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THE OUTLAWED FAMILY: HOW RELEVANT IS THE LAW IN FAMILY LITIGATION?

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The involvement of the law in the family is generally considered inevitable and desirable. The family is often depicted as the locus of important and delicate problems, which demand legal intervention through designated tools commonly referred to as "family law." This Paper questions the veracity of this depiction with regards to the paradigmatic family dispute—divorce. Divorce cases are composed of three sub-cases: the divorce itself (i.e., the legal separation of the parties), child custody, and the division of property. The Paper examines whether, and to what extent, courts and legal rules decide family disputes. It argues that, with the rise of personal considerations such as autonomy and the best interest of the child, the law has become almost irrelevant to divorce and that courts currently have little substantive influence over custody disputes. The diminishing importance of the law in these contexts is particularly striking when compared to the reality of matrimonial property issues. Family law addresses familial considerations, legal norms, and judicial procedures. Based on the shortcomings this Paper identifies in the regulation of divorce and child custody, namely the gap between the perceived and actual regulation of these matters, this Paper calls for reconsideration of the regulation of these issues.

I. INTRODUCTION

Currently, the term "family law" is an almost oxymoronic fusion between the situs of emotion and love on the one hand and duties and rights on the other. This was not always the case. Only a century ago, the family unit was considered the nuclear building block of society and very relevant to the law.[1] But over time, new principles were adopted and old ones discarded. Changes such as the rise of autonomy, individualism within the family, and the best interest of the child have altered the center of gravity within the field.

Despite these changes, for the most part, the understanding of "the family" as a matter for law and adjudication has remained broadly accepted and even desired.[2] This Paper discusses the extent to which changes in Western family law and practice have pushed the law away from "the family."[3] While some legal debates over the definition of "the family" and

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[1] *See* Janet Halley, *What Is Family Law?: A Genealogy Part II*, 23 YALE J.L. & HUMAN. 189, 190 (2011) ("[D]omestic relations/family law did not always exist; rather, it was invented, [over the course of the twentieth century] and the ideological implications of that act of creation remain embedded in the field today.").

[2] *See, e.g.*, Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 531 (1992); Mary Ann Glendon, *Modern Marriage Law and Its Underlying Assumptions: The New Marriage and the New Property*, 13 FAM. L. Q. 441, 443 (1980). *See also* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 3 (U. N.C. Press ed., 1988) (demonstrating the perception of a connection between the notion of the family as the building-block of society and the need to regulate it through law in the U.S. colonies). The exception to this legal conceptualization of the family is marriage, an area in which some have argued the law is now irrelevant. *See, e.g.*, MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 95–141 (2004); Martha Albertson Fineman, *The Meaning of Marriage*, *in* MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS 29, 57 (Anita Bernstein ed., 2006). *See also* Gregg Strauss, *Why the State Cannot Abolish Marriage A Partial Defense of Legal Marriage Based on the Structure of Intimate Duties*, 90 IND. L. J., 1261, 1293–94 (2015) (some criticize even this limited exception).

[3] The "West" has been described as "the Atlantic littoral of Europe (the British Isles, Scandinavia, the Low Countries, France, and Iberia) plus America . . . Australia, New Zealand, and all other European overseas settlements." William H. McNeill, *Western Civ in World Politics: What We Mean by the West*, FOREIGN POL. RES. INST. 513, 513–14 (1997).

familial relationships (who is a parent, who is a spouse, what rights, if any, do grandparents have, etc.) still invite broad legal intervention, others might not.

This Paper examines these changes through the lens of a typical family law case, composed of three main familial disputes: spousal relations,[4] parental relations,[5] and marital property.[6] Analyzing these three issues, this Paper argues that in the first two matters, family considerations overshadow the law to the point that they no longer pose real legal issues requiring court decisions.[7] In contrast, the third issue demonstrates a modern compromise between the family and the law.[8] It affords more room to civil law considerations by balancing them with family needs.[9] The Paper substantiates this argument by contrasting traditional and current attitudes towards these matters, as well as by addressing their regulation in different legal systems.

The Paper does not purport to offer a comprehensive comparative review, but rather, it demonstrates the prevalence of the phenomenon discussed. Though no one legal system is discussed in detail, the findings of this Paper are generally relevant to all Western legal systems. Further, since the Paper is restricted to only three familial matters, it makes no statement regarding family law as a whole. Instead, it calls attention to changes to several core family law issues and suggests that these changes warrant a reconsideration as to how "the family" and the law interact.

II. FAMILY AND THE LAW—MIND THE GAP

Modern law focuses on regulating special interpersonal relationships—mainly spousal and parental relationships.[10] This regulation includes an accounting of property and monetary rights amongst family members in an attempt to support family life and help individual members adjust to changes and breakdowns in the family.[11] These regulations also promote specific public interests in family life.[12] The paradigmatic "family law" case has always involved the trio of suits often brought together upon

[4] *See infra* Part III.
[5] *See infra* Part IV.
[6] *See infra* Part V.
[7] *See infra* Parts III, IV.
[8] *See infra* Part V.
[9] *See infra* Part V.
[10] Jonathan Herring, *Making Family Law More Careful*, *in* VULNERABILITIES, CARE AND FAMILY LAW 43, 43 (Julie Wallbank & Jonathan Herring eds., 2013) [hereinafter Herring, *Making Family*].
[11] *See id.* at 53–54.
[12] *Id.* at 52–57 (addressing the protective, adjustive, and supportive "functions" of family law).

the breakdown of a marriage or similar alternative spousal relationship.[13] Such alternatives are not discussed here, but reflect similar tendencies. These suits are marriage dissolution, child custody, and property division.[14]

The history of family law as a distinct legal field is a short one,[15] though the legal regulation of familial issues appeared in ancient legislations.[16] In the nineteenth-century, Savigny discussed this new notion, distinguishing between family law and potentialities law—the law of patrimony.[17] Savigny described family law as the aggregation of statuses—relationships between spouses, parents, and children—and the law of patrimony as part of private law regulating the dealings and interactions of individuals through property and obligations.[18] Modern legal thought classifies matters involving the family—marriage, parenthood, support, and property—as all belonging to family law.[19] However, we may have moved into a new era: one in which some of the traditional statuses no longer lie within the legal spectrum, while at the same time, marital property has entered into the realm of the family.

In order to examine this assumption, the Paper proceeds by demonstrating the historical evolution and the current state of affairs regarding each of the three issues mentioned. The Paper illustrates that the connection between "the family" and "the law" is loosening in different ways, all of which erode the notion of "family law." The Paper argues that divorce and child custody are matters resolved without meaningful judicial or legal intervention, while family property is addressed in a legal manner that reflects a limited consideration of the family. Before making this argument, however, an explanation regarding how the terms "law" and "legal matters" will be applied throughout this discussion is required.

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[13] Typical alternatives to marriage include common law marriages, civil unions, domestic partnerships, and cohabitation. *See generally* JEANINE ELBAZ, MARRIAGE AND ITS ALTERNATIVES (N.Y.U. Press, 2009).

[14] *See, e.g.*, REBECCA PROBERT, FAMILY LIFE AND THE LAW: UNDER ONE ROOF 2 (2007).

[15] *See* Wolfram Muller-Freienfels, *The Emergence of Droit De Famille and Familienrecht in Continental Europe and the Introduction of Family Law in England*, 28 J. FAM. HIST. 31, 37–38 (2003) (in continental law, this development was dated to the eighteenth century and attributed mainly to Hugo and Savigny, and in common law, this development seems to have happened later still). *See also* Halley, *supra* note 1, at 196–210.

[16] *See, e.g.*, MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 18–21 (1989).

[17] Duncan Kennedy, *Savigny's Family/Patrimony Distinction and its Place in the Global Genealogy of Classical Legal Thought*, 58 AM. J. COMP. L. 811, 813 (2010) (describing FRIEDRICH CARL VON SAVIGNY, SYSTEM OF THE MODERN ROMAN LAW 276–78 (William Holloway trans., Hyperion Press ed., 1979) (1867)).

[18] *Id.* at 814.

[19] *See generally* Janet Halley, *What is Family Law?: A Genealogy Part I*, 23 YALE J.L. & HUMAN. 1, 5 (2011) (noting that these topics within family law continue to be areas of focus in law schools).

Is going to the cinema a legal matter? Surely, there are legal rules that apply: the ticket is a contract, or a testament thereto; the cinema is bound by safety regulations, and there are likely numerous copyright and franchise rules that allow the cinema to exist and ensure that patrons can view films therein. But most people would not consider going to the cinema a strictly legal matter. Similarly, this Paper does not aim to suggest that when a matter, such as divorce, becomes "not legal," the law is somehow alienated in its entirety. Naturally, the law serves as a regulating framework regarding most human institutions and interactions. Some extreme cases may require resolution through legal proceedings, but the majority will not. In this sense, the matter is "not legal." The law, and particularly the judicial process, is no longer the tool that regulates it on a day-to-day basis.[20]

So, when suggesting that an issue is not "legal," this does not mean the law has nothing to do with it. In most instances, the law created and generally regulates the matter, but the law is not the tool used to operate and manage it, and the court is not the best forum in which to address it. Typically, litigation is not only cost-ineffective but also unhelpful.[21] The parties may bargain in the shadow,[22] but that shadow is not cast by the law because legal rules or predictions of legal outcomes are not at play. The law has pre-regulated the issue, and time has shown that these issues are now governed by other mechanisms. Presently, when disputes arise, the judge's role becomes more of an overseer of the process than an adjudicator using legal expertise.

The argument does not go so far as to claim there are no cases that are indeed "legal" or that the court's involvement is never necessary, only

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[20] Rory Van Loot, The Corporation as a Courthouse, 33 YALE J. ON REG. 547, 549 (2016) ("The main institutional actor in the private consumer legal system is not the arbitration tribunal, but the consumer-facing corporation."). See also Jane Aiken & Stephen Wizner, Law as Social Work, 11 WASH. U. J. L. & POL'Y 63, 64 (2003) ("It is commonly accepted that the professional expertise of lawyers is limited to 'legal' issues: those involving the identification, interpretation, and application of relevant legal rules and concepts. Lawyers provide legal advice, counsel, representation, and advocacy to and on behalf of individual clients in private legal settings and public legal arenas. Pursuing social justice is not an explicit goal of the legal profession.").

[21] *See generally* Craig C. Martin, *Avoiding the Inefficiency of Litigation*, COMMITTEE ON PRETRIAL PRAC. & DISCOVERY (2007).

[22] Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale. L.J. 950, 997 (1979). [hereinafter Mnookin & Kornhauser, *Bargaining in the Shadow*]. Contrary to my contentions, Mnookin and Kornhauser once argued:

Divorcing parents do not bargain over the division of family wealth and custodial prerogatives in a vacuum; they bargain in the shadow of the law. The legal rules governing alimony, child support, marital property, and custody give each parent certain claims based on what each would get if the case went to trial. In other words, the outcome that the law will impose if no agreement is reached gives each parent certain bargaining chips.

Id.

that the law is no longer the centerpiece and leading concept in these areas. In most cases that do end up in court, the law has little bearing on the actual decision, and legal tools would rarely be used in reaching a solution. It is only in *this* sense that this Paper points to the diminishing importance of the law and courts in the field of family law, while it overtly concedes the law still regulates "the family" through legislation.

Furthermore, it may very well be that other issues that are considered "legal" are treated in a similarly non-legal manner to some extent. For example, a heavy reliance on experts is clearly prevalent in medical malpractice cases.[23] This does not negate the veracity of the argument regarding family law. It merely suggests that the same arguments may apply in other areas of the law as well and that further examination of these areas may also be required.

III. DIVORCE AND THE LAW

The first few chapters in a typical family law book are dedicated to marriage and its legal regulation, thus pointing to the centrality of marriage in family law.[24] However, the importance of marriage and its dissolution as an actual legal issue, is questionable. Other works have discussed the declining involvement of the law in marriage,[25] and as it will be argued, legal notions and legal adjudication are almost irrelevant when it comes to divorce by itself.

A. The Evolution of Divorce

Prior to relationships becoming matters of law, spousal arrangements were matters of private choice.[26] They were created and dissolved, de facto, by spouses moving in together or parting ways.[27] Once law entered the equation, first through religion and later as an independent secular agent, marriage and divorce transformed from a personal, social

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[23] *See* Faiza Jibril, *The Medical Expert Witness Litigation Guide*, EXPERT INST. (Aug. 25, 2020), https://www.expertinstitute.com/resources/insights/the-medical-expert-witness-a-litigation-guide/ [https://perma.cc/25FU-WY3W] (stating that expert testimony can be necessary to determine whether the accused was negligent by comparing the accused actions against the medical community's standard of care). *But cf.* David E. Seidelson, *Medical Malpractice Cases and the Reluctant Expert*, 16 CATH. U. L. REV. 158, 160 (1966) (stating that there has been an effort by courts to eliminate the need of expert testimony in certain medical malpractice cases).

