARY MCINTOSH, *THE ANTI-SOCIAL FAMILY* 35 (1982) (“[T]he family is quintessentially a social rather than a natural unit, and . . . the tendency to hypostasize the family as natural goes back to the Enlightenment.”); *id.* at 95 (“[T]he family’ is a constructed unity.”).

⁵ *See, e.g.*, KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* (2017); FINEMAN, *supra* note 4; Anne L. Alstott, *Is the Family at Odds with Equality? The Legal Implications of Equality for Children*, 82 S. CAL. L. REV. 1 (2008). *See also* JOHN RAWLS, *A THEORY OF JUSTICE* 301 (1972) (observing that “the family may be a barrier to equal chances between individuals”).

⁶ *See, e.g.*, NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2009); Martha Minow, *Redefining Families: Who’s In and Who’s Out*, in *THE STATE OF FAMILIES: LAW, POLICY, AND THE MEANINGS OF RELATIONSHIPS* 11 (Jennifer Reich ed., 2020); *cf.* Erez Aloni, *The Puzzle of Family Law Pluralism*, 39 HARV. J.L. & GENDER 317 (2016) (criticizing the call for family law pluralism given its reliance on neoclassical contract theory).

as an artifact of capitalism,⁷ and in 1970s feminism, which views the white patriarchal family as an obstacle to women's liberation.⁸ Contemporary abolitionists' "bill of particulars" against the family cites inequality, coercion, violence, and isolation, among other problems.⁹ Although these calls for abolition differ in their details, they all aim to replace the family with liberated forms of care.¹⁰

Abolitionist projects have also surfaced, piecemeal, in family law conversations. During the run-up to marriage equality in the United States, some queer skeptics called for the abolition of marriage.¹¹ In the context of state intervention purporting to help children, we find arguments for abolishing the Adoption & Safe Families Act,¹² for abolishing the family court,¹³ and for abolishing the family policing system (a.k.a. the family regulation system or the child welfare system).¹⁴ But, family law conversations have devoted significantly less attention to calls for abolishing the family itself, even as this topic has gained traction outside law.¹⁵

⁷ See O'BRIEN, *supra* note 2, at 131.

⁸ See SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION* (1970); Linda Gordon, *Functions of the Family*, WOMEN: J. LIBERATION 20 (Winter 1970); Kathi Weeks, *Abolition of the Family: The Most Infamous Feminist Proposal*, 24 FEMINIST THEORY 433 (2021). Writing at the same time as the 1970s feminists, liberal philosopher John Rawls floated the idea of family abolition, noting the family's conflict with a commitment to equality of opportunity for all, although he ultimately dismissed the urgency of this move, based on other aspects of his theory of justice. RAWLS, *supra* note 5, at 511-12. Of course, such critiques of the family produced objections and counterarguments. See, e.g., RONALD FLETCHER, *THE ABOLITIONISTS* (1988).

⁹ See generally O'BRIEN, *supra* note 2 (citing such problems).

¹⁰ See *supra* text accompanying notes 1 & 2.

¹¹ E.g., Patricia A. Cain, *Imagine There's No Marriage*, 16 QUINNIPIAC L. REV. 27, 29 (1996); see also Stephanie Coontz, *Taking Marriage Private*, N.Y. TIMES (Nov. 26, 2007), <http://www.nytimes.com/2007/11/26/opinion/26coontz.html> [<https://perma.cc/TR98-SNZY>]; Pamela S. Karlan, *Let's Call the Whole Thing Off: Can States Abolish the Institution of Marriage?*, 98 CALIF. L. REV. 697, 702-04 (2010). They were later joined by objectors in the wake of *Obergefell v. Hodges*, 576 U.S. 644 (2015), who decided that eliminating civil marriage altogether would be better than opening it to same-sex couples. See Shane Trejo, *Alabama Senate Passes Bill to Effectively Nullify All Sides on Marriage*, TENTH AMEND. CTR. (May 23, 2015), <https://blog.tenthamentendmentcenter.com/2015/05/alabama-senate-passes-bill-to-effectively-nullify-all-sides-on-marriage/> <http://blog.tenthamentendmentcenter.com/2015/05/alabama-senate-passes-bill-to-effectively-nullify-all-sides-on-marriage/> [<https://perma.cc/Y3NE-24XM>].

¹² Martin Guggenheim, *How Racial Politics Led Directly to the Enactment of the Adoption and Safe Families Act of 1997: The Worst Law Affecting Families Ever Enacted by Congress*, 11 COLUM. J. RACE & L. 711 (2021); Shanta Trivedi, *The Adoption and Safe Families Act Is Not Worth Saving: The Case for Repeal*, 61 FAM. CT. REV. 315 (2023).

¹³ JANE M. SPINAK, *THE END OF FAMILY COURT: HOW ABOLISHING THE COURT BRINGS JUSTICE TO CHILDREN AND FAMILIES* (2023).

¹⁴ Dorothy E. Roberts, *Keynote: How I Became a Family Policing Abolitionist*, 11 COLUM. J. RACE & L. 455 (2021); see also DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* (2022).

¹⁵ See, e.g., SOPHIE LEWIS, *FULL SURROGACY NOW: FEMINISM AGAINST FAMILY* (2019); LEWIS, *supra* note 1; O'BRIEN, *supra* note 2; Weeks, *supra* note 8. Abolishing the family, as we see it, would entail more than abolishing marriage, although abolishing marriage could be an incremental step toward the larger goal. Cf. MARTHA ALBERTSON FINEMAN, *THE NEUTERED*

On its face, the term “family abolition” appears to suggest eliminating the family *tout court*. Yet contemporary family abolitionists make room for families even amidst their calls for abolition. As gender and political theorist M.E. O’Brien writes:

Family abolitionism does not seek to obliterate the social basis through which people may romantically partner, or raise children, or care for each other. For those who want to be freed from their families, by all means we all must enable their escape. But for others the family may be their best source of support. Nearly everyone in families does not have many better options. Family abolitionists are not setting out to rob people of the support and care they currently find in their families.¹⁶

Feminist scholar Kathi Weeks offers a complementary perspective, explaining that individual families as defined by their own members are not the target of abolition and would survive:

[F]eminist family abolitionism targets the family as a social and economic institution, not families, each of which bears a different relationship to the family as it is legislatively declared, legally defended, and socially prescribed.¹⁷

Although it might seem paradoxical for family abolition to allow for the continued existence of families, there is daylight between “the family” as defined by law and privileged by society and the individual families that we experience in the world.¹⁸ We acknowledge these different meanings by using “the family” to refer to the institution that law and society recognize and “families” (or simply “family”) to refer to those collectives or arrangements that individuals understand as such, with or without legal recognition.¹⁹

Law fails to make any such distinctions. It routinely appeals to an understanding of the family untethered from the economic, social, and legal forces that shape it. It assumes one singular and obvious entity. In *Stanley v. Illinois*, for example, the Supreme Court ruled that the state’s definition of “parent” violated Peter Stanley’s rights as a parent;²⁰ likewise, in *Moore v.*

MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 8 (1995) (“I propose the end of family law as we know it with the suggestion that marriage be abolished as a legal category.”).

¹⁶ O’BRIEN, *supra* note 2, at 55-56.

¹⁷ Weeks, *supra* note 8, at 434.

¹⁸ Cf. Benjamin Levin, *Abolitionisms*, UCLA CRIM. JUST. L. REV. (forthcoming 2026) (manuscript at 5) <https://ssrn.com/abstract=5189491> [<https://perma.cc/W5SD-JVC9>] (arguing that abolitionist discussions “would benefit from greater clarity”).

¹⁹ We also recognize that these distinctions are porous because what particular individuals might recognize as families is, of course, informed by law and society and vice versa.

²⁰ 405 U.S. 645, 650-51 (1972) (finding a statute that excludes unwed fathers from the definition of “parent” unconstitutional).

City of East Cleveland, the Court rejected the city's definition of "family" for "slicing deeply into the family itself."²¹ In each case, the Court begged the question, gesturing toward a meaning for the key word, independent of the challenged statutory definition.

Law, however, cannot be excised from the meaning of "the family." After all, it is family law that assigns parents to children, gives those parents authority over their children, addresses dependency by creating and enforcing obligations among family members, relieves other individuals of duties of care, assumes domestic labor is rendered for free, determines the rules of entry into and exit from relationships, and selectively allocates state benefits only to the relationships that it favors. In short, family law participates in producing the problems that today's abolitionists assail. Family law must therefore be part of the discussion of family abolition. Our Article begins this conversation.

Part I identifies how family law has been unable to rid itself of rules that preserve, rather than dismantle, inequalities within and across families, including those based on race, class, and gender. Because a central concern of family abolitionists is the distribution of care, this Part details the ways that law keeps care and support private by assigning such responsibilities exclusively to the family. Despite the importance of such care, family law places work done within the home on a different legal footing than work done outside of it. In particular, domestic care is presumed to be gratuitous, devalued accordingly, and gendered in a way that maintains hierarchies among family members. This Part then transitions to show how family law obscures its own role in perpetuating these inequalities by naturalizing its value judgments on topics ranging from who counts as a family, to what form that family should take, to whether law can recognize any work that occurs within its confines.

While family abolition represents in many ways a radical departure from current law reform and family law scholarship, Part II shows that it is not wholly unprecedented. Part II engages in a literature review, but its principal contribution is analytic, providing a taxonomy that brings together legal and non-legal critiques that strike at the core features of the family. Our taxonomy uncovers five theoretical models that we argue already exist in the literature and that we explore as different paths towards family abolition. We call these models: the direct compensation model, the communal care model, the friendship model, the disaggregation model, and the statist model. Each model envisions a world in which law does not maintain the family's status as a distinctive entity that merits the application of special rules.²² Each model further suggests an alternative way of addressing some of the problems that the family and family law have created and maintained.

²¹ 431 U.S. 494, 498-99 (1977) (plurality opinion) (ruling unconstitutional a zoning law that "makes a crime of a grandmother's choice to live with her grandson").

²² This project finds kinship in Janet Halley's call to jettison "family law exceptionalism" (leaving the family to be governed by ordinary contract, tort, and property law). See Janet Halley, *What Is Family Law?: A Genealogy Part I*, 23 YALE J.L. & HUMAN. 1 (2011); Janet Halley, *What Is Family Law?: A Genealogy Part II*, 23 YALE J.L. & HUMAN. 189 (2011); Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary*

Part III concludes by identifying insights that come from engaging in a family abolitionist project, as opposed to a family reformist project. The distinction is more than semantic and offers some answers to foundational questions about how a society that does not rely on the family as an organizing principle would function.²³ Here, we operationalize the models, investigating how they might or might not address family law's persistent problems. In doing so, we show that abolishing the family does not amount to destroying relationships based on love and care. Like others exploring the abolition of well-entrenched but unjust institutions, we consider incremental steps towards the goal that can act as "nonreformist reforms."²⁴ Finally, we provide a case study by analyzing what would happen to divorce, a core element of family law, under each of the five abolitionist models. Ultimately, our aim is to expand conversations about family law to include family abolition and, in turn, to broaden conversations about family abolition to include family law.

Before we continue, it is important to examine our use of the term "abolition." One might well question whether "abolition," with its roots in anti-slavery commitments and activism, belongs in a discussion of family law. "Abolition" has currency in several areas of critical scholarship, most prominently in calls to abolish the carceral practices of the state—with its reliance on actual cages for punishment and a burgeoning prison-industrial complex—and the family policing system—which many can no longer call the child welfare system. Among legal scholars, Dorothy Roberts stands out as a leading proponent in both abolitionist endeavors. As Roberts points out, these movements—to abolish the carceral state and to abolish the family policing system—show how the powerful legacy of slavery lives on in these modern institutions.²⁵ What claim can critics of the family and family law make to a project sounding in abolitionism?²⁶

Studies of Family Law Exceptionalism, 58 AM. J. COMP. L. 753 (2010). We also align with Halley insofar as her "hope is to reconstruct family law so that it becomes possible to teach the family and its law as distributive." Halley, *What Is Family Law?: A Genealogy Part I*, 23 YALE J.L. & HUMAN. at 5 (emphasis omitted). Our project is distinct, however, in that it also takes aim at private law, given that these private law fields are themselves not free from the family's influence. As such, rather than "expand" what is currently considered family law, we seek to re-envision family law from the ground up and to offer different models for doing so.

²³ This is not to imply that the line is always clear or agreed-upon. See Levin, *supra* note 18, at 7 (referring to the "increasingly common debates about 'abolition versus reform'").

²⁴ See, e.g., Dorothy E. Roberts, *The Supreme Court 2018 Term Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 114 (2019). On how Austrian-French philosopher André Gorz originated this term, see Mark Engler & Paul Engler, *André Gorz's Non-Reformist Reforms Show How We Can Transform the World Today*, JACOBIN (July 22, 2021), <https://jacobin.com/2021/07/andre-gorz-non-reformist-reforms-revolution-political-theory> [<https://perma.cc/KCG7-3VF8>].

²⁵ See Roberts, *supra* note 24; see also *supra* note 14 (citing other abolitionist scholarship by Roberts).

²⁶ Feminist literature has pointed out many parallels between slavery, on the one hand, and marriage, on the other. Race-based oppression and gender-based oppression share several common ingredients, and race, like gender, is baked into family law. See, e.g., NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 61 (2000); Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348 (1994); Twila

Despite reservations about using the language of abolition, given the unique inhumanities of slavery, we choose to retain this rubric. Race is an incontrovertible dimension of family law, and the terminology of abolition can help to “attend to the ways that the western notion of the family functions as a site of violence and dehumanization.”²⁷ Use of this specific word also allows us to borrow insights from other contemporary abolitionist projects. Moreover, as we have previewed, explicit calls to abolish the family have roots in Marxist theory, including the work of Karl Marx and Friedrich Engels, who wrote that family abolition occupied a prominent place in their revolutionary program and decried the exploitation of children and women as characteristic of the family.²⁸ Similarly, 1970s feminist writers invoked the language of abolition to imagine a post-family future, as Weeks’s recent scholarship reminds us.²⁹ Finally, the modern theorists whose work first drew us to this analysis describe their projects in expressly abolitionist language.³⁰ For all these reasons, we adopt the term “abolition” in this Article.

I. FAMILY LAW’S PROBLEMS

Family law, broadly understood, “structur[es] the rights and responsibilities that family members have because of their family status.”³¹

L. Perry, *Alimony: Race, Privilege, and Dependency in the Search for Theory*, 82 GEO. L.J. 2481 (1994). Yet, notable differences distinguish these forms of oppression and thus distinguish marriage and enslavement. See Cheryl L. Harris, *Finding Sojourner’s Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309, 321 (1996) (“‘Slaves’ and ‘women’ were constituted as subordinated categories; however they were unequal to white men for different, although related, reasons. The disability of race differed from the disability of gender: slaves were not free individuals, but a class completely outside the social compact, while women were within the polity but not the public sphere.”). For example, although coverture made spousal rape a legal impossibility, anyone could lawfully have forcible sex with an enslaved person so long as the owner did not object. See DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 22-55 (1997).

²⁷ Tiffany Lethabo King, *Black ‘Feminisms’ and Pessimism: Abolishing Moynihan’s Negro Family*, 21 THEORY & EVENT 68, 70 (2018). King elaborates: “I consider the possible abolition of the family (and Black family) because I fear that the institution crowds out the dynamic and emerging ways that Black people reimagine and invent new modes of relation.” *Id.*

²⁸ KARL MARX & FRIEDRICH ENGELS, *THE COMMUNIST MANIFESTO* 88 (Jeffrey C. Isaac ed., Yale University Press 2012) (1848) (bracketed text in original):

Abolition [Aufhebung] of the family! Even the most radical flare up at this infamous proposal of the Communists.

On what foundation is the present family, the bourgeois family, based? On capital, on private gain. In its completely developed form, this family exists only among the bourgeoisie. But this state of things finds its complement in the practical absence of the family among the proletarians, and in public prostitution.

The bourgeois family will vanish as a matter of course when its complement vanishes, and both will vanish with the vanishing of capital.

Do you charge us with wanting to stop the exploitation of children by their parents? To this crime we plead guilty.

²⁹ See Weeks, *supra* note 8.

³⁰ See, e.g., O’BRIEN, *supra* note 2; LEWIS, *supra* note 1; King, *supra* note 27.

³¹ Jill Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 892 (2004).

Family law includes not only the rules that regulate marriage and divorce, but also “the myriad legal regimes that contribute structurally but silently to the ways in which family life is lived and the household structured.”³² The sheer extent of what counts as family law makes it challenging to address comprehensively. To cabin our critiques, we follow the principal concerns of family abolitionists, who focus on how care is both artificially constrained and unequally distributed within a narrowly defined family unit.

This Part begins by recounting how *law* privatizes care within the family. The “care and support” that we center encompasses the quotidian tasks of domestic life, namely performing household and childrearing responsibilities as well as providing sexual and emotional sustenance—what gender and labor scholar Heather Berg, among others, calls “unpaid feminized labor.”³³ Providing and receiving care lies within family law’s specific remit, insofar as the family has served as the preferred site for attending to the needs of dependent individuals and engaging in sexual intimacy. Of course, in our market-based economy, meeting the needs of dependent individuals also entails financial obligations. These economic responsibilities, typically called “support” duties, are a more specific iteration of the broader understanding of “support” that we use above. Family law keeps this purely financial role private as well, with troubling consequences, as we point out. Still, among these various family roles, the “care and support” function stands out as especially problematic.³⁴

Despite the indispensability of such care, this Part shows how family law consistently devalues it, determining that care within the family—long gendered female—is either free or given altruistically, in turn creating dependency.³⁵ Moreover, the family that law recognizes as the central locus of caretaking is defined in specific and exclusionary ways; we thus turn to consider how family law polices, both theoretically and practically, its constituent family members. We end this Part by stepping back to address how family law presents contestable judgments as foregone conclusions and

³² Halley & Rittich, *supra* note 22, at 761. See also CLARE HUNTINGTON, FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS 58-67 (2014) (cataloguing the many laws that directly or indirectly regulate family life).

³³ Heather Berg, *Free Sex*, 122 S. ATLANTIC Q. 505, 511 (2023).

³⁴ This distinction between care and financial support reflects traditionally gendered family roles, which expected the wife-mother to perform domestic labor without pay and the husband-father to serve as the family breadwinner. See, e.g., Nancy Fraser, *After the Family Wage: Gender Equity and the Welfare State*, 22 POL. THEORY 591, 591 (1994).

³⁵ See Berg, *supra* note 33 and accompanying text. Political theorist Susan Moller Okin cited these attributes in making the case that the family is a fundamentally unjust institution. SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 135 (1989) (“I argue that marriage and the family, as currently practiced, are unjust institutions.”) According to Okin, “the family—currently the linchpin of the gender structure—must be just if we are to have a just society, since it is within the family that we first come to have that sense of ourselves and our relations with others that is at the root of moral development.” *Id.* at 14. The remedy, she contended, is not to abolish the family, but to abolish gender. See, e.g., *id.* at 171 (“A just future would be one without gender.”). See also Susan Moller Okin, *Families and Feminist Theories: Some Past and Present Issues*, in FEMINISM AND FAMILIES 13, 25 (Hilde Lindemann Nelson ed., 1997) (rejecting family abolition).

obscures its own participation in perpetuating this state of affairs by appealing to nature and the way things are.

As evinced by the reams of family law scholarship on which we rely, the problems we cite are enduring and tenacious, even as manifestations have changed over time. These persistent problems lay the foundation for our proposal to consider what abolishing the family might entail—in order to address more completely the inequalities created by law, rather than nature, and to articulate alternatives for how to value and allocate care.

A. *Privatizing Care and Support*

Law must contend with the irreducible fact that all humans need care: “Everyone has been, is, or will be dependent on others for essential care since we have all been infants and many of us will require assistance due to either age, disability or illness.”³⁶ The question is how to organize society to facilitate the provision of such care. In the United States, law has largely looked to the family, long treated as private,³⁷ as opposed to welfare or other state-supported programs. More specifically, in this country, family law has offered marriage as the antidote to female dependency and parentage as the preferred response to children’s dependency.³⁸

That American law privatizes care by assigning it to the family is well-trodden ground for family law scholars. “Family law is full of private tragedy,”³⁹ Anne Alstott has observed, by which she means that individual families, rather than society at large, must absorb the costs of expected life events such as sickness, disability, poverty, and unemployment. A comparable frame is offered by Maxine Eichner, who describes the American family as “increasingly . . . privatized,” insofar as “our law and public policy are premised on the view that families should shoulder their own financial weight.”⁴⁰ And, of course, Martha Fineman has laid claim to the whole terrain by identifying family law’s paramount purpose as the

³⁶ Martha Albertson Fineman, *The Inevitability of Dependency and the Politics of Subsidy*, 9 STAN. L. & POL’Y REV. 89, 90 (1998). Cf. JENNIFER NEDELSKY, *LAW’S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW* (2012) (theorizing that autonomy requires relying on others).

³⁷ See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (recognizing “the private realm of family life which the state cannot enter”).

