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## The Institutions of Family Law

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# ARTICLES

## THE INSTITUTIONS OF FAMILY LAW

CLARE HUNTINGTON\*

### ABSTRACT

*Family law scholarship is thriving, with scholars using varied methodologies to analyze intimate partner violence, cohabitation, child maltreatment, juvenile misconduct, and child custody, to name but a few areas of study. Despite the richness of this discourse, however, most family law scholars ignore a key tool deployed in virtually every other legal-academic domain: institutional analysis.*

*This methodology, which plays a foundational role in legal scholarship, focuses on four basic questions. Scholars often begin empirically, identifying the specific legal, social, and economic institutions that shape an area of legal regulation. Beyond descriptive accounts, scholars analyze how authority is and should be allocated across institutions—what is called institutional choice. Scholars similarly consider questions of institutional design, exploring how a specific institution operates and asking whether the institution could be more efficient and effective. Finally, scholars evaluate institutional frictions, anticipating the institutions that are likely to advance or impede law reform.*

*For nearly every contemporary issue in family law, a descriptive account of relevant institutions and an analysis of institutional choice, institutional design, and institutional friction would add critical—and missing—elements to current debates. To demonstrate the value of this methodology, this Article frames the relevance of these four dimensions of institutionalism and begins the process of applying that frame to specific controversies at the heart of contemporary family law. The resulting insights across a range of doctrinal, theoretical, and policy debates are deeply relevant to scholars, lawmakers, and policymakers. In short, it is long overdue for family law scholars to join the ranks of institutionalists, and this Article charts the path for doing so.*

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## INTRODUCTION

Family law scholarship is flourishing, with in-depth analyses of the economic rights of cohabitants,<sup>1</sup> the impact of child support policies on family poverty,<sup>2</sup> the rights of unmarried fathers,<sup>3</sup> responses to family violence,<sup>4</sup> state policies to help families negotiate caregiving and paid labor,<sup>5</sup> child custody rules,<sup>6</sup> competing rationales for awards of spousal support,<sup>7</sup> and much more. In this

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<sup>1</sup> See, e.g., Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. REV. 2139, 2159-90 (2019) (arguing that principles rooted in coverture govern distribution of property between separating unmarried couples); Emily J. Stolzenberg, *The New Family Freedom*, 59 B.C. L. REV. 1983, 2018-31 (2018) (describing debates about economic rights of cohabitants).

<sup>2</sup> See, e.g., Tonya L. Brito, *The Child Support Debt Bubble*, 9 U.C. IRVINE L. REV. 953, 955-56 (2019) (contending child support policies do not alleviate child poverty because low-income noncustodial parents do not have income to pay awards); Laurie S. Kohn, *Engaging Men as Fathers: The Courts, the Law, and Father-Absence in Low-Income Families*, 35 CARDOZO L. REV. 511, 531-33 (2013) (making similar argument).

<sup>3</sup> Compare Leslie Joan Harris, *Family Policy After the Fragile Families and Relationship Dynamics Studies*, 35 LAW & INEQ. 223, 231-35 (2017) (arguing family law should not treat unmarried fathers the same as married fathers given differences in commitment in nonmarital relationships and greater incidence of violence), with Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 225-31 (2015) [hereinafter Huntington, *Postmarital Family Law*] (arguing for stronger family law protection of unmarried fathers).

<sup>4</sup> See, e.g., LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 3-6 (2012) (identifying many problematic ways family law responds to intimate partner violence); Joan S. Meier, *U.S. Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations: What Do the Data Show?*, 42 J. SOC. WELFARE & FAM. L. 92, 95-102 (2020) (reporting results of empirical study on custody cases and claims of child abuse by each parent); Elizabeth M. Schneider & Cheryl Hanna, *The Development of Domestic Violence as a Legal Field: Honoring Clare Dalton*, 20 J.L. & POL'Y 343, 350-58 (2012) (reviewing legal literature on intimate partner violence).

<sup>5</sup> See, e.g., MAXINE EICHNER, THE FREE-MARKET FAMILY: HOW THE MARKET CRUSHED THE AMERICAN DREAM (AND HOW IT CAN BE RESTORED) 195-212 (2020) (listing such policies).

<sup>6</sup> See, e.g., Katharine T. Bartlett, *Prioritizing Past Caretaking in Child-Custody Decisionmaking*, 77 LAW & CONTEMP. PROBS. 29, 30-32 (2014) (describing lack of uptake for past-caretaking rule); Robert Mnookin, *Child Custody Revisited*, 77 LAW & CONTEMP. PROBS. 249, 250-53 (2014) (revisiting Mnookin's canonical argument that the best-interests standard is inevitably and problematically indeterminate).

<sup>7</sup> For a foundational account positing a noncontractual theory for spousal support, see Ira Mark Ellman, *The Theory of Alimony*, 77 CALIF. L. REV. 1, 40-81 (1989). For a description of current debates, see Marshal S. Willick, *A Universal Approach to Alimony: How Alimony Should Be Calculated and Why*, 27 J. AM. ACAD. MATRIM. LAWS. 153, 172-201 (2015).

This Article defines family law to include three principal domains: substantive rules that regulate family behavior, dispute-resolution systems, and the distribution of material resources and services to families. See *infra* text accompanying note 124. Some scholars, including myself in some contexts, define family law much more broadly to include virtually every area of the law that affects family functioning, from tax law to criminal law. See *infra*

work, scholars fruitfully deploy varied methodologies, including doctrinal analysis, empiricism, ethnography, critical race theory, feminist legal theory, and law and economics.<sup>8</sup> Most family law scholars, however, ignore a methodological tool deployed by scholars in virtually every other field in the legal academy: institutional analysis.

The study of institutions has a rich history. For more than a century, scholars in sociology, economics, political science, and other disciplines have studied the creation, evolution, and influence of institutions.<sup>9</sup> Legal scholars have long been part of this discourse, drawing on institutionalism to make significant contributions to the understanding of the law.<sup>10</sup> Indeed, institutionalism is so widespread in legal scholarship that one commentator calls it a unifying methodology.<sup>11</sup> Except in family law.

Institutional analysis can be synthesized into four basic questions,<sup>12</sup> each with its own rigorous methodology and large body of multidisciplinary literature.<sup>13</sup> Scholars often start by mapping the institutional landscape, asking which

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text accompanying note 121. The absence of institutional analysis is largely confined to the narrower definition of family law. *See infra* Section I.B (discussing rare examples of institutionalism in family law).

<sup>8</sup> *See, e.g.*, MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 14-54 (1995) (discussing feminist legal theory); Antognini, *supra* note 1, at 2159-90 (applying doctrinal analysis); Margaret F. Brinig, *Empirical Work in Family Law*, 2002 U. ILL. L. REV. 1083, 1085 (reviewing law and economics scholarship in family law); Clare Huntington, *The Empirical Turn in Family Law*, 118 COLUM. L. REV. 227, 235-66 (2018) [hereinafter Huntington, *Empirical Turn*] (describing empiricism in family law); R.A. Lenhardt, *The Color of Kinship*, 102 IOWA L. REV. 2071, 2101-06 (2017) (advocating for application of critical race theory in family law); Tonya L. Brito, Daanika Gordon & David J. Pate, Jr., *Focused Ethnography: A Methodological Approach for Engaged Legal Scholarship*, in *LEGAL SCHOLARSHIP FOR THE URBAN CORE: FROM THE GROUND UP* 141, 141-74 (Peter Enrich & Rashmi Dyal-Chand eds., 2019) (proposing use of ethnography in legal scholarship).

<sup>9</sup> *See infra* text accompanying notes 44-46 (defining features of institutionalism across various scholarship fields).

<sup>10</sup> *See infra* text accompanying notes 47-67 (describing this scholarship in multiple fields, from statutory interpretation and property, to law and economics and election law). For a foundational account documenting the institutional turn in legal scholarship and its foundation in new institutional economics and continental social thought, see Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1411-33 (1996). For a summary updating the legal scholarship in multiple fields, see Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 85-90 (2009).

<sup>11</sup> *See* Rubin, *supra* note 10, at 1424-25 (noting institutionalist methodology unites seemingly divergent areas of legal thought and arguing this institutional turn reflects new synthesis in legal thought, with scholars coalescing around microanalysis of institutions).

<sup>12</sup> *See infra* Section I.A.2.

<sup>13</sup> *See infra* text accompanying notes 81-95.

institutions influence an area of legal regulation.<sup>14</sup> Beyond descriptive accounts, scholars analyze institutional choice, asking how authority is and should be allocated across institutions.<sup>15</sup> Scholars likewise consider questions of institutional design, exploring how specific institutions operate and, prescriptively, whether institutions could be more efficient and effective.<sup>16</sup> Finally, scholars often evaluate institutional friction, anticipating which institutions are likely to advance or impede reforms to law and policy.<sup>17</sup>

There is no singular definition of an “institution,” and scholars most broadly define the concept as the “humanly devised constraints that structure human interaction.”<sup>18</sup> Institutions thus include legal, economic, and social institutions,

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<sup>14</sup> See *infra* text accompanying note 81 (describing mapping of institutional landscape in context of First Amendment rights). This mapping exercise is, standing alone, a significant contribution to the literature. It reveals, for example, which institutions are especially influential, and it can surface the hidden force of underappreciated institutions. See, e.g., *infra* Section III.A (discussing central role of nonstate institutions in family law). In any given analysis, the breadth of relevant institutions will accord in or out.

<sup>15</sup> See *infra* text accompanying notes 84-88 (describing analysis of institutional choice); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1076-77 (2011) (“Institutional choice involves the allocation of power across institutions, taking those institutions as fixed. By contrast, institutional design takes the allocation of tasks as fixed and asks how institutions should be designed so as best to execute the tasks entrusted to them.”).

<sup>16</sup> See *infra* text accompanying notes 89-92 (describing analysis of institutional design); Mitchell Pearsall Reich, *Incomplete Designs*, 94 TEX. L. REV. 807, 812-13 (2016) (describing legal scholarship on institutional design).

<sup>17</sup> See *infra* text accompanying notes 94-95 (describing analysis of institutional friction—institutions that can be harnessed in support of reform and those institutions that will resist it).

<sup>18</sup> Douglass C. North, *Economic Performance Through Time*, 84 AM. ECON. REV. 359, 360 (1994) (providing definition and noting inclusion of “formal constraints (e.g., rules, laws, constitutions), informal constraints (e.g., norms of behavior, conventions, self-imposed codes of conduct), and their enforcement characteristics”); see also *infra* text accompanying notes 70-75 (describing broad definition that institutions structure human interaction and further noting that an institution has normative component, telling person how they *should* act; regulative component, providing rules to guide action; and cognitive component, relieving person of conscious thought because compliance is routine). There are other meanings of an institution, of course, including the popular use of the term to refer to a psychiatric hospital—as in the pejorative statement “she should be institutionalized.” See, e.g., Kate Moore, *Declared Insane for Speaking Up: The Dark American History of Silencing Women Through Psychiatry*, TIME (June 22, 2021, 5:35 PM), <https://time.com/6074783/psychiatry-history-women-mental-health/> (explaining nineteenth-century practice of institutionalizing women “for defying ‘all domestic control’”). This Article uses the term “institution” consistent with dominant practice in academic discourse, see *infra* text accompanying notes 70-75, which is itself an institution. See *infra* notes 68-69 (defining “institution”).

As this broad definition of an institution implies, institutions are a potentially infinite category. Indeed, many social, cultural, economic, and political factors could be considered an institution. See *infra* notes 68-70 (discussing broad scope of the term “institution”). This

ranging from abstract institutions with informal rules, such as professionalism, to concrete institutions with formal rules, such as property rights.<sup>19</sup> One general understanding of an institution is that it reflects a practice or structure so embedded in our society and consciousness that a shorthand reference suffices.<sup>20</sup> In a ritual like shaking hands, an aspect of everyday life like paid labor, or a constitutive process like passing legislation, the rules are clear as to what is encompassed: reaching out a right hand to greet an acquaintance, receiving an hourly wage or salary in exchange for work, and crafting laws through political representatives.<sup>21</sup> Notwithstanding this broad definition, what unites institutional legal scholarship is the understanding that without identifying relevant institutions and grappling with questions of institutional choice, design, and friction, any analysis of legal regulation is incomplete.<sup>22</sup>

To appreciate the striking absence of institutional analysis in family law and the value of adding this methodological lens, consider one of the most active debates in family law today: whether and how to confer economic rights on unmarried partners.<sup>23</sup> Currently, cohabitants have far fewer economic rights than married couples, and courts and legislatures are generally reluctant to impose more obligations on these couples.<sup>24</sup> There are many views on this contentious, unsettled issue, and the debate is highly complex, in part because cohabitants are a large and diverse group.<sup>25</sup> Scholars have analyzed the issue for years,<sup>26</sup> and in

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Article focuses on the institutions that play the most salient role in family law but also invites conversation; indeed, debating the question of which institutions are relevant is part of bringing institutionalism to family law.

<sup>19</sup> See CATHERINE R. ALBISTON, INSTITUTIONAL INEQUALITY AND THE MOBILIZATION OF THE FAMILY AND MEDICAL LEAVE ACT: RIGHTS ON LEAVE 27-28 (2010) (defining “institution” and noting that institutions are highly varied, including “the vacation, the 40-hour work week, or even Tuesday”).

<sup>20</sup> See *id.*

<sup>21</sup> See *id.* at 28.

<sup>22</sup> See *infra* Section I.A.2.

<sup>23</sup> For an overview of this issue and a description of the debates around the economic rights of cohabitants, see Stolzenberg, *supra* note 1, at 2018-31.

<sup>24</sup> See *id.*

<sup>25</sup> Some cohabitants have considerable personal wealth and income, but many do not; some cohabitants share their resources, but many do not, with varying degrees of separateness; some cohabitants make a conscious decision to live together, as a step toward marriage, but others fall into cohabitation, often for economic reasons; some cohabitants have made a principled decision not to marry, for personal or political reasons, but others have not made a conscious choice either way; and some cohabitants are committed to each other long-term, but some are not. See June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 99-101 (2016).

<sup>26</sup> For examples of foundational texts, see CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 223 (2010), arguing family law should treat unmarried couples as married if they live together for two years and have a child; and Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1391-1402 (2001), reviewing court decisions and finding most courts treat unmarried cohabitants as separate economic units,

2021, the Uniform Law Commission adopted an act to standardize the economic rights of cohabitants and ensure consistency across states;<sup>27</sup> this act stands a significant chance of becoming the basis for state legislation across the country.

In this debate about legal rules for cohabitants, scholars and policymakers raise important doctrinal and theoretical questions, such as whether to base rights on status or contract and the role of consent in creating legal obligations.<sup>28</sup> This is a useful start to the debate, but it ignores equally key questions. It is difficult to understand fully the issue of nonmarital economic rights without determining which institutions influence cohabitation (the descriptive account of the institutional landscape), how authority should be allocated among potential decision-making institutions (institutional choice), how these institutions operate and whether they could be improved (institutional design), and which institutions will resist and promote law reform in this area (institutional friction).<sup>29</sup>

Intentional and structured analysis of these questions would add significant but missing elements to the debate. Mapping the institutions that influence the legal regulation of cohabitation, to begin, would highlight the specific legal institutions, such as legislatures and courts, that establish and currently administer the rules governing cohabiting couples; relevant social institutions, such as marriage, against which cohabitation is usually measured; and foundational economic institutions, such as the family wage, which influences expectations about economic sharing in marital families.<sup>30</sup> The simple exercise of identifying these core institutions would yield insights, such as the reality that courts currently—and problematically—dominate the end of cohabiting relationships, that marriage is still the social yardstick for intimate relationships, and that economic sharing is an entrenched expectation for married couples but

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with claims for spousal support possible but rarely granted, and property typically retained by whoever paid for it. For examples of more recent work, see Kaiponanea T. Matsumura, *Consent to Intimate Regulation*, 96 N.C. L. REV. 1013, 1046-57 (2018), defending the role of consent in regulating nonmarital relationships; Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1, 58-63 (2017), arguing for a new paradigm beyond marriage and nonmarriage when assigning property rights; and Carbone & Cahn, *supra* note 25, at 93-107, 112-13, describing with approval the legal distinction between marriage, which treats spouses as an economic unit, and cohabitation, which treats partners as separate economic entities, unless they have contracted otherwise.

<sup>27</sup> UNIF. COHABITANTS' ECON. REMEDIES ACT (UNIF. L. COMM'N 2021).

<sup>28</sup> See Memorandum from Mary Devine & Craig Stowers, Co-Chairs & Naomi Cahn, Rep., to Drafting Comm. on Econ. Rts. of Unmarried Cohabitants, Unif. L. Comm'n 2 (Nov. 13, 2019) (noting issue for drafting committee to address: whether to impose obligations on cohabitants without their affirmative consent), <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=a89890d9-eaf2-51aa-69a7-782a03e83e21&forceDialog=0> [<https://perma.cc/8TUZ-NQ9A>]; Matsumura, *supra* note 26, at 1046-58 (discussing theoretical and doctrinal reasons to emphasize consent in regulation of nonmarital relationships).

<sup>29</sup> See, e.g., *infra* Section I.A.2.