[24] Herring, *Making Family*, *supra* note 10, at 50.

[25] *See, e.g.*, Sharon Shakargy, *Marriage by the State or Married to the State*, 9 J. PRIV. INT'L L. 499, 510–16 (2013).

[26] *See* GLENDON, *supra* note 16, at 20.

[27] *Id.* at 21. *See also* H.F. JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 113 (2d ed. 1967).

matter into a legal one. Law was introduced to divorce as early as the fifteenth-century B.C.E, through the norms of Biblical and subsequent Jewish Law.[28] However, this notion took time to sink in. In Western society, marriage was a social and spiritual rather than a legal phenomenon for centuries—though it did have legal consequences.[29] This was the case in Rome.[30] The structured legal doctrine of marriage emerged in the West, through Christianity, much later in the twelfth century C.E.[31] The most important and broad-reaching change occurred in 1563 at the Council of Trent, which formalized marriage under Christian dogma and strictly forbade divorce.[32] From that point on, Canon Law allowed for annulment of marriage but only under circumstances manifesting a grave breach of the marriage, such as adultery or the inability to consummate the marriage.[33] In all other cases, even the most dissatisfied spouses could only hope for an order allowing separation from bed and board.[34] A granting of this order was only possible following proof of adultery, desertion, or cruelty, and it provided no permission to remarry.[35]

Divorce was first re-established in the West by England and her colonies during the seventeenth century.[36] Even still, it was an exceedingly

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[28] *See Deuteronomy* 24:1 (Biblical law acknowledged divorce and subjected it to cause. The Documentary Hypothesis dates this source to the sixth century BCE, however, it is considered to reflect a much earlier reality). This rule was further clarified in subsequent Jewish sources such as the Mishna (*Ktubot* tractate), I. Bedzow 9:10, and the Talmud (*Gitin* tractate). Y. Berakhot 2:14 (2d).

[29] *See* GLENDON, *supra* note 16, at 21. *See also* JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION AND LAW IN THE WESTERN TRADITION 19–22 (1997) (discussing pre-sacramental Christian marriages).

[30] GLENDON, *supra* note 16, at 21; *see also* PAUL DU PLESSIS, BORKOWSKI'S TEXTBOOK ON ROMAN LAW 118 (4th ed. 2010) ("Marriage in Roman Law was . . . purely a social act with certain legal consequences.").

[31] WITTE, *supra* note 29, at 23.

[32] JAMES A. BRUNDAGE, LAW, SEX AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE 433 (1987); WITTE, *supra* note 29, at 38, 42.

[33] BRUNDAGE, *supra* note 32, at 288, 370–71.

[34] WITTE, *supra* note 29, at 65. This means the couple does not live together, but the marriage is functionally, though not technically, dissolved. As a result, remarriage is forbidden. *Id.*

[35] *Id.*

[36] *See* Sybil Wolfram, *Divorce in England 1700-1857*, 5 OXFORD. J. OF LEGAL STUD. 155, 156–57 (1985) (the first divorce by act of parliament was granted in 1670 to Lord Roos, but divorce through private act of parliament only became a regular procedure following the divorce of Duke of Norfolk in 1700). Similarly, in the Massachusetts Bay Colony, divorce was legalized in 1629 for grounds such as adultery, cruelty, and desertion. At that time, divorce had to be approved by the governor, which made the procedure somewhat similar to the English divorce by act of parliament. *See* Betty Malesky, *Divorce: Dilemma For Early Americans*, ARCHIVES (June 21, 2012), http://www.archives.com/experts/malesky-betty/divorce-in-family-history-research.html [https://perma.cc/G3YT-YBET]. Other colonies introduced divorce later. For example, in South Carolina, divorce was first granted

rare procedure,[37] effectively available only to men in cases involving adultery.[38] Other unhappy marriages were simply to be "borne as a cross."[39] Even after civil courts obtained jurisdiction over divorce during the nineteenth century,[40] the grounds for the procedure remained essentially unaltered, "merely adding cruelty, desertion and a few qualifying aggravations of adultery incest and bigamy."[41] Likewise, in France, where divorce was permitted in 1884,[42] it was available only upon an offering of proof of a grave marital breach, such as adultery, insanity, or having committed some shameful crime.[43] The laws of other European countries reflected similar norms.[44]

During the twentieth century, the focal point of discussions surrounding divorce in Western legal codes shifted from whether to allow divorce—under limited circumstances—to the extent to which divorce should be attainable and, ultimately, to whether specific grounds ought to be required at all.[45] This was nothing short of a revolution. Divorce ceased to be a rare measure used only in extreme cases and instead gained growing social acceptance.[46]

Moreover, the grounds for divorce expanded immensely during the last decades of the twentieth century. In the United Kingdom (U.K.), the irretrievable breakdown of the marriage can now be the basis for divorce.[47] Adultery, cruelty (now called "unreasonable behavior"), and desertion—the three classic grounds for divorce—all still provide the basis for such a

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in 1868. *See* MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 15 (1996).

[37] There were only 131 cases of divorce in England throughout the 18th century. Wolfram, *supra* note 36, at 157.

[38] *Id.*

[39] GEORGE BERNARD SHAW, PYGMALION act V (1913).

[40] RODERICK PHILLIPS, PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY 403–04 (1988).

[41] Wolfram, *supra* note 36, at 157.

[42] PHILLIPS, *supra* note 40, at 403. While divorce had been permissible prior, a ban on divorce was reinstated in the Code Civil in 1816.

[43] *Id.*; FREDERIC R. COUDERT, MARRIAGE AND DIVORCE LAWS IN EUROPE: A STUDY IN COMPARATIVE LITIGATION 23–24 (1993).

[44] *See, e.g.*, PHILLIPS, *supra* note 40, at 420, 424, 430 (England, France, and Germany); COUDERT, *supra* note 43, at 23–24 (France).

[45] Masha Antokolskaia, *Comparative Family Law: Moving with the Times?*, *in* COMPARATIVE LAW: A HANDBOOK 241, 247 (Esin Örücü & David Nelken eds., 2007) [hereinafter Antokolskaia, *Comparative Family Law*].

[46] *Id.* at 247; *see also* KATHARINA BOELE-WOELKI, FRÉDÉRIQUE FERRAND, CRISTINA GONZÁLEZ BEILFUSS, MAARIT JÄNTERÄ-JAREBORG, NIGEL LOWE, DIETER MARTINY & WALTER PINTENS, PRINCIPLES OF EUROPEAN FAMILY LAW REGARDING DIVORCE AND MAINTENANCE BETWEEN FORMER SPOUSES 24–25 (2004).

[47] Matrimonial Causes Act of 1973, c. 18, § 1 (Eng.).

breakdown.[48] However, the novelty of this legislation was marked by the addition of circumstances that do not reflect fault on the part of either party. For example, a two-year separation followed by a consensual petition for divorce or a five-year separation followed by a contested petition is grounds for irretrievable breakdown.[49] Other Western countries have also loosened their divorce laws—some by adding no-fault grounds and some by eliminating grounds altogether. In Germany and France, an extended separation is itself a sufficient ground for divorce: one year where a petition is uncontested and three in the case of a contested petition in Germany.[50] In France, a two-year separation suffices where a petition is contested,[51] and an uncontested petition requires no separation at all.[52] In the United States, waiting periods following fault-based divorce have been shortened, and all states now have no-fault divorce with waiting periods generally ranging between six months and two years.[53] Furthermore, "[m]ost courts do not question one spouse's claim that the couple has 'irreconcilable differences.'"[54]

Taken together, these changes demonstrate a shift in the legal approach towards divorce. Once highly regulated and hardly attainable, divorce has gradually become more easily accessible under a wider range of circumstances. Neither judges nor legal grounds, such as fault, govern and decide the matter. Instead, the will of the parties and their autonomous decisions are the principal drivers. This begs the question, should courts be involved at all? Naturally, these changes make an enormous difference in the lives of parties involved in divorce proceedings. However, they also extend beyond the parties and local legal arrangements, reflecting a transformation in the meaning of divorce and creating a new phenomenon altogether.

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[48] *Id.* § 1(2)(a)–(c) (first added through the Divorce Reform Act of 1969, c. 55, § 2 (UK)). In the late 1980s, the Law Commission attempted to abolish the grounds for divorce altogether. These attempts led to the Family Law Act 1996, which was later repealed. *See* Rhona Schuz, *Divorce Reform–Part I: The Ground for Divorce*, 23 FAMILY L. 580, 580 (1993).

[49] Matrimonial Causes Act of 1973, c. 18, § 1(2)(d), (e) (Eng.) (first added through the Divorce Reform Act of 1969).

[50] BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 1566, *translation at* https://www.gesetze-im-internet.de/englisch_bgb/ (Ger.) (discussing the presumption of a breakdown of the marriage as grounds for divorce). According to section 1565(2), in exceptional hardship cases, divorce may be granted following less than a year of separation.

[51] CODE CIVIL [C. CIV.] [CIVIL CODE] art. 238 (Fr.) (discussing divorce on grounds of irretrievable breakdown of the marriage).

[52] Masha Antokolskaia, *Dissolution of Marriage in Western Countries*, *in* ROUTLEDGE HANDBOOK OF FAMILY LAW AND POLICY 87 (John Eekelaar & Rob George eds., 2014).

[53] Strauss, *supra* note 2, at 1271 (noting that a waiting period may be somewhat prolonged in disputed cases).

[54] *Id.*

B. Divorce Revisited

The change in the legal treatment of divorce is a seminal one. To a great extent, divorce has been taken out of the hands of the public, as represented by the Church or the State, and placed in the hands of the parties.[55] Today, the State still controls the form, but not the substance, of divorce. Because the State is still the sole guardian of the registry,[56] it is the sole authority with the power to determine whether an individual is legally divorced. However, the State does very little, if anything at all, to control its exercise of that power or to limit the availability of divorce. The outcomes of this shift are more far-reaching than they initially appear. Now, not only is divorce more flexible, but it is also governed chiefly by the wishes of the parties, which grants it a deeper meaning.

Traditionally, when seeking to obtain a divorce, fault was the only way out of a marriage—and innocence was a mighty shield. A guilty party could not ask for a divorce based on his or her own guilt.[57] And an innocent party could hold on to their marriage even if it became a sham, such as when the other spouse left the marital home and severed all ties with the family,[58] or obnoxious, such as when the other spouse brought a mistress into the family home.[59] Though some may have deemed it advisable that such marriages end, at that time, the law did not. Thus, an innocent party had a right to preserve their marriage for whatever reason he or she chose.[60] Some reasons included: avoiding the stigma of divorce, safeguarding children's welfare or financial interests, and leveraging a better deal in an eventual divorce by forcing the party at fault to buy his or her way out of the marriage.[61] Yet another reason might have been sheer spite or a desire to punish the spouse at fault.[62] In any event, this structure gave an innocent party a *right* to his or her marriage. It also made divorce a legal issue: legal

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[55] GLENDON, *supra* note 16, at 31–34. *But see* Jonathan Herring, *Divorce, Internet Hubs and Stephen Cretney*, *in* FIFTY YEARS OF FAMILY LAW 187, 197 (Rebecca Probert & Chris Barton eds., 2012) [hereinafter Herring, *Divorce, Internet Hubs*] (discussing the public interest in divorce reflected in public investments including legal aid).

[56] Joel A. Nichols, *Misunderstanding Marriage and Missing Religion*, 2011 MICH. ST. L. REV 195, 195 (2011) (acknowledging how, in the United States, at times "couples that were married in a different state from their current locale face issues of whether their state will legally 'recognize' the validity of their out-of-state marriage.").

[57] Antokolskaia, *Comparative Family Law*, *supra* note 45, at 250.

[58] MARTIN WOLFF, PRIVATE INTERNATIONAL LAW 374 (2d ed. 1950) (this was a requirement under English law).

[59] *Id.* (this was a requirement under Belgian law).

[60] *Id.*

[61] Allen M. Parkman, *Reforming Divorce Reform*, 41 SANTA CLARA L. REV. 379, 386 (2001) ("The result [of requiring the "innocent" party to initiate divorce] could often be a much more generous compensation and custodial package than the divorcing spouse preferred.").

[62] *Id.*

rules had to be interpreted, facts needed to be checked and applied appropriately by judges trained and versed in the law, and only then would dissolution of the marriage be possible. The modern reality of divorce differs from jurisdiction to jurisdiction.