³⁸ See, e.g., Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1644-45 (2003) (“The notion that marriage offers a solution to female poverty . . . has a substantial history, embedded in a still larger history of marriage as a tool of public policy.”); Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2203 (1995) (“[R]ecent welfare reforms resort to the privatized solutions of marriage or child support as the answer for myriad societal problems, including child poverty.”).

³⁹ Anne L. Alstott, *Private Tragedies? Family Law as Social Insurance*, 4 HARV. L. & POL’Y REV. 3, 3 (2010).

⁴⁰ Maxine Eichner, *The Privatized American Family*, 93 NOTRE DAME L. REV. 213, 214 (2017).

“privatization of dependency.”⁴¹ While the push to privatize spans many familial functions, it refers fundamentally to how care and financial support are distributed: Law imposes the burden on families, rather than the state, to take responsibility for meeting the needs of society’s dependent members.⁴²

To describe how law privatizes care and support is to criticize its decision to do so. Accordingly, various scholars have called for a re-orientation of family law to enable families to flourish,⁴³ to provide them with additional state support,⁴⁴ to integrate them into a public model of social insurance,⁴⁵ and to render visible the care required for dependents by making it a public, rather than a private, responsibility.⁴⁶ Each of these proposals arises from law’s nearly exclusive reliance on individual families to provide a safety net for their members.

Our current child support system and its rules for setting and enforcing parental payments offers one concrete example of how law privatizes dependency. The system’s goals are twofold: to provide for the best interests of children by ensuring their financial well-being and to protect the public fisc.⁴⁷ Including the duty to provide economic support among a parent’s many obligations might seem obvious. Yet “just because society has an interest in a child’s well-being does not necessarily mean that the duty of support should fall on the child’s parents.”⁴⁸ Nevertheless, the parental duty of financial support is so strong that our laws enforce it even when one parent did not provide meaningful consent to the act that led to the child’s birth.⁴⁹ It also applies when formal family bonds have been broken or were

⁴¹ FINEMAN, *supra* note 4, at 44, 108-09, 208.

⁴² There are other definitions of privatization, such as the privatization of decision-making and the replacement of status-based rules for contract-based ones. *See, e.g.*, Brenda Cossman, *Contesting Conservatism, Family Feuds and the Privatization of Dependency*, 13 AM. U. J. GENDER SOC. POL’Y & L. 415, 426 (2005) (“In the context of family law, the dominant conception of privatization is one of the increasing emphasis on private decision-making over public norms.”); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1444 (1992) (“In virtually all doctrinal areas, private norm creation and private decision making have supplanted state-imposed rules and structures for governing family-related behavior.”). *But see* Hasday, *supra* note 31, at 841 (“[T]he status-to-contract story, now firmly entrenched in the family law canon, offers an incomplete and even misleading description of family law and its governing principles.”).

⁴³ HUNTINGTON, *supra* note 32.

⁴⁴ MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA’S POLITICAL IDEALS* 61 (2010) (explaining how families and the state should share responsibility for meeting citizens’ dependency needs).

⁴⁵ Alstott, *supra* note 39, at 5; *see also* Brenda Cossman, *Abolishing Family Law (as We Know It)*, in *HOUSE RULES: CHANGING FAMILIES, EVOLVING NORMS, AND THE ROLE OF THE LAW* 303, 309, 314 (Erez Aloni & Régine Tremblay eds., 2022) (imagining Canadian family law “disarticulated from its private, civil law moorings” and understood instead as social law, connected to “social insurance”).

⁴⁶ FINEMAN, *supra* note 4, at 262-63.

⁴⁷ Michael Higdon, *Fatherhood by Conscript: Nonconsensual Insemination and the Duty of Child Support*, 46 GA. L. REV. 407, 418 (2012).

⁴⁸ *Id.* Alternatives would be more robust state, or community, support.

⁴⁹ *Id.*

never established, either because the parents divorced or had no ongoing relationship.⁵⁰ And it applies when parents have limited means to provide support and must explicitly rely on the government for aid. That is, welfare law and policy—apparent exceptions to the rule of privatization—offer an especially powerful instance of law’s drive to keep dependency within the family. Congress’s decision to strengthen the enforcement of child support orders and the frequent efforts of local authorities to pursue reimbursement for public assistance already provided are not designed to resolve the problem of child poverty, but rather to reduce the government’s own expenditures.⁵¹ Consistent with this goal, responsibility shifts away from the government and falls squarely on private parties, even when they cannot make ends meet.⁵²

Families do not bear the material costs of privatizing care equally. The decision to privatize care and support means that a family unit’s resources, including both time and money, directly affect its ability to provide for children.⁵³ Poor fathers subjected to the child support system are worse off than wealthy fathers, and so are their children.⁵⁴ Even middle-class families suffer under this regime of privatization.⁵⁵ Under the privatized model of care, adult family members today spend longer hours at work while bearing more

⁵⁰ Even fathers who have no parental rights based on clear and convincing evidence that they conceived the child by means of sexual assault still may have duties of child support. See Rape Survivor Child Custody Act, 34 U.S.C. §§ 21301-21302. Accordingly, law recognizes unwed fathers more easily in child support cases than in other contexts. Cf. Albertina Antognini, *Unwed Parents: The Limits of the Constitution*, 35 J. AM. ACAD. MATRIM. LAW. 425, 434-35 (2023) (discussing affirmative requirements imposed on unwed fathers and not unwed mothers). See also Katharine K. Baker, *Homogenous Rules for Heterogeneous Families: The Standardization of Family Law When There Is No Standard Family*, 2012 U. ILL. L. REV. 319 (2012) (critiquing the standardized and formulaic approach to child support obligations regardless of family form or relationships).

⁵¹ Laura W. Morgan, *Family Law at 2000: Private and Public Support of the Family: From Welfare State to Poor Law*, 33 FAM. L. Q. 705, 706 (1999) (“The government’s focus has been to decrease the cost of support of the family to the government, not to eliminate poverty.”).

⁵² See, e.g., *Elisa B. v. Super. Ct.*, 117 P.3d 660, 662, 669 (Cal. 2005) (upholding action for child support against “a woman who agreed to raise children with her lesbian partner,” reasoning that “the Legislature implicitly recognized the value of having two parents, rather than one, as a source of both emotional and financial support, especially when the obligation to support the child would otherwise fall to the public”); see also Emily J. Stolzenberg, *The New Family Freedom*, 59 B.C. L. REV. 1983, 2013 (2018) (“[B]ecause our society is unwilling to take on much collective responsibility for meeting children’s needs, legislatures and courts continue to equate the choice to have sex with the choice to become a parent, and to punish low-income fathers who are unable to provide financially for their children.”).

⁵³ See Alstott, *supra* note 5; Susan Frelich Appleton, *The Forgotten Family Law of Eisenstadt v. Baird*, 28 YALE J.L. & FEMINISM 1, 48 (2016) (noting how “[i]nterfamily inequality pervades family law” and identifying its sources).

⁵⁴ Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 208 (2015) (“[C]hild support laws largely fail to take into account the dismal economic circumstances of unmarried fathers and instead create unrealistic obligations.”).

⁵⁵ Eichner, *supra* note 40, at 247 (“If the privatized-family system benefits no one else, it should certainly benefit the children of well-to-do families. Yet even these children are severely compromised in this system.”).

demanding responsibilities at home than they used to, “overwhelming [] many, if not most, American families.”⁵⁶

Not only do families have uneven access to the resources necessary to provide care, but within individual families some members routinely shoulder disproportionate burdens of performing such care work:

Caretaking has costs and, as things are currently arranged, these costs are typically borne by the caretaker alone. If she is lucky, she is able to persuade her partner in the private family to share the costs with her, spreading them out a bit. But the costs remain confined to the family in a world in which market institutions assume workers are unencumbered by family and dependency and the government assumes that (functioning) families provide for basic needs.⁵⁷

The use of female pronouns is no coincidence. Stated plainly, one of the central effects of law’s privatization of care is that women continue to bear the brunt of it, in their role as wives, mothers, or daughters.⁵⁸ Despite the advent of formal gender neutrality and the eradication of rules that defined the family in explicitly gendered terms, women continue to supply care more than men do.⁵⁹ And, even when it is not women who perform such caretaking, it remains gendered and discounted accordingly.⁶⁰

⁵⁶ *Id.* at 236.

⁵⁷ Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403, 1411 (2001).

⁵⁸ See Naomi Cahn, *The Power of Caretaking*, 12 YALE J.L. & FEMINISM 177, 185 (2000) (“Although the allocation of work within the family is becoming more equal, women still perform a disproportionate share of childcare. Women remain responsible for ‘mothering’ their children and for managing the household.”).

⁵⁹ See, e.g., Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 (finding, *inter alia*, “due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men”); Nev. Dep’t of Hum. Res. v. Hibbs, 538 U.S. 721, 736 (2003) (holding that FMLA applies to state employers and employees because of gender stereotypes about family care responsibilities). For a recent discussion of the costs associated with motherhood in particular, see Jessica Grose, Opinion, *‘Motherhood Should Come with a Warning Label’*, N.Y. TIMES (June 25, 2025), <https://www.nytimes.com/2025/06/25/opinion/motherhood-penalty-career.html> [<https://perma.cc/6YQJ-CATY>]. See also Fineman, *supra* note 38, at 2188 (“This assignment of burdens within the family operates in an inherently unequal manner; the uncompensated tasks of caretaking are placed with women while men pursue careers that provide economically for the family but also enhance their individual career or work prospects.”).

⁶⁰ To be clear, state support also reflects this gendered division of labor, allocating to women the role of caretaker, while giving men the role of provider. See Eichner, *supra* note 40, at 216 (“The welfare state model was imperfect in many ways, including that it was built on a model of ‘separate spheres,’ in which women stayed home to accomplish caretaking while men performed paid labor.”); Fraser, *supra* note 34, at 591 (Under “the ideal of the family wage . . . [t]he male head of the household would be paid a family wage, sufficient to support children and a wife and mother, who performed domestic labor without pay.”). Scholars postulate that the advent of marriage equality will not disrupt “the gender dynamics presumed to be associated with different-sex couples.” Suzanne Kim & Edward Stein, *The Role of Gender and Gender Dynamics in Same-Sex Divorce and Dissolution*, in LGBTQ DIVORCE AND RELATIONSHIP DISSOLUTION: PSYCHOLOGICAL AND LEGAL PERSPECTIVES AND IMPLICATIONS FOR PRACTICE 353, 354

B. Devaluing Care

The care that law designates as an essential family function materially disadvantages the individual providing it. This is so because law labels as alternately free or priceless the necessary labor in families, affording those who perform it no access to the market. The extent of the market's exclusion of care is pervasive: It is presumed to be rendered gratuitously, does not count towards the gross national product, and no tax is imposed on those who receive the benefit of its value.⁶¹ Property law, family law, and tax law, among other fields, have all failed to properly identify and appraise this care.⁶²

Under coverture, the legal regime that subsumed a wife's identity into that of her husband, the wife performed services that were owed to, and owned by, the husband. This definition of marriage once supplied the doctrinal reason for law's inability to acknowledge care. Since coverture's formal demise, scholars have identified law's continued refusal to value to such services. Reva Siegel has revealed how, despite the passage of the married women's property acts, courts excluded domestic services from their reach: "[C]ourts reformulated a putatively feudal body of status law so that the doctrine of marital service imposed upon the wife the duty to perform such work as is necessary to reproduce the labor force in a modern industrial economy."⁶³ Jill Hasday has detailed the way certain status rules, whose origins lie in coverture, "continue[] to preserve substantial elements of the coverture regime" to this day.⁶⁴ And, as we have shown elsewhere, coverture persists in influencing decisions that address individuals who have not married, which "explains why courts consider homemaking services to inhere in an intimate relationship and why any value they may have does not benefit the individual performing them."⁶⁵

The regulation of nonmarriage provides one pressing example of how law continues to devalue work done within the home. In deciding whether

(Abbie E. Goldberg & Adam P. Romero eds., 2019) ("[T]he institution of marriage is likely to remain gendered in various ways . . .").

⁶¹ As Martha Fineman has spelled out: "The gross national product calculation does not include labor overwhelmingly supplied by women working as mothers, wives, and daughters. The recipients of this type of subsidy are not taxed on the value they receive and do not consider themselves dependent as a result of their acceptance of the fruits of another's time and effort." Fineman, *supra* note 36, at 91.

⁶² See, e.g., Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1996). Tort law, at least, has made an attempt. See Albertina Antognini & Susan Frelich Appleton, *Sexual Agreements*, 99 WASH. U. L. REV. 1807, 1823-26 (2022).

⁶³ Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2130 (1994).

⁶⁴ Hasday, *supra* note 31, at 844.

⁶⁵ Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. REV. 2139, 2146 (2019); see also SUSAN FRELICH APPLETON, *ADVANCED INTRODUCTION TO FAMILY LAW IN THE US* 51 (2026) (noting how courts often discount the value of domestic services when unmarried couples end their relationships).

to distribute property at the end of a nonmarital relationship, courts refuse to quantify the value of any work performed, determining that it is either rendered gratuitously or worth whatever amount the individual already received as support throughout.⁶⁶ Adopting this approach means that plaintiffs struggle to make out a successful claim for property at the conclusion of an intimate relationship.⁶⁷ Such reasoning is so powerful that it affects even an individual's capacity to enter into an express agreement with another willing party.⁶⁸ Courts in this space decline to enforce contracts either because they find that the services provided inhered in the relationship itself or because sex was an illicit basis for the contract.⁶⁹ As a result, sex and other domestic services once owed to the husband under coverture have now become duties that are intrinsic to all intimate relationships, marital or not, such that the person performing them cannot receive anything of market value in return.

Family law does have the capacity to value caretaking indirectly, including both domestic and sexual services, through abstract principles like the partnership theory of marriage. This theory, which underlies divorce laws in separate and community property states, acknowledges contributions made to the relationship, such as "care work to . . . improve the well-being of the couple and its children."⁷⁰ At divorce, every state legally provides for equitable or equal distribution, including when one of the spouses worked in the market and the other shouldered care at home. Yet even here, the distribution of assets is not necessarily based on an understanding that such labor has value.⁷¹ Further, divorce law, the only vehicle for recouping the benefit of such services, discounts their worth. The partnership theory's limits become clear in the general cap that courts often impose on property awards at the

⁶⁶ Albertina Antognini, *Nonmarital Contracts*, 73 STAN. L. REV. 67 (2021). Both rationales are problematic in that they either assume such services have no value, or they equate the value to whatever support might have been received from the other individual during the relationship. *Id.* at 114-16.

⁶⁷ There are a few exceptions. See Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1, 46-48 (2017).

⁶⁸ Some scholars misunderstand what these cases addressing contracts entail. Katharine Baker, for example, conflates a court's decision to uphold a contract entered into by an unmarried couple for a particular property distribution with granting cohabiting couples marital-like remedies. Katharine K. Baker, *Family Law Exceptionalism Revisited*, 37 J. AM. ACAD. MATRIM. LAW. 395, 414 (2025) ("Courts [] sometimes award cohabitants marital-like remedies using contract law. . . ."). Baker further conflates courts that consider an intent to share property with courts that address explicit contractual claims and assumes that the latter are "weak[]." *Id.* at 413-14. The conflation of marriage and nonmarriage also often entraps courts. See Antognini, *supra* note 66, at 78 (considering the case law addressing express contract claims outside of marriage and finding that "courts refuse to uphold contracts outside of marriage for the same reasons they refuse to do so in marriage").

⁶⁹ Antognini, *supra* note 66, at 104-18.

⁷⁰ Laura Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1241 (2005).

⁷¹ *Id.* at 1242 (noting that because "nontangible contributions by definition have no market value, this conceptualization" of marriage as equally valuing intangible and tangible contributions "seems implausible").

end of high-asset marriages, restricting distributions from the breadwinner to less than half.⁷² Thus, when law has occasion to value such services directly, it is unable to do so, whether they take place within marriage or outside of it.⁷³

By simultaneously privatizing domestic care and treating it as gratuitous, law necessarily devalues traditionally feminized labor, reaffirming the separation of care and work, family and market.⁷⁴ As a result, no market process applies to this work within the family, even though the family must rely on the market when it needs material necessities for survival.

C. Family Policing

Much of family law turns on the determination of who is, or is not, a family. Certain constitutional protections rest on whether a particular group of individuals can claim a cognizable family relationship.⁷⁵ Access to property turns on whether the parties have assumed a formal legal status.⁷⁶ A great deal follows from whether law recognizes a family.⁷⁷ As such, the

⁷² These outcomes reveal an underlying assumption that work done within the home is not on par with work done outside of it. JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 201 (2011) (noting “courts almost never divide property equally when there is so much of it” and explaining “[t]hey do not buy the partnership idea; and settle for an amount sufficient to maintain the wife at the level she lived during marriage”).

⁷³ See, e.g., *Borelli v. Brusseau*, 12 Cal. App. 4th 647, 654 (Cal. Ct. App. 1993) (“We therefore adhere to the longstanding rule that a spouse is not entitled to compensation for support, apart from rights to community property and the like that arise from the marital relation itself. Personal performance of a personal duty created by the contract of marriage does not constitute a new consideration supporting the indebtedness alleged in this case.”); see also *supra* notes 66-69 and accompanying text (finding similar devaluation of domestic services in the nonmarriage cases).

⁷⁴ See, e.g., Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

⁷⁵ Compare *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (finding a zoning ordinance that limits the number of unrelated individuals who live with each other constitutional), with *Moore v. City of East Cleveland*, 431 U.S. 494, 498 (1977) (plurality opinion) (finding unconstitutional a zoning ordinance that “has chosen to regulate the occupancy of its housing by slicing deeply into the family itself”).

⁷⁶ See, e.g., *Blumenthal v. Brewer*, 69 N.E.3d 834, 851 (Ill. 2016) (“[T]he legislature intended marriage to be the only legally protected family relationship under Illinois law, and permitting unmarried partners to enforce mutual property rights might ‘encourage formation of such relationships and weaken marriage as the foundation of our family-based society.’”) (citations omitted); *Davis v. Davis*, 643 So. 2d 931, 936 (Miss. 1994) (refusing to distribute property at the end of a nonmarital relationship, reasoning that the “legislature has not extended the rights enjoyed by married people to those who choose merely to cohabit”).

⁷⁷ It is not always a boon, of course. See, e.g., Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1276, 1280 (2014) (“Largely missing from the celebration of recognition in the law of domestic relations is the simple yet meaningful fact that legal recognition comes with a financial cost—sometimes an unjust cost.”).

family, as we understand it, is a category created largely by law rather than by nature.⁷⁸

Regardless of the particular rationale that might lead to familial recognition in any given setting, family law, by doling out family status, consistently serves a disciplinary function. To discipline—rather than, say, reflect—lies at the core of family law. Melissa Murray has considered at length marriage's instrumental uses towards disciplinary ends by examining its function as a substitute for the literal ball and chain, i.e., the penitentiary.⁷⁹ Foregrounding marriage's role as a defense in the now-defunct crime of seduction, Murray shows how marriage meted out its correction: "Marriage and its status obligations deprived men and women of important liberties, while simultaneously imposing upon them the discipline required for the discharge of family responsibilities."⁸⁰ That marriage effectively expunged the crime of seduction "signaled to the rest of society that similar breaches of sexual norms would be tolerated only if they ultimately resulted in marriage."⁸¹ Marriage simultaneously worked to punish wrongdoers and provide content for what counted as legitimate relations—sex within the confines of a formal legal status.

Driving people into marriage is not law's only disciplinary move. Jeannie Suk Gersen has written about how, in the case of misdemeanor domestic violence, criminal law imposes *de facto* divorce on couples who have *not* chosen to end their relationship. She argues that the civil protection order routinely issued by prosecutors' offices in this context does not seek to protect the victim, but rather "seeks in practice to end the relationship" regardless of the "express permission of the protected party" or whether it was "initiated by either of the parties to the relationship."⁸² The impact, she notes, hinges on class; the policing of domestic violence largely occurs in poor communities, where the violence may be more visible and allocation of state resources can be rationalized as a response.⁸³

⁷⁸ See, e.g., *In re Campbell's Estate*, 12 Cal. App. 707 (Cal. Dist. Ct. App. 1910) (refusing to distribute property to the sons of a decedent based on finding they were not born to a legitimate marriage, given that the parents had the status of enslaved persons at the time of the alleged marriage).

⁷⁹ Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 5 (2012). The article also serves as a warning to advocates of marriage equality, highlighting the disciplinary consequences of achieving their goal. See *id.* at 61-62.

⁸⁰ *Id.* at 35 ("Upon marriage, both parties surrendered some degree of freedom and autonomy in order to assume the disciplined identity and rigid gender roles that the institution imposed.")

⁸¹ *Id.* at 36.

⁸² Jeannie Suk Gersen, *Criminal Law Comes Home*, 116 YALE L.J. 2, 58 (2006). See also Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 45 (2009) (describing criticisms of mandatory arrest policies in domestic violence cases on the basis that they "deny women the ability to define themselves, distilling every woman down to the stereotypical victim in need of the system's protection, unable to make rational choices").

⁸³ Gersen, *supra* note 82, at 59-60.