<sup>30</sup> See *infra* Section I.A.



much less so for cohabitants. This institutional mapping would also reveal that cohabitation itself is not as institutionalized as marriage and instead is a heterogeneous phenomenon: some cohabiting couples live together for relatively brief periods, often for reasons of economic exigency, and without an explicit social and economic commitment to each other, but other cohabiting couples have fully integrated their economic and social lives, made an explicit commitment to each other, and stay together for decades.<sup>31</sup> Cohabitation, in other words, is not a uniform practice so embedded in our society and consciousness that a shorthand conveys its essence.<sup>32</sup>

With this descriptive account, scholars and policymakers could consider the question of institutional choice. The current debate focuses on the substantive standards governing economic rights, but it does not scrutinize the institutions that could apply the standard.<sup>33</sup> Instead, the assumption is that courts will adjudicate these claims and that parties will negotiate the issues in the shadow of the substantive rules.<sup>34</sup> But just as different legal rules might make sense for subpopulations of the diverse group of cohabitants,<sup>35</sup> so too will cohabitants need different fora for adjudicating these rights. Identifying the different institutions that oversee the end of a cohabiting relationship is essential to understanding which institutions *should* do so.

A well-established framework for comparative institutional analysis guides this inquiry, prompting an examination of the relative benefits and problems with each potential institution.<sup>36</sup> This analysis would demonstrate that the strengths and weaknesses of an institution are context specific, depending on which individuals use it and how they do so.<sup>37</sup> For cohabitants with economic means, for example, the institutions of state courts, private settlement negotiations, and alternative processes such as mediation likely serve their needs

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<sup>31</sup> See *supra* note 25 (describing this heterogeneity). Some family law scholars have observed that cohabitation is underinstitutionalized. See Carbone & Cahn, *supra* note 25, at 93-94. This engagement, however, tends not to use the explicit methodology of institutional analysis deployed by legal scholars in other fields.

<sup>32</sup> See Carbone & Cahn, *supra* note 25, at 93-94.

<sup>33</sup> See, e.g., Matsumura, *supra* note 26, at 1071-81 (discussing extension of rights to unmarried cohabitants).

<sup>34</sup> See, e.g., Devine et al., *supra* note 28, at 2; Antognini, *supra* note 1, at 62-63 (proposing framework for economic rights of cohabitants but focusing on judicial context); Matsumura, *supra* note 26, at 1071-81 (same).

<sup>35</sup> See Devine et al., *supra* note 28, at 2; Memorandum from Cathy Sakimura, Nat'l Ctr. for Lesbian Rts. & Courtney Joslin, Professor, U.C. Davis, to the Unif. L. Comm'n Econ. Rts. of Unmarried Cohabitants Act Comm. 1-4 (Dec. 3, 2019), <https://www.uniformlaws.org/viewdocument/2019-december-committee-meeting> [<https://perma.cc/BX39-WKJZ>].

<sup>36</sup> See *infra* text accompanying notes 85-88 (describing comparative institutional analysis and framework developed by Neil Komesar). A different institutional choice question asks which institution does and should decide the content of the substantive rule, but this discussion focuses on a different question: Once a rule is determined, which institution should apply it?

<sup>37</sup> See *infra* text accompanying notes 85-88.

well. But for lower-income cohabitants, who will almost certainly be unable to afford lawyers and who have fewer assets, there may be alternative institutions that would better serve their interests. Australia, for example, is experimenting with community-based, nonlegal processes that help separating cohabitants quickly resolve issues, including economic disputes.<sup>38</sup> A focus on institutional choice would surface these differences, leading to more nuanced and effective legal regulation.<sup>39</sup>

It is equally fruitful for scholars and policymakers to examine the design of the relevant institutions. For any institution—say, family court or community-based mediation—scholars and policymakers should study its inner workings, with an eye to improving it. This analysis could look to a rich vein of social science institutionalism research to understand how institutions operate and the possibilities for change.<sup>40</sup>

Finally, exploring institutional friction helps scholars and policymakers anticipate resistance and support for proposed reforms.<sup>41</sup> Scholars often consider questions of feasibility, but institutionalism both insists on this consideration and provides a methodology for translating legal research into pragmatic progress. Any reform effort would need to address the entrenched institutional interests, such as a matrimonial bar often bent on protecting its hold on the market for dispute resolution. Similarly, reform efforts would need to anticipate the stickiness of the institution of marriage, which casts a long shadow over cohabitation, arguably making it harder to recognize cohabitants. An analysis of institutional frictions is thus more than a consideration of the political economy of law reform. It is a holistic and far-ranging inquiry into the institutional factors that will advance or impede reforms.

As this Article will show, the economic rights of cohabitants is only one example of the necessity of institutional analysis. But it illustrates the foundational role of this methodology in legal scholarship and gives a sense at the outset of the range of valuable insights institutionalism will yield.

In short, this Article calls for an intentional institutional turn in family law, foregrounding the questions of institutional landscape, choice, design, and friction that are ubiquitous—but largely unaddressed—in family law. This is not to say that institutional considerations are completely absent in family law, but they persist now mostly at the margins and usually without a structured and rigorous methodology grounded in the multidisciplinary discourse of

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<sup>38</sup> *Family Relationship Centres*, FAM. RELATIONSHIPS ONLINE: AN AUSTRALIAN GOVERNMENT INITIATIVE, <https://www.familyrelationships.gov.au/talk-someone/centres> [<https://perma.cc/9RQ2-LUAL>] (last visited Feb. 4, 2022).

<sup>39</sup> When creating legal rules and processes, drafters need not be neutral in shaping which institution or set of institutions is relatively better positioned to apply the rules and serve the interests of both the state and a range of different cohabitants. See Stolzenberg, *supra* note 1, at 2006 (describing state's interest in privatizing dependency).

<sup>40</sup> See *infra* text accompanying notes 89-92.

<sup>41</sup> See *infra* text accompanying notes 94-95.

institutionalism.<sup>42</sup> Adding institutional analysis to the field would open new avenues for productive research and law reform by highlighting important aspects of debates now largely undertheorized and underanalyzed. And an institutional turn would provide new tools, vocabulary, and resources for the discourse, improving both legal debate and family law itself.<sup>43</sup>

To these ends, the Article proceeds as follows. Part I reviews the multidisciplinary literature on institutions, explaining how legal scholars use this work. It then describes the failure of most family law scholars to engage in explicit institutional analysis. Part II begins the institutional turn in family law by providing a descriptive account of different categories of institutions that shape this area of legal regulation. Part III then engages several current debates in the discourse of family law to demonstrate the relevance of institutional analysis—leveraging the empirical mapping of the institutional landscape to focus on questions of choice, design, and friction. The Article concludes by demonstrating how these inquiries converge, providing a blueprint for scholarly inquiry and law reform moving forward.

## I. THE UBIQUITY OF INSTITUTIONAL ANALYSIS

Legal scholars have long engaged with and contributed to a multidisciplinary literature on institutions, asking questions about institutional choice, institutional design, and more. This institutional turn, apparent in both public and private law subjects, is highly generative, producing insights into numerous legal questions and helping shape legal regulation. By contrast, most family law scholars overlook institutionalist methodology. This Part traces these developments, concluding with a description of the few family law scholars who deploy institutional analysis to make significant contributions to understanding and reforming family law.

### A. *Institutionalism*

#### 1. History and Definitions

Since at least the end of the nineteenth century, scholars in multiple disciplines, including economics, sociology, and political science, have studied

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<sup>42</sup> A few family law scholars explicitly deploy the tools of institutional analysis, generating critical insights. *See infra* text accompanying notes 100-09 (discussing work of Catherine Albiston, Maxine Eichner, and Katharine Silbaugh). Across the breadth of family law, however, most scholars do not, typically ignoring the well-developed literature on institutionalism within law and across other disciplines. *See infra* text accompanying notes 96-97. My own scholarship suffers from these shortcomings, as I, too, have not explicitly deployed institutional methodology.

<sup>43</sup> Bringing institutionalism to family law does not mean that every family law scholar needs to engage with the methodology in every project, nor does it mean institutionalism must be the center of any given project. *See infra* text accompanying notes 277-79. But it does mean that scholars should at least ask whether institutionalist methodology is relevant to the project and, if so, engage in institutional analysis.

institutions.<sup>44</sup> The work varies by discipline, but the overarching commonality is an institutional, rather than individualistic or purely theoretical, account of social, political, and economic arrangements.<sup>45</sup> Rather than seeing an individual as a rational actor with complete agency, or scholarly questions as entirely abstract, institutional accounts of politics, economics, and human behavior focus on the context of, and constraints on, choices.<sup>46</sup>

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<sup>44</sup> Sociologists and economists were the first scholars to study institutions. In establishing the field of sociology, Émile Durkheim proposed that scholars should study how institutions are created and endure. See ÉMILE DURKHEIM, *THE RULES OF SOCIOLOGICAL METHOD AND SELECTED TEXTS ON SOCIOLOGY AND ITS METHOD* 38, 45 (Steven Lukes ed., W.D. Halls trans., The Free Press 1982). Durkheim argued that sociology should be understood as the “science of institutions, their genesis and their functioning.” *Id.* at 45. In economics, Thorstein Veblen contended that parsimonious economic models that did not account for the influence of institutions undermined the practical applicability of economic theory. Thorstein Veblen, *The Limitations of Marginal Utility*, 17 J. POL. ECON. 620, 621-22 (1909) (“It is characteristic of the [marginal-utility] school that wherever an element of the cultural fabric, an institution or any institutional phenomenon, is involved in the facts with which the theory is occupied, such institutional facts are taken for granted, denied, or explained away.”). Veblen suggested that instead of assuming static models, economists should engage with the cultural and historical contingency of institutions, thereby incorporating “human culture” into economic accounts of growth and change. See *id.* at 627-29.

Scholars in many disciplines briefly rejected institutionalism in the middle of the twentieth century in favor of rational-choice methodologies that emphasized individual behavior. See B. GUY PETERS, *INSTITUTIONAL THEORY IN POLITICAL SCIENCE: THE NEW INSTITUTIONALISM* 12-13 (3d ed. 2012) (describing mid-century interest in rational-choice methodologies in political science); Paul J. DiMaggio & Walter W. Powell, *Introduction to THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* 1, 2 (Walter W. Powell & Paul J. DiMaggio eds., 1991) (“[T]he behavioral revolution of recent decades . . . interpreted collective political and economic behavior as the aggregate consequence of individual choice. Behavioralists viewed institutions as epiphenomenal, merely the sum of individual-level properties.”). By the last quarter of the twentieth century, however, scholars in multiple disciplines had fully reengaged with an institutional inquiry. See Rubin, *supra* note 10, at 1393-94; DiMaggio & Powell, *supra*, at 2-3 (noting that within some disciplines, especially macrosociology, social history, and cultural studies, the focus on institutions remained constant).

In light of this history, many disciplines use the qualifier “new” to distinguish the relatively recent focus on institutions from the original study: within economics, there is new institutional economics, see generally OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* (1975) (coining this term); new institutionalism or neoinstitutionalism in sociology, see DiMaggio & Powell, *supra*, at 1-2; and new institutionalism in political science, see James G. March & Johan P. Olsen, *The New Institutionalism: Organizational Factors in Political Life*, 78 AM. POL. SCI. REV. 734, 738 (1984) (discussing return within political science field to study of institutions and calling this “new institutionalism”).

<sup>45</sup> See DiMaggio & Powell, *supra* note 44, at 3.

<sup>46</sup> In political science, new institutionalism explores ways in which individuals and institutions dynamically influence each other in political systems. See PETERS, *supra* note 44, at 5, 26; see also JAMES G. MARCH & JOHAN P. OLSEN, *REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS* 17 (1989) (“Political democracy depends not only on

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economic and social conditions but also on the design of political institutions.”). *See generally* Peter A. Hall & Rosemary C.R. Taylor, *Political Science and the Three New Institutionalisms*, 44 POL. STUD. 936 (1996) (describing three strands within new institutionalism).

New institutional economics is based on the insight that transaction costs—including information, bargaining, and enforcement costs—are the driving force behind the choice to conduct business through different institutions, including contracts on the market or through a firm. *See* R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 390-93 (1937); L.J. Alston, *New Institutional Economics*, in 6 THE NEW PALGRAVE DICTIONARY OF ECONOMICS 32-39 (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed. 2008) (describing this basis for new institutional economics); R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15-19 (1960) (identifying transaction costs as driving force behind structure of different economic institutions and comparing ability of different institutions, notably market and state, to regulate externalities). Oliver Williamson and others picked up on this insight, reinvigorating the focus on the comparative ability of different institutions—particularly the market and the state—to regulate externalities. *See* WILLIAMSON, *supra* note 44, at 1-19. In the new institutional economics account, institutions arise and persist because they confer an advantage in managing these costs, providing a more efficient and reliable framework for transactions. *See, e.g.*, Coase, *The Nature of the Firm*, *supra*, at 390-93.

Like economics, new institutionalism in sociology rejects an “agent-centric” account of change and instead gives primacy to institutional arrangements. *See* Victor Nee & Paul Ingram, *Embeddedness and Beyond: Institutions, Exchange, and Social Structure*, in THE NEW INSTITUTIONALISM IN SOCIOLOGY 19, 20-33 (Mary C. Brinton & Victor Nee eds., 1998). Sociologists use the in-depth, on-the-ground study that is characteristic of the discipline to develop rich accounts of how institutions work, including the relationship between formal and informal rules governing institutions. *See* W. RICHARD SCOTT, INSTITUTIONS AND ORGANIZATIONS: IDEAS, INTERESTS, AND IDENTITIES, at xi-xiii (4th ed. 2014); John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, in THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS, *supra* note 44, at 41, 41-63. Sociologists study many different institutions, but some focus on racism, patriarchy, and classism. *See, e.g.*, Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1807 (2000) (quoting MARY DOUGLAS, HOW INSTITUTIONS THINK 48 (1986), for contention that notions of racial hierarchy become institutionalized by claiming basis in nature); Jessica E. Birch, *Gender as Institution*, in 3 THE WILEY BLACKWELL ENCYCLOPEDIA OF GENDER AND SEXUALITY STUDIES, 1052, 1052-56 (Nancy A. Naples, renée c. hoogland, Maithree Wickramasinghe & Wai Ching Angela Wong eds., 2016) (describing scholarly debate about gender as institution); J. Kenneth Benson & Byung-Soo Kim, *Institutionalism and Capitalism in Organization Studies* 2-9 (2007) (unpublished manuscript) (on file with author) (describing capitalism as an institution).

Organizational theorists examine how the practices of organizations become institutionalized over time and resistant to change. *See* DiMaggio & Powell, *supra* note 44, at 11-15. For a brief overview of the field of organizational theory, see generally Neil Fligstein, *Organizations: Theoretical Debates and the Scope of Organizational Theory* (Aug. 2001) (unpublished manuscript) (available at <https://sociology.berkeley.edu/sites/default/files/faculty/fligstein/inter.handbook.paper.pdf> [<https://perma.cc/Y2CM-A3B5>]). Insight from this field demonstrates that institutions both constrain and empower human action, institutions do not transfer easily to different cultural and political contexts, and strong local institutions may hinder the development of macroinstitutions. *See* DiMaggio & Powell, *supra* note 44, at 28-29; Ronald L. Jepperson, *Institutions, Institutional Effects, and Institutionalism*, in THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS, *supra* note 44, at 143, 146. Further,

In law, the study of institutions began with legal scholars and judges debating the relative competencies of courts and legislatures as decision makers.<sup>47</sup> Legal Process scholars developed these ideas, elevating questions of institutional choice and institutional design.<sup>48</sup> As commentators have since argued, Legal Process institutional analyses were relatively unsophisticated,<sup>49</sup> but they did introduce comparative institutionalism into legal scholarship.

Now nearly ubiquitous in legal scholarship,<sup>50</sup> institutionalism's basic insight is that law does not occur in the abstract but instead is created, implemented, and influenced by specific legal bodies and within specific social and economic structures. Take First Amendment discourse: Institutionalists in the field identify the institutions that make it possible for individuals to exercise speech, religious, and associational rights.<sup>51</sup> For freedom of speech, schools and universities

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scholars have assessed the role of power within institutions, positing that key players within an institution benefit from the continued existence of the institution, and that a weakened institution will try to retain control by both acculturating newcomers and seeking reinforcement of the institution from the state. *See* DiMaggio & Powell, *supra* note 44, at 30-31.

<sup>47</sup> William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW*, at li, lix-lxii (William N. Eskridge, Jr. & Philip P. Frickey eds., The Found. Press 1994) (tent. ed. 1958) (describing Justice Brandeis's argument that judges could not and should not make policy decisions and instead should defer to legislative policies, and Dean James Landis's contention that legislatures should delegate line-drawing questions to agencies with courts deferring to these judgments).

<sup>48</sup> *Id.* at xciv-xcv (describing contention of Legal Process theorists that members of pluralist society will disagree about what law should be, and therefore it is critical to have clear and consistent process for determining content of the law). This focus developed into the theory of institutional settlement, which holds that substantive decisions about the law should be assigned to institutions depending on their relative capacities, and once a decision has been made, other institutions should respect it even if the second institution would have reached a different conclusion. *See id.* at xcv-xcvi.

<sup>49</sup> *See, e.g.,* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 4-5, 11-12 (1994) (noting Hart and Sacks compared institutions of the executive, legislature, and judiciary but used "largely idealized image of institutions" and thus "assume[d] away most of the difficulty and richness of institutional choice"); ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 9-10 (2006) (arguing that Legal Process theorists used "stylized" or "asymmetrical institutionalism," which inaccurately portray functioning of institutions and that such an account is necessary and leads in different direction than Legal Process). There is some evidence that the early accounts of institutions in other fields also lacked rigor. *See* DiMaggio & Powell, *supra* note 44, at 2 (describing how behavioralists "viewed institutions as epiphenomenal, merely the sum of individual-level properties," while neglecting "social context and the durability of social institutions").