In most parts of the modern Western world, divorce is always attainable.[63] If one party decides he or she wants to terminate the marriage, divorce is the probable outcome. It may be a matter of time, related to the duration of separation, or a matter of money, where one spouse pays the other to concede to a divorce and thus shorten the waiting period. But it will almost inevitably happen.[64] So much so that some countries changed their laws. In Denmark, an uncontested divorce may be granted via an administrative procedure.[65] This notion of a non-judiciary divorce is not unique. In Australia, divorce is obtainable by an administrative procedure accomplished by mailing forms through the post, without the need for a court appearance, though this is only possible in uncontested divorces where no children are involved.[66] Similarly, the United Kingdom's Family Justice Review, an advisory panel to the Ministry of Justice, suggested divorce should be an administrative procedure conducted through an online hub, with legal intervention limited to cases where a divorce is disputed.[67] A more interesting situation is revealed when the situation is viewed from the respondent spouse's perspective. A spouse reluctant to divorce, who has not infringed on the marriage, may nonetheless be forced

[63] With the exception of religious divorce, particularly Jewish divorce in Israel (where no civil divorce exists for most couples). *See* Jodi M. Solovy, *Civil Enforcement of Jewish Marriage and Divorce: Constitutional Accommodation of a Religious Marriage*, 45 DEPAUL L. REV. 493, 497 (1996). Notably, the religious Jewish divorce is sometimes unattainable, mostly due to objections and interruptions by the spouses, usually husbands. *See* Susan Weiss, *Divorce Law in Israel*, THE JERUSALEM POST (Nov. 29, 2018), https://www.jpost.com/opinion/divorce-law-in-israel-573185 [https://perma.cc/62FA-UYNN].

[64] This, however, is not necessarily true in all jurisdictions and under all circumstances. *See, e.g.*, Babiarz v. Poland, App. No. 1955/10, Eur. Ct. H.R. (2017) (where the ECHR upheld the decision of a Polish court to preserve a marriage as per the respondent's request and deny the divorce application of a party that was found to be solely responsible for the breakdown of his marriage).

[65] BOELE-WOELKI ET AL., *supra* note 46, at 21–22.

[66] *Family Law Act 1975* s 98A (Austl.). *See also* PATRICK PARKINSON, AUSTRALIAN FAMILY LAW IN CONTEXT 338 (2009).

[67] MINISTRY OF JUSTICE, THE DEP'T FOR EDUC. & THE WELSH ASSEMBLY GOV'T: FAMILY JUSTICE REVIEW FINAL REPORT, 25, 51 (2011). At point 131, the report says that the court would be overseeing divorce through an administrative capacity, but it later clarifies that it is not the judges but rather the "Family Justice Service" that would oversee the case. *Id.* at 25, 172. *See also* Stephen Cretney, *Private Ordering and Divorce – How Far Can We Go*, 33 FAM. L. 399 (2003) (discussing this idea without controversy).

into a divorce by their counterpart.[68] Previously, marriages could be *dissolved* only following a showing of fault and, in the past few decades, through consent. Now, they cannot be *preserved* without spousal consent, regardless of the parties' acts or faults. This means the right to divorce has developed in a way that overthrows and replaces the right to preserve a marriage. A person's "right" to keep their marriage is now subject to, and much weaker than, their spouse's "right" to divorce.

These changes affect not only the balance between the parties but also the conceptualization of divorce. Arguably, divorce is becoming less a legal matter in need of adjudication and more a private matter subject to administrative regulation. In legal proceedings, rights are weighed and balanced against each other. In a world where divorce was subject to cause, the offended party's right to exit the marriage depended upon the offender's guilt. Only the establishment of a grave enough breach of marital obligations provided one with the right to demand a divorce. In a fault-based world, an innocent party could easily prevent a divorce. So long as his or her behavior fell within the confines of the law, that spouse's marital status could not be revoked against his or her will. This is no longer the case in today's world. Though many jurisdictions still appear to maintain a traditional outlook regarding the right to keep one's marriage as reflected in their laws, the reality, as well as their actual socio-legal positions on the matter, have changed.

C. The Law as a Disservice

The changes divorce laws underwent are extensive, and they have altered the entire concept of divorce as a legal phenomenon. These changes have become normative. While some consequences of divorce—such as division of property—may call for judicial attention, divorce itself is different. The result of these changes is that, in some legal systems, divorce is becoming an autonomous action of both parties, or even of just one of them.[69] In other countries, where court involvement is still required, the role of the court is virtually reduced to issuing a rubber stamp.[70] Even when

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[68] *See, e.g.*, Owens v. Owens [2018] UKSC 41. Here, a wife failed to prove that her husband's moody and argumentative behavior was such that she could not be reasonably expected to live with him, and all she had to do was wait a while longer in order to establish a long enough separation period that would be in itself sufficient ground for divorce under section 1(2)(e) of the Matrimonial Causes Act of 1973. *Id.*

[69] *See* Ayelet Hoffmann Libson, *Not My Fault: Morality and Divorce Law in the Liberal State*, 93 TUL. L. REV. 599, 601 (2019) ("The right to exit is derivative of the centrality of autonomy to liberal thought and signifies a person's right to detach oneself from a relationship with another person.").

[70] Lynn D. Wardle, *Divorce Reform at the Turn of the Millennium: Certainties and Possibilities*, 33 FAM. L.Q. 783, 795 (1999) ("[In California] judges rubber stamp any claim

parties negotiate over the divorce, they do not do so "in the shadow of the law" because the law has no say regarding the divorce itself.[71] In such cases, the court applies very few, if any, of its special skills—such as rules analysis, fact-finding, etc. Therefore, courts may not be the ideal, and surely not a necessary, arena in which to entertain separation discussions.[72] Indeed, conducting divorce proceedings in court probably amounts to an unwarranted consumption of limited judicial resources.

But inefficiency is neither the only nor the main problem with leaving divorce in the hands of courts. Other, more significant, problems involve the parties themselves. First, people tend to hire lawyers or apply for legal aid when they go to court based on the assumption that they need a legal expert when appearing before the court. If divorce is, in fact, not a legal matter, the money spent on lawyers is probably wasted. Indeed, the U.K.'s administrative divorce proposal could limit the need for lawyers. True, lawyers are often hired to manage the divorce as a whole—including child custody, property division, and other related issues—so little, if any, of the money paid goes towards obtaining the divorce itself. Furthermore, the bureaucracy of divorce, which ranges from simply filling out forms to appearing before a court, is imposing on many people who would prefer to have professional assistance. Moreover, in some cases, clients use lawyers to hasten the process—by demonstrating the relationship's breakdown or arguing over the length of separation. But it may be that in other cases, the notion of divorce as a legal matter surely misleads lawyers as well, inducing them to spend time and effort making a case for their clients when no such case is truly necessary. Inasmuch as legal tools cannot change the outcome of these cases, the use of lawyers may be a wasteful mistake.

Leaving divorce in the hands of courts is also an emotional mistake. Parties are probably better off not fighting unwinnable fights, and society might be better off deterring people from dealing with emotional crises through hopeless lawsuits. Putting a spouse who would have liked to maintain their marriage through a long, arduous procedure is an unnecessary emotional strain that simply adds to the inherent perils and sorrows of divorce.[73]

This is not to suggest that a divorce should be a purely administrative process composed only of filling out forms. Having a formal divorce process that facilitates discourse may provide the parties with an opportunity to negotiate and plan their separation, rather than simply an arena for discussing whether separation may be allowed at all. In the absence of these formalized discussions, petitioning spouses may be unduly shielded

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for no-fault divorce, without any honest or meaningful effort to determine whether the breakdown really is 'irretrievable'").

[71] Mnookin & Kornhauser, *Bargaining in the Shadow*, *supra* note 22, at 968.

[72] *See* BOELE-WOELKI ET AL., *supra* note 46, at 21–22.

[73] *See, e.g.*, Strauss, *supra* note 2, at 1308 ("Litigation also creates psychological tensions.").

from the emotional pain their soon-to-be ex-spouse is experiencing. Discussions may also increase the parties' willingness to negotiate openly and compensate for the hurt caused by the termination of their marriage. However, this proceeding need not be "legal," nor must it occur in a courtroom.

A meaningful divorce process may be of great value, even when not used for a legal inquiry. Divorce proceedings serve a symbolic role, which may help a reluctant party mourn the loss of their dreams and come to terms with their separation. As Jonathan Herring beautifully notes, the end of a marriage should be treated with solemnity rather than being guided purely by considerations of efficiency.[74] After all, "[w]e could, when a person dies, arrange for an economical and efficient way of disposing of the body. We do not. The death of the person is marked as a serious moment, respecting what has been lost and looking forward to the future."[75] Likewise, requiring some sort of formal divorce proceedings, as opposed to allowing for mail or otherwise unceremonious delivery of notice, can promote a serious and respectful attitude towards the marriage. Such a requirement acknowledges losing something of meaning and importance. It can also give voice to an injured spouse, allowing them to be heard by their former partner. This is particularly important in a crumbling marriage, where it may be difficult for spouses to pause and listen to one another. Acknowledging such needs might call for a rethinking of the norms underlying the divorce process—including the idea that fault is better left undiscussed. These norms potentially deny the parties an opportunity to have their feeling of injustice recognized and their grievances considered.[76]

Justice and recognition of grievances are very important goals when dealing with such a potentially dramatic life change. However, it is doubtful that traditional court proceedings serve these principles. Even if court processes changed, offering improved negotiation space and grief support, other institutions and professions might be better equipped to cater to these emotional and psychological needs than courts of law. Such notions have gained traction, as reflected in laws requiring family counseling as a part of, and almost in lieu of, separation proceedings.[77] These requirements change not only the venue but, more importantly, the contents of the discussion.

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[74] Herring, *Divorce, Internet Hubs*, *supra* note 55, at 197.

[75] *Id.* at 196.

[76] *See* CLARE HUNTINGTON, FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS 116 (2014); LAW COMMISSION, *Facing the Future: A Discussion Paper on The Ground For Divorce*, 1988, Law Com No 170, ¶ 3.22 (UK).

[77] *See, e.g.*, Children and Families Act 2014, c. 6, § 10 (UK). The Mandatory Information and Assessment Meetings in cases involving children in the U.K. are aimed at providing information regarding mediating family disputes and ADR. Likewise the Family Dispute Resolution procedure is mandatory in all cases involving children in Australia according to section 60I of the Family Law Act of 1975. *See Family Law Act 1975* (Cth) s 60I (Austl.).

IV. THE LEGAL NATURE OF THE BEST INTEREST OF THE CHILD

Parental responsibility is another central element in family law.[78] Disputes regarding child custody and guardianship are an integral part of most divorce suits where the parties have children together.[79] However, the relevance of the law to such disputes is questionable.

A. The Evolution of Custody Norms

The notion of parental disputes regarding children is relatively new. In antiquity, children were sometimes treated as part of their father's property.[80] As head of the household, the father owned the dwellers of his household to different extents.[81] And although children were not considered their father's property under the Common Law, they were still perceived as economic assets.[82] As was the case under Roman Law, all Common Law parental rights were vested solely in the father.[83] Furthermore, since marriage suspended the legal capacity of women, it was essential that the father attain legal control over the family's children.[84] Under this legal assumption, a father had an immediate right to his legitimate children and could use this right as he saw fit.[85] Fathers' rights over their children were so

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See, e.g., Deborah Thompson Eisenberg, *Reflections on "Innovations in Family Dispute Resolution,"* 75 MD. L. R. 1, 1 n.1 (2016) (sharing similar scholarly suggestions calling for new models to address family law issues, new interdisciplinary partnerships to support these models, and expanded training for lawyers navigating the broad range of family dispute resolution options). However, these suggestions, and many others like them, are insufficiently grounded in theoretical phenomenology.

[78] Herring, *Making Family*, *supra* note 10, at 50.

[79] Christopher Allan Jeffreys, *The Role of Mental Health Professionals in Child Custody Resolution*, 15 HOFSTRA L. REV. 115, 135 (1986).

[80] *See generally Child Custody–Parental Rights vs. the Child's Best Interest*, THE CONVERSATION (Nov. 14, 2014), https://theconversation.com/child-custody-parental-rights-vs-the-childs-best-interest-33620 [https://perma.cc/BU9R-FELE] (outlining a brief history of child custody in colonial America).

[81] *See, e.g.*, Christopher L. Blakesley, *Child Custody and Parental Authority in France, Louisiana and Other States of the United States: A Comparative Analysis*, 4 B.C. INT'L & COMP. L. REV. 283, 286–88 (1981) (discussing the changes in Roman Law and the impact of that law over modern Western laws); Allan Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. L. 423, 435 (1976–77) (mentioning, alongside the famous Roman Law example, the laws of ancient Persia, Egypt, Greece and Gaul); BRIAN H. BIX, THE OXFORD INTRODUCTIONS TO U.S. LAW: FAMILY LAW 59 (2014).

[82] MASON, *supra* note 36, at xii.

[83] Roth, *supra* note 81, at 426–27.

[84] *See* MASON, *supra* note 36, at 59 (noting the more recent nineteenth-century decision quoted and discussed there would have applied during earlier times as well).