Who can live as a family also differs sharply based on race. As Gersen notes, the impact of policing is mostly felt by “poor urban minorities and immigrants.”⁸⁴ When deviations from the normative family reflect racially distinctive patterns, official condemnation often follows, as the infamous Moynihan Report demonstrated.⁸⁵ The Report found “a tangle of pathology” in perceived “reversed roles of husband and wife,” classifying them as characteristic of “Negro American family life.”⁸⁶ As gender and sexuality scholar Tiffany Lethabo King has observed, even the methodology of the Moynihan Report “reproduced scientific empiricism in order to measure and assess Black normalcy and deviance from the statistical norm, the white family.”⁸⁷

Exercise of this disciplinary function not only brings individuals into the fold of family law, but also excludes them from its protections.⁸⁸ The phenomenon that Gersen addresses is problematic in part because “the family law apparatus that surrounds divorce is not applied.”⁸⁹ There are no determinations of child custody, property division, visitation, or support at the conclusion of the state-imposed separation. Family law’s protections therefore become a rarefied privilege, accessible only to those who are deemed worthy. For everyone else, criminal law applies. Khiara Bridges exposes a similar dynamic in the context of privacy rights, which also fail to attach to families in poverty.⁹⁰ Her work focuses on mothers, and she makes the strong case “that alongside the articulated rules stating that all persons bear family privacy rights are unarticulated rules about who may be included within the class of rightsbearers.”⁹¹ The state’s omnipresence in the lives of only some mothers provides yet another iteration of family law’s selectivity in ways that follow class and race—creating the “dual system of family law” that Jacobus tenBroek identified many decades ago.⁹²

⁸⁴ *Id.* at 8.

⁸⁵ See DANIEL PATRICK MOYNIHAN, U.S. DEP’T OF LABOR, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965) (hereinafter referred to as the “Moynihan Report,” after its author Daniel Patrick Moynihan).

⁸⁶ *Id.* at 29-31 (criticizing the “matriarchal pattern” of such families). See also King, *supra* note 27, at 76 (“White families are constructed as private and impenetrable spaces that protect white people . . . from the excesses of state power. However, black matriarchal households in *The Report* are porous spaces that the state enters obliterating any possibility of private space.”); R.A. Lenhardt, *Marriage as Black Citizenship?*, 66 HASTINGS L.J. 1317 (2015) (countering the Moynihan Report with a new call to action challenging marital supremacy).

⁸⁷ King, *supra* note 27, at 73. Because King concludes that “[e]ven the transgressive capacity of Black matriarchal and queer formations folded into the appellation family, fail to arrest the historic and ongoing violence of the western family,” *id.* at 71, she calls for “other ways to name each other as our relations,” *id.* at 84.

⁸⁸ See, e.g., Michael Warner, *Beyond Gay Marriage*, in LEFT LEGALISM/LEFT CRITIQUE 260, 260 (Wendy Brown & Janet Halley eds., 2002) (explaining why marriage necessarily excludes and discriminates).

⁸⁹ Gersen, *supra* note 82, at 57.

⁹⁰ BRIDGES, *supra* note 5.

⁹¹ *Id.* at 114.

⁹² Jacobus tenBroek, *California’s Dual System of Family Law: Its Origin, Development and Present Status*, 16 STAN. L. REV. 257 (1964) (Part I); 16 STAN. L. REV. 900 (1964) (Part II); 17 STAN. L. REV. 614 (1965) (Part III).

The disciplining of the family turns into actual policing in the context of child protective services, which has led Dorothy Roberts to more accurately label such intervention “the family policing system.”⁹³ Describing the overrepresentation of Black children and Black families in the foster care system, as well as the percentage of Black and Native children who experience foster care before their entry into adulthood, Roberts explains that “[i]f you came with no preconceptions about the purpose of the child welfare system, you would have to conclude that it is an institution designed to monitor, regulate, and punish poor Black families.”⁹⁴ While Roberts couches the family regulation system explicitly within the carceral one—“[f]amily policing *is* part of the carceral regime”⁹⁵—it is also, comfortably, part of the family law regime, which as we have seen, disciplines, defines, and excludes.

The child support enforcement regime, a direct outgrowth of the impetus to privatize financial support, stands out as carceral in an even more literal sense, with delinquent obligors, usually fathers, often sent to jail.⁹⁶ This regime also provides content to the role fathers ought to play, namely, that of economic providers.⁹⁷ Their failure to do so simultaneously codes them as “deadbeat dads,”⁹⁸ stereotyped as men who are able to but refuse to pay, and makes them culpable, deserving of a prison sentence. Tonya Brito has shown, however, that it is “[t]he poorest noncustodial parents [who] are the most likely to face incarceration for nonpayment through the civil contempt process, even though lawmakers enacted such harsh enforcement measures with deadbeat dads in mind.”⁹⁹ The legal regime thus effectively punishes poverty—the inability to pay.¹⁰⁰ In doing so, it polices fathers’ compliance with the role that family law has assigned to them, exacerbating class and race divisions.

⁹³ Roberts, *supra* note 14, at 457.

⁹⁴ DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 6 (2001).

⁹⁵ Roberts, *supra* note 14, at 467.

⁹⁶ See Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and their Families*, 15 J. GENDER RACE & JUST. 617 (2012).

⁹⁷ Law thereby ignores other forms of caretaking engaged in by fathers. See Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991, 1009, 1011-12 (2006) (showing that “many deadbroke fathers contribute to their children’s support in informal ways not recognized by the law or child enforcement authorities” and arguing for a more expansive legal view of fatherhood that values a “broader definition of fathering”).

⁹⁸ Brito, *supra* note 96, at 628; see generally Elizabeth D. Katz, *Criminal Law in a Civil Guise: The Evolution of Family Courts and Support Laws*, 86 U. CHI. L. REV. 1241 (2019) (engaging in a historical analysis showing how family law operates as criminal law in the context of support obligations and their enforcement).

⁹⁹ Brito, *supra* note 96, at 655.

¹⁰⁰ *Id.* at 619 (“Ironically, low-income noncustodial parents who lack the ability to pay their child support debts are more likely to face incarceration than are the more culpable noncustodial parents who have the means to pay child support but refuse to pay.”).

D. *The Nature of Things*

The prior sections have explored law's role in privatizing support, devaluing care, and policing the family and its members. Yet family law's participation is often difficult to see because it consistently hides its own involvement by appealing to nature or how things are. The move to naturalize judgments that are in fact social, political, or legal in character is not unique to family law, of course, but it does appear with special force and frequency in this realm.¹⁰¹ Such moves sometimes rest on appeals to biology; often, however, they go further, with reliance on nature and "general knowledge"¹⁰² appearing in judicial opinions about the right to marry,¹⁰³ the legality of surrogacy,¹⁰⁴ or the types of claims that can be brought at the conclusion of an intimate relationship.¹⁰⁵

Here, we consider how family law naturalizes the provision of care, along with the family form, which serves as the site of such care, even as law is actively endorsing these specific arrangements. Because family law has a long history of relying on contentions about what is natural or obvious, directly conflicting positions have emerged over time, along with justifications for what hindsight reveals to be entirely contingent points of view.¹⁰⁶

Care—who provides it and what it is worth—is a prime site of naturalization. In an "ideal system," "[t]he head of the household 'naturally' supplies his family's economic needs; his wife, the adult 'naturally' dependent on her husband's economic provisions for her household work, provides the caretaking."¹⁰⁷ This "natural" dynamic has, of course, been shaped by law, namely the common law of "baron and femme," which spelled out the doctrine of coverture, including husbands' specific duties to provide financial support and wives' to perform domestic services.¹⁰⁸ Defined by marriage,

¹⁰¹ Cf. Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 846 (1985) (describing "the coexisting and competing 'natural law' belief that the family exists as a natural human formation, not created but merely recognized (or not recognized) by the state").

¹⁰² *Muller v. Oregon*, 208 U.S. 412, 421 (1908).

¹⁰³ See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (adopting a view of marriage as "fundamental to our very existence and survival").

¹⁰⁴ See, e.g., *In re Baby M*, 537 A.2d 1227, 1234 (N.J. 1988) ("The intent of the contract is that the child's natural mother will thereafter be forever separated from her child The contract providing for this is called a 'surrogacy contract,' the natural mother inappropriately called the 'surrogate mother.'").

¹⁰⁵ See, e.g., *Morone v. Morone*, 413 N.E.2d 1154, 1157 (N.Y. 1980) ("[I]t is not reasonable to infer an agreement to pay for the services rendered when the relationship of the parties makes it natural that the services were rendered gratuitously.").

¹⁰⁶ See Olsen, *supra* note 101, at 848 ("We now recognize law's important role in creating the nineteenth-century family. I would hope we will not have to wait until the twenty-first century to recognize the constitutive role of law in the twentieth-century family.").

¹⁰⁷ Fineman, *supra* note 38, at 2206-07.

¹⁰⁸ 1 WILLIAM BLACKSTONE, COMMENTARIES 430-31 (1765-1979); Antognini, *supra* note 65, at 2149-59; see also APPLETON, *supra* note 65, at 24-61 (showing how marriage and its regulation shape family law more generally).

the family is still generally assumed to absorb these caretaking functions “and is thus the ‘core’ upon which all else is founded.”¹⁰⁹ As such, “[d]ependency, ‘naturally’ assigned to the family, is privatized.”¹¹⁰ For those who deviate from—and therefore challenge—the “natural” form, as in the case of single or divorced mothers, legal and policy responses often have sought to incorporate them into the “natural” family. That is, the solution to female poverty has been to find the woman a husband-father-provider.¹¹¹

While female dependency is now widely understood to result from legal rules and social mores that constrained the roles women were allowed to occupy, rather than from any natural inferiority, the concept of “natural” dependency remains steadfast in the context of children.¹¹² For example, Fineman explains that caretakers, often women, suffer from “a derivative dependency that stems from their roles as caretakers and the need for resources that their duties generate.”¹¹³ This dependency, according to Fineman, is avoidable, unlike what she calls “inevitable dependency,” which “flows from the status and situation of being a child and often accompanies aging, illness or disability.”¹¹⁴ But even children’s dependencies have legal foundations. Family law scholar Frances Olsen explains:

In civilized society, young children remain dependent. That this dependency is on the child’s parents is surely based on laws. Laws ensure that most children remain with their parents, although in spite of the law, large numbers of children are separated from their parents. Presumably more children would be taken from their parents were it not for the legal (as well as social) disapproval of kidnapping.

Moreover, the period of dependency could be considerably shortened if, for example, property laws were not enforceable against children. One could have a society in which children were

¹⁰⁹ See Fineman, *supra* note 38, at 2197. While Fineman specifically referenced “heterosexual marriage,” the nuclear family has expanded to include same-sex marriage, but marriage, nonetheless. See *Obergefell v. Hodges*, 576 U.S. 644, 657 (2015); Clare Huntington, *Obergefell’s Conservatism: Reifying Familial Fronts*, 84 *FORDHAM L. REV.* 23, 31 (2015) (“By reifying the social front of family as children with married parents, and by penning an unnecessary paean to marriage, Justice Kennedy made the lives of nonmarital families lesser.”).

¹¹⁰ Fineman, *supra* note 38, at 2187 (“The ideology of the private family mandates that the unit nurture its members and provide for them economically.”).

¹¹¹ See Lenhardt, *supra* note 86; 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 (2005); see also MAVIS MACLEAN, *SURVIVING DIVORCE* 69, 75-77 (1991) (arguing that remarriage provides women with a path to self-sufficiency after post-dissolution maintenance ends).

¹¹² See Olsen, *supra* note 101, at 850 (“Today courts are less expected to bolster the power of the husband over the wife, but they are still expected to reinforce parents’ authority over children.”); see also Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 *DUKE L.J.* 75, 93 (2021) (“[C]hildren continue to suffer many of the same disabilities that wives suffered under coverture, including having limited to no control over their associates, labor, or bodies.”).

¹¹³ Fineman, *supra* note 38, at 2200.

¹¹⁴ *Id.*

allowed to take whatever they needed and to eat food they found as freely as many children eat at home.¹¹⁵

While youth itself causes some dependencies as a matter of fact, they remain distinct from dependencies created by law. As a result, law's current decision to give parents broad authority and control over their children is not inevitable.¹¹⁶

Yet legal conceptions of parentage abound with assertions about what nature dictates. "Natural" parents have the "natural rights" to provide for their children, which assumes a two-parent family.¹¹⁷ Even parentage expressly established by law rests on these underpinnings, with adoption often described as an imitation of what nature would otherwise accomplish.¹¹⁸ Indeed, when law explicitly defines parentage in direct opposition to "nature," references to the natural still control the analysis. *Michael H. v. Gerald D.* proves the point, with Justice Scalia's plurality opinion declaring that "California law, like nature itself, makes no provision for dual fatherhood," while basing fatherhood on marriage to the mother—to the exclusion of another's proven genetic connection to the child.¹¹⁹ In *Michael H.*, appeals to nature explicitly prop up marriage, a legal status; they also serve to justify restricting fatherhood to one individual, a limitation that is no longer treated as absolute.¹²⁰ The malleability of nature's import similarly surfaces in authorities expressing preferences for child custody in dissolution cases, which have seesawed from asserting that custody ought to go to the father as "the natural protector of children," to the mother as "better suited to raise children,"¹²¹ to shared parenting arrangements that foster relationships with both.¹²²

¹¹⁵ Olsen, *supra* note 101, at 851 n.46; see also PHILIPPE ARIÈS, CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE 33 (Robert Baldick trans., Alfred A. Knopf 1962) (1960) (detailing the hypothesis that childhood as a concept first emerged in approximately the twelfth century, replacing an earlier view of children as miniature adults).

¹¹⁶ See Dailey & Rosenbury, *supra* note 112, at 92-93 (identifying "[c]hild coverture," which they argue "continues to confer on parents broad control over children's emotional, intellectual, moral, spiritual, and everyday lives"); see also Barbara Bennett Woodhouse, "Who Owns the Child?": Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995 (1992) (criticizing parental autonomy doctrine).

¹¹⁷ See Dailey & Rosenbury, *supra* note 112, at 104 ("Expansive parental rights . . . implicitly rest on a naturalized vision of the private two-parent family, one rooted primarily in legal status flowing from biology.").

¹¹⁸ See, e.g., *In re Smith's Estate*, 72 N.W.2d 287, 295 (Mich. 1955).

¹¹⁹ *Michael H. v. Gerald D.*, 491 U.S. 110, 118 (1989) (plurality opinion) (emphasis added).

¹²⁰ See UNIF. PARENTAGE ACT § 613(c) Alternative B (2017) ("The court may adjudicate a child to have more than two parents under this [act.]").

¹²¹ See Cynthia A. McNeely, *Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court*, 25 FLA. ST. U. L. REV. 891, 897 (1998).

¹²² See Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 VA. L. REV. 79, 112-16 (2016) (describing the demise of the tender years presumption favoring mothers of young children).

Invocations of nature, particularly in the form of biology, have also proven effective in upholding laws that differentiate between mothers and fathers. As the Supreme Court explains: “The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.”¹²³ Birth provides a biological—and hence, an objective, observable—difference between the sexes that justifies their differential treatment. Yet, time and again, what appears to follow from biology turns out to be anything but.¹²⁴ Appealing to “real” differences conceals reliance on gender stereotypes and obscures the way these laws assume—and then, by virtue of their application, ensure—that women, and not men, will take responsibility for any children born outside of marriage.¹²⁵

Constitutional reasoning has long accepted sex-based legislation as merely reflecting “facts” about physiology instead of enforcing socially and legally constructed gender-based roles. *Muller v. Oregon* encapsulates this mode of analysis: The opinion distinguishes men and women not on account of any difference in “contractual and personal rights,”¹²⁶ but because “in the struggle for subsistence she is not an equal competitor with her brother.”¹²⁷ Specifically, “woman’s physical structure and the performance of maternal functions place her at a disadvantage.”¹²⁸ Siegel has called the phenomenon

¹²³ *Nguyen v. INS*, 533 U.S. 53, 73 (2001).

¹²⁴ See *id.* at 92 (O’Connor, J., dissenting) (arguing that the statute at issue, rather than reflecting any difference based on biology, “is . . . paradigmatic of a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children”); see also Albertina Antognini, *Fraudulent Families*, 15 U.C. IRVINE L. REV. 128, 173–74 (2024) (describing the Supreme Court’s misleading reliance on biology to uphold sex-based differences between unwed parents).

¹²⁵ See Antognini, *supra* note 124, at 184–93 (arguing that law and social norms, rather than biology, are responsible for making distinctions between unwed parents on the basis of sex). But see *Sessions v. Morales-Santana*, 582 U.S. 47 (2017) (situating the longer residency requirements imposed on unwed fathers and not unwed mothers within the history of laws recognizing fatherhood only within marriage); Albertina Antognini, *Unwed Parents: The Limits of the Constitution*, 35 J. AM. ACAD. MATRIM. LAW. 425, 442 (2023) (“Rather than adhere to a line of reasoning that makes claims about the inevitability of motherhood and the revocability of fatherhood based on the facts of biology, the Court identifies these rules as the legacy of a regime that allowed the husband to control his wife and children in marriage, and absolved him of any responsibility outside of it.”).

¹²⁶ 208 U.S. 412, 418 (1908).

¹²⁷ *Id.* at 422. In this way, the opinion is broader than Justice Bradley’s oft-quoted concurrence in *Bradwell v. Illinois*, which similarly relied on “nature herself,” “the divine ordinance,” and “the nature of things” to justify excluding women from being admitted to the bar, 83 U.S. 130, 141 (1872) (Bradley, J., concurring), but was ultimately based on a married woman’s inability to sign contracts, a disability imposed by the legal, as opposed to natural, status of coverture, see *id.*

¹²⁸ *Muller*, 208 U.S. at 421. All women are distinguishable from all men at any given moment in light of the social role they are assigned as mothers, rather than any physical difference based on sex. Confusingly, the purported biological distinction between men and women (the latter’s ability to become pregnant) does not have the same force in defining what counts as sex-based discrimination. See *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) (“The California insurance program does not exclude anyone from benefit eligibility because of gender

set forth in *Muller* “physiological naturalism,”¹²⁹ which has proven successful in “modernizing norms of gender *status*” by reducing them to questions about the female *body*, “render[ing] them natural, reasonable, hence invisible.”¹³⁰ Thus, reasoning about physiological facts, instead of recognizing the social roles men and women are allowed to occupy, permits laws that enshrine sex-based distinctions to pass constitutional muster.¹³¹ The success of the movement materializes in *Dobbs v. Jackson Women’s Health*, which refused to appreciate how abortion restrictions discriminate on the basis of sex and should thus have merited heightened scrutiny.¹³²

What is natural, factual, or a matter of general knowledge routinely arises in the less embodied question of how to value care at the end of a nonmarital relationship. Courts considering requests for property based on services provided during the relationship resort to general statements about the nature of such exchanges and the nature of all intimate relationships. In *Morone v. Morone*, for example, the Court of Appeals of New York declined to recognize an implied contract based on nonmonetary contributions made to a nonmarital relationship.¹³³ The court reasoned that “the relationship of the parties makes it natural that the services were rendered gratuitously”; it also noted that “[a]s a matter of human experience personal services will

but merely removes one physical condition—pregnancy—from the list of compensable disabilities.”). Although subsequent cases raised doubts about the continuing validity of *Geduldig*, the Court revitalized it in dissolving almost fifty years of constitutional protection for the right to terminate a pregnancy. See *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 236 (2022).

¹²⁹ Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 265, 323 (1992) (emphasis added).

¹³⁰ *Id.* at 323.

¹³¹ See *id.* at 265 (“[T]he physiological framework in which the Court reasons about reproductive regulation [] obscures the gender-based judgments that may animate such regulations and the gender-based injuries they can inflict on women.”). As recent action from the White House demonstrates, legal reliance on “nature” has gained new momentum, with appeals to biology providing the rationale. One executive order signed by President Trump, “Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government,” declares a bright-line female/male binary and states that everyone’s biological sex is unalterably determined at conception. Exec. Order No. 14168, 90 Fed. Reg. 8615 (Jan. 20, 2025). The order—which applies to federal programs, agencies, and facilities as well as recipients of federal funds—seeks to erase both transgender individuals and any concept of gender identity that might diverge from one’s anatomically dictated sex. Cf. *Mahmoud v. Taylor*, 606 U.S. 522, 612 (2025) (Sotomayor, J., dissenting) (discerning in the majority’s approach to a school district’s LGBTQ+-inclusive materials the “failure to accept and account for a fundamental truth: LGBTQ people exist”). Another executive order from President Trump, “Restoring Truth and Sanity to American History,” calls into question the now well-accepted “view that race is not a biological reality but a social construct.” Exec. Order No. 14253, 90 Fed. Reg. 14563, 14653 (Mar. 27, 2025). Cf., e.g., Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994). If accepted and broadly applied, these views could upend much of settled family law.

¹³² See *Dobbs*, 597 U.S. at 536. Without citing *Dobbs*, the Court has also reached a similar conclusion regarding bans on treatment for transgender minors. See *United States v. Skrmetti*, 605 U.S. 495 (2025).