<sup>50</sup> Rubin, *supra* note 10, at 1393-94, 1424 (suggesting institutionalism as a "a new unified methodology for legal scholarship").

<sup>51</sup> For a discussion in the context of freedom of speech and the right of association, see PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS 3 (2013). *See also id.* at 5-7, 49-67

expose individuals to ideas and train them to think critically and methodically; libraries provide access to new ideas; and newspapers, book publishers, and the internet allow an individual to communicate with others, leading to an exchange of views and possibly the formation of new views.<sup>52</sup> For the freedom of religion, places of faith allow individuals to come together to learn about and develop religious beliefs and exercise those beliefs.<sup>53</sup> And for the freedom of association, political groups allow individuals to join with others to advance common purposes.<sup>54</sup> Scholars use this institutional mapping to develop arguments about the law, contending, for example, that First Amendment doctrine should grant distinctive rights to the press, universities, and libraries, or should treat religious entities as largely immune from government regulation.<sup>55</sup>

Across public and private law, scholars have taken an institutional turn, adding to and drawing on well-developed multidisciplinary literature. The

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(critiquing standard story of First Amendment as acontextual, focusing largely on individual and state but not institutions); *id.* at 8 (noting as descriptive matter “a good deal of the speech and conduct that makes up some of the most important aspects of the lived world of First Amendment activity takes place through *institutions*”); Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 827-29 (2008) (proposing “New Institutional First Amendment” theory). *See generally* Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005) (introducing “Institutional First Amendment” theory). A similar discourse arises in the context of freedom of religion. *Compare* Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 293 (2008) (“[A]n appropriately institutional approach to the Religion Clauses would involve attention to the religious-freedom rights of religious entities . . .”), *with* Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 919 (2013) (arguing against institutional understanding of religion clauses).

<sup>52</sup> HORWITZ, *supra* note 51, at 13-15, 107-10, 144-51, 194-98.

<sup>53</sup> *See* Garnett, *supra* note 51, at 274 (“Like the freedom of speech, religious freedom has and requires an infrastructure. Like free expression, it is not exercised only by individuals; like free expression, its exercise requires more than an individual with something to say; like free expression, it involves more than protecting a solitary conscience. The freedom of religion is not only lived and experienced through institutions, it is also protected and nourished by them.”). *But see* Schragger & Schwartzman, *supra* note 51, at 921 (“We argue that ‘freedom of the church’ relies on selective history, violates basic republican political principles, has no limiting principle, and fails to explain why churches are different from other mediating institutions.”).

<sup>54</sup> *See* HORWITZ, *supra* note 51, at 211-24.

<sup>55</sup> *See, e.g., id.* at 10, 128-41, 171-73, 188-89; *see also supra* notes 51, 53 (describing debate among scholars about whether courts should view freedom of religion through institutionalist lens).

institutional turn is apparent in statutory interpretation,<sup>56</sup> property law,<sup>57</sup> antidiscrimination law,<sup>58</sup> criminal law,<sup>59</sup> law and economics,<sup>60</sup> federalism,<sup>61</sup>

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<sup>56</sup> This has been a particularly active area of institutional analysis. See William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041, 2044-51 (2006) (reviewing VERMEULE, *supra* note 49) (identifying three distinct institutional turns in statutory interpretation scholarship: (1) the Legal Process school, which focused on relative institutional capacities of courts, legislatures, and agencies; (2) post-1950s institutional turn, which identified illegitimacy of state institutions because of their failure to represent interests—and sometimes active oppression—of women and marginalized groups; and (3) introduction of new institutional economics as applied to statutory interpretation, which brought rigorous cost-benefit analysis to assessment of relative capacities of state institutions as decision makers). For a book-length treatment of the subject, see generally VERMEULE, *supra* note 49, positing that the field of statutory interpretation needs to consider more rigorously the institutional capacities of decision makers, including the potential for error by courts, the costs of different interpretive methods, and the difficulty of members of the judiciary coordinating to adopt a unified method of statutory interpretation, and therefore arguing for courts to engage in parsimonious statutory interpretation and, when in doubt about a statute's meaning, defer to agency interpretation.

<sup>57</sup> Building on the work of Ronald Coase, property law has long been a focus of scholars of new institutional economics. For a brief summary, see Henry E. Smith, *Law and Institutional and Organizational Economics*, SOC'Y FOR INSTITUTIONAL & ORGANIZATIONAL ECON., <https://www.sioe.org/field/law-and-institutional-and-organizational-economics> [<https://perma.cc/ZUS3-8BRM>] (last visited Feb. 4, 2022).

<sup>58</sup> See, e.g., Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 462-63 (2001) (deploying institutional analysis to describe and argue in favor of emerging approach to second-generation employment discrimination “that encourages the development of institutions and processes to enact general norms in particular contexts”); Haney López, *supra* note 46, at 1723-29, 1806-09 (drawing on new institutionalism in sociology to develop “theory of institutional racism”).

<sup>59</sup> See, e.g., Robert Weisberg, *Empirical Criminal Law Scholarship and the Shift to Institutions*, 65 STAN. L. REV. 1371, 1374-75, 1383-88 (2013) (describing empirical work in criminal law that focuses on institutions, such as research on mass incarceration, deterrence, recidivism, selection of prosecutors and judges, and responsibility for costs of incarceration).

<sup>60</sup> See KOMESAR, *supra* note 49, at 10 (arguing that comparative institutional analysis is “clearly related” to law and economics and that “the most powerful insights to be gained from the economic analysis of the law come from comparative institutional analysis”).

<sup>61</sup> See, e.g., Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 727-30 (2008) (proposing role for agencies in preemption doctrine, which previously was solely dominated by courts); Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1816-53 (2005) (exploring “distinctive institutional capabilities of courts, legislatures, and executive actors, and ask[ing] how these different capacities bear on federalism questions”).



Second Amendment law,<sup>62</sup> administrative law,<sup>63</sup> election law,<sup>64</sup> intellectual property,<sup>65</sup> international economic law,<sup>66</sup> and tort law,<sup>67</sup> to give a long but by no means exhaustive list.

Defining an institution varies somewhat by discipline,<sup>68</sup> but a common understanding is that an institution is the set of “humanly devised constraints

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<sup>62</sup> See Darrell A.H. Miller, *Institutions and the Second Amendment*, 66 DUKE L.J. 69, 73 (2016) (arguing for institutional turn in Second Amendment doctrine and demonstrating insights, such as allowing judges to “recognize and potentially defer to salient organizations, rules, traditions, and norms,” i.e., the militia; the home; the city; the school, the university, and the church; shooting, sporting, and guns-rights organizations; police, policing, and public carry; and self-defense, “that both facilitate and constrain Second Amendment activity”).

<sup>63</sup> See Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 574-79 (2017) (describing institutionalist turn in federal administrative law and calling for similar institutional turn in local-government legal scholarship and highlighting “the exploration of common themes in new institutional settings” and the provision of “new grounds to complicate longstanding assumptions about the implications of federal structure and practice”).

<sup>64</sup> See HEATHER K. GERKEN, *THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT* 1-10 (2009) (arguing for nonjudicial institutions to play role in election law); Richard L. Hasen, *Election Administration Reform and the New Institutionalism*, 98 CALIF. L. REV. 1075, 1087-88 (2010) (reviewing GERKEN, *supra*) (describing work of some election law scholars who look to new institutions, including electoral advisory commissions, to make changes to election administration).

<sup>65</sup> See Paul R. Gugliuzza, *IP Injury and the Institutions of Patent Law*, 98 IOWA L. REV. 747, 749-50, 750 n.18, 769 (2013) (reviewing CHRISTINA BOHANNAN & HERBERT HOVENKAMP, *CREATION WITHOUT RESTRAINT: PROMOTING LIBERTY AND RIVALRY IN INNOVATION* (2012)) (collecting sources that reflect institutional approach to patent law and demonstrating insights from institutionalism, such as analysis of “how institutional structure affects substantive law” and the identification of the government body that is best suited to “resolve the IP crisis and return IP law to its constitutional roots of protecting and promoting innovation”).

<sup>66</sup> See SUSAN BLOCK-LIEB & TERENCE C. HALLIDAY, *GLOBAL LAWMAKERS: INTERNATIONAL ORGANIZATIONS IN THE CRAFTING OF WORLD MARKETS* 1-21 (2017) (reporting findings from socio-legal empirical study of United Nations Commission on International Trade Law based on many years of observation of the body); Gregory Shaffer & Joel Trachtman, *Interpretation and Institutional Choice at the WTO*, 52 VA. J. INT’L L. 103, 105 (2011) (conducting comparative institutional analysis of World Trade Organization).

<sup>67</sup> See Richard B. Stewart, *Crisis in Tort Law? The Institutional Perspective*, 54 U. CHI. L. REV. 184, 190-95 (1987) (supporting institutionalism as method of analyzing tort liability and insurance).

<sup>68</sup> For examples of definitions in different disciplines, see ROBERT N. BELLAH, RICHARD MADSEN, WILLIAM M. SULLIVAN, ANN SWIDLER & STEVEN M. TIPTON, *THE GOOD SOCIETY* 10 (1991) (“In its formal sociological definition, an institution is a pattern of expected action of individuals or groups enforced by social sanctions, both positive and negative.”); DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* 3 (James Alt & Douglass North eds., 1990) (defining institutions in context of political decision-making as “the rules of the game in a society”); DiMaggio & Powell, *supra* note 44, at 7-8, 28 (describing different definitions by discipline and noting institutions are both constraints on human action).

that structure human interaction.”<sup>69</sup> This broad definition encompasses political, social, and economic institutions, ranging from the practice of gift-giving (an abstract institution without formal rules) to the adjudicative process (a concrete institution with formal rules).<sup>70</sup> Institutions generally have three components: normative, regulative, and cognitive.<sup>71</sup> Consider the two institutions just mentioned—gifts and adjudication: the normative component of the institution tells a person how they *should* act,<sup>72</sup> the regulative component provides rules to guide action,<sup>73</sup> and the cognitive component relieves a person of conscious thought because compliance is routine.<sup>74</sup> As this broad definition implies, a seemingly infinite number of practices and arrangements could qualify as institutions. Accordingly, scholars use varying degrees of specificity depending on the context and particular inquiry.<sup>75</sup>

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and products of human action); James G. March & Johan P. Olsen, *Elaborating the “New Institutionalism,”* in THE OXFORD HANDBOOK OF POLITICAL INSTITUTIONS 3, 3 (R.A.W. Rhodes, Sarah A. Binder & Bert A. Rockman eds., 2006) (defining an institution as “a relatively enduring collection of rules and organized practices, embedded in structures of meaning and resources that are relatively invariant in the face of turnover”). For scholars discussing different and potentially conflicting definitions, see Daniel H. Cole, *The Varieties of Comparative Institutional Analysis*, 2013 WIS. L. REV. 383, 388-93; and Oliver E. Williamson, *The New Institutional Economics: Taking Stock, Looking Ahead*, 38 J. ECON. LIT. 595, 595 (2000).

<sup>69</sup> North, *supra* note 18, at 360; *see also* ALBISTON, *supra* note 19, at 27 (“In sociological terms, an institution is more than just a hospital, firm, or university. It is a set of complementary social practices and meanings that form taken-for-granted background rules that shape social life.”).

<sup>70</sup> *See* ALBISTON, *supra* note 19, at 27-33.

<sup>71</sup> *See infra* text accompanying notes 72-74.

<sup>72</sup> Sociologists emphasize the normative aspect of institutions, partly due to their focus on kinship and religious systems, where values are omnipresent and highly influential. *See* ALBISTON, *supra* note 69, at 27-28 (describing normative aspect of institutions and noting “[p]eople come to believe that institutionalized practices are correct, fair, and appropriate”); SCOTT, *supra* note 46, at 19.

<sup>73</sup> *See* SCOTT, *supra* note 46, at 33. Economists emphasize the regulative aspect of institutions. *See id.* at 35; *see also* NORTH, *supra* note 68, at 4 (“[Institutions] are perfectly analogous to the rules of the game in a competitive team sport. That is, they consist of formal written rules as well as typically unwritten codes of conduct . . .”).

<sup>74</sup> Anthropologists and sociologists emphasize the cognitive aspect of an institution. *See* ALBISTON, *supra* note 19, at 27-28 (describing this aspect of institutions and noting that although these cognitive shortcuts make thought more efficient, they also “constrain[] the available choices”); DOUGLAS, *supra* note 46, at 52 (contending an institution begins as a behavioral convention and, when combined with a cognitive counterpart, becomes an institution, appearing as natural, not human-made); SCOTT, *supra* note 46, at 43.

<sup>75</sup> Scholars across disciplines sometimes conceive of institutions at a high level of generality, comparing the institutions of market processes, political processes, and adjudicative processes, for example. *See* KOMESAR, *supra* note 49, at 9-10. In other instances, scholars find a granular taxonomy more useful, such as dividing the market into firms, spot markets, futures markets, and so on. *See id.* Depending on the context, legal scholars also use

Many scholars distinguish an institution from an organization.<sup>76</sup> As the economist Douglass North notes, “institutions are the rules of the game, [and] organizations . . . are the players.”<sup>77</sup> Thus, the legislative process is a political institution, and the U.S. Congress is an organization; paid labor is an economic institution, and Walmart is an organization; religion is a social institution, and the Catholic Church is an organization.<sup>78</sup> As in other disciplines, some legal scholars make this same distinction,<sup>79</sup> but there is lingering uncertainty about the precise definition of an institution and some scholars use the terms “institution” and “organization” more interchangeably.<sup>80</sup>

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a general or more specific conception of the relevant institutions. Legal Process scholars, for example, typically compare the competence of legislatures, courts, and administrative agencies. *See supra* text accompanying notes 47-49. By contrast, an institutional analysis of the First Amendment might focus on somewhat more discrete institutions, such as the media and education. *See supra* text accompanying notes 51-55.

<sup>76</sup> *See* Cole, *supra* note 68, at 395 (listing leading scholars in multiple disciplines who do and do not differentiate between organizations and institutions); *see also* March & Olsen, *supra* note 68, at 3 (noting that within political science, new institutionalism views institutions as a “collection of rules and organized practices” that are “relatively resilient to the idiosyncratic preferences and expectations of individuals”). Early institutionalists did not distinguish between institutions and organizations, but the new institutionalism across disciplines, which began in the middle of the twentieth century with the emergence of organizational theory, generally does make this distinction. *See* SCOTT, *supra* note 46, at 14, 16. Organizational theory posits that an organization becomes an institution (hence the verb “institutionalize”) when the values surrounding the organization surpass the needs of the organization. *See id.* at 18. The field of institutional and organizational economics, however, studies both institutions and organizations and is less concerned with the demarcation between the two. *See id.* at 21-54.

<sup>77</sup> North, *supra* note 18, at 361. North also contends that institutions shape organizations. *Id.* (“The organizations that come into existence will reflect the opportunities provided by the institutional matrix. That is, if the institutional framework rewards piracy then piratical organizations will come into existence; and if the institutional framework rewards productive activities then organizations—firms—will come into existence to engage in productive activities.”).

<sup>78</sup> *See id.* (“Organizations include political bodies (e.g., political parties, the Senate, a city council, regulatory bodies), economic bodies (e.g., firms, trade unions, family farms, cooperatives)[.] social bodies (e.g., churches, clubs, athletic associations), and educational bodies (e.g., schools, universities, vocational training centers).”).

<sup>79</sup> *See, e.g.*, Blocher, *supra* note 51, at 842 (distinguishing organization, such as a specific university, from institution, such as academia; further arguing “[i]nstitutions set the rules” whereas “[o]rganizations follow and . . . apply them”); *see also* Zoë Robinson, *What Is a “Religious Institution”?*, 55 B.C. L. REV. 181, 185 (2014) (“[I]t is surprising that there has yet to be any serious attempt to define a ‘religious institution’ for First Amendment purposes.”).

<sup>80</sup> In practice, legal scholars often conflate the distinction or use the term “institution” more colloquially to refer to what a strict institutionalist would define as an organization. *See, e.g.*, HORWITZ, *supra* note 51, at 11 (acknowledging North’s distinction between institution and organization but noting that his analysis uses “institution” to refer to what institutional

Despite uncertainty at the margins about definitional boundaries, the term “institution” has proven a useful label to describe a set of social, economic, and political practices, facilitating examination of law and policy, as the next Section illustrates.

## 2. Four Questions

There are numerous aspects of institutionalist methodology in legal scholarship, but for present purposes, four core questions are particularly relevant to family law.

*Institutional landscape.* The foundation of institutional analysis is empirical, identifying the broad range of institutions that shape a given area of the law.<sup>81</sup> This descriptive work can reveal hidden forces that influence the law, prompting debates about which institutions play a role and laying the groundwork for other aspects of institutional analysis.<sup>82</sup> Depending on the goal of the analysis, scholars expand or contract the breadth of relevant institutions, but descriptive accounts of the relevant institutions in an area of the law, standing alone, contribute to the literature.<sup>83</sup>

*Institutional choice.* Legal scholars analyze how authority is and should be allocated among the relevant institutions. Legal Process scholars first invited institutional comparison,<sup>84</sup> and over time, other scholars have refined the inquiry. A classic account from the new institutional economics scholar Neil Komesar is particularly helpful. To advance public policy, Komesar contends, it is insufficient to identify a goal and underlying values; instead, it is imperative to compare the possible institutions that could implement the policy.<sup>85</sup> Komesar is adamant that what he calls “single institutional analysis”—the examination of an institution in a vacuum—is problematic and misleading because any assessment of the advantages and disadvantages of an institution is incomplete

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literature would term an organization: *The Washington Post*, for example, as well as more general category of newspapers); Cole, *supra* note 68, at 395 tbl.1 (classifying Neil Komesar as legal scholar who includes organizations within definition of “institutions”).