[85] As opposed to illegitimate children who, by definition, had no legal fathers and therefore stayed with their mothers. *See Unmarried Fathers' Rights*, LAWSHELF, https://lawshelf.com/coursewarecontentview/unmarried-fathers-

unquestioned that child custody was not an issue in a divorce proceeding because children were automatically granted to their father.[86] The few rights mothers did have regarding their children were subjected to the rights of fathers. In France, for example, a mother could only assert her parental rights if the father died while the children were still minors.[87] As time went on, the proprietary aspect of the father-child relationship was softened, allowing courts to remove children from the custody of abusive fathers.[88] However, such fathers retained the right to control their children's upbringing and could assert their interest in having custody of their children or withholding it from others.[89]

The regulation of child custody upon divorce gradually transformed during the eighteenth and nineteenth centuries.[90] During that time, courts in the United States contemplated diverging from the Common Law as to the question of paternal superiority.[91] Some courts were willing, in select cases, to give mothers custody of their young children in order to promote the children's welfare.[92] A deeper change arose in England, aimed

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rights/#:~:text=Traditionally%2C%20under%20the%20common%20law,the%20primary%20right%20to%20custody.&text=Historically%2C%20family%20law%20statutes%20gave%20deference%20to%20mother's%20in%20custody%20disputes [https://perma.cc/P3QV-67D8].

[86] Joan B. Kelly, *The Determination of Child Custody, The Future of Children*, 4 CHILDREN & DIVORCE 121, 121 (1994).

[87] *See* Blakesley, *supra* note 81, at 289–90; Roth, *supra* note 81, at 427. In England, where the law followed Roman legal traditions, guardians were appointed in the event of a father's death, restricting mothers' rights even further. Kelly, *supra* note 86, at 121.

[88] Roth, *supra* note 81, at page 428 (referring to England and the United States).

[89] *See* Letter from Caroline Sheridan Norton, English author, to the Queen on Lord Chancellor Cranford's Marriage and Divorce Bill 63 (1855) (on file with Indiana University), http://webapp1.dlib.indiana.edu/vwwp/view?docId=VAB7092&chunk.id=d1e505&toc.id=&brand=vwwp;query=#docView [https://perma.cc/N5QR-TXES] ("[In England] at that time the law was . . . that a man might take children from the mother at any age, and without any fault or offence on her part."). *See also* Blakesley, *supra* note 81, at 289–99 (explaining that in France, fathers were free to control their children as they saw fit, but only so long as they were not found to be abusive); Kelly, *supra* note 86, at 122 (noting that mothers in Colonial America were granted no custodial rights during their marriages or after divorce); MASON, *supra* note 36, at 17–18 (explaining that in Colonial America, women did not sue for their children, but that may be either because they did not think they stood a chance of winning or because they did, in fact, have the children, as one of the leading causes for divorce was desertion "and it is unlikely that the father deserted with children in tow."); EUROPEAN FAMILY LAW IN ACTION – VOL. III: PARENTAL RESPONSIBILITIES 77–104 (Katharina Boele-Woelki et al. eds., 2005) (providing state-by-state civil law examples).

[90] Kelly, *supra* note 86, at 122.

[91] *Id.*

[92] *See* MASON, *supra* note 36, at 60–61; Kelly, *supra* note 86, at 122; Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J. L. FAM. STUD. 337, 367 (2007).

at accommodating mothers' rights.[93] English wives, who fought for the recognition of their separate legal capacity and rights, also sought to extend them to include parental rights.[94] After centuries of male domination over child custody,[95] the suffragette movement argued for mothers' custodial rights over children during marriage and upon divorce.[96] Even before the suffragettes, women fought to change this reality. One such woman was Caroline Norton, who, after being deprived of her children following a divorce,[97] later fought for the enactment of the English Custody of Infants Act 1839,[98] which allowed judges some discretion regarding child custody.[99] The Act empowered courts to grant mothers access to the custody of their children under the age of seven,[100] thus paving the way to maternal rights.[101]

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[93] *See* MASON, *supra* note 36, at 51, for a discussion of a similar change in Colonial America, where Mason attributes the change not only, or mainly, to the rise of woman's rights, but also to what she refers to as the "cult of motherhood," which understood child rearing as the duty of the mother for the benefit of the child. These observations may be relevant to England, given the strong legal ties between the Colonies and England at that time. *See* Kelly, *supra* note 86, at 113 (discussing how more direct and independent thinking regarding mothers' rights appears to have emerged in the United States only during the 1920s, when it was sometimes argued that a wife who was entitled to a divorce due to her husband's fault was also entitled to custody of her children).

[94] Mary Lyndon Shanley, *Suffrage, Protective Labor Legislation, and Married Women's Property Laws in England*, 12 SIGNS 62, 72 (1986).

[95] *See* Martha J. Bailey, *England's First Custody of Infants Act*, 20 QUEEN'S L. J. 391, 394 (1994–95) (explaining that even though fathers could allow mothers access and even custody of their children, the law did not grant mothers the right to demand custody or even access to their children; hence, mothers were usually left subject to a fathers' good graces).

[96] *See* MASON, *supra* note 36, at 57 (explaining this phenomenon was not unique to England and mentioning expansion by the New York State of the Married Woman's Property Act of 1860 such that it would grant joint guardianship and equal powers to married mothers and fathers). *See also* Norton, *supra* note 89.

[97] S*ee* Bailey, *supra* note 95, at 402 (providing a detailed account of Norton's efforts); Norton, *supra* note 89, at 64–69 (providing the sad details of Norton's own story).

[98] *See Custody rights and domestic violence*, U.K. PARLIAMENT, http://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/relationships/overview/custodyrights/ [https://perma.cc/FF9E-UJMW]; Norton, *supra* note 89 (noting that the high point of Norton's campaign in promoting the 1839 bill was her letter to Queen Victoria).

[99] Innocent mothers were allowed to sue for custody of children under the age of seven and for access to older children. *See* Bailey, *supra* note 95, at 393, 433–34. Until this legislation, though parties could make a private agreement granting custodial rights to mothers, courts were hesitant to make such orders. *Id.* Notably, mothers who were guilty of adultery could not submit such petitions. *Id.*

[100] Kelly, *supra* note 86, at 122; Roth, *supra* note 81, at 425.

[101] Bailey, *supra* note 95, at 393 (noting the Act left that decision to the discretion of the court, and therefore had little effect on the actual rulings, such that fathers were still granted custody in most cases).

Later, Parliament extended maternal rights to children under the age of sixteen.[102]

Over time, the English focus on maternal rights and the American focus on child welfare merged into a single legal notion giving preference to the mother as a custodian of children.[103] Some jurisdictions went as far as to formulate this notion in a legal rule—the Tender Years Doctrine.[104] Under this doctrine, courts assumed it was best for the child to remain with its mother, as a matter of either nature[105] or science,[106] and mothers were regularly awarded custody over their young children,[107] displaying a complete reversal from the previous paternal supremacy norm. This presumption later became the legal norm in most Western jurisdictions.[108]

B. Custody Revisited

Much of the above-mentioned evolution surrounding the regulation of custody can be attributed to the shift of legal attention from family units to the individuals within the family—who are themselves the subject of rights—as well as a move from a patriarch-centered focus to a more general people-centered focus, which included children. Additionally, the

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[102] The Custody of Infants Act 1873, 36 & 37 Vict. c. 12, art. 1 (UK).

[103] *See* NIGEL LOWE & GILLIAN DOUGLAS, BROMLEY'S FAMILY LAW 312–13 (Oxford U. Press 11 ed., 2015) (noting that in the United Kingdom, the preference was formulated via discretion given to courts, allowing them to designate rights to the mother, and not as a prima facia presumption).

[104] *See generally* Julie E. Artis, *Judging the Best Interests of the Child: Judges' Accounts of the Tender Years Doctrine*, 38 L. & SOC'Y REV. 769, 770 (Dec. 2004).

[105] *See, e.g.*, Bailey, *supra* note 95, at 433 (regarding England); MASON, *supra* note 36, at 53 (regarding the United States); Blakesley, *supra* note 81, at 316 (regarding France).

[106] MASON, *supra* note 36, at 164–65 (arguing that with the rise of the social sciences, mothers' supremacy was ratified based on empirical observations).

[107] *Id.* at 61 (citing several cases, including one, Mercein v. People *ex rel.* Barry, 25 Wend. 63, 77 (1840), where the court went so far as to say about a mother that "the law of nature has given to her an attachment for her infant offspring which no other relative will be likely to possess in an equal degree").

[108] Kohm, *supra* note 92, at 338–39 ("[T]he doctrine of the best interests of the child is genuinely and uniquely American, and that the doctrine itself has indeed greatly influenced child law globally."). Indeed, this is a prevailing doctrine in the United States. *See* Roth, *supra* note 81, at 425 (regarding Common Law); KATHARINA BOELE-WOELKI, FRÉDÉRIQUE FERRAND, CRISTINA GONZÁLEZ BEILFUSS, MAARIT JÄNTERÄ-JAREBORG, NIGEL LOWE, DIETER MARTINY & WALTER PINTENS, PRINCIPLES OF EUROPEAN FAMILY LAW REGARDING PARENTAL RESPONSIBILITIES 36–37 (2007) (regarding Civil Law). At least in some jurisdictions, courts generally gave custody to mothers, reflecting what was perceived as the child's best interest. *See* Artis, *supra* note 104, at 770. Furthermore, if the mother demonstrated to the court that she is competent and responsible, she would be granted custody not only of children of tender age but also of older siblings of a tender-aged child. *See* Blakesley, *supra* note 81, at 316–18.

child's needs and interests became the leading consideration in custody matters,[109] though sometimes tempered by other legal presumptions.[110]

The "best interest of the child" concept is now the prevailing principle regularly present in both national[111] and international[112] legal documents throughout the Western world. Despite its importance, this doctrine is "the most heralded, derided and relied upon standard in family law today. It is heralded because it espouses the best and highest standard; it is derided because it is necessarily subjective; and it is relied upon because there is nothing better."[113]

In custody cases, the best interest of the child standard means the court grants custodial rights to maximize the child's welfare.[114] The court's decision can place the child under joint custody of both parents, with only one parent, with or without visitation rights for the other parent, or with a third party. In essence, unlike its predecessors, the best interest of the child standard requires sorting out details and patterns of social and psychological importance, weighing them in light of theories regarding emotional wellness, and assessing the child's future development based on foreshadowing signs demonstrated in the existing reality.[115] No part of this process involves legal reasoning. Such evaluations are not based on legal understanding, and courts are generally neither trained, nor ideally suited, to undertake them.[116]

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[109] This terminology emerged in court decisions in Colonial America during the early 1700s and began infringing on parental authority late in the nineteenth century, before reaching a peak in worldwide prevalence and child-focused interpretation in the late 1970s. *See* Kohm, *supra* note 92, at 353–56. This highpoint was further strengthened with the 1989 United Nations Convention on the Rights of the Child, stating in Article 3 that the best interest of the child is a primary consideration in matters involving children. *See id.*

[110] *See* Andrea Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, 5 YALE L. & POL'Y. REV. 267, 267–76 (1986); MASON, *supra* note 36, at 129–33; BIX, *supra* note 81, at 188 (regarding the legal presumptions of primary caretaker, psychological parent, joint custody, etc.).

[111] *See supra* note 105 (discussing examples).

[112] *See* Convention on the Rights of the Child art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3 (explaining that the best interest of the child as a primary consideration in various proceedings including legal ones); *see also* Kohm, *supra* note 92, at 351.

[113] Kohm, *supra* note 92, at 337.

[114] Importantly, the assumption that placement with the mother would necessarily be the best outcome for the child no longer exists, hence the transformative importance of the shift from the tender years doctrine to the best interest of the child principle. *See* MASON, *supra* note 36, at 123. This same shift is also a part of the difficulty in this transition, as there is no concrete guideline to substitute the maternal preference rule and to guide judges. *See infra* text surrounding note 126.

[115] *See* J. Carl Funderburk, *Best Interest of the Child Should Not Be an Ambiguous Term*, 33 CHILD.'S LEGAL RTS. J. 229, 234 (2013) ("'best interest' should protect the rights of the child").

[116] *See* Aiken & Wizner, *supra* note 20, at 66.

Judges are professionally trained to find facts and determine what *has happened*. They have no special skills in determining what *will happen*. They are trained at making conclusions based on the analysis between facts and legal provisions. Furthermore, once the legal principle is asserted—i.e., once it is decided that the case should be resolved on the basis of the best interest of the child—most of the remaining work is not strictly "legal" in nature.[117] Jurists are trained to make conclusions based on their application of the facts and legal provisions, while the best interest of the child standard requires conclusions based on the application of facts to sociological and psychological theories.[118] Consequently, when judges determine child custody arrangements, they no longer turn to their law books or legal precedent, but instead rely heavily on expert opinions.[119] More often than not, courts apply these experts' opinions "as is" since judges lack the training and skills to refute or question them.[120] Thus, in this manner, judges make the experts the de facto judges of the case. While all these phenomena exist in other legal contexts,[121] they seldom appear all at once. The accumulation

[117] *See Re G (Children)* [2012] EWCA (Civ) 1233 (Eng.) (noting that exceptions do exist, such as the alignment of child welfare with modern reality); JOSEPH GOLDSTEIN, ALBERT J. SOLNIT, SONJA GOLDSTEIN & ANNA FREUD, THE BEST INTEREST OF THE CHILD 17–62 (1998) (outlining a comprehensive theory for applying a best interest of the child framework, or at least a decision-making tool that utilizes social science knowledge); Kohm, *supra* note 92, at 353 (stating that the effect of the book was a growing reliance on expert testimony in judicial decision-making, as well as judges themselves deciding based on their own observations and convictions).