¹³³ See 413 N.E.2d 1154 (N.Y. 1980).

frequently be rendered by two people living together[.]”¹³⁴ Similar reasoning reappears throughout the case law addressing nonfinancial contributions to a nonmarital relationship: Courts appeal to the nature of the intimate relationship, the apparent expectations of the parties, or the altruistic motives of the service-provider.¹³⁵ These supposedly *factual* assertions have their basis in law. That is, not only is the presumption of gratuity imposed by law, but it also has its roots in law, namely the doctrine of coverture, which held that a wife had a duty to provide domestic services to her husband.¹³⁶ These descriptions about what is natural thus obscure the way that law works to enforce gendered inequality.¹³⁷ In particular, relying on matters of general knowledge prevents the individual requesting property—typically the individual who has less of it and who is often a woman—from receiving any.

The elision of nature and law is almost imperceptible, which makes the resulting inequalities more difficult to identify.¹³⁸ An accounting of what law, as opposed to nature, has created, and a critical assessment of its claim to neutrality therefore become especially important.¹³⁹ The move to naturalize also exposes why calling for an end to the family might seem impossible—because we ordinarily understand the family to be a naturally occurring entity, rather than a constructed one.

¹³⁴ *Id.* at 1157.

¹³⁵ See Antognini, *supra* note 66, at 104.

¹³⁶ See Antognini, *supra* note 65, at 2145 (“Here is the most glaring example of coverture, hiding in plain sight: services that take on the form of homemaking or childrearing—duties undertaken by the wife under coverture—do not lead to any attendant property rights.”).

¹³⁷ See *id.* at 2201 (“[E]xposing how a regime steeped in coverture continues to erect legal impediments to accessing property when the labor she, or sometimes he, contributed to the relationship was to the home rather than the workforce.”).

¹³⁸ Cheryl Harris has addressed the perils of turning to nature in the context of race and gender: “Rights discourse was inherently linked with systemic exclusion that was purportedly mandated by ‘natural’ differences. These presumed natural differences between white and Black men and women, had both similar and dissimilar consequences for Black and white people generally and for Black and white women in particular.” Harris, *supra* note 26, at 345-46. Harris explains that the status of enslaved persons was “dictated by their natural essential inferiority,” *id.* at 346, while the status of married women meant “she was naturally under the authority of the male who headed her household,” *id.* at 349. The ways that enslaved persons and women were inferior differed, which Harris explores at length, but the justifications for their subordinate status were rooted in nature, which effectively obscured the source of the inequalities and blunted discussions of ways to rectify them. See also COTT, *supra* note 26, at 61-62 (noting how slavery proponents advanced their cause by invoking marriage and the inferiority of wives as an analogy).

¹³⁹ See Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10, 68 (1987) (“Power is at its peak when it is least visible, when it shapes preferences, arranges agendas, and excludes serious challenges from discussion or even imagination. Daily social practices that reinforce existing arrangements stand in the way of efforts to expose unstated assumptions about the power behind attributions of difference.”).

II. ABOLITIONIST MODELS

What would it mean to abolish the family? What would happen to family law? Self-identified family abolitionists in fields outside of law have already started a lively discourse with which we engage. Here, we uncover five models that abolitionists and critics with similar concerns have suggested that could challenge the status quo. For each model, we provide an analysis of how the nonlegal literature, along with any relevant legal scholarship, can be understood as abolitionist, whether or not the author uses such terminology. Along the way, we also note how, for some of these theorists, abolishing the family constitutes one piece of a much larger societal transformation that places everything from property to capitalism to the state in the crosshairs.

A. *The Direct Compensation Model*

One path towards family abolition entails directly compensating services like sex and other care work. Paying for sex strikes at the core of one of family law's main functions, which is to obscure the link between sex and property by tying sex to marriage and keeping sex in a private zone that discourages analysis or critique.¹⁴⁰ So, too, does paying for housework, which courts often conflate with the provision of sex and present either as a wifely duty or as a service rendered gratuitously.¹⁴¹

Based on her interviews with sex workers, Heather Berg recounts several arguments that emphasize how receiving pay can subvert the family form. The sex worker radicals she consults describe the family as a site of hierarchy, coercion, and violence.¹⁴² Their priorities include a source of self-support to permit exit from felt oppression, along with interests in autonomy and self-worth. For these individuals, the direct compensation that sex work provides serves these objectives.

To be sure, conventional waged labor could also serve these objectives, but it might require skills and resources that a given individual lacks.¹⁴³ In addition, several of the interviewees in Berg's archive express opposition to conventional waged labor based on a larger opposition to capitalism; according to some, sex work and porn work fall outside mainstream definitions of work altogether and thus remain exempt from such critiques.¹⁴⁴

In any event, for queer and other young persons who do not conform to their families' norms, sex work makes it possible for them to leave home.¹⁴⁵

¹⁴⁰ See Antognini & Appleton, *supra* note 62, at 1807.

¹⁴¹ See Antognini, *supra* note 66, at 104-09.

¹⁴² See HEATHER BERG, NOTES FROM THE SEX WORKER LEFT: LUMPEN THEORY (forthcoming 2026) (manuscript at 23-24) (on file with authors).

¹⁴³ Berg describes sex work as "one of the few jobs people disabled by trauma can do." *Id.* (manuscript at 26).

¹⁴⁴ See HEATHER BERG, PORN WORK: SEX, LABOR, AND LATE CAPITALISM 1-11 (2021).

¹⁴⁵ See BERG, *supra* note 142 (manuscript at 33).

For adults—whom Berg notes are “ex-children”¹⁴⁶ and thus carry their own past familial experiences—sex work can also provide an exit from home. Under this account, sex work presents an attractive alternative to a monogamous heterosexual relationship because it allows deploying sexuality to one’s own advantage and increasing one’s own control.¹⁴⁷

While enabling one to exit the family does not abolish the family,¹⁴⁸ the direct compensation model also provides a point of departure for challenging foundational assumptions of family law. As a theoretical matter, it closes the fundamental divide between the family and the market.¹⁴⁹ In a more material way, against the tradition of “free sex” expected in family settings,¹⁵⁰ such “demands for pay reveal all the work we do for free.”¹⁵¹ Who are the “we” here? Individuals gendered as women, of course, because the underlying problem is “unpaid feminized labor.”¹⁵²

Berg finds the roots of these challenges to the family in 1970s feminism, which produced a rich literature on family abolition.¹⁵³ In contrast, Berg expresses frustration with contemporary feminist thought, which regularly takes aim at private sex work while avoiding critiques of private domestic life, particularly marriage and motherhood.¹⁵⁴ We share this frustration, while also looking beyond it to identify additional difficulties with the sex workers’ arguments as exposed by modern feminist theory.

First, the distinction between free sex in marriage versus paid sex work outside marriage fails to take account of all the nonmarital, nonmarket sex embraced by what is known as third-wave feminism.¹⁵⁵ Second and more specifically, today’s sex-positive feminism might well raise questions about who should pay whom for a sexual encounter—in or out of an ongoing relationship. The 1970s paradigm and the radical sex workers who promote its legacy seem to envision a situation in which only one party, presumably the purchaser or the one who should be the purchaser, receives pleasure that merits compensation for the party providing it. In gendered terms, the man receives pleasure given by the woman, who thus merits compensation.

¹⁴⁶ *Id.* (manuscript at 23, 32).

¹⁴⁷ *See* Berg, *supra* note 33, at 511.

¹⁴⁸ *Compare* O’Brien, *supra* note 2, at 142 (criticizing abolitionists of the 1970s for seeing the project as voluntary and for limited groups rather than “a society-wide restructuring of economic relations”), *with id.* at 169 (noting how some people would primarily benefit from a “means of escape” from their existing households).

¹⁴⁹ *See* Olsen, *supra* note 74.

¹⁵⁰ Berg, *supra* note 33, at 511.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *See* Weeks, *supra* note 8.

¹⁵⁴ *See* Berg, *supra* note 33, at 508–11.

¹⁵⁵ *See, e.g.,* Bridget J. Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 MICH. J. GENDER & L. 99 (2007). Here, we refer to sex that takes place outside marriage or marriage-like relationships and outside directly compensated sex, such as “hooking up” or other casual and unencumbered sex.

Yet to the extent that sex-positive feminism recognizes and promotes pleasure for women,¹⁵⁶ even in a heterosexual marriage,¹⁵⁷ the distinction between the giver and the receiver unsettles the assumed paradigm.

This perspective certainly does not mean sex workers, wives, or other feminized sexual partners always enjoy the sex to which they consent.¹⁵⁸ And, of course, enjoyment does not negate the importance of payment. Those of us who love our careers do not work for free! Indeed, the value that payment signals likely enhances satisfaction, enjoyment, and self-esteem.¹⁵⁹

Turning to other types of feminized labor for which payment has sparked controversy helps to illuminate the direct compensation model without the complications raised by sex work. Accordingly, we consider two additional illustrations, the “wages for housework” movement of the mid-1970s and the modern rise of paid gestational labor in surrogacy arrangements.

Italian political philosopher Silvia Federici stands out as a leading theorist in the wages for housework movement.¹⁶⁰ She explained the true objective of this challenge to the absence of direct compensation for household labor, including sex:

In fact, to demand wages for housework does not mean to say that if we are paid we will continue to do this work. It means precisely the opposite. To say that we want wages for housework is the first step towards refusing to do it, because the demand for a wage makes our work visible, which is the most indispensable condition to begin to struggle against it, both in its immediate aspect as housework and its more insidious character as femininity.¹⁶¹

Federici’s ideas attracted a new look in the wake of the COVID lockdowns, when usually invisible household labor—and its gender—emerged from the shadows for the world to see.¹⁶² Because of stay-at-home measures,

¹⁵⁶ See Susan Frelich Appleton, *Sex-Positive Feminism’s Values in Search of the Law of Pleasure*, in THE OXFORD HANDBOOK OF FEMINISM AND LAW IN THE UNITED STATES 94 (Deborah L. Brake et al. eds., 2023).

¹⁵⁷ See Susan Frelich Appleton, *Toward a “Culturally Cliterate” Family Law?*, 23 BERKELEY J. GENDER, L. & JUST. 267 (2008).

¹⁵⁸ See, e.g., Robin L. West, *Sex, Law, and Consent*, in THE ETHICS OF CONSENT: THEORY AND PRACTICE 221 (Franklin G. Miller & Alan Wertheimer eds., 2010).

¹⁵⁹ Socialism offers potential common ground for sex-positive feminists and family abolitionists, especially those who advocate communizing care. See KRISTEN R. GHODSEE, *WHY WOMEN HAVE BETTER SEX UNDER SOCIALISM: AND OTHER ARGUMENTS FOR ECONOMIC INDEPENDENCE* (2020); *infra* Part II.B.

¹⁶⁰ See Cynthia Grant Bowman, *Socialist Feminist Legal Theory: A Plea*, in RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 91, 97 (Robin West & Cynthia Grant Bowman eds., 2019).

¹⁶¹ SILVIA FEDERICI, *REVOLUTION AT POINT ZERO: HOUSEWORK, REPRODUCTION, AND THE FEMINIST STRUGGLE* 19 (2012); see also O’BIEN, *supra* note 2, at 139 (emphasizing this aspect of Federici’s project); LEWIS, *supra* note 15, at 76 (reminding readers of the pamphlet entitled *Wages Against Housework*).

¹⁶² See Jordan Kisner, *The Lockdown Showed How the Economy Exploits Women. She Already Knew.*, N.Y. TIMES (Feb. 22, 2021), <https://www.nytimes.com/2021/02/17/magazine/>

family members and women in particular found themselves supervising remote schooling, shouldering previously outsourced care work, and consequently exiting paid employment.¹⁶³ The popular press took note, as illustrated by an interview with Federici during the pandemic. According to the reporter:

Federici argues that it's not "natural" that the kinds of work that involve care and sustaining life were the province of any one gender; neither is it natural or inevitable that people be subjugated by an economic system that benefits a very few. These were merely conventions useful to the rise of an economic system that has become so all-encompassing that we no longer dare to imagine another way.¹⁶⁴

Federici's thinking echoes the claim of socialist theorist Friedrich Engels that evolving family forms rest on economic conditions, not "nature."¹⁶⁵ With a principal goal of exposing invisible labor—rather than actually requiring payment—wages for (or against) housework might make plain that domestic care within the home constitutes productive labor,¹⁶⁶ but it does not necessarily offer sex work's exit ramp from an oppressive family, a source of self-support, or autonomy. Significantly, though, it collapses the distinction that family law erects between market relations and family relations, prompting us to question the inevitability of the way that care is provided and valued in our society.

Even if "wages for housework" remains largely a symbolic project, law has been able to accommodate one form of direct compensation for traditionally gratuitous feminized labor, as seen in the rise of commercial surrogacy. In paid gestational carrier agreements, a woman or other individual with a uterus gestates a pregnancy for the prospective child's intended parent(s). Despite the predominant view just a few decades ago that law permits such arrangements only if undertaken without pay,¹⁶⁷ commercial surrogacy has

waged-housework.html [https://perma.cc/7PXL-WH3K] ("Silvia Federici has been warning for decades of what happens when we undervalue domestic labor."); *see generally*, e.g., ANGELA GARBES, *ESSENTIAL LABOR: MOTHERING AS SOCIAL CHANGE* (2022) (highlighting the work of motherhood as exposed by the COVID pandemic).

¹⁶³ See Melissa Murray & Caitlin Millat, *Pandemics, Privatization, and the Family*, 96 N.Y.U. L. REV. ONLINE 106 (2021); Emily J. Martin, *Women and the Workplace—What We Learned from COVID*, HUM. RTS., Oct. 2023, at 20 (2023).

¹⁶⁴ Kisner, *supra* note 162.

¹⁶⁵ FRIEDRICH ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE* 95 (1972, with new introduction added in 2010) (based on original version from 1882) (theorizing that the rise of monogamous marriage rested "not on natural but on economic conditions—on the victory of private property, over primitive, natural communal property"); *see also id.* at 96 (stating "monogamous marriage comes on the scene as the subjugation of the one sex over the other; it announces a struggle between the sexes unknown throughout the whole previous prehistoric period").

¹⁶⁶ *See also* Staudt, *supra* note 62 (arguing that taxing housework would substantiate its value).

¹⁶⁷ *See In re Baby M*, 537 A.2d 1227, 1264 (N.J. 1988).

become legal in many states.¹⁶⁸ Scholars have noted the parallels between sex work and surrogacy, because both entail the use of one's body to provide a personal service¹⁶⁹—and a feminized one at that. Yet while sex work remains illegal in virtually all of the United States and housework in the family receives no direct compensation, paid work as a gestational carrier has become fully legitimized.¹⁷⁰ Commercial surrogacy makes plain that pregnancy is labor, often poses risks, and merits compensation.¹⁷¹ Indeed, even while challenging paid transactions generally by taking aim at capitalism and the market,¹⁷² family abolitionist Sophie Lewis emphasizes the importance of recognizing all pregnancies as work.¹⁷³

Given the current state of the law, paid surrogacy provides, perhaps, the most salient case for how the direct compensation model might defy the family form. Paid surrogacy facilitates exit from the family by providing a source of self-support; it offers a sense of autonomy and control and signals the value of the personal service—all without the risk that criminal prohibitions on sex work pose.¹⁷⁴ As Lewis writes, treating paid surrogacy as work is at least a step in an abolitionist direction because “[l]ooking at surrogacy as productive care labor is not a solution to all problems, but it opens up the realization that pregnancy workers can bargain, commit sabotage, and go on strike.”¹⁷⁵

Lewis's aspirations address the problems of inadequate pay and exploitation that the direct compensation model raises and that the practice of reproductive tourism has highlighted.¹⁷⁶ A more fundamental complication

¹⁶⁸ See Courtney Joslin, *(Not) Just Surrogacy*, 109 CALIF. L. REV. 401, 412-13 (2021) (describing the more permissive scheme that has emerged since the late 1980s).

¹⁶⁹ See CAROLE PATEMAN, *THE SEXUAL CONTRACT* 212 (1988) (“A prostitute does not sell her body, she sells sexual services. In the surrogacy contract, there is no question of a baby being sold, merely a service . . . [T]he contract is for the use of the property a woman owns in her uterus.”); see also Joan Heifetz Hollinger, *From Coitus to Commerce: Legal and Social Consequences of Noncoital Reproduction*, 18 U. MICH. J.L. REFORM 865, 893 (1985) (“The payments are not to purchase a child, but to compensate for personal services.”); see, e.g., MARGARET JANE RADIN, *CONTESTED COMMODITIES* 148 (1996) (joining analyses of prostitution and surrogacy and observing that “paid surrogacy within the current gender structure may symbolize that women are fungible baby-makers for men”).

¹⁷⁰ See Antognini & Appleton, *supra* note 62, at 1826-30. Michigan, the last state to make surrogacy legal, decriminalized the practice in 2024. See Governor Gretchen Whitmer, *Gov. Whitmer Signs Bills Decriminalizing Surrogacy and Protecting IVF*, MICHIGAN.GOV (Apr. 1, 2024), <https://www.michigan.gov/whitmer/news/press-releases/2024/04/01/whitmer-signs-bills-decriminalizing-surrogacy-and-protecting-ivf> [<https://perma.cc/W24M-GDN8>].

¹⁷¹ See LEWIS, *supra* note 15, at 45.

¹⁷² See *id.* at 33.

¹⁷³ See *id.* at 59, 71; see also *id.* at 45 (“[W]e’re collectively too busy, worrying about what surrogacy being pregnancy makes surrogacy, to think about what that very same realization makes pregnancy.”).

¹⁷⁴ But see Joslin, *supra* note 168, at 446-47 (identifying jurisdictions that allow agreements limiting surrogates’ bodily autonomy).

¹⁷⁵ See LEWIS, *supra* note 15, at 75.

¹⁷⁶ See *id.* at 31, 37, 144; see generally Lisa C. Ikemoto, *Reproductive Tourism: Equality Concerns in the Global Market for Fertility Services*, 27 LAW & INEQ. 277 (2009) (citing critics

with using surrogacy to exemplify the direct compensation model is that, while the gestational carrier's opportunities might fit within one version of a family-abolition framework, the purpose of the undertaking as we understand surrogacy today—bringing to term a child for others—helps create a family, often a genetically related family, possibly conflicting with more ambitious abolitionist visions. Here, the distinction between the family as a legal construct and families as affiliations chosen by particular individuals offers a response.¹⁷⁷ Yet the analysis must continue because Lewis offers a radically different perspective on surrogacy, suggesting a second abolitionist model, which we examine next.

B. *The Communal Care Model*

Abolition proponent Lewis would replace the family with communal care and support, suggesting a second model. With respect to surrogacy in particular, Lewis asks what it would take to create “the conditions of possibility for open-source, fully collaborative gestation” in which “every pregnancy [would] be for everyone.”¹⁷⁸ This model would go beyond eliminating the “ownership” that family law currently accords parents over their children under the parental autonomy doctrine¹⁷⁹ and would pave the way for children to develop meaningful relationships with multiple members of the community, which some scholars deem valuable.¹⁸⁰ Put in terms of a recent political meme, when children belong to everyone, there are no “childless cat ladies.”¹⁸¹

M.E. O'Brien, who sees the family as an artifact of capitalism and a site of coercion, also advocates for “communizing care.”¹⁸² As O'Brien explains:

Instead of destroying the family, we must abolish it by preserving what is crucial to it—human love, connection, care, community, and romance—without binding these qualities to the particular form of the household within capitalism. Abolition means radically transforming these qualities, freeing them from relationships of

who regard tourism for third-party assisted reproduction as trafficking and showing how this practice allocates the risks of harm to women).

¹⁷⁷ See *supra* notes 16-17 and accompanying text.

¹⁷⁸ LEWIS, *supra* note 15, at 22.

¹⁷⁹ See *id.* at 119 (“For purposes of this book, ‘family abolition’ refers to the (necessarily postcapitalist) end of the double-edged coercion whereby the babies we gestate are ours and ours alone, to guard, invest in, and prioritize.”); see, e.g., Woodhouse, *supra* note 116 (providing a critical reading of classic cases recognizing parental rights).

¹⁸⁰ See Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1484-92 (2018).

¹⁸¹ See generally ‘I Was a Childless Cat Lady’: Women Respond to JD Vance, N.Y. TIMES (July 30, 2024), <https://www.nytimes.com/2024/07/30/opinion/jd-vance-childless-cat-ladies.html?searchResultPosition=1> [https://perma.cc/KHP3-NPK2] (letters to the editor).