<sup>81</sup> See, e.g., *supra* text accompanying notes 51-55 (describing work of First Amendment scholars to identify institutions relevant to First Amendment law).

<sup>82</sup> See, e.g., *supra* text accompanying notes 51-55.

<sup>83</sup> See, e.g., *supra* text accompanying notes 51-55.

<sup>84</sup> See *supra* text accompanying notes 47-49 (discussing how Legal Process scholars argued that central question for law is which institution should decide substance of law and how those decisions should be treated by other institutions).

<sup>85</sup> KOMESAR, *supra* note 49, at 271; *id.* at 5 (“Goal choice and institutional choice are both essential for law and public policy. They are inextricably related.”). Komesar is quick to point out that while he did not invent the idea of comparative institutional analysis, his contribution is to argue for a structured and rigorous comparison and to show the dangers of failing to do so. *Id.* at ix-x. As Komesar puts it, institutional choice is the question of *who* decides, and “institutional” means “*what* decides”: the “complex processes, such as the political process, the market process, and the adjudicative process.” *Id.* at 3.

if it is not weighed against a similar assessment of alternative institutions.<sup>86</sup> No one institution will be ideal, and thus the comparison is between “imperfect alternatives.”<sup>87</sup> Institutional choice is unavoidable, he argues, and the only question is whether the choice will be conscious and rigorous or unconscious and indiscriminate.<sup>88</sup>

*Institutional design.* Legal scholars also explore the complexities of how institutions operate, usually with the goal of changing an institution to make it more effective.<sup>89</sup> In lieu of thin and idealized accounts used by early institutionalists,<sup>90</sup> legal scholars today argue that only a rich, realistic account of an institution leads to convincing theories and insights.<sup>91</sup> Understanding institutional design is essential for comparative analysis, as well as for efforts to improve the functioning of any given institution through law reform. In this way,

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<sup>86</sup> *See id.* at 19-22.

<sup>87</sup> *See id.* at 5. To compare these alternatives, Komesar offers an analytical framework that requires a careful analysis of the costs and benefits of participating in each institution. *See id.* at 7 (terming this “the participation-centered approach”). In this approach, the analyst examines each possible institution, focusing on the actions and interactions of the people in the institution, be they voters, consumers, litigants, etc., and, to a lesser degree, the actions of government officials. The analyst identifies the benefits and costs of participating in the institution. The analyst can then conduct a further microanalysis of each institution. *See id.* at 7-8. This process is repeated for each potential institution. Komesar contends that his framework is widely applicable to both public policy and the resolution of specific legal questions, such as the preferred reach of tort liability and the proper method of constitutional interpretation. *See id.* at 11, 153-231, 271.

<sup>88</sup> *See id.* at 11.

<sup>89</sup> *See Reich, supra* note 16, at 812-13 (describing legal scholarship on institutional design). Institutional design, for example, shows how institutions both empower and constrain their members. In their study of judging, Edward Rubin and Malcom Feeley identify the institutional constraints on judges that influence their law-making actions. *See* Edward Rubin & Malcolm Feeley, *Creating Legal Doctrine*, 69 S. CAL. L. REV. 1989, 1992-96 (1996); *see also id.* at 1991 (“The new institutionalism explores the functional and dysfunctional elements of institutional structure as created by and embedded in complex social environments.”). As Rubin and Feeley explain, institutions provide scripts and clear expectations—both formal and informal—for the actors in the institution and these expectations are enforced by other members of the institution. These expectations originate outside the actor but are soon internalized, clarifying the reach but also the limits of the person’s power. *See id.* at 1996-98, 2026-32.

<sup>90</sup> *See supra* text accompanying note 49 (describing critique of Legal Process scholars, who developed thin accounts of institutions); *see also Reich, supra* note 16, at 812 (“Whereas formalists and Legal Process scholars of an earlier era had assumed a sort of heroic quality on the part of many institutions, modern institutionalists took the perspective that every institution is in its own way imperfect.”).

<sup>91</sup> *See, e.g., Eskridge, supra* note 56, at 2049-50 (critiquing Adrian Vermeule’s *Judging Under Uncertainty* because Vermeule idealized decision-making capacities of agencies and did not rest his argument on detailed analysis of agencies).

an analysis of institutional design can reveal shortcomings of legal regulation, as well as more promising alternatives.<sup>92</sup>

*Institutional friction.* Finally, legal scholars understand that reforming the law is not simply a matter of choosing the best legal rule or policy but rather a complex process that inevitably implicates vested interests.<sup>93</sup> Institutional analysis helps scholars anticipate which institutions are likely to promote or impede a proposed reform.<sup>94</sup> With this understanding of institutional friction, legal scholars can advance law reform more successfully and better strategize to resist reforms that scholars deem undesirable.<sup>95</sup>

#### B. *Institutionalism in Family Law: The Rare Case*

Most family law scholars do not draw on the rigorous and structured institutional methodology described above, myself included. In my work on child maltreatment, for example, I have argued that the footprint of the child welfare system should be much smaller, focusing on the most egregious cases and, for the remaining cases, offering supportive programs for parents rather than coercive state intervention.<sup>96</sup> Consistent with the work of other scholars, I

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<sup>92</sup> In the area of employment discrimination, for example, Susan Sturm argues that the dominant institution of the adjudicative process is ill-suited to modern forms of discrimination, which tend to be structural. *See* Sturm, *supra* note 58, at 537-53; *see also id.* at 553-66 (describing emerging alternative in which different institutions—employers, employees, and third-party mediating organizations—work together to develop effective solutions tailored to specific workplaces that addresses structural issues at root of discrimination).

<sup>93</sup> *See, e.g., supra* text accompanying notes 56-67 (describing institutionalist debates in legal scholarship, including inevitable trade-offs in vested interests).

<sup>94</sup> *See, e.g.,* Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1, 32 (describing insights generated by institutionally sensitive account of political economy of different law reform efforts).

<sup>95</sup> For an example, see David Freeman Engstrom's institutionally based retelling of a failed proposal to reform consumer class actions focused on the roles of different institutions and organizations. David Freeman Engstrom, *Jacobins at Justice: The (Failed) Class Action Revolution of 1978 and the Puzzle of American Procedural Political Economy*, 165 U. PA. L. REV. 1531, 1541-63 (2017) (examining actions of Advisory Committee on Rules of Civil Procedure, Judicial Conference of the United States, Congress, plaintiffs' bar and other interest groups, state attorneys general, and federal agencies, and identifying institutional resistance to change, comparative advantages of different institutions leading reform efforts, and challenges and potential benefits of polycentric rulemaking regime).

<sup>96</sup> *See* Clare Huntington, *Mutual Dependency in Child Welfare*, 82 NOTRE DAME L. REV. 1485, 1512-24 (2007); Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 666-72 (2006) [hereinafter Huntington, *Rights Myopia*]. Other scholars have made similar arguments. *See, e.g.,* MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 199-201 (2005) (arguing in favor of addressing poverty as preventive means for child abuse and neglect); DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 268 (2002) ("The ingredients for a strong child welfare program are clear and simple: first, reduce family poverty by increasing the minimum wage, instituting a guaranteed income, and

contended that the overly broad brush of the child welfare system contributes to biased and unnecessary intervention in the lives of families of color.<sup>97</sup> My scholarship thus addresses the issues of when the state should intervene in family life and when it should not. But like most family law scholars in contemporary debates, I did not map relevant institutions, compare them, evaluate their design, or contemplate the frictions they present.

In contrast to other fields of law, only a small handful of family law scholars explicitly deploy institutionalist methodology. Some scholars address a single institution or subset of institutions,<sup>98</sup> and institutional choice is implicit in some

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enacting aggressive job creation policies; second, establish a system of national health insurance that covers everyone; third, provide high-quality subsidized child care, preschool education, and paid parental leave for all families. Increasing the supply of affordable housing is also critical.”); Maxine Eichner, *Children, Parents, and the State: Rethinking Relationships in the Child Welfare System*, 12 VA. J. SOC. POL’Y & L. 448, 459 (2005) (arguing for supportive approach to majority of families in child welfare system); Marsha Garrison, *Reforming Child Protection: A Public Health Perspective*, 12 VA. J. SOC. POL’Y & L. 590, 595, 611-35 (2005) (arguing in favor of orienting child welfare system toward public health model that would analyze and determine needed reforms rather than current system, which is based on “acute care” medical model where treatment is contemplated as “rapid cure and exit”; this approach would further understanding of child abuse and neglect as problems that require extensive and far-ranging help for parent as well as child, and, centrally, emphasize prevention).

<sup>97</sup> See Huntington, *Rights Myopia*, *supra* note 96, at 656-58. For foundational critiques advancing this claim, see ROBERTS, *supra* note 96, at 14-25; and Michael Wald, *State Intervention on Behalf of “Neglected” Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 1000-04 (1975), arguing that broad statutory definitions of neglect increase the likelihood of unnecessary or even harmful state intervention. For examples of more recent scholarship, see David Pimentel, *Criminal Child Neglect and the “Free Range Kid”*: *Is Overprotective Parenting the New Standard of Care?*, 2012 UTAH L. REV. 947, 973-76, describing how vague neglect statutes pit jurors’ parenting preferences against those of defendants; and Cynthia Godsoe & Carissa Hessick, *Vague Neglect 1-2* (unpublished manuscript) (on file with author), criticizing vague neglect statutes for, among other things, inadequately distinguishing between parenting choices and criminal behavior.

<sup>98</sup> We might think of this as narrow institutionalism. Janet Halley’s genealogy of family law, for example, explores how the family became an institution and the impact of this institutionalization on the law, most notably that it justified treating marriage as a status rather than a contract. Janet Halley, *What Is Family Law?: A Genealogy* (pts. 1 & 2), 23 YALE J.L. & HUMANS. 1, 12-26, 51 (2011), 23 YALE J.L. & HUMANS. 189, 216, 254-55 (2011) (describing as well role of other institutions in reconceptualization of family law in the 1950s, with professional associations revitalizing and rebranding field). Carl Schneider’s foundational account of family law emphasizes that the law creates or reinforces social institutions in the family, such as marriage and parenthood, and then encourages people to join these institutions by giving legal effect to the institutions and rewarding participation in them. See Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 496-511 (1992). This narrow institutionalism acknowledges the value of an institutional lens and deploys some aspects of the methodology, but the scholarship typically takes a cramped view of the relevant institutions rather than starting with a broad descriptive account of family law’s institutions. It thus misses the larger ecology of family law and the multiple

scholarship,<sup>99</sup> but the few scholars who fully embrace institutionalism deeply enrich family law debates.

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forces that can impact the law. Some scholars have invited an analysis of institutions but without focusing on institutionalism as a methodology. *See, e.g.*, Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 *YALE J.L. & FEMINISM* 1, 1-15, 12 n.31 (2008) (arguing for reassessment of institutions that manage human vulnerabilities, including analysis of how “asset-conferring institutions,” such as those governing health, education, and employment, ensure that all individuals are receiving the societal goods necessary for well-being and further contending that a policy analysis must look at institutions because they “are simultaneously constituted by and producers of vulnerability”).

<sup>99</sup> The Legal Process theory of institutional settlement is so woven into the law, *see, e.g.*, *supra* text accompanying notes 47-49 (describing this theory), it is unsurprising that in the debates about marriage equality, scholars deliberated whether courts, legislatures, or citizens through the ballot box should decide the contours of legal marriage. *Compare* Lynn D. Wardle, *The Judicial Imposition of Same-Sex Marriage: The Boundaries of Judicial Legitimacy and Legitimate Redefinition of Marriage*, 50 *WASHBURN L.J.* 79, 100 (2010) (arguing against judicial activism in redefining marriage), *with* Kenji Yoshino, *The Paradox of Political Power: Same-Sex Marriage and the Supreme Court*, 2012 *UTAH L. REV.* 527, 543 (supporting judicial intervention in marriage equality cases). This was considered in *Obergefell v. Hodges* itself. *See* 576 U.S. 644, 708-11 (2015) (Roberts, C.J., dissenting) (arguing marriage equality was not an issue for courts to decide but rather for states through democratic process).

Similarly, in doctrinal debates, scholars may touch upon questions of institutional choice. In his classic critique of the best-interests standard governing child custody decisions, Robert Mnookin contended that the standard is indeterminate and that family courts lack the competence to make accurate, reliable decisions using the standard. *See* Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 *LAW & CONTEMP. PROBS.* 226, 261-62, 269-70 (1975). Mnookin detailed the shortcomings of judicial decision-making, but he only briefly touched on alternative decision-making institutions, *see id.* at 292, thus treating the institutional choice question as an afterthought. Similarly, Elizabeth Scott’s work proposing a standard that bases custody on an approximation of past caretaking focuses primarily on the benefits of the substantive standard as compared with other substantive rules, addressing the institutional decision maker as a subsidiary issue. *See* Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 *CALIF. L. REV.* 615, 638, 649-50 (1992) (listing one argument in favor of proposed approximation rule as difficulty of judge making best interests determination as compared with judge’s ability to determine past caretaking and noting that parties can also apply standard in settlement negotiations). Scott and a coauthor come closer to a comparative institutional analysis in later work, but this work focuses on only two institutions—judicial decision-making and mental health testimony—and does not explicitly deploy a rigorous framework to guide the comparison. *See* Elizabeth S. Scott & Robert E. Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard*, 77 *LAW & CONTEMP. PROBS.* 69, 91-100 (2014) (identifying shortcomings of mental health professionals as custody decision makers).

This kind of work rarely places institutional issues at the center of analysis and typically does not deploy the frameworks developed by other legal scholars to guide a comparative institutional analysis. *See supra* text accompanying notes 85-88 (describing this framework). As a result, the Legal Process analysis is less rigorous and intentional than it could be.



To appreciate what is gained when family law scholars use this methodology, consider the debate about the state's role in helping families balance the demands of paid labor and caregiving. The few scholars who turn to institutional analysis to explore this problem make distinctive contributions to the debate. Perhaps unsurprisingly, these scholars often have interdisciplinary training and thus are familiar with the institutional literature in other disciplines.

Maxine Eichner, a legal scholar and political scientist, interrogates the institutions that play a role in supporting families to meet their basic needs.<sup>100</sup> In *The Free-Market Family*, for example, Eichner examines the institutional differences between countries, showing that the United States relies primarily on markets to meet the basic needs of families, whereas other wealthy countries, particularly in Europe, rely on the state to distribute resources to families.<sup>101</sup> As she demonstrates, the European model profoundly benefits children, parents, and the economy, and yet America is deeply invested, as it were, in the market model.<sup>102</sup> Eichner thus uses the tools of institutional landscape, institutional choice, and institutional design to identify and analyze the stark differences in family-support policies, and she uses institutional friction to anticipate the challenge of reorienting the United States, given our strong market commitments.

As a professor of both law and sociology, Catherine Albiston likewise fruitfully deploys institutional analysis to contribute to this debate. Albiston has written extensively about family leave laws and policies, illuminating the role of institutions.<sup>103</sup> Albiston contends that laws such as the Family and Medical Leave Act cannot easily resolve the conflict between the demands of work and caregiving because these laws run headlong into the economic and social institutions of work, gender, and family.<sup>104</sup> Albiston uses sociological research

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<sup>100</sup> See EICHNER, *supra* note 5, at 69-91; Maxine Eichner, *The Privatized American Family*, 93 NOTRE DAME L. REV. 213, 220-59 (2017).

<sup>101</sup> See EICHNER, *supra* note 5, at 19-42, 220-21 (discussing work of Danish sociologist Gøsta Esping-Andersen); *id.* at 38-52, 95, 107-13 (describing how United States falls far behind other wealthy countries in supporting caregiving and paid labor, with absence of policies such as guaranteed paid parental leave, universal child allowances, and widely available subsidized childcare).

<sup>102</sup> See *id.* at 20-42, 47-48, 206-07, 220-21.

<sup>103</sup> See, e.g., ALBISTON, *supra* note 19, at 25-68 (developing account of relationship between family leave laws and their institutional context); Catherine R. Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 LAW & SOC'Y REV. 11, 11, 22-40 (2005) (reporting results of study on family leave, which found that social institutions influenced decision to take—and often not take—family leave, and focusing particularly on “institutionalized conceptions of work, gender, and disability that shape workers’ perceptions, preferences, and choices about mobilizing their rights”); Catherine Albiston & Lindsey Trimble O’Connor, *Just Leave*, 39 HARV. J.L. & GENDER 1, 6, 40-47 (2016) (arguing “institutional and cultural factors” influence decisions of low-wage workers not to take family leave to which they are legally entitled).

<sup>104</sup> See Catherine Albiston, *Institutional Perspectives on Law, Work, and Family*, 3 ANN. REV. L. & SOC. SCI. 397, 398 (2007) [hereinafter Albiston, *Institutional Perspectives*].

to show that these institutions are socially constructed but perceived as natural by their participants. Thus, individual players typically do not question social practices, such as the idea that men are breadwinners and women are caregivers or that the workplace requires undivided loyalty.<sup>105</sup> As Albiston explains, the law cannot easily change these institutions, and thus any policy must account for the resistance within existing institutions.<sup>106</sup> Adding this analysis of institutional design and institutional friction to debates about family leave policies demonstrates that identifying the “right” policy is necessary but not nearly sufficient to resolve the conflict between work and caregiving.