[118] GOLDSTEIN ET AL., *supra* note 117, at 46–48 (referring to the law's inability to supervise the day-to-day life of families or predict the future and arguing that "the intricate character of the parent-child relationship places it beyond the constructive, though not the destructive, reach of the law," while suggesting that judges allocate custody and then pull away and allow the selected caregiver to meet the child's changing needs).

[119] *See* Kohm, *supra* note 92, at 34 n.221 (quoting LYNN D. WARDLE & LAURENCE C. NOLAN, FUNDAMENTAL PRINCIPLES OF FAMILY LAW 858 (2002)) ("Courts may be in the poorest position of all to know what the facts are; custody decisions are based on short hearings (if any testimony), with heavy reliance on paid experts.").

[120] *See* Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decision Making*, 101 HARV. L. REV. 727, 751 (1988); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, LAW & CONTEMP. PROBS. 226 (1975). *See also* Rebecca Aviel, *A New Formalism for Family Law*, 55 WM. & MARY L. REV. 2003, 2014 (2003) ("Especially in contrast to the approaches it replaced, which provided fixed rules for child custody that were explicitly gender-based, the best-interests standard 'seems wonderfully simple, egalitarian, and flexible.' It also, as observed, 'expresses the right societal message about the responsibility of parents to put their children's interests first.' But the praise is faint in comparison to the criticism; these same commentators go on to assert that the standard 'has no objective content' and 'is not determinate enough to produce predictable results, yielding instead a process that is contentious, expensive, subjective, and unjust.' They are joined by a legion of scholars who have produced a body of criticism that is as extensive as the standard is amorphous.").

[121] *See* Jeffrey J. Parker, *Contingent Expert Witness Fees: Access and Legitimacy*, 64 S. CAL. L. REV. 1363, 1363 (1991) ("Testimony by expert witnesses is a practical necessity in many

of this heavy reliance on experts, prospective assessment, non-legal subject matter, and determinative formulation points to a deeper incompatibility between the subject matter and court adjudication.

Even when courts use their discretion in such cases, they only apply legal thinking and mechanisms to a limited extent. The best interests of the child principle has no legal content, so judicial discretion is applied absent any guidelines.[122] Thus, despite their efforts, judges are unsuccessful in formulating a clear approach towards child custody disputes between parents. In contrast to divorce proceedings, where judges have very little discretion regarding the outcome, in child custody decisions, their discretion is completely unhindered by legal considerations. However, the outcome is the same. In both cases, a judge's work is not judicial in nature. In the absence of legal considerations, other experts essentially decide child custody disputes.[123] Naturally, that decision is not strictly "legal" in nature.

Certain cases involve allegations regarding related legal matters, such as claims of neglect or molestation. Such cases call for legal decision-making, but its substance is of criminal or welfare law, which is beyond the scope of pure family law. Even in "pure" custody cases, where fact-finding is generally undertaken by experts, and no evidence is presented to the courts, courts still play a major role in coordinating and managing the decision-making in the case and even, on occasion, in choosing between conflicting expert opinions. Whenever experts are used, legal and non-legal considerations and arguments are intertwined. The court must use typical judicial skills, such as questioning witnesses and establishing credibility to evaluate an expert opinion. Alongside this, the court must use other experts and bodies of knowledge, in which lawyers are not typically well versed, to assess the experts' methods and the theories used. In most legal cases, the expert opinion comprises only one component of the case, such that the

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legal disputes."); STEVEN PEGALIS & HARVEY WACHSMAN, AMERICAN LAW OF MEDICAL MALPRACTICE 267 (1980) (Expert testimony is generally necessary in medical malpractice cases).

[122] Even when legal principles were introduced in an effort to guide judicial discretion, some criticized them as not representing the best interests of the child. *See* Kohm, *supra* note 92, at 373–74 (discussing Scott's approximation rule that was adopted by the American Law Institute as a guideline for judicial discretion); MASON, *supra* note 36, at 133 (discussing the primary caretaker presumption); BIX, *supra* note 81, at 187–89.

[123] MASON, *supra* note 36, at 161–62 (building a multi-layered argument regarding the influence of social sciences over the law in custody cases). First, the social sciences have a theoretical influence over legislators and over judicial decision-making; second, social scientists are called upon to give testimony and evaluate cases; third, courts refer to decision-making processes of these sciences, rather than using the legal decision-making processes. *Id. See also* BIX, *supra* note 81, at 162–85 (discussing the aspects laid out by Mason in greater depth).

use of a court is both reasonable and worthwhile.[124] However, in "pure" custody cases—those not involving allegations of violence or neglect—the entire case revolves around the expert opinion.[125] Indeed, the best interest of the child doctrine does not reflect a legal formula.

Moreover, this doctrine is undisputed,[126] so any applicable legal work has already been completed—leaving little for the judge to contribute. Hence, the legal system is inappropriate for resolving issues regarding the principle of the best interest of the child; not because the courts cannot do the job, but because other professions and professionals might likely do it better.

C. The Law as a Disservice

One might argue that even if the use of courts and lawyers offers nothing but a smoke screen, disguising non-judicial decision-making, the law is still of use since it offers a state-sanctioned structure for dispute resolution. However, even in this regard, the law may be doing the parties a disservice.

First, courts are accustomed to rewarding and punishing. Therefore, they are more likely to, and in fact do, mistakenly use custody rights to reward or punish parents or misevaluate the proper reaction to parental actions.[127] Thus, their input as to what is in the best interest of the child may be well-intended but ill-executed.

Second, the law is usually used to resolving disputes after-the-fact, and jurists are, for the most part, trained in terminating relationships. However, when parties have children, despite the marriage's failure, the familial relationship often lives on as the parties continue to share parental responsibilities and attachments. Hence, the law is neither a good tool for dealing with parental conflicts, nor an appropriate one. The law knows how

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[124] *See generally* Stephen Gomez, *Family Law Expert Witness and an Introduction to Family Law*, EXPERT INST., https://www.expertinstitute.com/resources/insights/family-law-expert-witness-introduction-family-law/ [https://perma.cc/9WKB-JTSK] (describing the different types of expert witnesses).

[125] Note that in many cases only one expert is involved, appointed by the court; hence, this expert becomes a "substitute judge." *See generally* Stephanie Domitrovich, Mara L. Merlino & James T. Richardson, *State Trial Judge Use of Court Appointed Experts: Survey Results and Comparisons*, 50 JURIMETRICS J. 371 (2010) (survey conducted about court appointed experts).

[126] *See, e.g.*, BIX, *supra* note 81, at 11–12.

[127] GOLDSTEIN ET AL., *supra* note 117, at 81 ("Where abandonment by the biological parent is involuntary, judges, also out of an adult-cantered sense of justice . . . may use the child's placement as restitution to parents who are innocent victims of war, illness, poverty, deception or any another circumstances 'beyond their control.'"). Such decisions reflect adult and law-oriented reasoning, while the best interest of the child would suggest leaving the child in the care of their current guardians and avoiding yet another separation from parental figures might be best.

to *end* relationships, but parents who are going through a family dispute still need to raise children and parent together. Therefore, they are not in need of the law's severing power; rather, they need a healing caregiver.

There are other ongoing, potentially divisive, relationships that are handled by courts—the most obvious being business partnerships involving fiduciary duties. But the needs of co-parents are different and more dire than those of other relationships for several reasons. One reason is that familial disputes are usually more emotional, as they are "closer to home" in the most literal sense. In Savigny's terms, custody is familial and not patrimonial.[128] Therefore, in the absence of rules, courts do not employ legal discretion regarding the questions arising before them. Rather, they respond based on social and emotional considerations, areas in which they have no professional advantage.

Another reason is that unlike business partnerships, with co-parenting, there is no way out of the relationship. Contrary to business partners, co-parents *must* stay in touch, at least on some minimal level, unless they are willing to risk losing their relationship with their children. Third, unlike business partnerships, separating co-parents must chart new waters and create a new relationship with one another in caring for their children. Such parties need an intervention that permits, encourages, and even forces the creation of alternative lines of communication, enabling them to manage their parental duties in the best interest of their children, notwithstanding the disintegration of their own spousal relationships. These lines of communication are particularly vital given the high emotional and financial costs of re-addressing every single disagreement in court, as well as courts' general reluctance to discuss daily issues in family life and custody agreements. Such emotional compromises and psychological processes, which might be achieved in therapy, are seldom created in a court of law.[129] Creating a state-sanctioned procedure that is clearly and openly governed by social workers or psychologists might be a better alternative.

V. MONEY AND THE FAMILY

The last core aspect of family disputes is the monetary aspect of the relationships—mainly the division of property and mutual support.[130]

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[128] *See, e.g.*, VON SAVIGNY, *supra* note 17, at 281–99.

[129] *See, e.g.*, HUNTINGTON, *supra* note 76, at 114–15.

[130] Another aspect less relevant to the argument made herein is the matter of child support. The thorny problem of dividing pensions and other special assets lies beyond the scope of this Article as well. It seems that many jurisdictions, including England, Germany, Switzerland, and the United States provide for the division of pensions. *See* Carol Calhoun & Gregory Needles, *The Division of Pensions Across Borders*, EMP. BENEFITS LEGAL RESOURCE SITE (Dec. 17, 1996), https://benefitsattorney.com/articles/aaml/#2_Pensions_in_ Financial_Maintenance

Previously, this Paper argued that two of the three core issues of the paradigmatic family law cases—divorce and custody—are non-legal subject matters or, at least, are not best served by courts. By contrast, monetary issues are increasingly legal matters.[131] While the first two issues were clearly matters of special familial importance, the monetary aspects paint a more nuanced picture.

Family-related property issues typically arise when the family breaks up: when someone leaves the family through death, in which case the question is one of succession, or, more important to the current discussion, through separation following the breakdown of a spousal relationship. In this sense, these matters are highly personal. Further, in terms of substance, it seems there is an attempt to balance "the family" with property interests.

A. The Evolution of the Money-Family Relationship

Traditionally, a close connection existed between the division of property and other aspects of marriage and separation. Matrimonial property was divided upon divorce, and the division was influenced by the findings of the divorce petition in several ways. First, in the crown jewel of family-related monetary rights—maintenance[132]—fault influenced both the fundamental entitlement to such allowance and the amount awarded.[133]

[https://perma.cc/4PN4-373A] (United States & England); European Justice, *Divorce – Germany*, EUROPEAN JUDICIAL NETWORK, https://e-justice.europa.eu/content_divorce-45-de-en.do?member=1 [perma.cc/3VPN-HXZ3] (Germany); Reto Reichenbach, *What Happens to Your AHV (Old Age and Survivors' Insurance), Pension Fund, and Pillar 3a if You Get Divorced?*, CREDIT SUISSE (June 18, 2019), https://www.credit-suisse.com/ch/en/articles/private-banking/was-geschieht-bei-einer-scheidung-mit-ahv-bvg-und-3-saeule-201701.html [https://perma.cc/JRC4-778J] (Switzerland). In some jurisdictions, like England, this right goes undiscussed as a de facto matter. *See* Hilary Woodward, *Everyday Financial Remedy Orders: Do They Achieve Fair Pension Provision on Divorce?*, 27 CHILD & FAM. L. Q. 151, 171 (2015). Furthermore, even where it is addressed in court, either the pension is divided similarly to the entire mass of assets, or it is discussed as part of spousal support. *Id.* at 153.

[131] Others make this argument as well. *See, e.g.*, BIX, *supra* note 81, at 12 ("There are, however, places within American family law where the law has moved towards the opposite extreme: relatively rigid rules and guidelines, or at least presumptions. The best example of this is current family law in child support guidelines.").

[132] Historically, there was a divide between alimony (which was the support given to a separated wife) and maintenance (which was the support given following divorce). *See* ANTHONY DICKEY, FAMILY LAW 346 (5th ed., 2007). In current literature, the terms are used more loosely: in England and Australia, "maintenance" is now used to refer to both types of support, while in the United States, "maintenance" is used to refer to temporary payments and "alimony" to a permanent one. *Id.* In this paper, the term "maintenance" is used as a general term for spousal support.

[133] *See* AM. L. INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION ANALYSIS & RECOMMENDATIONS 43 (2002) ("Prior to 1968, . . . fault was almost universally allowed" as

Second, in some jurisdictions, fault influenced the division of property upon divorce.[134] The party at fault would often compensate the other party financially for the breach of the marriage and breakdown of the relationship.[135] Courts often awarded the innocent party more, if not the lion's share, of the property.[136] Finally, it is worth noting that in cases where fault influenced custody, it could also influence the monetary provisions attached to custody. This, at times, forced the party at fault to part with additional property in order to support or visit their children.