¹⁸² O'BRIEN, *supra* note 2.

coercion, abuse, isolation, and property. Abolition is a powerful way to describe moving toward the simultaneous destruction of the basis of coercion, and the unleashing of new forms of care.¹⁸³

In arguing for abolition, O'Brien exposes how the institution of the family as we know it today fails both family members and those excluded from family membership.¹⁸⁴ O'Brien would shift care from the isolated and private household to a larger classless society in which care is performed by everyone according to their ability and provided to all according to their need,¹⁸⁵ in "[c]ommunal, shared, and collectivized units of consumption" instead of the private household.¹⁸⁶

O'Brien cites as illustrations several modern protest camps, including the Oaxaca Commune of 2006¹⁸⁷ and the Occupy Wall Street camp in 2011,¹⁸⁸ and goes on to imagine communes of the future.¹⁸⁹ Additional examples appear in the informal childrearing found in Black communities, among others.¹⁹⁰ The practice, which entails taking in a child of a relative or friend, sometimes called "othermothering,"¹⁹¹ has roots in slavery, when separation of enslaved family members and "natal alienation"¹⁹² often left children in need of care.¹⁹³ Along similar lines, Lewis points out how in Native communities, "tribes practiced few or no forms of patriarchy; raising children collectively, honoring more than two genders, . . . and sometimes conceptualizing mothering-practices (such as breast-feeding) as gender-inclusive."¹⁹⁴

¹⁸³ *Id.* at 56-57. Lewis also embraces these rationales for family abolition. *See* LEWIS, *supra* note 1.

¹⁸⁴ For some of this analysis, we are indebted to Maryn Lowell, Washington University School of Law, Class of 2024, for the insights in the excellent review of M.E. O'Brien's book, *supra* note 2, that she submitted as her final paper in *Regulating Sex: Historical and Cultural Encounters*, Spring 2024. *See* Maryn Lowell, (Regulating) Sex on the Commune: Care, Reproductive Justice, Sexual Unfolding, and Harm in the Post-Family Future (2024) (course final paper, Washington University School of Law) (on file with authors).

¹⁸⁵ *See* Lowell, *supra* note 184.

¹⁸⁶ O'BRIEN, *supra* note 2, at 221.

¹⁸⁷ *See id.* at 1.

¹⁸⁸ *See id.* at 205-06.

¹⁸⁹ *See id.* at 219-33; M.E. O'BRIEN & EMAN ABDELHADI, *EVERYTHING FOR EVERYONE: AN ORAL HISTORY OF THE NEW YORK COMMUNE, 2052-72* (2022).

¹⁹⁰ *See, e.g.*, CAROL STACK, *ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY* 62-89 (1997); *see also* LEWIS, *supra* note 15, at 149 (citing additional authors). A more organized effort would be the survival programs, including free breakfast programs, that the Black Panther Party established in the 1960s and 1970s. *See* DEAN SPADE, *MUTUAL AID: BUILDING SOLIDARITY DURING THIS CRISIS (AND THE NEXT)* 9-10 (2020).

¹⁹¹ Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL'Y 47, 57 (2007).

¹⁹² ROBERTS, *supra* note 26, at 45.

¹⁹³ Poverty and substance use disorder have also prompted such arrangements, which are considered informal not because the relationships that develop are insubstantial or casual, but rather because family law does not always recognize them. *See, e.g.*, Courtney G. Joslin & Douglas NeJaime, *Multiparenthood*, 99 N.Y.U. L. REV. 1242, 1274 (2024).

¹⁹⁴ LEWIS, *supra* note 1, at 42.

A particularly unsettling, and relatively recent, glimpse of efforts to replace the family with communal care and intimacy appears in journalist Alexander Stille's *The Sullivans: Sex, Psychotherapy, and the Wild Life of an American Commune*.¹⁹⁵ Stille tells the story of the collective formed in the 1970s on the Upper West Side of New York by the Sullivanian Institute's psychotherapists and their patients.¹⁹⁶ Elevating friendship ("chumship") and repudiating romance, leaders assigned members to single-sex living groups,¹⁹⁷ orchestrated members' sexual encounters,¹⁹⁸ designated who would rear any resulting children (usually groups but not biological parents),¹⁹⁹ and went to considerable lengths to break up any incipient nuclear families forming among members,²⁰⁰ all the while providing therapy sessions that urged members to cut ties with their families of origin to facilitate emotional growth and self-actualization.²⁰¹

As Stille explains, the leaders saw "the nuclear family as the basic unit of capitalist production, the means by which the system perpetuated itself to the detriment of individual growth,"²⁰² a view that some other radical therapists of the time also embraced.²⁰³ Accordingly, the "central feature of Sullivanian therapy was the systematic dismantling of the nuclear family."²⁰⁴

¹⁹⁵ See ALEXANDER STILLE, *THE SULLIVANS: SEX, PSYCHOTHERAPY, AND THE WILD LIFE OF AN AMERICAN COMMUNE* (2023). For some of the analysis that follows, we are indebted to Quentin Ashley, Washington University School of Law, Class of 2025, for the insights in the excellent review of Stille's book that he submitted as his final paper in *Regulating Sex: Historical and Cultural Encounters*, Spring 2024. See Quentin Ashley, *Sullivanians and the Law: How Marriage and Parenthood Built and Dismantled a Manhattan Psychotherapy Cult* (2024) (course final paper, Washington University School of Law) (on file with authors).

¹⁹⁶ The Institute was named for psychiatrist and psychoanalyst Harry Stack Sullivan, who died in 1949, long before the commune was founded. See STILLE, *supra* note 195, at 41.

¹⁹⁷ See *id.* at 43, 62, 118.

¹⁹⁸ See *id.* at 143, 231.

¹⁹⁹ See *id.* at 76, 260-61.

²⁰⁰ See *id.* at 141-43.

²⁰¹ See *id.* at 101.

²⁰² *Id.* at 41.

²⁰³ See *id.* at 106-07.

²⁰⁴ *Id.* at 62. This Sullivanian intervention has a contemporary counterpart: the controversial practice, often promoted online, of supporting "family cutoff" for those who tell their counselors about their "toxic" and dysfunctional families. Note the throughline that connects abolitionists' claims of the abuse, coercion, and isolation inherent in the family, on the one hand, with the Sullivanian ethos and the estrangement accomplished by today's family cutoff therapy, on the other. See, e.g., Ellen Barry, *Is Cutting Off Your Family Good Therapy?*, N.Y. TIMES (July 17, 2024), <https://www.nytimes.com/2024/07/14/health/therapy-family-estrangement.html?searchResultPosition=1> [<https://perma.cc/2WVH-B6VE>]; *Toxic Families: Is Breaking Away the Answer?*, N.Y. TIMES (July 28, 2024), <https://www.nytimes.com/2024/07/28/opinion/toxic-family-therapy.html?searchResultPosition=1> [<https://perma.cc/6SHE-AADM>] (letters to the editor); Anna Russell, *Why So Many People Are Going "No Contact" with Their Parents*, THE NEW YORKER (Aug. 30, 2024), <https://www.newyorker.com/culture/annals-of-inquiry/why-so-many-people-are-going-no-contact-with-their-parents> [<https://perma.cc/9HRX-GW4T>].

At its peak population, the Sullivanian commune had approximately 600 patient-members and bore all the indicia of a cult.²⁰⁵ Multiple causes led to its undoing, including political divisions, financial challenges, and the increasingly authoritarian and demented behavior of its leader.²⁰⁶ Perhaps most pertinently, however, this anti-family project unraveled because of “family.”²⁰⁷ Custody suits by parents who eventually decided to challenge the policy of separating them from their biological children eventually led to exposure and the commune’s downfall.²⁰⁸

This historical episode offers a cautionary tale about the viability of an arrangement built on forced separation of partners, parents, and children, but we should not read the Sullivanians’ story as evidence of the unsustainability of communal life. Theorists like Lewis and O’Brien might well say that the Sullivanian project failed because it lacked more far-reaching ambitions. For them, abolishing the family requires not only “changing everything about the family”²⁰⁹ but also overcoming other foundational institutions that complement the family—property, capitalism, the market, and the state.²¹⁰ Nonetheless, some of the Sullivanian commune’s precepts and aspirations resonate today, including the value accorded to “chumship.”

C. The Friendship Model

The celebration of what Sullivanian therapy called “chumship” lives on in contemporary calls to bring friendship into the mainstream of intimate life, evoking a model in which friendship might supersede the family. One recent call comes from writer and podcaster Rhaina Cohen’s 2024 book, which invites us to focus on “the other significant others” and to “reimagin[e] life with friendship at the center.”²¹¹ Friendship is also primed to become a more prominent field of study now that asexual identity²¹² and singlehood (often defined as being without a regular sexual partner)²¹³ have become subjects

²⁰⁵ Jessica Winter, *The Upper West Side Cult That Hid in Plain Sight*, THE NEW YORKER (June 14, 2023), <https://www.newyorker.com/books/under-review/the-upper-west-side-cult-that-hid-in-plain-sight> [<https://perma.cc/W7FW-BEQN>].

²⁰⁶ See STILLE, *supra* note 195, at 324-26.

²⁰⁷ Ashley, *supra* note 195, at 5.

²⁰⁸ See STILLE, *supra* note 195, at 294-319, 373.

²⁰⁹ LEWIS, *supra* note 1, at 81.

²¹⁰ See O’BRIEN, *supra* note 2, at 26, 53, 80.

²¹¹ RHAINA COHEN, *THE OTHER SIGNIFICANT OTHERS: REIMAGINING LIFE WITH FRIENDSHIP AT THE CENTER* (2024); see also Rhaina Cohen, *What If Friendship, Not Marriage, Was at the Center of Life?*, THE ATLANTIC (Oct. 20, 2020), <https://www.theatlantic.com/family/archive/2020/10/people-who-prioritize-friendship-over-romance/616779/> [<https://perma.cc/8LHE-GYUY>] (making similar arguments).

²¹² See Elizabeth F. Emens, *Compulsory Sexuality*, 66 STAN. L. REV. 303, 321-22 (2014); see generally ANGELA CHEN, *ACE: WHAT ASEXUALITY REVEALS ABOUT DESIRE, SOCIETY, AND THE MEANING OF SEX* (2020) (using the lens of asexuality to question prevailing norms and assumptions about relationships).

²¹³ See Naomi R. Cahn, *Reflections on Singlehood*, 72 WASH. U. J.L. & POL’Y 27, 32-33 (2023).

worthy of study in their own right.²¹⁴ Another timely reference point appears in the emerging practice of “platonic marriage,” in which friends become legal spouses in order to give their relationships the emotional and material benefits that marriage brings, albeit without the sexual incidents.²¹⁵

These recent developments recall earlier legal scholarship by Laura Rosenbury,²¹⁶ Katharine Franke,²¹⁷ and Ethan Leib.²¹⁸ Each has criticized law’s failure to respect and support friendship—even while such analyses acknowledge that legal recognition can come with stultifying downsides.²¹⁹ All of these sources merit a closer look to determine what they might contribute to the conversation about family abolition.

In urging more attention and support for friendship, Leib does not suggest that it might replace the family. Simply recognizing friends as fiduciaries would go far toward his goal.²²⁰ While Rosenbury aims for deeper structural reform, with a specific objective of disrupting the gendered character of family functions and relationships, she too contemplates simultaneous legal recognition of family and friendship²²¹ and thus a wider pluralism in terms of which relationships matter. Similar pleas for pluralism appear in other work, including Alice Ristroph and Melissa Murray’s exploration of “[d]isestablishing the family.”²²² Invoking the principle of limited government²²³ as well as the religion clauses of the First Amendment, Ristroph and Murray challenge the normative family as established by law and analyze how greater latitude for “familial free exercise” might play out.²²⁴

Franke’s examination of friendship goes further. As she writes in response to *Obergefell v. Hodges*, which held that the Constitution protects the right of same-sex couples to marry²²⁵:

Resisting the normative and epistemic frame that values nonmarital forms of life in direct proportion to their similarity to marriage, we must unseat marriage as the measure of all things. To this end,

²¹⁴ See Wendy L. Morris & Bella M. DePaulo, *Singlehood*, in *ENCYCLOPEDIA OF HUMAN RELATIONSHIPS* 1504 (Harry T. Reis & Susan Sprecher eds., 2009).

²¹⁵ Danielle Braff, *From Best Friends to Platonic Spouses*, N.Y. TIMES (May 7, 2021), <https://www.nytimes.com/2021/05/01/fashion/weddings/from-best-friends-to-platonic-spouses.html?searchResultPosition=4> [https://perma.cc/N4QM-3HFX] (reporting wedding of two friends who “share a bed without any physical contact”).

²¹⁶ E.g., Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189 (2007).

²¹⁷ E.g., Katharine M. Franke, *Longing for Loving*, 76 FORDHAM L. REV. 2685 (2008).

²¹⁸ E.g., Ethan J. Leib, *Friendship & the Law*, 54 UCLA L. REV. 631 (2007).

²¹⁹ E.g., Rosenbury, *supra* note 216, at 203-04.

²²⁰ See Ethan J. Leib, *Friends as Fiduciaries*, 86 WASH. U. L. REV. 665 (2009).

²²¹ See Rosenbury, *supra* note 216, at 233-42.

²²² Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1270 (2010).

²²³ See *id.* at 1242.

²²⁴ *Id.* at 1251, 1266.

²²⁵ See 576 U.S. 644 (2015).

I suggest a thought experiment: substituting friendship for marriage at the center of the social field in which human connection takes place.²²⁶

Beyond making room for new relationships, Franke would reorder the current hierarchy. To the extent hers is an abolitionist enterprise, it would abolish the supremacy of the normative family form and put friendship in its place at the top. In terms of structure, Franke's thought experiment recalls feminist scholar Martha Fineman's proposal to replace the paradigmatic family relationship—the heterosexual dyad—with the mother-child dyad, leaving all other affiliations (including sexual affiliations) to occupy secondary status.²²⁷

Cohen's book sends conflicting signals about whether her views align more with Franke's or those of the other legal scholars. Certainly, the phrase in the title "friendship at the center" sounds very much like Franke's project, and one of Cohen's vignettes describes a situation in which a friendship, in fact, becomes a substitute for a normative familial relationship.²²⁸ Yet Cohen's vignettes also include many in which—like her own situation—a featured individual has both a family and friends.²²⁹

Friendship makes an illuminating foil for the normative family. Friendship's potential multiplicity, in contrast to marriage's expected exclusivity (monogamy), unsettles how we think about intimate life. It elevates the nonsexual connections, while leaving room for reproductive labor in the form of co-parenting²³⁰ or nonparental support for childrearing. So flexible that it is difficult to pin down, the friendship model includes dyads, "pods,"²³¹ and larger networks that might also illustrate the communal care model.²³² Because friendship can take so many different forms, this model is amorphous and might—or might not—displace the family writ large.

D. *The Disaggregation Model*

Another route to abolition emerges from feminist calls in the 1970s to disaggregate family functions in order to allow different people to perform them, in contrast to assigning them all to, say, a spouse. In her recent retrospective on feminist proposals to abolish the family, Kathi Weeks recalls

²²⁶ Franke, *supra* note 217, at 2686-87 (referring to *Loving v. Virginia*, 388 U.S. 1 (1967)).

²²⁷ See FINEMAN, *supra* note 15, at 1-9.

²²⁸ COHEN, *supra* note 211, at 150-77 (recounting the relationship of Barb and Inez).

²²⁹ See *id.* at 25-28.

²³⁰ See, e.g., Jessica R. Feinberg, *Friends as Co-Parents*, 43 U.S.F. L. REV. 799, 822 (2009).

²³¹ See, e.g., GARBES, *supra* note 162, at 91-92 (noting the rise of small mutual aid collaborations formed during the COVID pandemic).

²³² See Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385 (2008).

such arguments from historian Linda Gordon and writer-activist Shulamith Firestone.²³³ Gordon observed:

In its political sense, the word ‘family’ is only a shorthand for the functions it performs. We must demystify the institution by revealing its functions and purposes.²³⁴

As for Firestone’s contribution, Weeks captures her proposal more succinctly and clearly than do Firestone’s own musings on post-abolition utopias in her book *The Dialectic of Sex: The Case for Feminist Revolution*²³⁵:

Firestone’s own proposal involves, among other features, deconstructing the consolidations that produced the nuclear family model with the couple form at its centre. . . . [T]his model imagines that a single partner can serve for a lifetime as sexual partner, romantic lover, friendly companion, income-pooler, co-parent, domestic co-worker and partner in aging. Disaggregating these roles and assigning some or all to different people would open up infinite possibilities for different households, patterns of intimacy and social networks to develop.²³⁶

More radical than the other models, Firestone’s vision includes eliminating the special status of childhood, challenging children’s dependence as culturally constructed, and fully integrating children (along with women) into the larger society.²³⁷ Disaggregation, applied to children, would explode the understanding of parentage as exclusive and complete,²³⁸ allowing multiple individuals to perform the particular functions assigned to parents.

Disaggregation proposals have counterparts in the family law literature.²³⁹ In analyzing the question of whether children can have more than two legal parents, scholars have suggested the disaggregation of parental functions as a means to operationalize polyparentage while avoiding competition and conflict that might arise, especially after adult relationships

²³³ Weeks, *supra* note 8, at 434.

²³⁴ Gordon, *supra* note 8, at 22.

²³⁵ FIRESTONE, *supra* note 8.

²³⁶ Weeks, *supra* note 8, at 434.

²³⁷ FIRESTONE, *supra* note 8, at 234–37. For legal analysis that tends in this direction without going so far as Firestone, see Dailey & Rosenbury, *supra* note 180.

²³⁸ Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 883, 944–45 (1984).

²³⁹ They also have a robust counterpart in the literature on policing and criminal reform. See Barry Friedman, *Disaggregating the Policing Function*, 169 U. PA. L. REV. 925, 931 (2021) (“To figure out how best to achieve public safety in today’s world, and to structure the role of police accordingly, we need to *disaggregate the policing function*.”); Benjamin Levin, *Disentangling Safety and Accountability in Criminal Justice Policy*, 111 IOWA L. REV. 1009, 1015 (2026) (articulating the functions of criminal legal institutions in society in order “to understand what we’re actually looking to accomplish”).

might dissolve.²⁴⁰ One helpful model is the “parenting plan” that some states require parents to submit upon filing for dissolution of marriage. The standard form divides between parents time with the child for each day of the year; allocates decisionmaking for the child within statutorily listed categories, such as educational decisions and medical decisions; and assigns specific financial obligations to each.²⁴¹ Even if the standard parenting plan template was designed for two parents, its disaggregation of parental functions lends itself to use by larger numbers—a helpful tool now that law has begun to recognize more than two parents for some children.²⁴²

Although family law’s functional turn has played a less prominent role in the law governing adult relationships in contrast to those of children, there is no reason why the various functions that compose the “exclusive and complete” marital affiliation could not be disaggregated, as Firestone proposes. Legal scholar James Herbie DiFonzo discerned that marriage is becoming a “bundle” of discrete rights and responsibilities, although he did not explicitly suggest distributing these rights and responsibilities among multiple individuals.²⁴³ By contrast, Alexander Chen and Christina Mulligan, in calling for recognition of “parafamily” members, argue that “the idea of parafamily is that, in different circumstances, faced with different life challenges and problems, individuals may want and need different people to act as ‘family,’ to be the close partners who support each other and work through the challenges of life together.”²⁴⁴ Similarly, Cohen’s advocacy of friendship explains how a person might have a sexual or romantic partner and, in addition, “friendly companion[s]”—or “other significant others.”²⁴⁵ In this way, Cohen’s proposal illustrates how the different models overlap or share blurred boundaries.

A recent example of how disaggregation can operate appears in the practice of “platonic co-parenting,” in which adults have an interest in raising a child together, but no expectations of having a relationship otherwise.²⁴⁶

²⁴⁰ See Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 22-23 (2008); Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309, 312-313 (2007); see also Kessler, *supra* note 191, at 49 (challenging the resistance to more than two legal parents); Murray, *supra* note 232, at 390-91 (showing the prevalence of caregiving by adults who are not a child’s legal parents); Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 834-35 (2007) (noting that “[m]uch of childhood takes place in spaces between home and school”).

²⁴¹ *E.g.*, MO. ANN. STAT. § 452.310(8).

²⁴² See Joslin & NeJaime, *supra* note 193 (collecting authorities and reporting findings from dataset to conclude that recognizing multiple parents can advance child wellbeing).

²⁴³ James Herbie DiFonzo, *Unbundling Marriage*, 32 HOFSTRA L. REV. 31, 32 (2003). But see *id.* at 65 (noting how Judith Stacey “recommends challenging the ‘dyadic limitations of Western marriage’”).

²⁴⁴ Alexander Chen & Christina Mulligan, *Parafamily*, 105 B.U. L. REV. 385, 390 (2025).

²⁴⁵ See COHEN, *supra* note 211, at 25-28.

²⁴⁶ Alyson Krueger, *In Search of a Platonic Co-Parent*, N.Y. TIMES (Jan. 24, 2026), <https://www.nytimes.com/2026/01/24/style/platonic-co-parenting-apps.html> [https://perma.cc/G5QX-WL4D].

Thus, one cordons off the parenting relationship from the romantic relationship. Another example of limited disaggregation recognized by statute appears in “designated beneficiary” laws, like Colorado’s.²⁴⁷ Originally enacted for those who could not marry, forms to be completed under this law list a series of benefits and responsibilities. Signatories can choose whether or not to designate a person to fulfill each one, and—unlike in a reciprocal beneficiary scheme—the person selected need not choose the other person to perform that function, for example, making health care decisions on the other’s behalf. However, under the statute, signatories cannot enter more than one designated beneficiary arrangement.²⁴⁸ Full disaggregation would go beyond the statute to allow one to enter more than one agreement and to designate different individuals for different purposes.