Finally, Katharine Silbaugh uses an institutional lens to identify the multiple ways the state exacerbates the conflict between paid labor and caregiving. In a series of articles, Silbaugh has analyzed the impact of urban design on families, underscoring that urban sprawl is deeply influenced by institutional arrangements, including racism, car culture, single-family homes, and educational systems, with distinct government policies that create and reinforce these social patterns.<sup>107</sup> Silbaugh argues that proposals to address the tension between work and family cannot easily overcome these institutional arrangements, which channel family life into specific—and often untenable—residential patterns.<sup>108</sup> Like Eichner and Albiston, Silbaugh places institutional analysis at the center of the argument, using the methodology to identify relevant institutions, analyze their design, and pinpoint institutional friction.

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<sup>105</sup> See ALBISTON, *supra* note 19, at 27-28; Albiston, *Institutional Perspectives*, *supra* note 104, at 401-12.

<sup>106</sup> Albiston, *Institutional Perspectives*, *supra* note 104, at 399-401, 408-19.

<sup>107</sup> See Katharine B. Silbaugh, *Sprawl, Family Rhythms, and the Four-Day Work Week*, 42 CONN. L. REV. 1267, 1270-74 (2010) [hereinafter Silbaugh, *Sprawl*]; Katharine B. Silbaugh, *Women's Place: Urban Planning, Housing Design, and Work-Family Balance*, 76 FORDHAM L. REV. 1797, 1818-19, 1836-39, 1842-52 (2007) [hereinafter Silbaugh, *Women's Place*].

<sup>108</sup> See Silbaugh, *Sprawl*, *supra* note 107, at 1270. In other work, Silbaugh also casts in institutional terms the debate about whether and how the government should assume responsibility for care work. See Katharine B. Silbaugh, *Foreword: The Structures of Care Work*, 76 CHI.-KENT L. REV. 1389, 1391-1401 (2001); see also Katharine Silbaugh, *The Legal Design for Parenting Concussion Risk*, 53 U.C. DAVIS L. REV. 197, 201-05, 232-55 (2019) (assessing legislation to manage sports-related concussion risk among minors and arguing that it places most decision-making risk on parents, consistent with larger policy trend of shifting risk from institutions—and thus society more broadly—to individuals, and that this risk shifting is inconsistent with legal framework for parental decision-making); Katharine B. Silbaugh, *The Practice of Marriage*, 20 WIS. WOMEN'S L.J. 189, 208-11, 214-16 (2005) [hereinafter Silbaugh, *The Practice of Marriage*] (analyzing marriage as legal and social institution); Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 70 (1998) (analyzing premarital agreements, assessing whether “individuals [can] create their own definition of” marriage, and arguing that “without social boundaries to the stock of available meanings [of marriage,] the individual meanings would be merely private and unrecognizable; the opposite of an institution”).

In sum, the few scholars who engage in explicit institutional analysis illustrate the potential of foregrounding institutional considerations and drawing on the robust literature from other disciplines.<sup>109</sup>

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It is unclear why family law scholars generally do not embrace institutionalism. Perhaps it is because family law simply implicates too many institutions.<sup>110</sup> Individual cases can involve numerous legal institutions, including courts, mediation, expert witnesses, different kinds of lawyers and advisers, including guardians ad litem and court-appointed special advocates, and so on. Entrenched social institutions, from racism to patriarchy, deeply influence family law's rules.<sup>111</sup> And economic institutions, from markets to the family wage, play a role in legal regulation.<sup>112</sup> Beyond this institutional array, every state has its own laws, and family law practice varies by county, courthouse, city, and even judge.<sup>113</sup> In short, family law might be overwhelmed by the problem of variety and has not seen the institutional forest for the trees. Indeed, as Part II shows, it is remarkably challenging—but not impossible—to map family law's institutions.

The problem might also be that intimacy and close personal relationships lie at the heart of family law, and scholars thus focus on individuals and affective ties rather than the institutions that influence intimacy.<sup>114</sup> Moreover, family law doctrine emphasizes rights of individuals: a parent has a right to the care and

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<sup>109</sup> There are a few other examples of the small universe of family law scholars directly engaging with explicit institutional analyses. *See, e.g.*, Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2005 (1996) (arguing tax policy can address some concerns of feminists about work, family, and entrenched gender roles but contending this requires explicit analysis of institutional choice); Nancy J. Knauer, *The Recognition of Same-Sex Relationships: Comparative Institutional Analysis, Contested Social Goals, and Strategic Institutional Choice*, 28 U. HAW. L. REV. 23, 24 (2005) (arguing for use of modified comparative institutional choice analysis in context of contested social goals).

<sup>110</sup> I thank Emily Stolzenberg for this theory. *See* Stolzenberg, *supra* note 1, at 2051-52.

<sup>111</sup> *See infra* text accompanying notes 161-63.

<sup>112</sup> *See infra* text accompanying notes 150-57.

<sup>113</sup> *See* Sean Hannon Williams, *Wild Flowers in the Swamp: Local Rules and Family Law*, 65 DRAKE L. REV. 781, 790-97 (2017) (noting this variety and its problems); Sean Hannon Williams, *Sex in the City*, 43 FORDHAM URB. L.J. 1107, 1108-12 (2016) (arguing family law's standard-based approach to regulation delegates tremendous authority to local family court judges).

<sup>114</sup> I thank Katharine Silbaugh for this insight. *See generally* Silbaugh, *The Practice of Marriage*, *supra* note 108 (discussing marriage as a legal and social institution). *But see* Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1367-73 (2009) (describing role of state in shaping romantic preferences and opportunities).

custody of a child,<sup>115</sup> a woman has a right to terminate a pregnancy,<sup>116</sup> and an individual has a right to marry someone of the same sex.<sup>117</sup> These individual rights reflect narratives of heroic individuals rather than the relational aspects of life.<sup>118</sup> And individualism in family law distracts from understanding how institutional arrangements deeply affect family relationships, both shaping preferences and channeling behavior.<sup>119</sup> This, too, is a barrier that legal scholars can overcome, and an understanding of institutional arrangements can—and should—be at the fore.

Whatever the reason for the lacuna, there is no compelling reason for family law exceptionalism in institutional analysis. The remainder of this Article accordingly seeks to encourage more institutionalist scholarship, beginning the project of systematically and holistically integrating institutional analysis into family law.

## II. IDENTIFYING FAMILY LAW'S INSTITUTIONS

Identifying the institutions that shape family law is the first step in making institutionalism more central to the field. This descriptive foundation—itsself a contribution to the literature—makes it possible to analyze institutional choice, institutional design, and institutional friction.<sup>120</sup> Any descriptive account, however, must address two definitional questions: the boundaries of family law and the boundaries of the relevant institutions. Both are potentially very broad, which risks dulling the analysis. The field of family law arguably includes all aspects of legal regulation that influence intimate relationships and family functioning, from criminal law to tax policy.<sup>121</sup> And an array of political,

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<sup>115</sup> See *Pierce v. Soc'y of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534 (1925) (recognizing parent's right to make educational decisions for their child); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (endorsing "the power of parents to control the education of their [children]").

<sup>116</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992) (upholding woman's right to terminate a pregnancy and adopting "undue burden" test).

<sup>117</sup> See *Obergefell v. Hodges*, 576 U.S. 644, 665 (2015) (asserting analysis of past precedent "compels the conclusion that same-sex couples may exercise the right to marry").

<sup>118</sup> See JENNIFER NEDELSKY, *LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW* 19-38 (2011) (arguing for relational understanding of rights); see also Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 *YALE J.L. & FEMINISM* 7, 12 (1989) (describing "deeply ingrained sense that individual autonomy is to be achieved by erecting a wall (of rights) between the individual and those around him").

<sup>119</sup> See *supra* note 98 (describing work of Carl Schneider).

<sup>120</sup> As Part III illustrates, in any given institutional analysis, the map of institutions will expand or contract.

<sup>121</sup> As Maxine Eichner has characterized this conception of family law, "[f]ueled by the recognition that families are social institutions profoundly affected by their social and economic contexts, and that an increasing range of families are being destabilized by these contexts, the emerging scholarship of the 2010s situates families, including nontraditional

economic, and social institutions, from foster care to family dinners, are relevant to family law.<sup>122</sup> Further complicating the inquiry, family law and some institutions can be mutually constitutive, with each influencing the other in ways that are often difficult to disentangle.<sup>123</sup> But if all law is family law, and everything is an institution, deploying institutionalism is both an impossible task, and the methodology risks losing its distinctive contribution.

To address this problem, this Part puts some reasonable boundaries around the definition of family law. Loosely tracking Carl Schneider's iconic taxonomy of family law, this Part identifies three main domains of family law: the substantive rules that regulate family behavior, dispute-resolution systems, and the provision of material resources and services needed by families.<sup>124</sup> This relatively narrow definition of family law keeps the focus on methodology in this agenda-setting Article.

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families, within their surrounding world." Maxine Eichner, *The Family, in Context*, 128 HARV. L. REV. 1980, 1981-82 (2015) (footnote omitted) (reviewing books written by June Carbone and Naomi Cahn, Jill Elaine Hasday, and Clare Huntington). Scholars thus contend that criminal law is family law, *see, e.g.*, Elizabeth D. Katz, *Criminal Law in a Civil Guise: The Evolution of Family Courts and Support Laws*, 86 U. CHI. L. REV. 1241, 1245 (2019); Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1256 (2009); that racial segregation laws and their ongoing effects are family law, *see, e.g.*, Lenhardt, *supra* note 8, at 2076; and that zoning law is family law, *see, e.g.*, Silbaugh, *Women's Place*, *supra* note 107, at 1848-50. I, too, have argued that family law reaches across many areas of the law. *See* CLARE HUNTINGTON, FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS 55-80 (2014). For one approach to the definitional question, *see* Kerry Abrams, *Family History: Inside and Out*, 111 MICH. L. REV. 1001, 1003-05 (2013), which distinguishes family law, traditionally defined as marriage, divorce, and related issues such as parentage, from "the law of the family," which includes "the many ways in which families are created, shaped, and constrained by law," including tax law, contract law, property law, welfare law, criminal law, tort law, and so on.

<sup>122</sup> *See supra* text accompanying notes 110-13.

<sup>123</sup> *See* Silbaugh, *The Practice of Marriage*, *supra* note 108.

<sup>124</sup> In Schneider's taxonomy, family law has five functions: (1) protecting citizens from harm by other citizens, especially harm from parents and spouses; (2) helping people organize their lives as they wish by giving effect to contracts about private affairs; (3) resolving disputes within the family, especially at the end of relationships; (4) expressing society's views about desirable behavior; and (5) channeling people into social institutions that are widely believed to further desired ends, notably marriage and parenthood. *See* Schneider, *supra* note 98, at 497-98. Since Schneider identified these functions, family law scholars now regularly add a sixth function: public provisioning for a family's needs. *See, e.g.*, MAXINE EICHNER, THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS 8-10 (2010) (arguing why the state, consistent with a theory of liberal democracy, should proactively support families); *see also* Eichner, *supra* note 96, at 459-61 (describing scholars who argue for greater state support of all families, especially low-income families). This Article thus draws on these functional accounts but, for the sake of parsimony, simplifies family law into the three categories described in the text. The important aspects of expressing society's views and channeling individuals into desirable social institutions is an intrinsic part of the three categories used in the text.

When it comes to identifying relevant institutions, the goal is to demonstrate that families are embedded in a web of legal and nonlegal institutions that restrict and enable family life. Indeed, it is illuminating simply to identify this broad range of state, nonstate, political, social, and economic institutions. But because a far-reaching account risks watering down the analysis, this Part identifies *categories* of institutions and focuses on the most salient, reaching broadly but not including every possible institution. This Part also identifies areas of particularly strong mutual constitution, underscoring, for example, the co-construction of family law and racism, classism, and patriarchy. Finally, as this Part demonstrates, many institutions play a role in multiple domains of family law, and highlighting this overlap is part of the exercise, showing the dominant role of some institutions.

As noted in the Introduction and Part I, this Article relies on the widely accepted definition of an institution as “the humanly devised constraints that shape human interaction”<sup>125</sup> as well as the understanding that an institution must possess normative, regulative, and cognitive components.<sup>126</sup> Take family court, for example. As a normative matter, the institution of family court tells each party how they should act, such as expectations that litigants should present legal, not emotional, arguments that address justiciable issues, and that judges should display proper judicial comportment and decide issues based on the law.<sup>127</sup> As a regulative matter, family court monitors this behavior through substantive and procedural rules. And as a cognitive matter, family court is a widely understood shorthand for judicial resolution of issues such as divorce, adoption, parentage, and child maltreatment.<sup>128</sup> This Part does not repeat this exercise for each institution, but the definition limits the categories of institutions that are included.

#### A. *Substantive Rules*

Substantive rules are at the heart of family law. Some rules directly regulate families, such as determining legal parentage and prohibiting violence.<sup>129</sup> Some rules indirectly regulate families by providing incentives or subsidies, such as

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<sup>125</sup> See *supra* text accompanying notes 18, 69. This Part sometimes elides the distinction between an institution and an organization, embracing the institutionalists who argue that a strict demarcation is not necessary. See *supra* text accompanying notes 76-80. Thus, this Part typically identifies an institution (such as professional associations) and then discusses examples of specific organizations (such as the American Bar Association).

<sup>126</sup> See *supra* text accompanying notes 72-75 (describing this definition and these three parts of an institution).

<sup>127</sup> See, e.g., N.Y.C. BAR, INTRODUCTORY GUIDE TO THE NEW YORK CITY FAMILY COURT 1-39 (2006) (providing information to help families navigate family court); Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99 CALIF. L. REV. 1485, 1500 (2011) (describing anecdotal accounts of emotional impact of family cases on judges).

<sup>128</sup> See N.Y.C. BAR, *supra* note 127, at 1-39.

<sup>129</sup> See, e.g., UNIF. PARENTAGE ACT (UNIF. L. COMM’N 2017); UNIF. INTERSTATE ENF’T OF DOMESTIC VIOLENCE PROT. ORDERS ACT (UNIF. L. COMM’N 2002).

childcare subsidies that encourage parents to work outside the home.<sup>130</sup> And some rules constitute the choice architecture of family life,<sup>131</sup> such as the default rules on property distribution following a divorce.<sup>132</sup> As this Section describes, numerous institutions play a role in making and influencing these substantive rules, and sometimes the law and institutions are mutually constitutive.

### 1. Institutions that Make Rules

Unsurprisingly, state institutions play an outsized—but not monopolizing—role in establishing and reforming substantive rules. The legislature writes laws; courts interpret these laws and constitutions, and, to a lesser degree, establish substantive rules through the common law; and the administrative state interprets statutes and passes regulations when implementing legislative directives and programs.

Beyond the state, communities supply the norms for some of family law's standards-based approach to legal regulation. The rules governing corporal punishment and child neglect illustrate this role for communities. Every state in the country privileges a parent's use of "reasonable" corporal punishment,<sup>133</sup> and this inquiry looks to the community to determine what is reasonable. As norms of parenting and acceptable discipline change over time, what is reasonable, and thus legally privileged, is shrinking considerably. A century ago, it was perfectly reasonable to hit a child with a belt; today, much less so.<sup>134</sup> Similarly, the standard used to determine physical child neglect asks whether "a parent, guardian, or custodian inflicts serious physical harm on a child . . . in a manner that substantially deviates from the standard of care exercised by a reasonable parent."<sup>135</sup> As with the corporal punishment standard, this inquiry looks to the community to determine what is reasonable and what constitutes the standard of

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<sup>130</sup> See *OCC Fact Sheet*, U.S. DEP'T OF HEALTH & HUM. SERVS., <https://www.acf.hhs.gov/occ/fact-sheet> [<https://perma.cc/R26P-L3LJ>] (last updated June 23, 2021) (describing federal funding for child care subsidies, most notably the Child Care and Development Fund, which "is the primary federal funding source for child care subsidies to help eligible low-income working families access child care and to improve the quality of child care for all children").

<sup>131</sup> See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 3 (2008).

<sup>132</sup> See HUNTINGTON, *supra* note 121, at 55-80 (describing three categories of these substantive rules: direct regulation, indirect regulation, and choice architecture).

<sup>133</sup> RESTATEMENT OF CHILD. & THE L. § 3.24(a), (b) & cmt. a (AM. L. INST., Tentative Draft No. 1, 2018) (explaining parental privilege in criminal and civil law).

<sup>134</sup> *Id.* § 3.24(a), (b) & cmts. e & f. In a process that is difficult to disentangle, both courts and communities determine what is reasonable: To the extent a parent uses a form or degree of corporal punishment that is at odds with the norm in the community, this would be a factor in the reasonableness inquiry. *Id.* § 3.24 cmt. d. And to the extent a court determines certain conduct is unreasonable, this will likely influence behavior in the community. Either way, the community plays a direct and key role in determining the bounds of reasonableness.

<sup>135</sup> *Id.* § 3.20(b)(1).

care. These standards change over time, and they are not particularly granular, but the basic idea holds that the community, rather than the state, provides the content of the legal standard.