1. Maintenance

From antiquity to the nineteenth century, Western society limited married women's ability to own property.[137] Typically, men, be they fathers, husbands, or guardians, governed women's property.[138] Once a woman married, her husband was obligated to support her, and she had a duty to cohabit with him.[139] Only when a wife breached the marriage, either by desertion or adultery, did the husband's support obligation end.[140] In this regard, spousal maintenance extended the financial commitment of the parties beyond the marriage as a benefit to a wife who lost that support through no fault of her own.[141] Thus, a husband at fault was obligated to support his wife financially as if the marriage remained, while a guilty wife lost her entitlement to support.[142] This was based on the perception of marriage as a generally inseverable bond and the notion of marital fault.[143]

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a consideration when granting support in the United States, while the subsequent Uniform Marriage and Divorce Act does not allow for the consideration of fault).

[134] *See, e.g.*, FREIER & MCGINN, *infra* note 182, at 171 (discussing Roman Law); *see, e.g.*, Gomez, *supra* note 124 (discussing modern law in the United States).

[135] *See, e.g.*, Jane Biondi, *Who Pays For Guilt?: Recent Fault-Based Divorce Reform Proposals, Cultural Stereotypes and Economic Consequences*, 40 B.C. L. REV. 611, 616 (1999).

[136] *Id.* at 621.

[137] *See generally* Jone Johnson Lewis, *A Short History of Women's Property Rights in the United States*, THOUGHTCO. (June 13, 2019) https://www.thoughtco.com/property-rights-of-women-3529578 [https://perma.cc/9KLA-P843].

[138] *Id.*

[139] Joan Krauskopf & Rhonda Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 OHIO ST. L.J. 558, 560 (1974).

[140] DICKEY, *supra* note 132, at 350.

[141] *Id.* at 352. *See also* BOELE-WOELKI ET AL., *supra* note 46, at 73. Notably, however, under Common Law, this right to support was difficult, if even possible, to enforce until 1940. *See* DICKEY, *supra* note 132, at 350; *see also* John Eekelaar, *Post-Divorce Financial Obligations*, *in* CROSS-CURRENTS – FAMILY LAW AND POLICY IN THE UNITED STATES AND ENGLAND 405, 407–08 (Sanford N. Katz, John Eekelaar & Mavis Maclean eds., 2000).

[142] *See* DICKEY, *supra* note 132, at 346 (maintenance extended only to provide the supported wife with a normal life, such as buying food and cloths, paying for housing, etc.).

[143] *See* Lenore J. Weitzman & Ruth B. Dixon, *The Alimony Myth: Does No-Fault Divorce Make a Difference?*, 14 FAM. L. Q. 141, 146 (1980). *See also* Robert W. Kelso, *The*

This belief underpinned the laws of many European countries until well into the twentieth century.[144] Despite this, some countries granted maintenance based on both fairness and need.[145]

Today, fault still plays a role in the granting of maintenance in some jurisdictions.[146] However, in most areas, it does not.[147] Generally speaking, adults are now expected to be self-sufficient and not rely on support from an ex-partner after the dissolution of marriage.[148] Maintenance still exists in many jurisdictions, but establishing a need in the court's eyes is very different than it was in the past.[149] Though there is not one clear theory explaining modern maintenance and guiding its allocation,[150] it is apparent that fault is, for the most part, not the explanation.[151] In many jurisdictions,

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Changing Social Setting of Alimony Law, 6 LAW & CONTEMP. PROBS 186, 191–92 (1939); Judith G. McMullen, *Alimony: What Social Science and Popular Culture Tell Us About Women, Guilt, and Spousal Support After Divorce*, 19 DUKE J. GEN. L. & POL'Y 41, 44 (2011) [hereinafter McMullen, *Alimony*].

[144] *See* BOELE-WOELKI ET AL., *supra* note 46, at 73–74 (Bulgaria, 1944; England and Wales, 1971; Germany, 1976; Denmark, 1989; and Austria, 1999).

[145] *See id.* at 74 (maintenance based on fairness and need exists in Finland, Russia, and Sweden to some extent).

[146] *See id.* at 74–75 (fault still plays a role in Austria, Belgium, Bulgaria, Poland and Portugal); DIETER MARTINY & DIETER SCHWAB, GROUNDS FOR DIVORCE AND MAINTENANCE BETWEEN FORMER SPOUSES: GERMANY 26 (2002) (discussing Germany, where guilt is currently used in order to withhold payment to an otherwise deserving party); BOELE-WOELKI ET AL., *supra* note 46, at 73–74 (fault is also somewhat influential in France); *see also* CODE CIVIL [C. CIV.] [CIVIL CODE] art. 270 (Fr.).

[147] *See* Eekelaar, *supra* note 141, at 409–10 (outlining the declining use of maintenance for influencing marital behavior).

[148] BOELE-WOELKI ET AL., *supra* note 46, at 77. A recent Law Commission in England stated its goal very clearly as "making orders that lead to independence, to the extent that that is possible in the light of choices made within the marriage, the length of the marriage, the marital standard of living, the parties' expectation of a home, and their continued shared responsibilities in the future, particularly for children." LAW COMMISSION, *Matrimonial Property, Needs and Agreements*, 2014, Law Com No 343, ¶ 1.27 (UK).

[149] *See, e.g.*, Jonathan Herring, *Why Financial Orders on Divorce Should Be Unfair*, 19 INT'L J. L. POL. & THE FAM. 218, 219 (2005) [hereinafter Herring, *Why Financial Orders*] ("To seek fairness as between the parties is, I suggest, misguided. Not only misguided but undesirable in this context. Undesirable because the emphasis on fairness between the parties obscures important wider social interests."). *See also* MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 33 (2nd ed., 1998).

[150] Mary Kay Kisthardt, *Re-thinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance*, 21 J. AM. ACAD. MATRIMONIAL LAW. 61, 64 (2004) ("Spousal support, however, remains the most difficult of the economic issues to resolve because it lacks both the underlying rationale of the other issues as well as any standards by which to predict the amount of the award.").

[151] Cynthia Lee Starnes, *Alimony Theory*, 45 FAM. L. Q. 271, 278 (2011); Carol Rogerson, *The Canadian Law of Spousal Support*, 38 FAM. L. Q. 69, 73–96 (2004). *But see* BOELE-WOELKI ET AL., *supra* note 46, at 74–75 (discussing the fact that fault is still relevant in the sense that in some jurisdictions the party at fault could not receive such support, but

courts order payments to compensate parties who lost financial gains and earning capabilities due to the marriage[152] and who cannot support themselves based solely on their share of the marital property after division.[153] This is indeed a familial consideration in the sense that it supports familial investments. However, its justification is similar to business considerations in that it marks a payment for services rendered or compensation for losses incurred due to the structure of the family life and investments made in mutual endeavors. Such a mixed approach is apparent in the German,[154] French,[155] Australian,[156] and Canadian rules for maintenance,[157] which require the recipient to be unable to provide for themselves due to childcare, age, or sickness. Maintenance may also be paid based on the substantial investment in the care given during the marital life.[158]

The duration for support varies between jurisdictions. In many, it is still officially considered a life-long duty, while in others, the law limits the maximal duration.[159] However, the actual outcomes are similar since many systems would, in fact, only grant maintenance for a limited transition period.[160] Furthermore, while maintenance is still the law on the books of many countries, it is, in reality, a diminishing phenomenon in many jurisdictions.[161] For example, in the United States, maintenance is awarded in just nine percent of cases, compared to approximately twenty-five percent

concluding that "it was common for fault to play a key part in determining maintenance obligations. However, this is no longer the case.").

[152] DICKEY, *supra* note 132, at 354. *See also* Strauss, *supra* note 2, at 1272. Another example is suggested in the Commission on European Family Law Rules, which proposes granting maintenance based on a balance between the creditor's need and the debtor ability. *See* BOELE-WOELKI ET AL., *supra* note 46, at 79.

[153] BOELE-WOELKI ET AL., *supra* note 46, at 77.

[154] BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], §§ 1570–76 (Ger.). Similar rules exist in other jurisdictions. *See* BOELE-WOELKI ET AL., *supra* note 46, at 77, 85–91.

[155] CODE CIVIL [C. CIV.] [CIVIL CODE] art. 271 (Fr.). Interestingly, this code was rather recently changed, in January of 2005, to exclude guilt from its support considerations. These considerations have been discussed in depth. *See* FRE□DE□RIQUE FERRAND, GROUNDS FOR DIVORCE AND MAINTENANCE BETWEEN FORMER SPOUSES: FRANCE 39 (2002).

[156] *See* PARKINSON, *supra* note 66, at 452–56 (discussing article 75 of the Australian Family Law act of 1975). *See Family Law Act 1975* § 98A (Austl.).

[157] *See* Rogerson, *supra* note 151, at 70 (discussing Canada).

[158] MARTINY & SCHWAB, *supra* note 146, at 24.

[159] BOELE-WOELKI ET AL., *supra* note 46, at 112–13. McMullen, *Alimony*, *supra* note 143, at 76 ("Texas limits alimony awards to couples that have been married for more than ten years if one spouse cannot support herself. Similarly, Utah only allows alimony payments for a time period equal to the years of the marriage. The Massachusetts legislature also recently passed legislation to severely limit alimony. These states have effectively banned alimony in all but specified circumstances.").

[160] BOELE-WOELKI ET AL., *supra* note 46, at 113.

[161] *See* MARTINY & SCHWAB, *supra* note 146, at 23 (noting that Germany is an exception).

of cases during the 1960s.[162] In Australia, maintenance is awarded in about seven percent of the cases.[163] Similarly, in Sweden, "spousal support is legally possible but is in fact 'unusual.'"[164]

2. Matrimonial and Post-Nuptial Property

The prevailing notion of division of marital property upon separation is new in most legal systems.[165] Historically, "[t]he individuality of the spouses was subordinated to the idea of the family as a unit. The husband represented the unit towards the outside world and was its head in internal matters."[166] Most legal systems kept the parties' property separate, giving the husband the right to administer—but not own—his wife's property during marriage.[167] Though property items that belonged to the wife before marriage were returned to her upon dissolution, she was not considered a co-owner of the marital property;[168] hence, the familial property remained intact. Because children stayed with their father, the regulation of marital property focused on the interests of the family as a unit rather than on those of the individuals composing it.

More modern discussions of family property division reveal a very different vocabulary. For instance, there are rights, formulas for calculating monetary rates, and far fewer, if any, value-judgments or morals intervening in the calculation.[169] Generally, guilt is not mentioned, ex-spouses are expected to be self-sufficient, and divergence from equitable division

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[162] Judith G. McMullen, *Spousal Support in the 21st Century*, 29 WIS. J. L. GENDER, & SOC'Y 1, 6 (2014); Strauss, *supra* note 2, at 1272.

[163] Belinda Fehlberg, *Spousal Maintenance in Australia*, 18 INT'L J.L. POL'Y & FAM 1, 27 (2004). *See also* PARKINSON, *supra* note 66, at 446 ("Spousal maintenance plays a very limited role in modern Australian law.").

[164] Hans-Jürgen Andreß, Barbara Borgloh, Miriam Bröckel, Marco Giesselmann & Dina Hummelsheim, *The Economic Consequences of Partnership Dissolution: A Comparative Analysis of Panel Studies from Belgium, Germany, Great Britain, Italy, and Sweden*, 22 EURO. SOCIO. REV. 533, 538 (2006).

[165] *See* W.W. Smithers, *Matrimonial Property Rights under Modern Spanish and American Law,* 70 U. PA. L. REV. 259, 259–60 (1922) (noting that Spain is an exception).

[166] Max Rheinstein & Mary Ann Glendon, *Interspousal Relations*, *in* INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, VOL. 4 PERSONS AND FAMILY 9 (Max Rheinstein & Mary Ann Glendon eds., 2004).

[167] *See, e.g.*, LOUIS M. EPSTEIN, THE JEWISH MARRIAGE CONTRACT: A STUDY IN THE STATUS OF WOMEN IN JEWISH LAW 91–95 (2004) (discussing Jewish law); H. R. Hahlo, *Matrimonial Property Regimes: Yesterday, Today and Tomorrow*, 11 OSGOODE HALL L. J. 455, 457, 459 (1973) (discussing European law generally); FRE□DE□RIQUE FERRAND & BENTE BRAAT, PROPERTY RELATIONSHIP BETWEEN SPOUSES – NATIONAL REPORT: FRANCE 3 (2008) (discussing a later version of this property regime found in the pre-revolutionary French law).

[168] *See* FERRAND & BRAAT, *supra* note 167, at 3 (discussing France).