Singlehood, which is now attracting the attention of legal scholars,²⁴⁹ could have a place in this analysis as well. Single individuals can be seen to represent the ultimate disaggregation because they have no officially recognized family affiliation to which benefits and responsibilities are tied. Of course, they might have many unofficial roles, for example, as friends, as aunts or uncles, as siblings, or as their parents’ adult children, which, if recognized, could yield a constellation of different consequences.²⁵⁰

Finally, we might read Janet Halley’s challenge to “family law exceptionalism” as tantamount to a disaggregation proposal. If we replaced special laws governing the family with rules drawn from ordinary contract, tort, and property law,²⁵¹ we would be disaggregating the elements of the “package deal” that family status has long entailed and subjecting each element to the legal framework that would apply outside the family.²⁵² That is exactly what happened with the abrogation of interspousal immunity, for example. Traditional family law exempted a tortfeasor from liability if the injured party happened to be his wife; now, ordinary tort principles apply.²⁵³

²⁴⁷ See CO. REV. STAT. §§ 15-22-101 to 15-22-112 (2009).

²⁴⁸ John G. Culhane, *After Marriage Equality, What’s Next for Relationship Recognition?*, 60 S.D. L. REV. 375, 383-84 (2015) (discussing Colorado law). See generally JOHN G. CULHANE, *MORE THAN MARRIAGE: FORMING FAMILIES AFTER MARRIAGE EQUALITY* (2023).

²⁴⁹ See Cahn, *supra* note 213, at 32-33; cf. Rachel F. Moran, *How Second-Wave Feminism Forgot the Single Woman*, 33 HOFSTRA L. REV. 223 (2004).

²⁵⁰ See, e.g., Jill E. Hasday, *Siblings in Law*, 65 VAND. L. REV. 897, 898 (2012) (Family law’s “[r]eflexive focus on only two family relationships [marriage and parenthood] diverts legal scrutiny and support away from myriad family bonds and many kinds of relatives, such as siblings, grandparents, grandchildren, aunts, uncles, nieces, nephews, and cousins.”).

²⁵¹ See *supra* note 22 (citing sources).

²⁵² See also FINEMAN, *supra* note 4, at 109 (“[F]amily law’ can be thought of as a system of exemptions from the everyday rules that would apply to legal interactions among people in a nonfamily context[.]”).

²⁵³ Compare RESTATEMENT (SECOND) OF TORTS § 895F (AM. L. INST. 1965), with RESTATEMENT (THIRD) OF TORTS: CONCLUDING PROVISIONS § 1 (AM. L. INST., Tentative Draft No. 1, 2022).

E. The Statist Model

One final approach to family abolition centers questions about the role of the state. According to Ristroph and Murray in *Disestablishing the Family*, the status quo embodies a statist framework because the state currently uses criminal law to “establish an official family model,” an approach they label “thick establishment.”²⁵⁴ This description remains accurate despite nationwide marriage equality. Plural marriage, for example, still constitutes a criminal offense in every state. Alongside thick establishment, Ristroph and Murray discern what they call a “thinner” version of family establishment, for example, the Supreme Court’s endorsement of “the family as a site of ideological diversity,” depicted in cases about parental rights and education.²⁵⁵

We can add to Ristroph and Murray’s description of the role of the state under the status quo, in which criminal law is just one of several legal tools at the state’s disposal. First, the state actively imposes and enforces the obligations that it enacts for the private family through, inter alia, child support requirements, duties of unpaid care, child abuse and neglect laws, and domestic violence remedies. At the same time, the state relieves non-family members of duties of care, support, and rescue.²⁵⁶ Second, the state provides for and requires the education of children.²⁵⁷ Even for those who see the upbringing of children as a responsibility that “naturally” belongs to parents, compulsory schooling and public education, mostly funded with taxpayer dollars, represent a delegation to the state, which has strong interests in developing its future citizens.²⁵⁸ Finally, because the state defines who counts as family and who does not, we cannot extricate the state from the family, and so opposition to “state intervention in the family” is necessarily incoherent, as Frances Olsen has noted.²⁵⁹

All told, then, the family and the state are deeply intertwined. Abolishing the family would certainly “disestablish” it, to use the language of Ristroph and Murray. Yet what role would that leave for the state?

²⁵⁴ Ristroph & Murray, *supra* note 222, at 1259.

²⁵⁵ *Id.* at 1263-64. *Cf.* Mahmoud v. Taylor, 606 U.S. 522 (2025) (requiring “opt out” for parents with religious objections to their children’s exposure to public school’s LGBTQ+-inclusive curriculum).

²⁵⁶ *See, e.g.*, ANITA BERNSTEIN, *THE COMMON LAW INSIDE THE FEMALE BODY* (2018).

²⁵⁷ *See, e.g.*, West Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

²⁵⁸ *See* Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431 (2006); Emily J. Stolzenberg, *Tribes, States, and Sovereigns’ Interest in Children*, 102 N.C. L. REV. 1093 (2024). Note how homeschooling, now prevalent throughout the United States, undercuts the realization of these state interests—and the interests of children themselves. *See, e.g.*, Martha Albertson Fineman, *Homeschooling: Choosing Parental Rights Over Children’s Interests*, 46 U. BALT. L. REV. 57 (2016).

²⁵⁹ Olsen, *supra* note 101, at 836-37 (explaining why nonintervention in the family is an incoherent idea).

For some family abolitionists, the state's role would grow. As O'Brien recounts: "Many Marxist feminists of the 1970s and early 1980s hint toward a withering away of the family through an expansion of services provided by a social democratic or socialist state."²⁶⁰ Taken to its logical conclusion, this vision would replace the individual family with the socialist state, which becomes "a new universal family."²⁶¹

A variation on this theme appears in the recent work of children's rights scholar Anne Dailey. Flipping the usual script in which parents delegate some of their "natural" authority to the state via public education, Dailey invites us to understand the state interest in children as so powerful that it provides the starting point of the analysis, with the state delegating portions of its authority to parents when not inconsistent with the goal of citizenship preparation; instead of the state acting "in loco parentis" (in place of parents) parents act "in loco reipublicae" (in place of the state).²⁶² This conceptualization accords with Olsen's notion that the family is a legal construction, such that any analysis necessarily starts with the state.

Many contemporary feminists want the state to do more, but they are not calling for family abolition. Instead, decrying how the family functions as a mechanism for keeping dependency private,²⁶³ they seek what legal scholar Maxine Eichner calls a more "supportive state."²⁶⁴ Today's wish list of supportive state measures, such as those designed to make childcare more affordable or to ensure paid family leave,²⁶⁵ send mixed messages because they would have the state enable family members to engage in waged or salaried labor in order to support dependents in their families—a key feature of privatized care.

Going further, other scholars target the regime of negative constitutional rights that frees the state from any obligation to meet even basic needs, including the provision of food, shelter, and necessary medical care.²⁶⁶

²⁶⁰ O'BRIEN, *supra* note 2, at 191. *But see, e.g.,* FEDERICI, *supra* note 161, at 83-84 (explaining why the wages for housework movement rejected reliance on the state).

²⁶¹ O'BRIEN, *supra* note 2, at 191.

²⁶² Anne C. Dailey, *In Loco Reipublicae*, 133 YALE L.J. 419, 424 (2023).

²⁶³ FINEMAN, *supra* note 4, at 44, 108-09, 208. *See also, e.g.,* GROSSMAN & FRIEDMAN, *supra* note 72, at 262; Alstott, *supra* note 39; Laura A. Rosenbury, *Federal Visions of Private Family Support*, 67 VAND. L. REV. 1835, 1866 (2014).

²⁶⁴ *See* EICHNER, *supra* note 44, at 59 ("[T]he view that family members should bear responsibility for other family members does not exempt the state from its responsibility for its citizens' dependency needs").

²⁶⁵ *See, e.g.,* CTR. FOR AM. PROGRESS, *How to Expand Access to Affordable, High-Quality Child Care and Preschool* (Dec. 14, 2023), <https://www.americanprogress.org/article/how-to-expand-access-to-affordable-high-quality-child-care-and-preschool/> [<https://perma.cc/J8F7-DBHY>] (providing "a menu of state policy recommendations and examples of state policies to expand access to affordable, high-quality child care and preschool opportunities").

²⁶⁶ *See, e.g.,* Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 L. & CONTEMP. PROBS. 25, 25-42 (2015); Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990). In the context of carceral abolition, Adam Davidson identifies the following "paradox": "Abolition

An antidote would be an interpretation of the Constitution that recognizes a positive right in individuals to have the state meet such needs, which Frank Michelman—in an overly optimistic reading of the case law in the 1960s—predicted the Supreme Court was poised to do.²⁶⁷ Some scholars who call for such positive rights focus specifically on children.²⁶⁸ Illustrations of positive rights for children appear in provisions of the United Nations Convention on the Rights of the Child (UNCRC), for example.²⁶⁹ Yet this approach—with its recognition of positive rights against the state and its perceived threat to parental authority—significantly diverges from the American legal construction of the family. As a consequence, the United States is the only member country of the United Nations that has not ratified this convention.²⁷⁰

In contrast to those who seek a greater role for the state, some family abolitionists oppose the state just as much as they oppose the family. Heather Berg's sex worker radicals are explicitly anti-state,²⁷¹ associating the state with capitalism, surveillance, and violent control.²⁷²

O'Brien belongs to this camp as well, writing in this maximalist passage:

To be a basis of human freedom and collective emancipation, family abolition must concurrently be the overcoming of capitalist society, including the state and wage labor. [The goal] . . . is to imagine an overcoming of the family that does not replace it with the other institutions of capitalist society. What if your food was made by neither a restaurant worker nor a family member? What if children belonged to neither their parents nor a state-administered crèche? What if disabled or elderly people could rely on a form of universal care that wasn't administered by a separated social institution?

constitutionalists want a constitution that enables broad care powers and limits carceral powers, but our current constitution, in both its text and history, provides broad carceral powers and limited care powers." Adam A. Davidson, *Structural Abolition Constitutionalism* 32 (Feb. 1, 2026) (unpublished manuscript) (on file with authors).

²⁶⁷ See Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969). See Susan Frelich Appleton, *Obergefell's Liberties: All in the Family*, 77 OHIO ST. L.J. 919, 933-39 (2016) (recounting the rise and fall of the welfare rights thesis); see also Alstott, *supra* note 266, at 26-32 (reflecting on absence of constitutional law in analyses of state support for families).

²⁶⁸ See Dailey & Rosenbury, *supra* note 180, at 1528-35.

²⁶⁹ Per Article 27, "States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development." Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, art. 27. While Article 27 continues by vesting the responsibility for implementing this right first in parents, it goes on to spell out state duties when parents cannot meet children's needs. *Id.*

²⁷⁰ HUM. RTS. WATCH, *How Do US States Measure Up on Child Rights?*, <https://www.hrw.org/feature/2022/09/13/how-do-states-measure-up-child-rights> [<https://perma.cc/DUX7-BTAB>] (last visited July 4, 2025) ("The United States is the only UN member state that has not yet ratified the Convention.").

²⁷¹ BERG, *supra* note 142 (manuscript at 84).

²⁷² *Id.* (manuscript at 83-89).

In other words: how could human life be reproduced without the family, the state, and the wage?²⁷³

For such family abolitionists, the ideal lies in person-to-person communal care, unmediated by the state, which “is understood as an institution that rules over social life yet is separated from the direct relationships between people.”²⁷⁴

III. ABOLITIONIST FAMILY LAW

Proponents of abolishing the family, as we have seen, assert that they respect and appreciate families, so long as individual members find themselves in a satisfying arrangement.²⁷⁵ We read these family abolitionists to acknowledge that, for some, families provide positive experiences, such as desired intimacy, sexual and otherwise; essential love, nurture, and guidance for children; meaningful support for dependent members of society; and a welcome buffer to an often cruel and oppressive society—benefits that we, too, value.²⁷⁶ We also read them, however, to express concerns for those who find their families to be a site of confinement, isolation, conformity, drudgery, disappointment, and violence—concerns that resonate for us as well. More significantly, as we have shown, the family, as constructed by family law (not “nature”), entrenches inequalities within and across families by devaluing care, keeping dependency private, and policing those who do not adhere to norms that privilege marriage and the nuclear family form.²⁷⁷

The family law literature has repeatedly identified these problems and their inequities. But such scholarship has yet to consider systematically how law might rid itself entirely of the family.²⁷⁸ Nor do leading abolitionist voices outside law fully grapple with this challenge. For example, M.E. O’Brien tells us that to abolish the family we would need to eliminate capitalism, private property, the market, and the state,²⁷⁹ a position Sophie Lewis echoes in arguing that we would need to “chang[e] everything about the family.”²⁸⁰ Lewis goes on to reject as a bad question any inquiry about who has responsibility for the care of a dependent or vulnerable individual²⁸¹ and

²⁷³ O’BRIEN, *supra* note 2, at 194.

²⁷⁴ *Id.* at 192. But see *infra* notes 332-33 and accompanying text (showing how O’Brien does accept state involvement as an interim measure en route to full abolition).

²⁷⁵ See *supra* notes 16-17 and accompanying text.

²⁷⁶ See Weeks, *supra* note 8, at 435; but see King, *supra* note 27 (supporting family abolition as especially worthwhile for Black communities).

²⁷⁷ See *supra* Part I.

²⁷⁸ See, e.g., *supra* note 35 (summarizing views of political theorist Susan Moller Okin, whose analysis includes reforming rather than abolishing family law).

²⁷⁹ O’BRIEN, *supra* note 2, at 26, 83.

²⁸⁰ LEWIS, *supra* note 1, at 81.

²⁸¹ *Id.* at 5.

to announce that “nothing” should replace the family.²⁸² Law seems, at best, beside the point or, at worst, a target for obliteration. That is, without the state, what would “family law” mean?

If we stopped here, we could now pick up our marbles and go home, having reached the end of our project. Yet a closer look reveals that at least some of the family abolitionists—like those in other abolitionist movements—are willing to begin with smaller steps. For example, similar to abolitionists taking aim at the carceral system,²⁸³ O’Brien offers “nonreformist reforms,” or provisional measures that not only improve the status quo but also shrink the boundaries or the power of the targeted institution, pending achievement of the ultimate goal of abolition. More specifically, O’Brien describes qualifying proposals as “progressive anti-family reforms”²⁸⁴ and provides this explanation in introducing a list of possibilities:

These are potentially nonreformist reforms, in the sense that their implementation could expand many people’s ability to live under chosen circumstances and to be free of immediate violence, thereby allowing them to participate in future social movement activity. . . . Broadly conceived, progressive anti-family reforms are those that expand the capacity of large numbers of people to consensually choose living arrangements, intimate partnerships, and child-rearing practices that work best for them.²⁸⁵

In a similar vein, although this Article is not a how-to manual, we hope to offer readers something beyond the call for abolition itself, especially because it remains near impossible to “imagine the end of . . . the family.”²⁸⁶ We see the abolitionist models that we have spelled out as helpful in meeting this challenge. Accordingly, Section A considers how implementing each of

²⁸² *Id.* at 25, 88.

²⁸³ See Amna A. Akbar, *Non-Reformist Reforms and Struggles Over Life, Death, and Democracy*, 132 YALE L.J. 2497, 2527 (2023) (“First, a non-reformist reform aims to undermine the political, economic, and social system or set of relations as it gestures at a fundamentally distinct system or set of relations in relation or toward a particular ideological and material project of world-building. Second, a non-reformist reform draws from and builds the popular strength, consciousness, and organization of revolutionary or agential classes or coalitions—most clearly, in doctrinaire Marxism, for example, the working class.”); Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), <https://jacobin.com/2017/08/prison-abolition-reform-mass-incarceration> [<https://perma.cc/Y3LM-HJBB>] (defining nonreformist reforms as “those measures that reduce the power of an oppressive system while illuminating the system’s inability to solve the crises it creates”); Roberts, *supra* note 24, at 114.

²⁸⁴ O’BRIEN, *supra* note 2, at 170.

²⁸⁵ *Id.*

²⁸⁶ LEWIS, *supra* note 15, at 119. Appeals to imagination are, however, imperative in abolitionist projects. See Roberts, *supra* note 24, at 121 (“Abolitionists are engaged in a collective project of radical speculative imagination—what [Prof. Dylan] Rodríguez calls ‘[i]nsurgent abolitionist futurity.’”) (citation omitted); Davidson, *supra* note 266, at 47 (“One of the key goals of the carceral abolitionist movement is not just to help those people who are being hurt by carceral systems today, but to imagine the society of tomorrow in which those harmful systems are unimaginable.”).

our models might address the problems in family law that we examined in Part I. Section B uses one of family law's quintessential regulatory regimes, divorce or dissolution, as a "case study" illustrating how the different models might play out.

A. *Applying the Models to Family Law's Problems*

In Part I we presented four different problems that family law creates and perpetuates: keeping dependency private, devaluing care, policing families that depart from the prevailing norm, and camouflaging legal constructions as "natural" facts. Yet the four problems often intertwine and overlap, blurring their boundaries. For example, assumptions that "natural" affections and duties underlie sexual, reproductive, and domestic care encourage the view that such care is gratuitous and belongs within the family. This view, in turn, makes such care largely invisible—or at least taken for granted—resulting in its devaluation and facilitating the policy of keeping dependency private. The inequalities that this structure produces then often trigger policing by the state, especially of families that depart from prevailing norms or fail to maintain self-sufficiency without public assistance.

Each of the models that we tease out from the literature unsettles one or more pillars of this edifice. Here, we show how each model opens up a path towards family abolition.

1. *The Direct Compensation Model*

The direct compensation model most obviously challenges family law's tenet of "unpaid feminized labor."²⁸⁷ It attacks head-on assumptions that sexual, reproductive, and domestic care merit no payment. More concretely, this model would remove a key barrier to enforcement of care-provision bargains because courts could no longer invoke pre-existing familial duties as reasons to deny recovery to one seeking compensation.²⁸⁸ (There is no reason to believe that the general policy against ordering performance of personal services would also change, so that courts would continue to prevent enforcement on the other side of the agreement.²⁸⁹)

This model strikes at a core aspect of the family as legally constructed. It also recognizes that sex has value, contradicting categorical statements to

²⁸⁷ See *supra* notes 33 & 152 and accompanying text.

²⁸⁸ See Antognini & Appleton, *supra* note 62, at 1820 ("[C]ourts decline to uphold contracts for sex within marriage because marriage is understood already to include sex.").

²⁸⁹ In previous work, we challenged case law that allows enforcement of agreements between nonmarital partners only after the severance of any sexual component of the agreement. While recognizing the downsides of a contractual regime, we nonetheless argued that making sex subject to contract, to be enforced upon dissolution of a nonmarital relationship, would avoid both the camouflaged role of marriage and the gendered inequities that the current approach reflects. See *id.* at 1856-57.

the effect that “sexual conduct is not a contribution to [a] relationship.”²⁹⁰ In addition, by treating intimate and affective interactions beyond sex as market transactions, this model seeks to respond to the invisibility, “naturalness,” and resulting devaluation of such care. It collapses supposed divisions between family and market and exposes who exactly is being denied access to the latter, namely the provider of such unpaid services. Following the path recently paved by the legalization of commercial surrogacy,²⁹¹ the direct compensation model could spur rethinking of other longstanding “taboos.” Affection—even or especially love—and compensation need not remain irreconcilable; indeed, affection does not preclude exploitation, as existing law demonstrates.²⁹²

With intimate, affective, and domestic care no longer situated exclusively within the family, the commercialization of such care would provide resources that facilitate caregivers’ self-sufficiency. And, in the absence of claims to government support, we might expect the state to be less likely to intervene in lives organized in this way.

Applying this model exposes two difficulties, however. First, scholars have noted that “paid feminized labor” has long been just as undervalued as its unpaid counterpart, demonstrated by the low earnings of many sex workers, housecleaners, and nannies.²⁹³ Although gestational carriers in the United States can command more compensation, reproductive tourism continues to attract consumers to countries where they can purchase such services more inexpensively (and with a large portion of the payments going to intermediaries).²⁹⁴ Of course, it is precisely because common understandings of such labor are rooted in the family that compensation is depressed. But subjecting services that are generally considered gratuitous to valuation would perhaps enable us to more accurately assess their worth and allow us to confront more directly preconceived ideas of their gender and their race. That said, even the most fervent abolitionists, who claim we must “change everything,”²⁹⁵ do not seem to think we can rid ourselves of the family’s shadow, at least for some time to come.²⁹⁶ To make a related point, despite the emergence of relatively well-paid, legally authorized gestational carriers in the United States—perhaps the one recent development suggesting that revaluation is possible—we have yet to see increased appreciation of

²⁹⁰ UNIF. COHABITANTS’ ECONOMIC REMEDIES ACT § 2 cmt. (2021).

²⁹¹ See *supra* notes 167-70 and accompanying text.