## 2. Institutions that Influence Rules

Although they do not enact laws or set relevant standards, many nonstate institutions influence family law's substantive rules.<sup>136</sup> Professional associations are well-entrenched in the American political economy and can have a profound impact on substantive rules. Consider some specific organizations: The Uniform Law Commission produced draft legislation in 1973 on no-fault divorce, and nearly every state quickly adopted it.<sup>137</sup> The American Psychiatric Association classified and then declassified homosexuality as a mental illness, first contributing to the stigmatization of gay and lesbian people and then speeding the recognition of LGBTQ rights.<sup>138</sup> In 2002, the American Law Institute published the *Principles of the Law of Family Dissolution*,<sup>139</sup> which reflected and reinforced many of the existing divorce law trends in the states.<sup>140</sup> And the

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<sup>136</sup> Some of these institutions can be considered hybrid state-nonstate institutions. Academia is comprised of both private and public institutions, and professional associations often receive state funding and can be heavily influenced by the state, such as state governments appointing the members of the Uniform Law Commission. *See About Us*, UNIF. L. COMM'N, <https://www.uniformlaws.org/aboutulc/overview> [<https://perma.cc/LZ65-FR59>] (last visited Feb. 4, 2022).

<sup>137</sup> *See* MODEL MARRIAGE & DIVORCE ACT (UNIF. L. COMM'N 1973); HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 62-80 (1988) (describing history of no-fault divorce laws and pivotal role of Uniform Law Commission). More recently, the Uniform Law Commission wrote the influential Uniform Parentage Act of 2017, which states are beginning to adopt. UNIF. PARENTAGE ACT (UNIF. L. COMM'N 2017).

<sup>138</sup> *Compare* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL: MENTAL DISORDERS 38-39 (1952) (listing homosexuality as "sexual deviation" within the broader category of mental disorders), *with* Am. Psychiatric Ass'n, *Position Statement on Homosexuality and Civil Rights*, 131 AM. J. PSYCHIATRY 497, 497 (1974) (stating "homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities," and therefore "deplor[ing] all public and private discrimination against homosexuals" and "urg[ing] the enactment of civil rights legislation"). For a discussion of how the American Psychiatric Association influenced the modern gay rights movement and helped create greater acceptance of lesbian and gay individuals, see Jack Drescher, *The Removal of Homosexuality from the DSM: Its Impact on Today's Marriage Equality Debate*, 16 J. GAY & LESBIAN MENTAL HEALTH 124, 129 (2012). The American Psychiatric Association's declassification was cited by the Supreme Court when it struck down state laws limiting marriage to different-sex couples. *See Obergefell v. Hodges*, 576 U.S. 644, 661 (2015).

<sup>139</sup> PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS & RECOMMENDATIONS xv-xvi (AM. L. INST. 2002) (consolidating and prompting state-level reforms to the rules of child custody, child support, the distribution of marital property, and spousal maintenance).

<sup>140</sup> Bartlett, *supra* note 6, at 34-35 (describing this reinforcement, such as move away from



American Legislative Exchange Council<sup>141</sup> produces draft statutes, such as the Free Range Parenting Act, which are debated and adopted by state legislatures.<sup>142</sup>

Religious entities lobby legislators and influence legislation through other means. In the 1970s, Christian Science groups persuaded state legislatures to enact religious accommodation statutes that protect parents from findings of medical neglect when they decline medical treatment for their children on religious grounds.<sup>143</sup> And in New York State, the Catholic Church has heavily influenced legislation, resisting the adoption of no-fault divorce until it was finally enacted in 2010, decades after most states.<sup>144</sup>

The media may be a rapidly changing institution, with evolving rules of the game, but it can have a powerful, if also indirect, influence on substantive rules. Media—entertainment and news, traditional and social—shapes familial social norms, which provide the backdrop for family law’s substantive rules.<sup>145</sup> Content codes from the film industry in Hollywood prohibited the depiction of interracial couples through the 1960s, perpetuating the norm of racial

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terminology of custody and visitation). The American Law Institute (“ALI”) is currently developing the first family law restatement, *Restatement of Law, Children and the Law*, which will address the legal rules governing children in families, schools, the juvenile justice system, and as emerging adults. See *Children and the Law*, ALI ADVISER, <http://www.thealiadviser.org/children-law/> [<https://perma.cc/BP4M-N6HT>] (last visited Feb. 4, 2022). Disclosure: I am an associate reporter for the restatement.

<sup>141</sup> American Legislative Exchange Council (“ALEC”) is a group of state legislators and interested parties “dedicated to the principles of limited government, free markets and federalism.” See *About ALEC*, AM. LEGIS. EXCH. COUNCIL, <https://www.alec.org/about/> [<https://perma.cc/HFF7-SDLW>] (last visited Feb. 4, 2022).

<sup>142</sup> This draft legislation protects parents from allegations of neglect if they choose to give their children limited independence to do activities such as playing outside, bicycling, and walking to school. See *Free Range Parenting Act*, AM. LEGIS. EXCH. COUNCIL, <https://www.alec.org/model-policy/free-range-parenting-act/> [<https://perma.cc/3A43-DDPN>] (last visited Feb. 4, 2022).

<sup>143</sup> See Allison Ciullo, Note, *Prosecution Without Persecution: The Inability of Courts to Recognize Christian Science Spiritual Healing and a Shift Towards Legislative Action*, 42 NEW ENG. L. REV. 155, 169-74 (2007).

<sup>144</sup> See, e.g., J. Herbie DiFonzo & Ruth C. Stern, *Addicted to Fault: Why Divorce Reform Has Lagged in New York*, 27 PACE L. REV. 559, 569-70, 589 (2007) (discussing Catholic Church’s influence over divorce reform in New York); see also N.Y. DOM. REL. LAW § 170(7) (McKinney 2021); Meaghan E. Howard, Note, *Modern Reformation: An Overview of New York’s Domestic Relations Law Overhaul*, 29 TOURO L. REV. 389, 390-91 (2013) (“New York was the final state to adopt the no-fault system . . .”).

<sup>145</sup> For a discussion of the mutually constitutive relationship between social norms and family law’s rules, and the scholarship exploring that relationship, see Clare Huntington, *Familial Norms and Normality*, 59 EMORY L.J. 1103, 1127-32 (2010). For a discussion of social media and its pervasive presence in family life, generating and perpetuating familial norms, see Clare Huntington, *Staging the Family*, 88 N.Y.U. L. REV. 589, 609-16 (2013).

homogamy within families.<sup>146</sup> More positively, many LGBTQ+ advocates credit the TV show *Will & Grace* with introducing the American public to positive, if also stereotypical, images of a gay man.<sup>147</sup> *The Brady Bunch*, which aired from 1969 to 1974, normalized blended families.<sup>148</sup> And *black-ish*, which debuted in 2014, places race center stage in family life, telling positive and race-conscious stories about Black families.<sup>149</sup>

Economic institutions, such as private employers and insurance markets, also influence family law's substantive rules.<sup>150</sup> In 1992, long before legislatures and courts started recognizing marriage equality, private employers began offering benefits for domestic partners.<sup>151</sup> By 2015, the year the Supreme Court decided *Obergefell v. Hodges*,<sup>152</sup> 62% of all large employers offered such benefits,<sup>153</sup> contributing to the expectation that same-sex relationships are entitled to equal respect and support. And economic institutions can blunt, if not thwart, family law reforms, as illustrated by insurance markets. At common law, coverture—

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<sup>146</sup> See Kevin Noble Maillard, *Hollywood Loving*, 86 *FORDHAM L. REV.* 2647, 2651-54 (2018).

<sup>147</sup> See *Will & Grace* (NBC); Stacey L. Sobel, *Culture Shifting at Warp Speed: How the Law, Public Engagement, and Will & Grace Led to Social Change for LGBT People*, 89 *ST. JOHN'S L. REV.* 143, 179 (2015); Dahlia Lithwick, *Extreme Makeover: The Story Behind the Story of Lawrence v. Texas*, *NEW YORKER*, Mar. 12, 2012, at 76 (noting *Will and Grace* theory as “most commonly accepted account” explaining shift in public opinion favoring gay marriage).

<sup>148</sup> See *The Brady Bunch* (ABC).

<sup>149</sup> See *black-ish* (ABC); Tonya Pendleton, *'black-ish' Creator Kenya Barris Talks 'The Cosby Show' Comparisons*, *BLACKAMERICAWEB.COM*, <https://blackamericaweb.com/2014/11/19/blackish-creator-kenya-barris-talks-the-cosby-show-comparisons/> [https://perma.cc/YBW8-7G58] (last visited Feb. 4, 2022).

<sup>150</sup> Economic institutions can be categorized at both a high level of generality, such as competitive markets and the banking system, see Henry Hazlitt, *The Five Institutions of the Market Economy*, *FOUND. FOR ECON. EDUC.* (Nov. 25, 2016), <https://fee.org/articles/the-five-institutions-of-the-market-economy/> [https://perma.cc/U23M-XHVU] (describing “basic institutions of the market economy” as “(1) private property, (2) free markets, (3) competition, (4) division and combination of labor, and (5) social cooperation”), and a high level of specificity, such as a child's allowance and tipping, see *Economic Institutions*, *LIBR. OF ECON. & LIBERTY*, <https://www.econlib.org/library/Topics/HighSchool/EconomicInstitutions.html> [https://perma.cc/9PWU-PLNT] (last visited Feb. 4, 2022) (providing examples of these and other economic institutions). For a broader description of how the market has a pervasive influence on family functioning, see EICHNER, *supra* note 5, at 69-91.

<sup>151</sup> *Reflecting on the Legacy of LS&Co.'s Domestic Partner Benefits*, *LEVI STRAUSS & CO.: UNZIPPED BLOG* (June 28, 2019), [https://www.levistrauss.com/2019/06/28/partner\\_benefits/](https://www.levistrauss.com/2019/06/28/partner_benefits/) [https://perma.cc/XRA2-3BEF] (“In June of 1992, Levi Strauss & Co. became the first Fortune 500 company to offer domestic partner benefits, recognizing that the wellbeing of our employees and their loved ones transcends sexual orientation or marital status.”).

<sup>152</sup> 576 U.S. 644 (2015).

<sup>153</sup> JIM GREGWARE, *MERCER'S NATIONAL SURVEY OF EMPLOYER-SPONSORED HEALTH PLANS* 13 (2016).

the legal unity of spouses—meant that one spouse could not sue the other in tort.<sup>154</sup> Even after coverture was abolished, the doctrine of spousal immunity endured.<sup>155</sup> To overcome this barrier, states largely abrogated the spousal immunity,<sup>156</sup> but private insurance companies now add exclusionary clauses to policies, precluding recovery for a claim of one spouse against another.<sup>157</sup>

Finally, academic research influences family law. Extensive research on same-sex parenting played a key role in marriage equality litigation, convincing courts to strike down state restrictions.<sup>158</sup> Less robust and ultimately disproved research showing that mandatory arrest for perpetrators of domestic violence helps reduce recidivism was a central factor in persuading states and localities to adopt mandatory-arrest policies.<sup>159</sup> Academic research can also work in tandem with other institutions. A partnership between the media and academic researchers, for example, can convert technical research into accessible language and convincing policy frames. To convince policymakers, legislators, and the public of the importance of early childhood development, neuroscientists worked with media consultants to translate research into accessible language, introducing terms such as “brain architecture” and “toxic stress,” which are now thoroughly integrated into family law.<sup>160</sup>

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<sup>154</sup> See, e.g., *Thompson v. Thompson*, 218 U.S. 611, 614-15 (1910).

<sup>155</sup> Suzanne A. Kim, *Reconstructing Family Privacy*, 57 HASTINGS L.J. 557, 573 (2006) (“Spousal immunity for intentional torts persists in some form in several states as recently as 1996.”).

<sup>156</sup> See RESTATEMENT (SECOND) OF TORTS § 895F(1) (AM. L. INST. 1979) (“A husband or wife is not immune from tort liability to the other solely by reason of that relationship.”).

<sup>157</sup> STUART M. SPEISER, CHARLES F. KRAUSE & ALFRED W. GANS, *AMERICAN LAW OF TORTS* § 6:45 (Monique C.M. Leahy ed., 2021), Westlaw AMLOT. Some courts have upheld these clauses and some have not. See *id.*

<sup>158</sup> Academic research contributed significantly to the marriage equality movement. See Huntington, *Empirical Turn*, *supra* note 8, at 241-50 (describing how this research played central role throughout litigation, including in two of three cases that made it to Supreme Court, which sought review of trial court decisions that developed rich factual records using empirical evidence, notably work by sociologists, economists, and family studies scholars).

<sup>159</sup> See Brinig, *supra* note 8, 1083-84 (describing this research and its influence but also noting that this research was partially misleading because reduction in recidivism rate held true only for employed men embedded in their communities). Despite the disproven research, many jurisdictions still retain a mandatory-arrest policy. See *id.* at 1096. In family court, too often, judges admit unreliable research, such as the unscientific study of so-called parental alienation syndrome. See Huntington, *Empirical Turn*, *supra* note 8, at 256-57 (describing widespread practice of family courts not applying *Daubert* standard and thus admitting unreliable research).

<sup>160</sup> See *Key Concepts*, CTR. ON DEVELOPING CHILD, <https://developingchild.harvard.edu/science/key-concepts/> [<https://perma.cc/W9Q9-5T7D>] (last visited Feb. 4, 2022); see also Yael Cannon & Andrew Hsi, *Disrupting the Path from Childhood Trauma to Juvenile Justice: An Upstream Health and Justice Approach*, 43 FORDHAM URB. L.J. 425, 440-45 (2016) (describing toxic stress and its impact on early childhood development and child’s lifelong health).

### 3. Mutual Constitution

Some institutions and legal rules are mutually constitutive, including the social institutions of racism and patriarchy. Consider race: As Robin Lenhardt argues, antimiscegenation laws, with the central goal of preserving whiteness, reflected and further entrenched a widespread belief in a racial hierarchy.<sup>161</sup> In turn, these laws underscored which families are desirable: monoracial, white families.<sup>162</sup> As with race, family law long reflected and reinforced patriarchy. Legal rules such as coverture and the nonrecognition of marital rape granted husbands tremendous power over their wives, supporting and furthering the belief that this state of affairs was natural and justified because of the purported inherent weakness of women.<sup>163</sup>

Familial roles—such as spouses, parents and children, and grandparents—are institutions, and they too have a mutually constitutive relationship with the law.<sup>164</sup> When the Supreme Court recognized parental rights as part of the liberty guaranteed by the Fourteenth Amendment, the Court both drew on and buttressed the institution of parents, reinforcing it as a foundational relationship in the family.<sup>165</sup> But mutual constitution can work in the other direction, too, with family law undermining institutionalization. Othermothers, for example, are an institution in the African American community,<sup>166</sup> but family law typically does not recognize these parent-like relationships, treating othermothers as legal strangers to the child.<sup>167</sup>

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<sup>161</sup> R.A. Lenhardt, *According to Our Hearts and Location: Toward a Structuralist Approach to the Study of Interracial Families*, 16 J. GENDER RACE & JUST. 741, 742-43 (2013) [hereinafter Lenhardt, *Hearts and Location*]; see *Loving v. Virginia*, 388 U.S. 1, 6-7 (1967) (describing history of antimiscegenation laws and their goal of preserving whiteness).

<sup>162</sup> Lenhardt, *Hearts and Location*, *supra* note 161, at 742-43.

<sup>163</sup> See Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1387-92 (2000).

<sup>164</sup> See Schneider, *supra* note 98, at 496-511; see also Pierre Bordieu, *On the Family as a Realized Category*, 13 THEORY CULTURE & SOC'Y 19, 19 (1996) (arguing legal definition of family “while seeming to describe social reality, in fact construct[s] it”); *id.* at 25 (describing role of state in this institutionalization). Calling familial relationships institutions invites an analysis of the mutually constitutive roles of social norms and the law in creating, reinforcing, and changing these institutions. See Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM. L. REV. 293, 359-65 (2015) (discussing cohabitation, which includes broad range of social practices, from casual cohabitation with limited commitments to long-term highly committed cohabitation; further reflecting that law thus far has chosen not to confer significant legal status on cohabitating couples, partly because of their nonuniformity).

<sup>165</sup> See *supra* note 115 (citing foundational cases).

<sup>166</sup> This term generally refers to the caregiving many women provide to nonbiological children, which can range from emotional care, shelter, and meals, to a near-adoption-like relationship. See PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 173-200 (2d ed. 2000).

<sup>167</sup> See Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245, 1248 (2008). I do

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There are many other types of institutions that play a role in family law's substantive rules,<sup>168</sup> but this description is sufficient to demonstrate that the

not want to overstate the point. Family law does recognize some close adult-child relationships that do not neatly fit into the parent-child category. See Cynthia Godsoe, *Subsidized Guardianship: A New Permanency Option*, CHILD.'S LEGAL RTS. J., Fall 2003, at 11, 12-13 (describing guardianship rules for children leaving foster care); Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2367-69 (2017) (describing doctrine of de facto parenthood, although noting that doctrine reflects ambivalence about institutionalizing relationships outside parent-child norm, with some states conferring full rights on de facto parents and other states falling far short). Similarly, the eligibility requirements for food stamps count all household members who cook together as a family, reinforcing a broader understanding of the family. See U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 538 (1973) (striking down federal law denying food stamps to households of "unrelated persons"); 7 C.F.R. § 273.1 (2021) (defining "general household" in terms unrelated to familial relations). This is not necessarily a progressive rule, however, because it means that the income from any adult member of the household counts towards, and thus limits, eligibility. See *id.* § 273.10 (detailing method of determining benefits eligibility based on household income).