[169] *See, e.g.*, MASS. GEN. LAWS ch. 208, § 53 (2020) (Commonwealth of Massachusetts statutory formula for calculating alimony payments).

requires explanation.[170] In the absence of a right to preserve one's marriage against the wishes of a spouse, and where no legally-defined breach of that marital agreement exists,[171] there is no need to compensate for a breach of the marital accord.[172] Furthermore, child custody is more flexible. Thus, for the most part, judges can no longer leave the family and its property in a single parent's hands. This is also due, in part, to the decline in rights and interests afforded to the family as a group, and the rise of those afforded to individuals. Matrimonial property now employs a more general legal wording, using arguments such as fairness, reliance, and expectations instead of family and duty—with the notable exception of the marital home.[173]

The balance between property and family considerations varies between jurisdictions. In some, marriage is generally not considered to have any propriety consequences. Such was the case for many years in England.[174] Only in 1973 did English law introduce family-based considerations into the division of property.[175] These considerations include age, the length of the marriage, the parties' respective needs and resources, and even the welfare of the family—thus demonstrating family-oriented thinking.[176] In the years since the introduction of these considerations, business-style fairness and other "market" considerations ultimately pushed the court to create a

[170] *See, e.g.*, COLO. REV. STAT. § 14-10-113 (2020) (State of Colorado statute governing marital division of property, which presupposes equitable division of property between parties regardless of marital misconduct).

[171] *See* Antokolskaia, *Comparative Family Law*, *supra* note 45, at 250–53.

[172] This is reflected in the general demise of guilt considerations in different aspects of marital law: divorce, maintenance, custody, etc. *See, e.g.*, BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 1566, *translation at* https://www.gesetze-im-internet.de/englisch_bgb/ (Ger.) (German law on no-fault divorce); CODE CIVIL [C. CIV.] [CIVIL CODE] art. 238 (Fr.) (French law on no-fault divorce).

[173] *See, e.g.*, DIETER MARTINY & NINA DETHLOFF, PROPERTY RELATIONSHIP BETWEEN SPOUSES – NATIONAL REPORT: GERMANY 9 (2008) (German courts may allot the use of the marital home to a divorcing spouse, even if they do not own the house, in exchange for compensation paid to the spouse who owns the property). *But see* Chris Clarkson, Jonathan Hill & Mark Thompson, *Study on Matrimonial Property Regimes and the Property of Unmarried Couples in Private International Law and Internal Law – National Report*, United Kingdom, England, T.M.C. Asser Institute, 7–8 (2003) (any presumption that the spouse legally owning the marital home, holds the property, in part, in trust for the other, must be based on factual grounds such as the contribution of funds for the home's acquisition or a clear mutual intention to create a trust).

[174] *See* Clarkson, Hill & Thompson, *supra* note 173, at 5, 13.

[175] *See* Matrimonial Causes Act 1973, § 25 (Eng.).

[176] *Id.* This act was interpreted by the court to award a spouse "reasonable requirements," which for a wealthy spouse meant evaluation vis-à-vis the marital life. It was less relevant for most couples with more limited resources. *See* LAW COMMISSION, *supra* note 148, at 13–14, ¶ 2.6.

declared equal division regime.[177] However, reality remains more traditional.[178] Furthermore, even in jurisdictions where autonomy is stronger and family considerations are weaker, an equitable division is still possible when it comes to the division of the marital home,[179] and in some instances, other property.[180]

In other jurisdictions, marital property is now treated in a more business-like manner. Property owned by the parties is divided upon separation so that no "family estate" remains.[181] Thus, the ownership of each of the spouses' property takes precedence over the interests of the family, and in particular, the children, the old, and the sick.[182] Investments are

[177] *See* White v. White [2000] 2 FLR 981 (ruling that although no presumption of equal division exists, the objective of fairness demands that an equal division should nonetheless be made, unless there is a good reason not to).

[178] LAW COMMISSION, *supra* note 148, at 157–58, ¶ 8.5 (arguing that reported cases since *White v. White* indicate that wives are seldom being awarded fifty percent of the value of the assets).

[179] Clarkson, Hill & Thompson, *supra* note 173, at 7–8 (There is a presumption that the legal owner of the home holds a part of it in trust for the other; but this presumption must be based on some factual grounds, such as contributing funds for the acquisition of the home or a clear mutual intention to create a trust.). Such thinking is also apparent in French and German law, as discussed below in the text accompanying *infra* notes 189–92.

[180] This is the case where parties possessed joint accounts and used their money communally. Clarkson, Hill & Thompson, *supra* note 173, at 8.

[181] The demise of the family estate is what gives rise to all sorts of post-divorce financial remedies including maintenance orders, pension divisions, and property transfers. *See* LOWE & DOUGLAS, *supra* note 103, at 837, 843, 845.

[182] Currently, it is the state and not the family that is expected to care for those with nowhere else to turn in such cases. *See id.* at 773. This is contrary to Roman law, where despite the separation of property, if a wife died, the husband kept one-fifth of her dowry for each child they had, and if her father was no longer alive, he would keep the dowry in its entirety. BRUCE W. FREIER & THOMAS A.J. MCGINN, CASEBOOK ON ROMAN FAMILY LAW 170, 174 (2004). Similarly, if the parties separated due to fault of the wife, the husband could keep between one-sixth and one-eighth of the wife's dowry as compensation for gifts, expenses, guilt, and for the children. *Id.* In some cases, the dowry was not returned at all and was kept by the husband. DU PLESSIS, *supra* note 30, at 128. Though the reasons may have been closely related to patriarchy, the outcome was that a larger portion of the property continued to be available to the family (i.e., one spouse and the children). Another example is found in English law prior to 1857, where the husband's right to administer the wife's property survived past the separation of the spouses. *See* MASHA ANTOKOLSKAIA, HARMONISATION OF FAMILY LAW IN EUROPE: A HISTORICAL PERSPECTIVE 225 (2006). This was explained as a right to settle property for the benefit of the husband and children. LAW COMMISSION, *The Financial Consequences of Divorce: The Basic Policy*, 1980, Law Com No 103, 7 n.34 (UK). Even later, and up until the *White* case, the non-owner spouse (usually wives) would receive a small portion aimed at sustaining them, while the other party kept the majority of the property; but at that time, there was no apparent consideration of children's needs. *See generally* Mary Ann Glendon, *The New Family and the New Property*, 53 TUL. L. REV. 697, 697 (1979) (for a discussion of the transformation from family estate to individual rights).

acknowledged and accounted for, and in many jurisdictions, a personal debt accrued by one spouse does not bind the other party.[183]

The Canadian Supreme Court best articulated the modern understanding of marital property, suggesting that marriage is seen as "not only a union, but also . . . a 'joint endeavor,' a socio-economic partnership,"[184] as opposed to de facto unions, which are not economically united in the same sense.[185] Similarly, in the United States, most jurisdictions aim to divide matrimonial property "equitably."[186] Equitability is generally framed as influenced by spousal contributions to the marriage and the marital property.[187] In actuality, courts mainly consider these factors in order to "offset financial imbalance rather than compensate spouses for their contributions,"[188] allowing for generally equal division.[189] Likewise, in Germany, where the default rule not only creates a right where gains made by spouses must be evenly split,[190] parties may also apply one of several partnership regimes, which are not unique to marriage.[191] The French regulation is very similar.[192] Even Australian law, which at first glance seems more family-oriented, uses a similar logic of considering contributions made to marital assets, as if the family was a joint venture, and adjusting that division based on future resources and needs.[193]

Further, some jurisdictions still allow familial consideration in property distribution. For example, under German law, when dividing marital property post-separation, a party may refuse to pay his or her share of an equalization claim based on gross financial inequality between the parties.[194] Similar considerations exist, to different extents, in sixteen American states.[195] It should be noted that such considerations are in no way reflective of prevailing norms.

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[183] KATHARINA BOELE-WOELKI, FRÉDÉRIQUE FERRAND, CRISTINA GONZÁLEZ BEILFUSS, MAARIT JÄNTERÄ-JAREBORG, NIGEL LOWE, DIETER MARTINY & WALTER PINTENS, PRINCIPLES OF EUROPEAN FAMILY LAW REGARDING PROPERTY RELATIONS BETWEEN SPOUSES 165–68 (2013).

[184] Quebec v. A, [2013] 1 S.C.R. 61, para. 80 (Can.) (citing in part Bracklow v. Bracklow, [1999] 1 S.C.R. 420 (Can.)).

[185] *See* Jena McGill, *Developments in Constitutional Law: The 2013 Term*, 68 S.C.L.R. (2d) 137, 181 (2015).

[186] Strauss, *supra* note 2, at 1271.

[187] *Id.* at 1272.

[188] *Id.* Based on empirical data, Strauss notes that judges tend to use equal division as a general norm when applying equitable distribution rules.

[189] *Id.*

[190] MARTINY & DETHLOFF, *supra* note 173, at 4.

[191] *Id.* at 5–6.

[192] *See, e.g.*, FERRAND & BRAAT, *supra* note 167, at 3 (discussing the similarities in France).

[193] *Family Law Act 1975* (Cth) pt 79 div 14 (Austl.); PARKINSON, *supra* note 66, at 517–18.

[194] MARTINY & DETHLOFF, *supra* note 173, at 23–24.

[195] Strauss, *supra* note 2, at 1273.

Familial considerations, which no longer carry weight in many marital property-related issues, still apply in relation to the division of the matrimonial home. This is particularly true when children are involved, and these considerations often complement changes in the child custody regime. In this context, ownership is not a decisive factor. In Germany, for example, courts may award the use of the couple's marital home, even to an ex-spouse who does not own the real estate, for the benefit of the children.[196] Similarly, in France, the Civil Code precludes a spouse from disposing of any rights to property, ensuring that the dwelling and household furniture remain for the family.[197] While this rule aims mainly at preventing third parties from claiming rights to the family home, there are also limitations on the inter-party rights. The French Code also indicates that the lease to the family home belongs to both parties, even if it was created before the marriage and regardless of any other agreements the parties reach.[198] These arrangements, for the protection of the family home, exist in other jurisdictions as well.[199]

B. Maintenance and Matrimonial Property Revisited

Under traditional family law, money played a big role in the regulation of the family. It served as a means to keep the family unified and a way to punish undesirable familial behaviors.[200] Therefore, traditional family law was highly suspicious of the private regulation of property regimes. Furthermore, the law saw familial commitment as a lasting one.[201] Hence, it created support duties beyond the scope of the marriage and divided property based on family-related notions of husbands as patriarchs and providers rather than on the basis of equality and ownership.[202] However, the modern structure of family monetary issues is different.

The significance of this shift towards property regulation is well demonstrated in English law. England marked the last Western stronghold of the fully familial property regime[203]—banning prenuptial agreements,[204]

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[196] *See* MARTINY & DETHLOFF, *supra* note 173, at 9 (noting that the court may allot the use of the marital home to the other spouse, but that the spouse might owe compensation to the owner spouse during the occupancy).

[197] CODE CIVIL [C. CIV.] [CIVIL CODE] art. 215(3) (Fr.).

[198] *Id.* art. 1751(1). *See also* FERRAND & BRAAT, *supra* note 167, at 14.

[199] BOELE-WOELKI ET AL., *supra* note 46, at 73–74.

[200] *See* Rheinstein & Glendon, *supra* note 166 (regarding the unified group notion); DICKEY, *supra* note 132, at 350 (regarding behavior regulation).

[201] Glendon, *supra* note 2, at 454.

[202] *Id.*

[203] LAW COMMISSION, *supra* note 148, at 17, ¶ 2.20 (mentioning the twenty-year gap between England and the rest of Europe in this context).

[204] *See id.* at 8, ¶ 1.34. The Law Commission suggested recognizing such agreements, which have already been accepted by the courts. *See id.*; *e.g.*, Radmacher v. Granatino [2010] UKSC 42, [2011] 1 AC 534 (UK). It also suggested the introduction of "qualifying nuptial

mandating sharing and caring between spouses,[205] and until 1984, demanding that separating spouses maintain their former partners' post-divorce finances as if the marriage had never ended.[206] But even English law has shifted from familial consideration to more property-based legal parameters. Today, English law allows private accords regarding matrimonial property.[207] The absence of such agreement calls for a division of assets—similar to laws of other jurisdictions, though subject to court discretion.[208] The law complements this formulation through the consideration of factors intended to temper the effect of legally dividing all assets with familial concerns.[209] These factors include both the length of the marriage and the parties' respective needs and resources.[210]

It may seem that not much has changed in English law due to the preservation of some level of community. Yet, an analysis of the theoretical meanings of the shift suggests otherwise. Currently, English law bases property division on the parties' needs, compensation for lost income due to the marriage, and the sharing of any surplus or deficiency between the parties.[211] Now, courts no longer conceive of the family's property as one continuous unit and an ongoing commitment that continues even if divorce legally dissolves the family.[212] Rather, the law treats marital property as a separable partnership, but one that includes attentive terms. This makes a

agreements" that would allow the parties to create valid arrangements regarding their property but not to enable a party to avoid meeting the other's financial needs. LAW COMMISSION, *supra* note 148, at 8, ¶ 1.34.

[205] *See id.* at 1–2, ¶ 1.5.