²⁹² See, e.g., *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16 (Cal. Ct. App. 1993) (legitimizing husband’s failure to perform his promise to transfer property to his wife in exchange for her caring for him after a stroke).

²⁹³ See, e.g., Baker, *supra* note 68, at 405; Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE J. L. & FEMINISM 51 (1997).

²⁹⁴ See Ikemoto, *supra* note 176.

²⁹⁵ See *supra* note 280 and accompanying text.

²⁹⁶ See LEWIS, *supra* note 1, at 88.

the work and worth of pregnancy more generally, given persistently high maternal mortality rates²⁹⁷ and recent limitations on the abortion freedom.²⁹⁸

Second, the direct compensation model assumes sufficient bargaining power for the “feminized laborer” to negotiate a fair price—whatever that might be. Even if Heather Berg’s radical sex workers have found an approach that succeeds for them,²⁹⁹ would it be plausible to scale up this model so that it applies to everyone? Would others offering sexual, reproductive, and domestic care for sale similarly succeed? Or could efforts to negotiate direct compensation prove worse for care providers than the status quo, which relies on the “forced sharing” that marriage entails?³⁰⁰ Consider here Robin West’s observations about how often individuals (usually women) consent to sex they do not want and what that means for their ability to speak up for themselves in other situations and to act as a “liberal self” in society generally.³⁰¹

Such problems help explain why abolitionists insist on overcoming the market, property, and capitalism, along with the family.³⁰² In the absence of these institutions, questions of value and bargaining might well become moot. At the very least, however, the direct compensation model can be viewed as an off-ramp or an option for those rejecting life in the family as legally constructed and regulated by family law, just as Berg’s interviewees use it.³⁰³ Applied in this way, the direct compensation model could serve as a nonreformist reform or what O’Brien calls a “progressive anti-family reform.”³⁰⁴ Likewise, as Lewis’s discussion of surrogacy reminds us, during the interim period before full abolition there are possibilities for accreting power—for example, by bargaining, committing sabotage, or going on strike.³⁰⁵ Think (with modification of the underlying objective)

²⁹⁷ See Donna L. Hoyert, *Health E-Stat 100: Maternal Mortality Rates in the United States*, 2023, NAT’L CTR. FOR HEALTH STAT. (Feb. 2025), <https://www.cdc.gov/nchs/data/hestat/maternal-mortality/2023/Estat-maternal-mortality.pdf> [<https://perma.cc/49SP-UH8T>]. Although this report shows a decrease in maternal mortality rates between 2022 and 2023, the rate for Black individuals remains disproportionately high. *Id.* See also Rolanda L. Lister, Wonder Drake, Baldwin H. Schott & Cornelia Graves, *Black Maternal Mortality-The Elephant in the Room*, 3 WORLD J. GYNECOLOGY & WOMENS HEALTH (2019), <https://pmc.ncbi.nlm.nih.gov/articles/PMC7384760/> [<https://perma.cc/B4KY-6962>] (“[W]hen assessing the national black maternal mortality rate, it is quadruple that of non-Hispanic white women. Even in states such as California that appeared to buck the national trend [], Black women still died at triple the rate [] in that state []”).

²⁹⁸ See *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

²⁹⁹ See *supra* notes 142-48 and accompanying text.

³⁰⁰ Baker, *supra* note 68, at 423. The direct compensation model would, however, apply to a wider swath of the population, given that not everyone in an intimate relationship is married.

³⁰¹ Robin West, *Consensual Sexual Dysphoria: A Challenge for Campus Life*, 66 J. LEGAL EDUC. 804, 814-15 (2017).

³⁰² O’BRIEN, *supra* note 2, at 26, 53, 54.

³⁰³ See *supra* notes 145-52 and accompanying text.

³⁰⁴ O’BRIEN, *supra* note 2, at 170.

³⁰⁵ LEWIS, *supra* note 15, at 75.

Aristophanes's *Lysistrata*³⁰⁶—or, in more contemporary form, Spike Lee's *Chi-Raq*.³⁰⁷

While the direct compensation model helps to collapse the family/market divide, along with the private/public divide, it is equivocal when it comes to keeping dependency private. In a positive departure from the status quo, it offers new sources of income for those who might otherwise depend on a family member as breadwinner.³⁰⁸ Yet it does nothing to make support for caregivers a community or state responsibility or to advance abolitionists' aspiration of making care "a universal, unconditional, social good."³⁰⁹ Nor does it offer an antidote to inequalities among families.

Finally, the direct compensation model would have mixed effects on the problem of family policing. Direct compensation does not necessarily mean that law no longer criminalizes sex work. Unless and until sex work becomes legal, implementation of this model would likely invite punitive measures and accompanying state intrusion in the name of protecting children who live with adults so engaged.³¹⁰ Yet perhaps the direct compensation model requires legalizing sex work as a matter of first principle, given that criminalizing the provision of sex for money is designed to prop up marriage, as we have posited in other writing.³¹¹ As a counterpoint, even though legalized commercial surrogacy in the United States is regulated, family policing rarely poses a problem for those following this route to direct compensation, even if gestational carriers are rearing children at the same time.³¹² And, the money they earn—if they can bargain well—can contribute to economic self-sufficiency, preventing the need for public assistance, possible charges of child neglect, and ensnarement in the child support enforcement system.

³⁰⁶ See generally ARISTOPHANES, *LYSISTRATA*/ARISTOPHANES (Jack Lindsay trans., The Floating Press, 1925) (ancient Greek comedy about women's sex strike undertaken to pressure men to end the Peloponnesian War).

³⁰⁷ See generally *CHI-RAQ* (Amazon Studios and Forty Acres & a Mule Filmworks 2015) (film, based on *Lysistrata*, about women's sex strike undertaken to pressure men to end gang violence in Chicago's Southside).

³⁰⁸ See Fraser, *supra* note 34, at 591.

³⁰⁹ O'BRIEN, *supra* note 2, at 6. One of the core criticisms that family abolitionists coalesce around concerns the provision of care: "[T]he family is doing a bad job at care, and we all deserve better." LEWIS, *supra* note 15, at 5. The direct compensation model does not, by itself, dictate who would pay. It might very well be that the state, rather than another individual, could subsidize such activities. In this way, the direct compensation model blurs with the statist model we address later, *infra* notes 330-49 and accompanying text.

³¹⁰ For examples of state intervention in the name of child protection based on parents' sexual practices, see Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 311-12 (2004) (recounting removal of child from mother engaged in polyamory); Martin Guggenheim, *Texas Polygamy and Child Welfare*, 46 HOUS. L. REV. 759, 793 (2009) (critiquing removal of children from their homes solely because of parental polygamy).

³¹¹ See Antognini & Appleton, *supra* note 62.

³¹² In fact, many state surrogacy laws require that the gestational carrier have had a successful previous pregnancy and have parented a child. See Elizabeth Ziff, *"The Mommy Deployment": Military Spouses and Surrogacy in the United States*, 32 SOC. F. 406, 410 (2017).

2. *The Communal Care, Friendship, and Disaggregation Models*

We examine the communal care, friendship, and disaggregation models together because they share important features. Most notably, they all supplant the exclusivity that characterizes the family with the opportunity for a multiplicity of relationships. These models also challenge the “natural” connection that family law draws among sex, care, and support—what Martha Fineman calls “the sexual family.”³¹³ Sex is not necessarily an aspect of the relationships envisioned by these models, a feature that opens up a host of alternative caregiving arrangements, although those who prefer a dyadic sex-and-care affiliation could have one within any of these models. Accordingly, these models hold promise for arrangements built on chosen family—a foundational concept developed in LGBTQ+ communities³¹⁴ and embraced by some abolitionists, including O’Brien.³¹⁵

In addition, these three models all raise common questions that make sense to consider together. The communal care model expands the range of individuals who engage in caretaking and who receive it, thereby effectively redistributing care, even if not directly reassessing its value. The friendship and disaggregation models diversify not just the individuals providing and receiving care but might also degender the provision of care in ways that the communal care model does not.³¹⁶ As Laura Rosenbury explains in her analysis of friendship, a focus on care-based relationships outside the home can unsettle the familiar gendered patterns of domestic life.³¹⁷ Such thinking, in turn, might well provide a corrective to the customary devaluation of care.

The fluidity and multiplicity of arrangements that fit within these models epitomize the liberated forms of care, including mutual aid, that abolitionists seek. As Dean Spade explains, mutual aid endeavors are “inherently antiauthoritarian,”³¹⁸ so we should expect to see variations among them, and “scaling up” these models does not necessarily entail standardizing them.³¹⁹

Yet these models also bring to the fore a question that lurks beneath all of them: Who has responsibility for supporting a given dependent individual? This is a central family law issue that the privatization of dependency purports to address through the legal construction of the family, with

³¹³ See FINEMAN, *supra* note 15.

³¹⁴ See generally KATH WESTON, *FAMILIES WE CHOOSE: LESBIANS, GAYS, AND KINSHIP* (1991).

³¹⁵ See O’BRIEN, *supra* note 2, at 173-76.

³¹⁶ It follows that women or individuals gendered female could still be tasked with providing care under the communal care model, even if we move beyond the category of, say, wife or mother. Accordingly, O’Brien emphasizes that “ongoing struggles around gender and sexuality within the commune would be essential” in order to “resist the threat of a reassertion of the patriarchal family.” *Id.* at 229.

³¹⁷ Rosenbury, *supra* note 216, at 233-42.

³¹⁸ See SPADE, *supra* note 190, at 16.

³¹⁹ *Id.* at 40.

such responsibility continuing even after one exits from other aspects of the relationship.³²⁰

Lewis, for one, rejects the question entirely:

Without the family, who or what would take responsibility for the lives of non-workers, including the ill, the young, and the elderly? This question is a bad one. We don't hesitate to say that nonhuman animals are better off outside of zoos, even if alternative habitats for them are growing scarcer and scarcer and, moreover, they have become used to the abusive care of zoos. Similarly: transition out of the family will be tricky, yes, but the family is doing a bad job of care, and we deserve better. The family is getting in the way of alternatives.³²¹

Indeed, the practice of holding particular individuals responsible for meeting the needs of other individuals, so central to family law, conflicts with the aspiration for liberatory modes of care that abolitionists espouse.³²² Can liberation co-exist with responsibility? For both Lewis and O'Brien, any long-term solution or alternative frame of reference must await a complete societal transformation that conjoins family abolition with the abolition of property, capitalism, the market, and the state.³²³ As we have noted, Frances Olsen has gestured towards a similar conclusion, hypothesizing that without private property laws enforced against children, many could help themselves to food and other items they need, shortening the period of childhood dependency on one's parents and in turn reducing dependency overall.³²⁴

Notwithstanding this expansive approach, we can imagine implementations of the communal care model that do not require changing all background conditions or accepting only truly liberatory forms of care. In more modest iterations, along the lines of a nonreformist reform, the communal care model might well operate within our present society, using "ground rules" for entry under which the members of the collective take on certain responsibilities. The challenge of according fair value to care, examined under the direct compensation model, would then arise here as well. The friendship and disaggregation models would also encounter this challenge to the extent that participants take on responsibilities for care or receive assignments to perform it.

³²⁰ See, e.g., Rape Survivor Child Custody Act, 34 U.S.C. §§ 21301-21308 (encouraging states to terminate parental rights of fathers who conceived the child in question by rape, but allowing states to continue to impose child support duties on such fathers); Ira Mark Ellman, *The Theory of Alimony*, 77 CALIF. L. REV. 1 (1989) (attempting to articulate a rationale for why a duty of support based on marriage, in the form of alimony, continues after the marriage ends).

³²¹ LEWIS, *supra* note 1, at 5.

³²² See *id.* at 19 (describing utopias in which "people, against all odds, are devising liberatory and queer—which is to say, anti-property—modes of care").

³²³ See O'BRIEN, *supra* note 2, at 26, 53, 54.

³²⁴ Olsen, *supra* note 101, at 851-52 n.46. See *supra* note 115 and accompanying text.

Without more, all three models leave dependency to be addressed by private parties and units, not the state, thereby inviting the same inequalities that privatized dependency causes across families. Some communes will have more resources than others; one person's friends might be wealthier or poorer than another's. Designated beneficiaries under one version of the disaggregation model will receive different levels of benefits. Significantly, like family abolition writ large, no model by itself guarantees that state interests in keeping dependency private would evaporate. Put differently, even if the family was invented for the purpose of keeping dependency private, replacing the family with communities, or friends, or chosen individuals, might simply inspire the creation of a new means of achieving this end, differing only in the number of people and the types of relationships covered.³²⁵ Indeed, although Colorado's designated beneficiary law does not replicate the family as established by family law and offers a step in the direction of the disaggregation model, one of its stated purposes is "reducing reliance on public programs and services."³²⁶

In terms of family policing, these three models yield varying results. If these arrangements were to exist alongside the normative family, as privileged by family law, they invite the risk of policing in the name of child protection. We have seen such interventions in the past in unconventional living arrangements, including polygamy and polyamory.³²⁷ Yet even outside the imposed shadow of the normative family, the absence of clear lines of responsibility for child support, as just one example, could well trigger state interference. With no inevitable end to the policy of keeping dependency private, these three models could alter the targets of child support enforcement penalties and proceedings (e.g., deadbeat friends?), but would not necessarily halt this form of policing, even while disconnecting it from the family form. That said, the disciplinary content would change—the concept of deadbeat dads actively defines, and narrows, the role that fathers in particular ought to occupy.³²⁸ Expanding the range of individuals who provide support would, at least, dilute the disciplinary purchase of such laws that focused on the traditional nuclear family.

Thinking through implementing these models teaches us that only by "changing everything about the family,"³²⁹ along with background conditions, can we put to rest some of family law's most troubling aspects.

³²⁵ See, e.g., Appleton, *supra* note 267, at 978-79.

³²⁶ COLO. REV. STAT. § 15-22-102.

³²⁷ See *supra* note 310 (citing examples).

³²⁸ See *supra* notes 96-100 and accompanying text.

³²⁹ LEWIS, *supra* note 1, at 81.

3. *The Statist Model*

Despite the antipathy that many family abolitionists hold for the state, their concrete proposals often rely on it. Although certainly not the goal of all family abolitionists, several call for a more robust social welfare system in which the state provides the support that individuals and their families need to thrive. Even O'Brien, despite calling for abolition of the state along with the family,³³⁰ turns to the state in the meantime. O'Brien's list of "progressive anti-family reforms," or nonreformist reforms,³³¹ includes a universal basic income (UBI) sufficiently generous to allow people to leave their parents and other relatives and still live comfortably; free housing, healthcare, and childcare; and adolescent social services as well as changes in legal regulations extending protections and benefits to nonmarital families and other domestic arrangements that depart from the norm.³³² O'Brien follows up on this last point by applauding the longstanding LGBTQ+ commitment to "chosen family" and citing illustrations from various cultures that bring this precept to life.³³³

Thus, notwithstanding O'Brien's expressed aversion to the state, all the nonreformist reforms listed fit within a model that relies on the state to provide more, and more active, support. Even the encomium to chosen family fits within this model to the extent O'Brien uses it to add substance to the proposal for law reforms supporting diverse affiliations. If, however, "changing everything"³³⁴ means abolishing the family, the market, property, capitalism, and the state,³³⁵ then the statist model falls apart for our purposes, given that law necessarily presumes the existence of a state.

The statist model, to the extent it takes the form of proposals for government support, has a familiar ring in both family law and feminist scholarship. Scholars from Martha Fineman to Anne Alstott to Maxine Eichner have all challenged the principle that addressing dependency must be strictly a family responsibility, while proposing various ways in which state support would improve individual lives and society more broadly.³³⁶ And, of course, pressing for state recognition of non-normative families has been a staple of family law reform in recent decades.³³⁷ In a related vein, feminist

³³⁰ See *supra* notes 273-74 and accompanying text (quoting O'Brien).

³³¹ See *supra* notes 284-85 and accompanying text (quoting O'Brien).

³³² O'BRIEN, *supra* note 2, at 171-73.

³³³ *Id.* at 173-76. See generally WESTON, *supra* note 314.

³³⁴ LEWIS, *supra* note 1, at 81.

³³⁵ See *id.* at 9; O'BRIEN, *supra* note 2, at 26, 83.

³³⁶ See, e.g., FINEMAN, *supra* note 4, at 284-87; ANNE L. ALSTOTT, NO EXIT: WHAT PARENTS OWE CHILDREN AND WHAT SOCIETY OWES PARENTS (2004); MAXINE EICHNER, THE FREE-MARKET FAMILY: HOW THE MARKET CRUSHED THE AMERICAN DREAM (AND HOW IT CAN BE RESTORED) (2020).

³³⁷ See, e.g., POLIKOFF, *supra* note 6; Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260 (2017).

political theorist Nancy Fraser envisions a welfare state in which women's lives—combining market work and caregiving—become the norm, with government assistance to make it all feasible.³³⁸ Certainly, however, the present political moment in the United States does not bode well for such efforts, given recent enactments designed to shrink the already paltry public safety net³³⁹ as well as messages and medals³⁴⁰ designed to celebrate only the most traditional family structures.³⁴¹

Beyond unsettling the policy that keeps dependency private, O'Brien's list of state-focused nonreformist reforms and similar proposals offers a means of countering other problems spelled out in Part I. For example, if public assistance were designed to recognize unpaid domestic caregiving as work that contributes to society, pursuant to Fineman's and Fraser's arguments,³⁴² this change would go far toward addressing the devaluation of such care and the assumption that it must be gratuitous and "natural." It would also help degender such work. And, if sufficiently generous, as O'Brien proposes for a UBI program,³⁴³ such support would level out at least some of the inequalities among households and keep at bay family policing in cases in which poverty gets labeled as child neglect.³⁴⁴ Freeing those who shoulder unpaid and devalued domestic services as well as those pressed into the role of breadwinner would liberate care and intimate life across multiple dimensions—as suggested by the provocative title of Kristen Ghodsee's book, *Why Women Have Better Sex Under Socialism: And Other Arguments for Economic Independence*.³⁴⁵

The promise of the statist model is more uncertain for family policing. In our present world, support from the state often entails government intrusion, whether designed to collect reimbursement from a designated family

³³⁸ See Fraser, *supra* note 34, at 611-12. Fraser considers both "state provision of employment-enabling services such as day care" and "state provision of caregiver allowances." *Id.* at 593.

³³⁹ See, e.g., Steven Rattner, Opinion, *How Bad Is This Bill? The Answer in 10 Charts*, N.Y. TIMES (July 3, 2025), <https://www.nytimes.com/interactive/2025/07/03/opinion/domestic-policy-bill-in-charts.html?searchResultPosition=7> [https://perma.cc/TVM3-UES6] (outlining how the "big beautiful bill" passed in 2025 at the urging of President Trump slashes Medicaid and benefits the wealthiest individuals).

³⁴⁰ See Caroline Kitchener, *White House Assesses Ways to Persuade Women to Have More Children*, N.Y. TIMES, <https://www.nytimes.com/2025/04/21/us/politics/trump-birthrate-proposals.html> [https://perma.cc/RT5R-LWQH] (April 23, 2025).

³⁴¹ See Lydia DePillis, *They Want More Babies. Now They Have Friends in the White House*, N.Y. TIMES (Mar. 30, 2025), <https://www.nytimes.com/2025/03/30/business/economy/birth-rate-politics-vance-musk.html?searchResultPosition=2> [https://perma.cc/5AWS-FKMW].

³⁴² See FINEMAN, *supra* note 4, at 284-91 (recommending subsidies and support for caregiving); Fraser, *supra* note 34, at 593 (discussing caregiver allowances).

³⁴³ O'BRIEN, *supra* note 2, at 171.

³⁴⁴ See Josh Gupta-Kagan, *Distinguishing Family Poverty from Child Neglect*, 109 IOWA L. REV. 1541 (2024).

³⁴⁵ GHODSEE, *supra* note 159.

obligor,³⁴⁶ rationalized as protection for vulnerable family members,³⁴⁷ or understood as a quid pro quo for the assistance provided.³⁴⁸ This model would, however, have the laudable effect of doing away with the illusion of family privacy that currently clouds legal and policy analyses. As Olsen has admonished: “[I]t is meaningless to talk about intervention or nonintervention, because the state constantly defines and redefines the family and adjusts and readjusts family roles.”³⁴⁹ And, in a world entirely free of the state, it would challenge the very meaning of “public” support.

B. Abolishing Divorce

One concrete way to envision the possibility of an abolitionist family law is to consider what it would mean for one of family law’s quintessential functions, divorce. We turn to divorce in particular,³⁵⁰ as the literature has amply discussed the abolition of marriage.³⁵¹ Here we find two different ways to understand the consequences for divorce of abolishing the family.

1. Eradicating Divorce

An obvious approach would interpret abolition to require the complete elimination of legal events such as marriage and divorce, which turn on family status.³⁵² Liberating care and facilitating exit from relationships could well invalidate all barriers, substantive and procedural, that constrain individual autonomy. As a practical matter, if abolishing the state is part and parcel of abolishing the family, there would be no court system to decide cases, no statutes to interpret or apply, and no state-recognized relationship to terminate. In this abolitionist future, one would be free to come and go

³⁴⁶ See, e.g., Brito, *supra* note 96, at 628.