<sup>168</sup> Consider three more categories of institutions. First, issue-advocacy groups are distinct from professional associations, drawing on a broader membership and created for the specific purpose of furthering an identified agenda. See CRAIG B. HOLMAN & LUKE P. MCLOUGHLIN, BRENNAN CTR. FOR JUST., BUYING TIME 2000: TELEVISION ADVERTISING IN THE 2000 FEDERAL ELECTIONS 22, 23 (2000) (defining issue advocacy to include "communications by parties or groups intended to further or to derail a political issue, legislative proposal, or public policy"). These groups provide a means for citizens who wish to express their views collectively. Working from different political perspectives, specific organizations seek to influence family law's substantive rules, primarily through legislative efforts, litigation, and the media. The marriage equality movement is a well-known example, see John F. Kowal, *The Improbable Victory of Marriage Equality*, BRENNAN CTR. FOR JUST. (Sept. 29, 2015), <https://www.brennancenter.org/our-work/analysis-opinion/improbable-victory-marriage-equality> [<https://perma.cc/R2UG-U6FD>] (describing role of both liberal advocacy and impact litigation groups, such as National Center for Lesbian Rights, Lambda Legal, and ACLU, as well as conservative groups, such as Young Conservatives for Marriage), but there are many others, such as the influence of fathers' rights groups over alimony reform, see Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 VA. L. REV. 79, 110-11 (2016).

Second, think tanks are a powerful institution affecting family law, helping generate and translate research for policymakers and the public. Think tanks are generally action oriented, focused on analyzing and developing policy solutions and then promoting these solutions. JAMES G. MCGANN, THINK TANKS & CIV. SOC'YS PROGRAM, UNIV. OF PA., 2019 GLOBAL GO TO THINK TANK INDEX REPORT 13 (2020). The specific organizations come in many forms, with different funding streams, but they are ubiquitous, with 1,872 think tanks in the United States alone. *Id.* at 15. Through their research agendas and publications, these institutions can shape the conversation and, particularly, the evidence base for public policy. See *id.* at 37.

Finally, foundations are highly influential, providing funds and direct assistance, usually to state and local governments as well as nonprofit agencies. See DANIEL RADER, COUNCIL ON FOUNDS., THE ESSENTIALS FOR COLLABORATION BETWEEN FOUNDATIONS AND GOVERNMENT 3 (2010). In a testament to the power of this kind of work, one critic has termed this kind of

reach is broad and includes state and nonstate institutions, as well as political, social, and economic institutions.

### B. *Dispute-Resolution Systems*

Dispute-resolution systems settle conflicts among family members and between families and the state. These civil, criminal, and administrative proceedings address issues including divorce and separation, family violence, juvenile offenses, and status offenses. As with family law's substantive rules, multiple institutions play a role in these systems.

#### 1. Institutions that Resolve Disputes

The main state institution is, unsurprisingly, the judiciary, which includes both courtroom dispute resolution and state-sponsored alternatives, such as mandatory, court-based mediation for divorcing spouses and diversion programs for juvenile offenders.<sup>169</sup> The administrative state plays a lesser role in the resolution of disputes, with the exception of child support: in many states, administrative agencies establish and enforce awards of child support.<sup>170</sup> Although legislatures no longer directly resolve disputes,<sup>171</sup> they do determine procedural rules, which can profoundly affect dispute resolution.<sup>172</sup>

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work a “corrupt policy-research merger,” contending that foundations choose programs, such as family preservation, that reflect the foundation’s values and then set out “not to *test*, but instead to *prove* the programs’ efficacy” to persuade policymakers to adopt the preferred program. See Elizabeth Bartholet, *Thoughts on the Liberal Dilemma in Child Welfare Reform*, 24 WM. & MARY BILL RTS. J. 725, 725-27 (2016).

<sup>169</sup> See, e.g., *General Stages of the Family Court Process*, NYC L. DEP’T: FAM. CT. DIV., <https://www1.nyc.gov/site/familycourtdivision/juvenile-delinquency/general-stages-of-the-family-court-process.page> [<https://perma.cc/9XTK-NR3Q>] (last visited Feb. 4, 2022).

<sup>170</sup> See, e.g., GA. CODE ANN. § 19-6-26(a)(1) (2021) (“‘Child support order’ means a judgment, decree, or order of a court or authorized administrative agency requiring the payment of child support in periodic amounts or in a lump sum . . . .”); 305 ILL. COMP. STAT. ANN. 5/10-11 (2021) (“In lieu of actions for court enforcement of support . . . , the Child and Spouse Support Unit of the Illinois Department . . . may issue an administrative order requiring the responsible relative to comply with the terms of the determination and notice of support due . . . .”); IOWA CODE § 252C.2(3) (2021) (“The provision of child support collection . . . creates a support debt due and owing to the individual or the individual’s child or ward by the responsible person in the amount of a support obligation established by court order or by the administrator. The administrator may establish a support debt in favor of the individual or the individual’s child or ward and against the responsible person . . . .”).

<sup>171</sup> See, e.g., DiFonzo & Stern, *supra* note 144, at 565; see also Simeon E. Baldwin, *Legislative Divorces and the Fourteenth Amendment*, 27 HARV. L. REV. 699, 699 (1914) (describing pre-Fourteenth Amendment practice of legislative divorce).

<sup>172</sup> See, e.g., Nicholas E. Kahn, Josh Gupta-Kagan & Mary Eschelbach Hansen, *The Standard of Proof in the Substantiation of Child Abuse and Neglect*, 14 J. EMPIRICAL LEGAL STUD. 333, 356-57 (2017) (reporting results of empirical study finding that burden of proof in child-protection proceeding affects substantiation rates for underlying abuse or neglect).

Some nonstate institutions play a role in resolving disputes. Private mediators, for example, abound in the field of divorce, facilitating negotiation settlements for divorcing and separating couples.<sup>173</sup> Courts generally rubberstamp these settlement agreements, which address everything from child custody to property division.<sup>174</sup> And in the child welfare context, communities can be decision makers, at least in some processes. Family group conferencing, for example, is part of the broader restorative justice movement; when properly implemented, the process defers to the decisions of a family's community about how best to keep the child safe and address the issues underlying the abuse or neglect.<sup>175</sup>

Outside the state, religious entities also resolve familial disputes. For Jewish families, the Beth Din has jurisdiction over divorce and related matters; for Christian families, the Christian Conciliation Service offers both conciliation counseling and, if couples choose to divorce, dispute resolution for property and maintenance; and for Muslim families, Islamic courts adjudicate family law disputes.<sup>176</sup> The extent to which civil courts uphold these agreements varies, but when couples do not seek civil enforcement or do not challenge the arbitration agreement in civil court, the religiously arbitrated decision is the final determination.<sup>177</sup>

## 2. Institutions that Influence Participants

Multiple institutions influence the behavior and decisions of judges, lawyers, litigants, and other participants in dispute-resolution processes. Beginning with professional associations, the National Council of Juvenile and Family Court Judges was a key player in reforming sentencing for juvenile offenders, encouraging judges to order community-based treatment rather than detention.<sup>178</sup> The American Academy of Matrimonial Lawyers requires its members to prevent clients from using child custody as a bargaining chip in

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<sup>173</sup> See ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 50-67 (2004) (describing prevalence of private alternative dispute resolution and mediation).

<sup>174</sup> See *id.*

<sup>175</sup> See Huntington, *Rights Myopia*, *supra* note 96, at 674-80 (describing process of family group conferencing).

<sup>176</sup> See MICHAEL J. BROYDE, SHARIA TRIBUNALS, RABBINICAL COURTS, AND CHRISTIAN PANELS: RELIGIOUS ARBITRATION IN AMERICA AND THE WEST 14-21 (2017); Julia Halloran McLaughlin, *Taking Religion Out of Civil Divorce*, 65 RUTGERS L. REV. 395, 421-26 (2013).

<sup>177</sup> See, e.g., *Jabri v. Qaddura*, 108 S.W.3d 404, 413-14 (Tex. App. 2003) (upholding agreement between two spouses that divorce would be arbitrated in Texas Islamic Court); see also BROYDE, *supra* note 176, at 21-24 (describing requirements under Federal Arbitration Act to ensure enforceability of religious arbitration agreements). *But see* Hirsch v. Hirsch, 774 N.Y.S.2d 48, 49-50 (N.Y. App. Div. 2004) (refusing on public policy grounds to enforce Beth Din award of child support, custody, and property).

<sup>178</sup> See NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, ENHANCED JUVENILE JUSTICE GUIDELINES: IMPROVING COURT PRACTICE IN JUVENILE JUSTICE CASES 27-28 (2018).

financial negotiations or as a tool for expressing vindictiveness.<sup>179</sup> And the American Bar Association writes practice standards guiding the representation of children, parents, and agencies in child welfare proceedings.<sup>180</sup>

Religious entities can influence the levers of dispute-resolution systems. Hasidic Jews in Brooklyn, for example, long supported the district attorney Charles Hynes,<sup>181</sup> and, in return, there is evidence that Hynes did not actively pursue credible allegations of child sexual abuse within the Hasidic community.<sup>182</sup> Religious entities also influence the behavior of family members in dispute-resolution processes, including whether to engage in legal processes at all, with some religious groups discouraging members from reporting intimate partner violence and sexual abuse.<sup>183</sup>

With more diffuse effect, the media can influence the resolution of disputes. Advocates know they need to win the media war as much as the legal battle.<sup>184</sup> Attorneys choose plaintiffs who play into popular images of the family.<sup>185</sup> And during litigation, lawyers actively seek media coverage that is sympathetic to

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<sup>179</sup> AM. ACAD. OF MATRIM. LAWS., BOUNDS OF ADVOCACY: GOALS FOR FAMILY LAWYERS § 6.2 (2000). One requirement of membership is that an attorney agrees to abide by the Academy's "Bounds of Advocacy" which establish basic practice norms—although not enforceable rules—for family law attorneys. *Id.* at preliminary statement.

<sup>180</sup> See generally AM. BAR ASS'N, STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES (1996); AM. BAR ASS'N, STANDARDS OF PRACTICE FOR ATTORNEYS REPRESENTING PARENTS IN ABUSE AND NEGLECT CASES (2006); AM. BAR ASS'N, STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILD WELFARE AGENCIES (2004); CHILD.'S JUST. PROJ., REPRESENTING PARENTS IN ABUSE AND NEGLECT PROCEEDINGS: AN ADVOCACY AND TRAINING GUIDE FOR WYOMING PRACTITIONERS (2016) (incorporating American Bar Association ("ABA") standards into state practice).

<sup>181</sup> Ray Rivera & Sharon Otterman, *For Ultra-Orthodox in Abuse Cases, Prosecutor Has Different Rules*, N.Y. TIMES, May 11, 2012, at A25 ("Mr. Hynes has won election six times as district attorney thanks in part to support from ultra-Orthodox rabbis, who lead growing communities in neighborhoods like Borough Park and Crown Heights.").

<sup>182</sup> Rachel Aviv, *The Outcast*, NEW YORKER, Nov. 10, 2014, at 44; Rivera & Otterman, *supra* note 181.

<sup>183</sup> See, e.g., OFF. OF ATT'Y GEN., COMMONWEALTH OF PA., REPORT I OF THE 40TH STATEWIDE INVESTIGATING GRAND JURY 3, 17, 67, 168, 326 (2018); Joshua Pease, *The Sin of Silence: The Epidemic of Denial About Sexual Abuse in the Evangelical Church*, WASH. POST (May 31, 2018), [www.washingtonpost.com/news/posteverything/wp/2018/05/31/feature/the-epidemic-of-denial-about-sexual-abuse-in-the-evangelical-church/](http://www.washingtonpost.com/news/posteverything/wp/2018/05/31/feature/the-epidemic-of-denial-about-sexual-abuse-in-the-evangelical-church/) (describing efforts of some Evangelical churches to discourage reporting of sexual abuse within community); Aviv, *supra* note 182 (describing sexual abuse in Hasidic community in Brooklyn and reporting evidence of religious leaders telling parents and children not to report abuse).

<sup>184</sup> See, e.g., Suzanne B. Goldberg, *Multidimensional Advocacy as Applied: Marriage Equality and Reproductive Rights*, 29 COLUM. J. GENDER & L. 1, 4 (2015).

<sup>185</sup> See Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J.F. 136, 145-53 (2015) (describing this practice in cause litigation).



their version of the facts.<sup>186</sup> These efforts are directed both at the decision maker and the broader context for the decision.<sup>187</sup>

### C. *Provision of Material Resources and Services*

Access to material resources and services is essential for child and family well-being. These include multiple needs, such as food, housing, health care, and childcare, as well as services for disabled family members and those who struggle with, for example, substance abuse disorder. As with the other domains of family law, a variety of political, social, and economic institutions—state and nonstate—play a role in the provision of resources and services.

#### 1. Institutions that Provide Resources and Services

Legislatures create the system of public provisioning, and the administrative state implements it. Through the exercise of delegated power, federal agencies oversee programs such as the Supplemental Nutrition Assistance Program, subsidized housing, Medicaid and Medicare, and Head Start.<sup>188</sup> The federal administrative state typically sets the policies, and, depending on the state, either state or local agencies administer the actual benefits, with considerable discretion for state and local officials.<sup>189</sup> To give one example of the power of the administrative process, consider the Medicaid program. Shortly after coming into office, the Trump Administration encouraged states to apply for waivers to Medicaid's statutory provisions.<sup>190</sup> Subsequently, numerous states applied for, and were granted, waivers allowing the states to require Medicaid recipients to work.<sup>191</sup>

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<sup>186</sup> For example, in *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013), the adoptive parents, who were seeking permanent custody of a Cherokee child they had fostered, actively sought media coverage vilifying the biological father's attempts to obtain custody pursuant to the Indian Child Welfare Act. See, e.g., George Howell & Greg Botelho, *Indian Family Protection Law Central to Emotional Custody Battle*, CNN (Jan. 8, 2012), <https://edition.cnn.com/2012/01/08/us/south-carolina-indian-adoption/> [<https://perma.cc/2G53-DG9Y>]; Megyn Kelly, *Young Girl Taken by Biological Father 2 Years After Adoption*, FOX NEWS (Jan. 11, 2012), <https://www.video.foxnews.com/v/1384028543001#sp=show-clips> [<https://perma.cc/8RPA-SE87>].

<sup>187</sup> See, e.g., Goldberg, *supra* note 184, at 4.

<sup>188</sup> *Programs that Use the Poverty Guidelines as a Part of Eligibility Determination*, HHS.GOV, <https://www.hhs.gov/answers/hhs-administrative/what-programs-use-the-poverty-guidelines/index.html> [<https://perma.cc/YS8T-WSWU>] (last updated Nov. 5, 2019).

<sup>189</sup> See, e.g., Letter from Thomas E. Price, Sec'y, U.S. Dep't of Health & Hum. Servs., & Seema Verma, Adm'r, Ctrs. for Medicare & Medicaid Servs., to Governor (Mar. 14, 2017), <https://www.hhs.gov/sites/default/files/sec-price-admin-verma-ltr.pdf> [<https://perma.cc/643Z-FFF4>] (affirming partnership in improving Medicaid).

<sup>190</sup> See *id.*

<sup>191</sup> See Jen Fifield, *Work Requirements for Medicaid Are Now OK in Four States*, PEW (May 9, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018>

Through the system of public provisioning, the government offers some goods and services directly to families, such as public education and food stamps,<sup>192</sup> but much public provisioning is accomplished through privatization.<sup>193</sup> Most housing subsidies, for example, are vouchers, which enable recipients to obtain housing from private landlords; and most Medicaid recipients go to a doctor who accepts Medicaid as a form of insurance rather than a Medicaid clinic.<sup>194</sup> Further, the government contracts directly with nonprofits to provide services, such as drug treatment<sup>195</sup> and early childhood education.<sup>196</sup> And many states have partially or wholly privatized the child

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/05/09/work-requirements-for-medicaid-are-now-ok-in-four-states [https://perma.cc/Y9YU-5TP8] (describing approvals for Arkansas, Indiana, Kentucky, and New Hampshire, as well as numerous applications in pipeline for approval). For a history of Kentucky's application and approval, as well as the subsequent litigation finding the granting of the waiver arbitrary and capricious, see *Stewart v. Azar*, 313 F. Supp. 3d 237, 243-48 (D.D.C. 2018).

<sup>192</sup> See JANET M. CURRIE, *THE INVISIBLE SAFETY NET: PROTECTING THE NATION'S POOR CHILDREN AND FAMILIES* 21-26, 61-90 (2006) (describing income support programs, including the Earned Income Tax Credit and nutrition assistance).

<sup>193</sup> Observing this privatization is not new. See, e.g., John J. DiIulio, Jr., *Government by Proxy: A Faithful Overview*, 116 HARV. L. REV. 1271, 1272-73 (2003) (describing privatization across multiple areas of government services); Matthew Diller, *Form and Substance in the Privatization of Poverty Programs*, 49 UCLA L. REV. 1739, 1758 (2002) (describing push toward privatizing poverty programs during the Bush Administration).

<sup>194</sup> See, e.g., U.S. DEP'T OF HOUS. & URB. DEV., *FISCAL YEAR 2020: BUDGET IN BRIEF* 10 (2020) (explaining how U.S. Department of Housing and Urban Development spent approximately \$22 billion on tenant-based rental assistance in 2019, which gives recipients vouchers to obtain housing from private landlords, and approximately \$7 billion on public housing in 2019). Medicaid is a joint federal and state program that, together with the Children's Health Insurance Program, provides health coverage to over 72.5 million Americans. *Eligibility*, MEDICAID.GOV, <https://www.medicaid.gov/medicaid/eligibility/index.html> [https://perma.cc/MP2J-6SCS] (last visited Feb. 4, 2022); *Cost Sharing*, MEDICAID.GOV, <https://www.medicaid.gov/medicaid/cost-sharing/index.html> [https://perma.cc/2YXW-STTW] (last visited Feb. 4, 2022) (describing payment structure under Medicaid).