[206] Matrimonial Proceedings and Property Act 1970, c. 45, § 5 (UK). The Act originally demanded the court to rule "as to place the parties . . . in the financial position in which they would have been if the marriage had not broken." This 'minimal loss principle' was repealed in 1984 at the recommendation of the Law Commission. *See* LAW COMMISSION, *supra* note 148, at 13, ¶ 2.5.

[207] *See, e.g.*, LAW COMMISSION, *supra* note 148, at 8, ¶ 1.35. However, this approach was criticized by (among others) Herring, *Why Financial Orders*, *supra* note 149, at 219.

[208] Matrimonial Causes Act 1973, c. 18, § 23 (UK) and similarly Civil Partnership Act 2004, c. 33 (UK).

[209] However, this effect is not guaranteed as the Act does not specify the effect these considerations have, or even what goal the court should aim to achieve. *See* LAW COMMISSION, *supra* note 148, at 12–13, ¶¶ 2.3–2.4.

[210] Matrimonial Causes Act 1973, c. 18, § 25. This was interpreted by the court in *White v. White* to award a spouses' "reasonable requirements," which for a wealthy spouse meant evaluation vis-à-vis the marital life, however, it was less relevant for most couples who have more limited resources. [2000] UKHL 54, [2001] 1 AC 596 (UK). *See* LAW COMMISSION, *supra* note 148, at 13, ¶ 2.6.

[211] *See* LAW COMMISSION, *supra* note 148, at 16, ¶¶ 2.15–2.18 (detailing the principles of *Miller v. Miller* and *McFarlane v. McFarlane*. [2006] UKHL 24; [2006] 2 AC 618 (UK)).

[212] For an illuminating discussion, see GILLIAN DOUGLAS, OBLIGATION AND COMMITMENT IN FAMILY LAW (2018).

weaker—though persistent—statement regarding the transformation of two people into an interconnected and committed couple.[213]

A similar but more nuanced approach is reflected in the subjection of the property division to the welfare of the parties' minor children.[214] This approach appears to take the family into account, but only considers the general welfare of minor children shared by the parties and not any other children in the family.[215] In so doing, the law contemplates the interests of members of the family, but only to the extent mandated by socio-economic factors.

The shift from familial considerations to autonomy-based economic ones expresses a change of theoretical importance. Instead of perceiving the family as a unit, it envisions a group of distinct individual parties. It is significantly less concerned with the group, and far more interested in principles such as ownership, equality, and the independence of individuals. These notions establish new norms and give different explanations to existing ones. They introduce a new language, out of the world of partnerships, into the family.

By the same token, the unique arrangement of maintenance continues shrinking.[216] Modern law assumes the parties maintain an obligation of self-sufficiency following divorce,[217] and it generally considers the equal division of assets to be just and preferable.[218] The fundamental understanding in maintenance orders "reflect[s] the underlying *property law*

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[213] A similar approach is reflected in the EU legislation. *See, e.g.*, Council Regulation 4/2009 of Dec. 18, 2008, art. 19, Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters Relating to Maintenance Obligations, 2009 O.J. (L 7) 1–79.

[214] This subjugation of property to child welfare is evident in chapter twenty-five, section three, of the Matrimonial Causes Act 1973, which held "to have regard to all the circumstances of the case, first consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen." Matrimonial Causes Act 1973, c. 25, § 3.

[215] LOWE & DOUGLAS, *supra* note 103, at 874–75.

[216] This is true both in the sense that it exists in fewer jurisdictions, and in that less money is allocated for less time where it still exists. *See, e.g.*, Marsha Garrison, *How Do Judges Decide Divorce Cases?: An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401, 469–71 (1996) (showing a fourteen percent decrease in alimony grants within one decade, as well as a decrease in the sums given, especially to women with some earning capacity). More recently, in the U.K., courts have shifted toward term limited maintenance orders. *See* Michael Gouriet, *Wind of Change on Spousal Maintenance (Alimony)*, WITHERSWORLDWIDE (2016), http://www.withersworldwide.com/news-publications/wind-of-change-on-spousal-maintenance-alimony--2 [https://perma.cc/M9NX-34F6].

[217] Suzanne Reynolds, *The Relationship of Property Division and Alimony: The Division of Property to Address Need*, 56 FORDHAM L. REV. 827, 837 (1988).

[218] *Id.* at 866.

assumption that 'he who earns it, owns it.'"[219] This has reached the point that some argue financial needs are seldom taken into account.[220]

While the connection between "family" and "law" in marital property still very much exists, its details and terminology have radically changed. "The family" is no longer perceived as one unit, connected for life, but instead as a joint endeavor that creates limited duties between the parties based on fairness and needs. Thus, maintenance might still be paid under certain circumstances, and marital property regimes are constructed with some familial considerations in mind.[221] For example, the correlation between the duration of the relationship and duration of support paid is sometimes explained as reflecting a financial merger over time between spouses[222]—a rationale that is of the familial realm.[223] In other jurisdictions, the duration of the marriage is considered when determining the parties' contribution to the family assets, for which compensation is required.[224]

C. The Family-Property Mix-Up: A Disservice?

Marital property is changing, and so is "the family." Most Western laws no longer treat marriage, or even other formal spousal relationships, such as civil partnerships, as unique or particularly special relationships.[225] Therefore, there is some doubt as to whether marriage should comprise the basis for the allocation of rights.[226] Further, family law has already been overtaken, at least to some extent, by contract law as the governing principle.[227] Not only are pre- and ante-nuptial agreements becoming more common, but their growing acceptance reshapes the marital property regime even in the absence of a signed agreement. This implies that parties

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[219] Joan C. Williams, *Is Coverture Dead?*, 82 GEO. L. REV. 2227, 2257 (1994).

[220] Reynolds, *supra* note 217, at 852–53. Financial needs were taken into account when a party suffered poor health or in connection with an opposing party's litigation misconduct. *Id.* at 854–55. In England, needs, like age, disability, standard of living, and earning capacity can be considered in some cases. *See* LOWE & DOUGLAS, *supra* note 103, at 870–71.

[221] While, currently, spousal support appears to be rare and sparse, it may be that not much more was actually paid in the past. *See* Reynolds, *supra* note 217, at 829, 843 n.79.

[222] *See* J. Thomas Oldham, *Economic Consequences of Divorce in the United States: Recent Developments*, U. OF HOUS. L. CTR. No. 2016-A-5, 6-10 (Apr. 2, 2016).

[223] Carol Rogerson & Rollie Thompson, *The Canadian Experiment with Spousal Support Guidelines*, 45 FAM. L. Q. 241, 254–55 (2011).

[224] Reynolds, *supra* note 217, at 881 (discussing marital property as means of spousal support in the United States).

[225] See, e.g., Sharon Shakargy, *What Do You Do When They Don't Say "I Do"? Cross-Border Regulation for Alternative Spousal Relationships*, 48 VAND. J. TRANSNAT'L L. 427, 439–40 (2015).

[226] Martha Albertson Fineman, *Why Marriage?*, 9 VA. J. SOC. POL'Y & L. 239, 267 n.77 (2001).

[227] *See, e.g.*, Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1475–76 (1992).

can choose how their property will be divided, rather than being forced into the default marital property regime suggested by state law.

Modern matrimonial regimes balance the individual and the familial group, seeking to bridge the gap between the autonomy of the individual and their commitments to one another. They do not afford support and reliance to financially able adults, but they do offer some protection to weaker members of the family. This is accomplished through special rules regarding the family home, the accounting for non-monetary contributions to matrimonial property, and consideration of the circumstances weaker spouses face in the division of property.[228] By doing so, the marital property regime regulates behavior in a way that accurately reflects a theoretical change and does not leave weaker parties destitute. It deters excessive co-dependence but supports some family community and accounts for some altruistic behavior within family life. This approach offers a balance between promoting selfless investments, which are good for the family, and protecting autonomy while deterring over-reliance and self-absorption. This admittedly imperfect balance is a "good enough" reflection of current socio-legal norms and an acceptable harmony between "legal" and "familial" considerations, language, and goals. Thus, unlike the two cases discussed above, the regulation of matrimonial property is not a disservice to the family or its members.

VI. WHERE DO WE GO FROM HERE?

Family law is fragmented and confusing. It is torn between different notions: autonomy, individualism, responsibility, commitment, and love. No one piece of legislation constitutes the problem. Rather, the lack of clear and coherent thinking about "the family" is to blame. This Paper calls us to revisit the norms and goals of family law and to reshape them in a theoretically sound and practically fitting manner. This is no easy task, but it cannot be avoided.

The search for the meaning of family structure entails reconciling—or choosing—between individualism and family commitments, which is especially apparent in the discussion of divorce and matrimonial property. Legal scholars have long noted the fragmentation of the family and the "emergence of the self-determining, separate individual from the network of family and group ties."[229] Mary Ann Glendon argues, "we ha[ve] moved away from a time when a person's position in society was determined by the family and where society itself was but an aggregation of families, toward a

[228] *See* Reynolds, *supra* note 217, at 840 n.62.

[229] C.K. Allen, *Introduction* to HENRY SUMNER MAINE, ANCIENT LAW, at xxvi (1959) (describing Maine's view). *See also* Glendon, *supra* note 2, at 455 (the author also mentions the work of Marx in this context).

situation in which the basic social unit was, for better or worse, becoming the *individual*."[230] On the other hand, the emotional, financial, and practical co-dependence of family members is as apparent as ever. Indeed, "no man [or woman] is an island entire of itself; every man is a piece of the continent, a part of the main."[231]

Once the proper theoretical balance between autonomy and community, and between freedom and commitment, is achieved, the legal meaning of different familial concepts should be clarified and fine-tuned. Concepts that have no legal meaning should be omitted from the law altogether. The discussion above demonstrates the shortcomings and undue costs imposed by existing divorce regimes. Therefore, giving clearer legal meaning to the legal commitment in marriage would allow parties to know what to expect and how to plan their actions. If marriage, by itself, is a legal commitment, divorce law should reflect as much. If it is not, divorce should be reconstructed as an administrative matter. The current situation is, as explained above, dissatisfactory. As long as divorce and marriage have no clear meaning, courts have very little to contribute to their adjudication. By the same token, legal meaning should be attributed to the best interests of the child, enabling courts to apply legal standards and decide cases in a legal manner. If the best interest of the child is not a real legal concept, custody cases that are decided through this concept should not be considered "legal" matters. So long as there are no legal means of identifying a child's best interests, courts cannot play a real role in determining custody.

Current family law—specifically the regulation of divorce and custody, but possibly other areas as well—is inadequate not because the relationships with which it deals are not important, but rather because they are *so* important. Families simply present more aspects, possibilities, and needs than legal practitioners are trained to deal with. Accordingly, the importance of these matters does not justify an over-reliance on legal tradition or an under-accounting of the ways in which the world, the family, and the law have changed. Only with theoretical clarity, proper regulation, and fitting institutions will the family and its members be properly served.

VII. CONCLUSION

[230] Glendon, *supra* note 2, at 455.

[231] Oliver Tearle, *A Short Analysis of John Donne's 'No Man Is an Island' Meditation*, INTERESTING LITERATURE, https://interestingliterature.com/2020/06/john-donne-no-man-is-an-island-for-whom-the-bell-tolls-meditation-analysis/ [https://perma.cc/76HW-LTZF] (quoting JOHN DONNE, DEVOTIONS UPON EMERGENT OCCASIONS, Meditation XII, 211 (1624)).

It was once argued that "*the family law legal system is broken*."[232] This Paper examines this argument. We have explored the historical developments concerning the three core aspects of family law disputes—divorce, custody, and property division—as a means by which to ponder the relationship between "the family" and the law. This Paper illuminates the evolution of this relationship by way of the questions discussed and stresses their importance and ramifications. The three aspects examined reveal substantive changes and a shift away from the traditional notion of family law. Each individual modification, alone, might seem insignificant. But when considered together, in light of their effect on all three core disputes, a more substantive and unique transformation emerges.

Indeed, the findings of this Paper allude to the same conclusion upon which Savigny arrived. What is now commonly called "family law" is not a conceptual union that behaves like one.[233] Rather, some aspects of the family—those revolving around personal relationships—have become ever more emotional and have drifted away from the law. While another aspect—composed of interpersonal obligations—remains within the firm grip of the law, with a more nuanced approach towards the needs of the family and its members.

Regardless of the future legal classification of these questions, surely "the family" deserves better solutions than those currently available. Reaching the exact equilibrium between "the family" and modern law is no easy task. It is a balancing act influenced by politics, religion, social norms, and other mighty forces. This Paper's attempt is only the first step in this journey, and it seeks to begin the process by shedding light on the shortcomings of the existing situation and by calling for a change.

[232] Marsha B. Freeman, *Comparing Philosophies and Practices of Family Law Between the United States and Other Nations: The Flintstones vs. The Jetsons*, 13 CHAP. L. REV. 249, 249 (2010).
[233] *See* VON SAVIGNY, *supra* note 17, at 282.

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