³⁴⁷ See, e.g., BRIDGES, *supra* note 5, at 6-10.

³⁴⁸ See, e.g., Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 297-98 (1988) (theorizing an “exchange view” of parenthood).

³⁴⁹ Olsen, *supra* note 101, at 842.

³⁵⁰ Exploring a different approach, Brenda Cossman has tried to reimagine divorce in Canada, considering the possibility of making it “social law,” using a licensing system, or subjecting it to insurance coverage, with associated procedural reforms. Cossman, *supra* note 45, at 305-07, 311.

³⁵¹ See Gregg Strauss, *Why the State Cannot “Abolish Marriage”: A Partial Defense of Legal Marriage*, 90 IND. L.J. 1261, 1283-87 (2015) (describing the literature calling for the abolition of marriage).

³⁵² While unmarried couples do not have access to divorce laws, it is more accurate to say that divorce is *unavailable*, rather than abolished; moreover, this state of affairs has not meant that the relationship is less affected by marriage or by its status. See Antognini, *supra* note 66, at 142-43 (“Given the explicit lack of status, we can only see its silhouette take shape from the discrete ways in which contract fails. But status is still driving these decisions—in that courts are making judgments about the nature of intimate relationships based on the content supplied by marriage—and limiting contract accordingly.”).

as one pleases, in and out of chosen affiliations, with no consequences to confront.

But, of course, some of the dependencies that divorce purports to address would not disappear. Family abolitionists give us precious little information about such matters, rejecting as objectionable questions about how to manage the project of abolition, invoking instead the call to change everything.³⁵³

2. *Redefining Divorce*

Ending divorce is not the only option for abolition. A second and less obvious possibility entails fundamentally changing what divorce means, by redefining what it does and to whom it applies, guided by the different models we have identified. That is, if family law's rights and responsibilities turn on family status,³⁵⁴ but the models fundamentally disrupt that status, then perhaps divorce becomes a mechanism untethered from the family—transforming instead of eradicating its legal and social meaning.

Regardless of whether divorce as we know it is eradicated or redefined by family abolition, relationships in which one individual becomes dependent on another will continue to exist; in a world without the family, these could include conjugal partners or members of collectives, children and those who are rearing them, elderly persons who rely on other adults, and even friendships. Such arrangements raise questions about how to address these dependencies when the relationship ends. Unlike Lewis, we do not reject these questions as “bad,”³⁵⁵ even if answers must for now remain preliminary. So, what mechanism, apart from family law's regime of privatized dependency and devalued care, might address such situations? Each model gives us a different way of understanding what abolishing this core family law function would entail, which we explore in turn.

a. *“Divorce” under Direct Compensation*

A strong version of the direct compensation model, as advocated by sex workers, would eliminate the obligation for individuals to form families, or marry, in the first instance, or to receive support later, given the ability to receive payment for services that were otherwise presumed familial and gratuitous. Under this reading, direct compensation would undermine the need for anything approaching marriage or divorce, because it would produce an entirely different way to structure relationships.³⁵⁶

³⁵³ See *supra* notes 281-82 and accompanying text (relying on Sophie Lewis).

³⁵⁴ See *supra* note 31 and accompanying text (quoting Jill Hasday).

³⁵⁵ See *supra* note 321 and accompanying text.

³⁵⁶ Marriage would not necessarily disappear, but its legal and social meaning would change. It would become a purely religious, or otherwise personal, event. See Coontz, *supra* note 11.

In a milder form, the direct compensation model would lead to a different accounting at the end of a relationship. Distributing property and calculating support would no longer follow from principles of equity, or partnership, but rather from a specific assessment of the housework supplied, the childrearing undertaken, or the sex provided. The mere fact of compensation might not do much to change the meaning of divorce as something that principally takes place at the end of a dyadic, intimate relationship, such as marriage. Yet what it would accomplish is recognition of the economic nature of such activities and facilitate an explicit analysis of who gets to recoup their value. In turn, it could help to degender these activities.³⁵⁷

We can see the Uniform Cohabitants' Economic Remedies Act (UCERA) as a nonreformist reform that takes a step in this direction. Designed as an enabling statute, this model legislation allows states to enforce contracts and fashion equitable remedies between cohabitants at the end of their relationship.³⁵⁸ In other words, per UCERA, states may treat former cohabitants like other parties to an agreement or allow them to seek equitable remedies.³⁵⁹

Significantly, UCERA does not ascribe a status to cohabitants, in contrast to other proposals like the American Law Institute's *Principles of the Law of Family Dissolution*, which recognizes parties as "domestic partners" once certain criteria are met, absent a decision to opt out.³⁶⁰ In another notable feature, UCERA does not require "cohabitants" to share a residence or have a sexual relationship.³⁶¹ Consistent with prevailing law, however, UCERA prohibits recovery for sexual services, which it distinguishes from other domestic services, and it requires severing sex from any agreement³⁶²—a limitation that we have challenged in other work.³⁶³

If we were to expand UCERA to include sexual services, it would effectively remove the question of family status—marital or otherwise—from the ability to receive compensation for care, whether by agreement or equitable remedy. It would make available the ordinary rules of contract law

³⁵⁷ See Philomila Tsoukala, *Gary Becker, Legal Feminism, and the Costs of Moralizing Care*, 16 COLUM. J. GENDER & L. 357, 408 (2007) ("[T]he moralization of women's work [in contrast to an economic analysis of such work] results in marking all of women's activities in the household as productive, men's work as leisure, while also effacing women's agency in this system of gender relations.").

³⁵⁸ UNIF. COHABITANTS' ECONOMIC REMEDIES ACT (2021).

³⁵⁹ *Id.* (Prefatory Note). See Antognini, *supra* note 66, at 149.

³⁶⁰ PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS ch. 6 § 6.03 (AM. L. INST. 2002).

³⁶¹ UNIF. COHABITANTS' ECONOMIC REMEDIES ACT § 2 cmt. (2021). However, it would exclude those who are "so closely related that they would be prevented from marrying in the state in which they reside." *Id.*

³⁶² *Id.* (Prefatory Note & § 2 cmt.).

³⁶³ See Antognini & Appleton, *supra* note 62.

and equity for personal relationships, eliminating the often tacit reliance on marriage to suspend such rules.³⁶⁴ It would shrink the role of the family and family law as a separate system, replacing those precedents that distort nonmarital agreements based on family law policies and that persistently devalue care.³⁶⁵

So expanded, UCERA provides an example of the direct compensation model—because that is what the enforcement of contracts or equitable remedies are designed to accomplish. True, payment would occur only after the relationship dissolves, rather than in advance or as services are rendered; still, we think this deferred compensation represents a pathway to direct compensation and a more complete evaluation of care.

Nonetheless, direct compensation would not necessarily be a boon, given that the market, as we have pointed out,³⁶⁶ currently devalues the provision of these kinds of services; accordingly, this approach might make some individuals worse off than under the present regime of marriage and divorce. That said, in the absence of changing everything, it is not clear what would remain constant amid these shifts—perhaps the very project of valuing domestic services would transform their stature and allow them to command a higher price. In any event, a direct compensation model would not inevitably result in more property for either party. This is so because an accounting would take place on both sides (if there are only two) and might mean that all individuals implicated would receive *something*, or that shared activities and their benefits (mutually enjoyed sex?) could cancel each other out, thereby decreasing the ultimate take-home amount.

Additional questions concern how to calculate the amount to compensate and who would be responsible for paying it. The calculation might be objective, applicable to everyone, based on the cost of the services provided; it could also be calculated as a percentage of the property accumulated during the course of the relationship. The latter approach suffers from the inequities that plague the current regime, exacerbating inequalities across families even as it changes the calculus within them. The former approach, while more egalitarian in that it exists independently of the assets actually owned by those in the relationship, might result in the obligor's inability to afford the payments calculated. In this situation, direct compensation could invite a more intrusive state, similar to what now takes place in the context of child support enforcement. That is, if these services merit compensation, and the person tasked with doing so cannot pay, then the system might resort to the state to enforce such payment.

This model raises the additional question of what should happen in a vertical relationship—whether children would have to pay their parent

³⁶⁴ See *id.* at 1814 (“[S]ex is not the problem; marriage is.”).

³⁶⁵ See Antognini, *supra* note 66.

³⁶⁶ See *supra* notes 293-94 and accompanying text.

or caregiver for services they received.³⁶⁷ And would children be able to seek compensation from their parents or caregivers whom they might have helped support at some point? A child could also, perhaps, be held responsible to another child, say, a sibling, for any care provided. The model itself provides no clear vector to decide who should pay whom,³⁶⁸ but it at least reveals the work involved in raising a family and asks how to allocate the costs of that work.

*b. "Divorce" under Communal Care; "Divorcing" Friends;
Disaggregating "Divorce"*

Because the communal care, friendship, and disaggregation models share underlying similarities, we address them together here, as we did earlier in applying the models. Each model helps to unsettle the notion that divorce contemplates only two people, based on a legal status they have acquired, and that that particular unit contains all the care and support each individual experiences. That is, each mutes the distinctiveness of marriage and hence divorce.

Under these models, remedies like property distribution and alimony would become less salient, given that they distribute care across multiple individuals, not just those internal to "the family," narrowly defined. A mechanism like divorce might not be as necessary where sources of care and support are spread across a community, rather than located in one individual. Similarly, the friendship model would expand care relations to "other significant others,"³⁶⁹ while the disaggregation model would have different individuals perform different functions—perhaps having a sexual relationship with one (or many), while rearing a child with another (or many), while arranging for the provision of one's own care with another (or many). This division of labor does not mean that any individual activity becomes less important, but it might mean that ending one such relationship does not necessarily implicate all the others and can allow for a more targeted resolution of any resulting dispute.

If a dispute does arise, with regard to contributions given or money owed, then law could intervene to determine questions about who should continue to receive care and who should be reimbursed for any care provided. The status of marriage, however, would no longer function as the sole gateway in determining who can access the rules of "divorce,"³⁷⁰ nor would

³⁶⁷ Cf. *Am. Healthcare Ctr. v. Randall*, 513 N.W.2d 566, 572 (S.D. 1994) ("The fact that an indigent parent has supported and cared for a child during that child's minority provides an adequate basis for imposing a duty on the child to support that parent.").

³⁶⁸ The state could also pay, though the model itself does not require it.

³⁶⁹ See *supra* note 211 and accompanying text.

³⁷⁰ See Antognini, *supra* note 67, at 58-63 (critiquing courts' approaches to nonmarital relationships that rely on the metric of marriage).

marriage, or its end, be the sole locus of support. Perhaps an instrument like UCERA, expanded to accommodate plural relationships but without excluding close relatives or sexual contributions, offers a starting point for imagining such intervention.³⁷¹

Each model has its limits. The practice of communal care can come with autonomy-threatening pitfalls. The plight of the Sullivanians provides one cautionary tale—when members attempted to extricate themselves, their agency was subordinated to the demands of the group and its leaders.³⁷² Meanwhile, the friendship model would not necessarily eliminate the need to distribute property or assign support at the end of the relationship, assuming no change in the policy of making private parties (not the state) address dependency.

An autonomy-related concern appearing in the friendship model is that unwilling friends might get conscripted into a “divorce” proceeding—akin to ascriptions of status that expand family law and thus contravene abolitionist goals.³⁷³ What the abolitionist future would bring is uncertain, however. Existing American law has doled out family status only parsimoniously, as shown by cases seeking property at the end of a nonmarital relationship.³⁷⁴ In contrast, the evolution of child support shows how the drive for privatization led to the legal recognition of unmarried fathers, who were previously ignored by law.³⁷⁵

Within these specific models, though, the presence and possibility of multiple significant others (as opposed to one) might diminish the need for ascribing responsibility, akin to what takes place in a communal care model, by rendering one individual source of care or support less consequential. Meanwhile, disaggregation would, ironically, make one individual especially important in performing a single necessary function, causing the loss of that particular relationship to become more acute. Significantly, however, ending a friendship or other relationship would not necessarily trigger a judicial proceeding in the way that ending a marriage does now.

³⁷¹ See *supra* notes 358-65 and accompanying text.

³⁷² See *supra* notes 206-08 and accompanying text.

³⁷³ Cf. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS ch. 6 (AM. L. INST. 2002).

³⁷⁴ Privatizing support has not always carried the day. See Antognini, *supra* note 65, at 2193-94 (concluding that nonmarital relationships “provide an instance where the goal of privatizing support seems to have less of a motivating or explanatory force” and that “privatizing support regularly takes a backseat to gendering the valuation of work”).

³⁷⁵ Well into the twentieth century, the law in many states did not recognize the father-child relationship outside of marriage, ignoring a potential source of child support supposedly in order to discourage nonmarital sex. See generally HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY (Bobbs-Merrill 1971). Today’s child support system shows keeping dependency private has come to outweigh such moral concerns. See *supra* notes 47-52 and accompanying text.

c. Statist "Divorce"

Finally, the statist model provides two starkly different ways to envision the state's involvement: complete elimination of the state or its acceptance as a totalizing presence. To heed the call of family abolitionists and rid the family of the state altogether would be near impossible in the context of a system, any system, that depends on law to regulate or mediate disputes.³⁷⁶ Indeed, even legal proposals that seek to disestablish the family recognize there must be a mechanism to address, for example, violence within a relationship.³⁷⁷ O'Brien implicitly concedes this point in turning to law and the state for nonreformist reforms pending abolition. The failure to disentangle the state from society might mean that our project fails in the eyes of some abolitionists.

But, if it is possible to accept the state as an entity, even as an entity that "is continuously affecting the family by influencing the distribution of power among individuals,"³⁷⁸ then abolition might still matter to the project of changing that distribution of power. A view that welcomes a more prominent role for the state could make "divorce," or any property distribution and support at the end of a relationship, less important and therefore less relevant, because public resources would address any resulting dependencies. Under this vision, the state would take over the dependencies of its citizens directly—which it could do by providing financial support (for example, issuing a direct payment once a need arises, as occasioned by childbirth), or by providing actual care (for example, assigning caretakers to an elderly individual). Fundamentally, the statist approach would eliminate the privatization of dependency that makes divorce necessary. Or, to use Anne Alstott's terms, the need for "family law as social insurance" would evaporate.³⁷⁹

Statist approaches can, however, shade into totalitarianism; the state that provides is the same one that punishes.³⁸⁰ Scholars have resisted that

³⁷⁶ See Olsen, *supra* note 101, at 836 ("As long as a state exists and enforces any laws at all, it makes political choices. The state cannot be neutral or remain uninvolved, nor would anyone want the state to do so.").

³⁷⁷ See Ristorph & Murray, *supra* note 222, at 1279 ("We do not think familial disestablishment disallows state intervention in response to familial violence . . .").

³⁷⁸ Olsen, *supra* note 101, at 842.

³⁷⁹ See Alstott, *supra* note 39. See also Cossman, *supra* note 45.

³⁸⁰ See Davidson, *supra* note 266, at 27 (explaining the central tension in abolitionist writings that seek to interpret the constitution to "enable[], if not mandate[], the government to exercise broad powers to engage in care work and to fight against oppression" at the same time that "they would like that constitution to narrow, if not eliminate, the government's ability to engage in carceral coercion"). But the state already exercises significant punitive power. See *id.* at 30 ("Every state command [] is backed by the *theoretical* threat of violence, and many are backed by a realistic threat of violent coercion."). What it has failed to do is deploy that power towards care. Thus, increasing the state's role in providing care work would not necessarily result in a corresponding increase in coercion; it would merely correct the current imbalance.

move by arguing for a more supportive state³⁸¹ or for a state that functions as a more explicitly protective force.³⁸² And, in any event, even under our current negative-liberties approach we have pointed out how extensively the state shapes the “private family.”³⁸³

CONCLUSION

In Sayaka Murata’s recently re-released and galvanizing novel *Vanishing World*, we encounter a society—set in the literally titled “Experiment City,” located somewhere in Japan—that has taken on state-run communal child-bearing and childrearing, where every adult is a “Mother” and every child is a “Kodomo-chan.”³⁸⁴ Expressing curiosity at this arrangement, one of the characters in the novel asks: “Can humans really be raised outside of the family system?”³⁸⁵ Similar questions are posed throughout: “[S]ociety can’t possibly function without family, can it?”³⁸⁶ The answer the book appears to give is a resounding no—unless mass conformity and a future without sex are appealing.³⁸⁷ Family abolitionists challenge us to ask these same questions, although reaching utopian, not dystopian, conclusions, which we have explored as issues of family law.

Thinking through what an abolitionist family law project entails can help to explain why reform efforts have proven so difficult to implement. The challenge is not only that inequality and its counterpart, privilege, continuously find ways to reassert themselves.³⁸⁸ In addition, engaging with

³⁸¹ EICHNER, *supra* note 44.

³⁸² See Dailey & Rosenbury, *supra* note 180 (envisioning a larger role for the state in setting out a new law of the child).

³⁸³ See Olsen, *supra* note 101, at 842 (“The state defines the family and sets roles within the family; it is meaningless to talk about intervention or nonintervention, because the state constantly defines and redefines the family and adjusts and readjusts family roles.”).

³⁸⁴ See generally SAYAKA MURATA, *VANISHING WORLD* (Grove Press 2025) (trans. Ginny Tapley Takemori). The novel ends with Amane, the protagonist, keeping her mom locked in a room, like an animal. Amane also violates the norms of Experiment City by having what can be described as sex with a Kodomo-chan. *Id.* at 220-33.

³⁸⁵ *Id.* at 143.

³⁸⁶ *Id.* at 111.

³⁸⁷ See Madeleine Feeny, Review, *An Absurd Dystopia Asks, What Happens to Families When Sex is Taboo?*, N.Y. TIMES, <https://www.nytimes.com/2025/04/14/books/review/sayaka-murata-vanishing-world.html> [<https://perma.cc/2Z4P-5H7P>] (May 12, 2025) (“Although too extreme to be wholly persuasive, it invites us to consider how reproductive gender equality could transform society, with chilling ramifications.”).

³⁸⁸ Although, of course, it is in part that. See Reva Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 205 YALE L.J. 2117, 2119 (1996) (identifying the concept of preservation through transformation). As Paisley Currah explains, the tenacity of gender subordination as “one of the organizing principles of domestic life” and other non-state relationships stems from the importance to the conservative project of maintaining what Corey Robin calls “the private life of power.” PAISLEY CURRAH, *SEX IS AS SEX DOES: GOVERNING TRANSGENDER IDENTITY* 24 (N.Y.U. Press, 2d ed. 2024). See COREY ROBIN, *THE REACTIONARY MIND: CONSERVATISM FROM EDMUND BURKE TO DONALD TRUMP* (Oxford Press, 2d ed. 2018) (summarizing the position as follows: “Allow men and women to become democratic citizens of the state; make sure

family abolition exposes how many of the reforms already proposed in the literature have failed because they defy core pillars of what we reflexively assume come from families. Proposals to compensate for domestic services or recognize labor performed within the home cut too deeply into how law defines the family. Proposals to provide more government support have provoked so much resistance because they challenge the responsibilities that we understand families ought to bear.³⁸⁹ As a result, grappling with family law's problems might prove more successful when seeking an explicitly abolitionist, as opposed to merely reformist, goal. An abolitionist approach does not require us to accept any existing assumptions.

We have gathered here projects that both self-identify as abolitionist and those that do not but that we argue can nevertheless be understood to strike at the heart of how law defines and regulates families. The direct compensation, communal care, and statist models serve to undo the privatization of care and disrupt the provision of services that the cramped family form currently absorbs and accommodates; the friendship and disaggregation models break open the gendered divisions of labor that take place within it. Each model exposes the family as contingent and contestable—the first step in being able to even consider alternate structures. Indeed, it remains near impossible to “imagine the end of . . . the family.”³⁹⁰ But it is an end that merits sustained attention.

To be clear, we are not advocating for any particular path to accomplish family abolition. Instead, we are dismantling the veneer of inevitability and appeals to nature that calcify discussions of both the family and family law. In fact, as we have noted, “[m]ost family abolitionists love their families.”³⁹¹ This point bears note because it underscores the ultimate aim of this abolitionist project—freeing us to question all of family law from the ground up.

they remain feudal subjects in the family, the factory, and the field. The priority of conservative political argument has been the maintenance of private regimes of power—even at the cost of the strength and integrity of the state.”).

³⁸⁹ See Appleton, *supra* note 267, at 966-77 (explaining various unsuccessful claims for state support or protection under the Constitution as implicitly based on family law's policy of keeping dependency private).

³⁹⁰ LEWIS, *supra* note 15, at 119 (“If it is easier to imagine the end of the world than the end of capitalism, it is still perhaps easier to imagine the end of capitalism than the end of the family.”).

³⁹¹ *Id.* at 3. These abolitionists acknowledge that families play a valuable role for individuals in marginalized communities, serving as a buffer against majoritarian oppression and a source of strength in resisting such oppression. Weeks, *supra* note 8, at 435 (quoting Hazel Carby). Nonetheless, Weeks stands by family abolition as the goal. See *id.* at 436.