<sup>195</sup> *Behavioral Health Services*, MEDICAID.GOV, <https://www.medicaid.gov/medicaid/benefits/behavioral-health-services/index.html> [https://perma.cc/SC8L-HFLN] (last visited Feb. 4, 2022).

<sup>196</sup> The Head Start program is the primary source of federal funding, and it awards grants directly to public agencies, private nonprofit and for-profit organizations, tribal governments, and school systems for operating Head Start programs in local communities. See U.S. Dep't of Health & Hum. Servs., *Head Start Program Facts: Fiscal Year 2018*, HEAD START ECLKC, <https://eclkc.ohs.acf.hhs.gov/about-us/article/head-start-program-facts-fiscal-year-2018> [https://perma.cc/RB8S-VLZA] (last updated Dec. 31, 2019).

welfare system,<sup>197</sup> usually through nonprofit agencies but sometimes through for-profit entities.<sup>198</sup>

Given this privatization, numerous nonstate institutions play a central role in public provisioning, including religious entities, nonprofit agencies, and for-profit entities. Religious entities, for example, contract directly with the government to provide housing and health care.<sup>199</sup> Religious entities are particularly active in the child welfare system, operating agencies that contract with the government to provide services to children and families.<sup>200</sup> States no longer allow these entities to prioritize children of their own faith,<sup>201</sup> but some states have enacted religious exemptions that allow faith-based social service

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<sup>197</sup> See Susan Vivian Mangold, *Challenging the Parent-Child-State Triangle in Public Family Law: The Importance of Private Providers in the Dependency System*, 47 BUFF. L. REV. 1397, 1410-12, 1449-55 (1999) (describing prevalence of private agencies in child welfare). In the child welfare system, states began to privatize in the 1990s, and by 2000, twenty-nine states had established privatization initiatives. Allison Dunnigan, *Does Privatization Matter? An Exploration of Foster Care Permanency Outcomes 23-24* (May 15, 2018) (Ph.D. dissertation, Washington University in St. Louis), [https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=2552&context=art\\_sci\\_etds](https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=2552&context=art_sci_etds) [<https://perma.cc/8WMV-W9R3>]. In Florida, the entire system is privatized. See Dunnigan, *supra*, at 34 tbl.1. In these privatization schemes, private agencies provide services to families, including casework, foster care, drug treatment, and much more. See *id.* at 34-35 tbl.1. Privatization contracts are typically service-based or performance-based, and states choose to prioritize or incentivize specific outcomes. See *id.* at 24.

<sup>198</sup> See Mimi Kirk, *Does Privatized Foster Care Put Kids at Risk?*, BLOOMBERG CITYLAB (June 15, 2018, 12:49 PM), <https://www.bloomberg.com/news/articles/2018-06-15/why-more-states-are-privatizing-foster-care> (explaining how for-profit corporations, such as MENTOR, contract to provide foster care services in growing number of states, and, even in states that forbid for-profit entities from providing foster care, nonprofit agency subcontracts with for-profit agency to provide services).

<sup>199</sup> Federal law prohibits any government entity from discriminating against a religious entity when contracting for services, thus faith-based organizations are eligible for service contracts. See Stanley W. Carlson-Thies, *Faith-Based Initiative 2.0: The Bush Faith-Based and Community Initiative*, 32 HARV. J.L. & PUB. POL'Y 931, 931-47 (2009); see, e.g., *Our Vision*, CATHOLIC CHARITIES USA, <https://www.catholiccharitiesusa.org/our-vision-and-ministry/> [<https://perma.cc/9QJX-X4TJ>] (last visited Feb. 4, 2022) (describing services, including affordable housing, integrated healthcare, and others).

<sup>200</sup> See Natalie Goodnow, *The Role of Faith-Based Agencies in Child Welfare*, HERITAGE FOUND. (May 22, 2018), <https://www.heritage.org/civil-society/report/the-role-faith-based-agencies-child-welfare> [<https://perma.cc/728B-K52R>] (“In 2016 alone, Catholic Charities agencies around the country served around 10,500 children through foster care and adoption services.”).

<sup>201</sup> See NINA BERNSTEIN, *THE LOST CHILDREN OF WILDER: THE EPIC STRUGGLE TO CHANGE FOSTER CARE* 44-45 (2001) (describing decades-long legal challenge to practices of New York City faith-based agencies, which were allowed to prioritize children based on their faith, and case’s settlement, which prohibited this practice).

agencies to decline to serve a population based on the agency's religious beliefs.<sup>202</sup>

Outside the state, communities support many families. This is especially true for moderate- and low-income families, who often rely on their extended networks for support, either in person or virtually through social media.<sup>203</sup> Communities of color have a particularly strong history of providing for each other, given the lack of government resources for these families.<sup>204</sup>

## 2. Institutions that Influence Public Provisioning

Numerous institutions influence government decisions about public provisioning, illustrated by examples of one economic and two social institutions. As Maxine Eichner has argued and Part I summarized, the market—and, more specifically, a commitment to the institution of the free market—is a powerful economic institution that also has a profound impact on public provisioning.<sup>205</sup> Many wealthy countries, especially in northern Europe, assign an active role for the state in public provisioning, ensuring that all families have their basic needs met.<sup>206</sup> These countries also assume there is a role for the state

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<sup>202</sup> See, e.g., Foster Care Nondiscrimination Act of 2003, CAL. WELF. & INST. CODE § 16001.9(a) (West 2021); Protecting Freedom of Conscience from Government Discrimination Act, MISS. CODE ANN. §§ 11-62-3 to -7 (2022). Until recently, Philadelphia did not have such an exemption and required all foster care agencies to serve all children and families. In June 2021, the Supreme Court held that Philadelphia's refusal to renew its foster care contract with Catholic Social Services, unless it agreed to certify same-sex couples as eligible foster parents, violated the Free Exercise Clause of the First Amendment. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021). For an argument that religious exemptions can significantly harm LGBTQ youth, see Jordan Blair Woods, *Religious Exemptions and LGBTQ Child Welfare*, 103 MINN. L. REV. 2343, 2402-08 (2019), which describes these laws and explains how they permit faith-based social service organizations to discriminate against LGBTQ youth.

Another example of the impact of religion on public provisioning is the Affordable Care Act's requirement that for-profit employers offer health insurance that includes access to all FDA-approved contraceptives; the Supreme Court struck down the contraception coverage requirement as applied to a privately held company, concluding that it created a substantial burden on the religious corporation by forcing it to violate its religious principles and that the federal government had other means to ensure women had access to contraceptives. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726-37 (2014).

<sup>203</sup> See, e.g., *Get Help with Medical Fundraising*, GOFUNDME, <https://www.gofundme.com/start/medical-fundraising> [<https://perma.cc/7Q2N-66G5>] (last visited Feb. 4, 2022) (reassuring users that such campaigns are widely used and accepted).

<sup>204</sup> See generally CAROL B. STACK, *ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY* (1974) (providing classic account of this kind of reliance); KATHRYN J. EDIN & H. LUKE SHAEFER, *\$2.00 A DAY: LIVING ON ALMOST NOTHING IN AMERICA* (2015) (describing modern systems of support, which are frayed for many families but can be stronger within communities of color).

<sup>205</sup> See EICHNER, *supra* note 5, at 19-42.

<sup>206</sup> See *id.* at 19-28 (discussing several countries policies' and emphasizing that Finland's social policies "come[] closest to the pro-family ideal").

to play in protecting working parents from the unbridled demands of the labor market.<sup>207</sup> By contrast, the United States offers only meager support for low-income families, relying instead on families to cover essential needs, such as childcare and parental leave; further, the government largely does not insulate families from the demands of the workplace.<sup>208</sup> As a result, families are far more vulnerable in the United States, and there is a high degree of inequality.<sup>209</sup>

The social institutions of racism and classism also play a powerful role in public provisioning, influencing the extent, structure, and terms of the goods and services provided. As Suzanne Mettler has demonstrated, all families receive state support, but this support is hidden and normalized for middle- and upper-income families, while exposed and pathologized for low-income families.<sup>210</sup> Public provisioning thus reflects the deep-seated belief that low-income people are to blame for their poverty,<sup>211</sup> and programs and rhetoric especially reinforce the notion that Black families are improperly dependent on the government.<sup>212</sup>

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For all the detail of this descriptive mapping, there is much more to be said about the institutional topography of family law, and one goal of this Article is to invite that conversation. With this initial descriptive account of family law's institutions, however, it is possible, as the next Part demonstrates, to engage in institutional analysis across an array of contemporary debates in the discourse.

### III. APPLYING INSTITUTIONAL ANALYSIS TO FAMILY LAW

With an understanding of the elements of institutional analysis described in Part I and the descriptive account of family law's institutions begun in Part II, five examples preview the novel insights that institutional analysis can bring to almost every significant debate in contemporary family law. Section III.A shows

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<sup>207</sup> *See id.*

<sup>208</sup> *See id.* at 19-42.

<sup>209</sup> *See id.*

<sup>210</sup> *See* SUZANNE METTLER, THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLICIES UNDERMINE AMERICAN DEMOCRACY 4-5, 37-43 (Benjamin I. Page, Susan Herbst, Lawrence R. Jacobs & James Druckman eds., 2011). Kaaryn Gustafson likens a welfare hearing to a degradation ceremony. *See* Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 U.C. IRVINE L. REV. 297, 307-12 (2013). Family law more generally reflects class differences. *See* Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (pt. 1), 16 STAN. L. REV. 257, 261-62 (1964) (discussing distinction between "family law of the rest of the community," which governs private disputes and generally defers to parents, and "family law of the poor," with the state readily intervening in family life).

<sup>211</sup> David A. Super, *The New Moralizers: Transforming the Conservative Legal Agenda*, 104 COLUM. L. REV. 2032, 2048-58 (2004).

<sup>212</sup> *See* EICHNER, *supra* note 5, at 177-79 (describing this history and its legacy in current debates).

that a clearer understanding of the institutional landscape brings to light underappreciated forces in family law. Section III.B demonstrates that no amount of doctrinal refinement is complete without a clear-eyed comparison of the institutions that could implement the doctrine. Section III.C illustrates that a study of institutional design illuminates new insights into perennial questions about how the family law system operates and what can be reformed. Section III.D offers an example of institutional resistance and institutional support, providing a template for converting scholarship into pragmatic change. And Section III.E weaves these strands together, showing how these elements of institutional analysis can help us rethink our understanding of a development in family law. In sum, these examples provide a roadmap for family law scholars eager to embrace institutionalism.

A. *Institutional Landscape: Family Law Outside the State*

To appreciate the significance of a clear descriptive account of family law's institutions, consider the long-standing debate about family autonomy. The traditional view, reflected in court decisions, is that families are largely insulated from the reach of the state, making their own decisions about important matters, including reproductive and child-rearing choices.<sup>213</sup> Scholars regularly challenge this account, arguing that the state is a deep and inescapable presence in the lives of all families,<sup>214</sup> especially low-income families of color.<sup>215</sup>

Institutional empirical mapping adds a missing but important factor to the conversation: the central role of nonstate institutions in family law. The debate among scholars focuses almost exclusively on state institutions, but as the map of the institutional landscape shows, family law often looks outside the state. Professional associations draft legal rules that legislatures adopt wholesale, communities provide the referent for standard-based rules, religious entities resolve family disputes, and nonprofit agencies use public funding to offer essential provisioning, to name but a few nonstate institutions identified in Part II.<sup>216</sup>

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<sup>213</sup> See *Pierce v. Soc'y of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 535 (1925) (“The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.”); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (finding unconstitutional a state law prohibiting teaching non-English languages to students, calling prohibition an “infringement of rights long freely enjoyed”).

<sup>214</sup> For two foundational accounts, see MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 307-08 (1989); and Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 836 (1985).

<sup>215</sup> See KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* 37-64 (2017); Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 YALE J.L. & FEMINISM 317, 318-19, 366-79 (2014).

<sup>216</sup> See *supra* text accompanying notes 136-42 (describing influence of ALI, ABA, ALEC,

Thus, when scholars consider family autonomy, it is important to ask: freedom *from whom*? This question is particularly relevant to scholars who examine the role of race and class in the state regulation of families. Khiara Bridges and Kaaryn Gustafson, for example, have shown that the state uses services, such as prenatal programs for low-income families and income-support programs, to scrutinize and stigmatize low-income families and especially women of color.<sup>217</sup> And Wendy Bach has argued that the state uses systems of public provisioning, including health care, education, and social services, to hyper-regulate the lives of low-income women of color, exposing them to a heightened risk of involvement in the criminal and child welfare systems.<sup>218</sup>

These scholars offer a powerful critique of state institutions of control, but the descriptive account of family law shows that the state also enlists *nonstate* institutions in its work. When the state privatizes public provisioning, the state deputizes nonstate institutions to regulate families.<sup>219</sup> When the state looks to communities to supply the content of legal standards—as with rules about corporal punishment and child abuse, which reference the conduct of other parents<sup>220</sup>—the state gives legal weight to community norms. And when the state upholds private religious arbitrations, it empowers those private processes.<sup>221</sup>

Identifying this enlistment of nonstate institutions raises concerns about the extension of state power. There are important questions to explore about how these nonstate institutions might cooperate, for example, in the hyperregulation of low-income women of color.

But the enlistment of nonstate institutions also opens the door to exploring how the deputation might *mute* state power. Scholars can consider, for example, how community-driven standards might be more protective of marginalized families. The standard for child neglect asks whether a parent has “exercise[d] a minimum degree of care in providing for the physical needs of a child.”<sup>222</sup> Scholars could usefully develop a framework to guide this analysis, drawing on sociological research to help courts understand what a minimum degree of care means for a family living in deep poverty.<sup>223</sup> This context-driven analysis would

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and Uniform Law Commission); *supra* text accompanying notes 133-35 (describing role of communities); *supra* text accompanying notes 176-77 (describing role of religious arbitrators); *supra* text accompanying notes 203-04 (describing role of religious entities and communities in social provisioning).

<sup>217</sup> See BRIDGES, *supra* note 215, at 37-64; Gustafson, *supra* note 210, at 307-12.

<sup>218</sup> See Bach, *supra* note 215, at 318-19, 366-79.

<sup>219</sup> See *infra* text accompanying notes 224-28.

<sup>220</sup> See *supra* text accompanying notes 133-35.

<sup>221</sup> See *supra* text accompanying notes 176-77.

<sup>222</sup> See RESTATEMENT OF CHILD. & THE L. § 2.24(b) (AM. L. INST., Tentative Draft No. 2, 2019).

<sup>223</sup> In judging whether a parent has met this standard, courts make some reference to family income, but the analysis is not as searching as it could be. See, e.g., *In re W.C.*, 288 S.W.3d 787, 789 (Mo. Ct. App. 2009) (discussing multiple factors leading to finding of physical

emphasize the constraints on families, ideally leading to a more supportive, rather than punitive, approach to cases of child neglect.

This consideration of state power and family autonomy through an empirical institutional lens similarly illuminates debates about privatization. A common critique of the practice is that it infuses private values into public functions, allowing nonstate entities to circumvent important public-law norms such as accountability, equality, and rationality.<sup>224</sup> Jody Freeman has a more optimistic account, arguing that privatization can lead to the “publicization” of state norms because the state can condition contracts on private entities complying with predetermined criteria.<sup>225</sup>

In the family law context, however, both privatization *and* publicization raise serious concerns about pluralism and individual dignity.<sup>226</sup> Family law addresses deeply personal issues, including reproductive choices, sexual expression, and parenting decisions. The provision of goods and services necessarily involves these issues, whether in nurse-visiting programs for new parents, marriage counseling, fatherhood initiatives, or clinics that provide family planning services. As these programs operate with government funds, the contracting entities—nonprofit and sometimes for-profit—make myriad decisions, large and small, that influence families and individuals.<sup>227</sup> This use of public funds to spread private values is a troubling empowerment of private entities. But the reverse is also true. As scholars have shown, the state’s stance towards low-income families of color is decidedly punitive and stigma-inducing.<sup>228</sup> Thus, to

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neglect, including raw sewage in yard, animal feces in home, no bed linens, children dirty, no utilities, children with lice infestations and flea bites, and one child with untreated and oozing burn, and noting connection with poverty but not excusing parental conduct); *In re E.Z.C.*, 2013 MT 123, ¶¶ 28-29, 370 Mont. 116, 300 P.3d 1174 (finding physical neglect when mother used methamphetamine; children had severe tooth decay and were fed only chips, candy, and popsicles; and home was extremely unsanitary, including bed infested with rat feces; similarly not placing parenting in full context of mother’s means); *In re C.M.*, 103 A.3d 1192, 1197 (N.H. 2014) (describing original neglect finding against parents based on multiple factors, including repeated failures to supervise, dirty home, lack of food and medicine, and inadequate clothing, and noting that parental neglect was only partly driven by lack of means).

<sup>224</sup> Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1301-08 (2003).

<sup>225</sup> *Id.* at 1290, 1314-29, 1346-47 (arguing this publicization holds potential for delivery of services to vulnerable populations); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 547-49 (2000) (arguing that through privatization, government can exert some control over private parties, furthering public goals).

<sup>226</sup> See *supra* text accompanying notes 218 and 225.

<sup>227</sup> See *supra* text accompanying note 216.

<sup>228</sup> See *supra* text accompanying notes 215, 217-18.

Another aspect of institutionalist methodology—institutional design—reveals this approach to social provisioning for low-income families. As the Danish sociologist Gøsta Esping-Andersen has demonstrated, structuring public-provisioning to shame and pathologize low-income recipients of state aid is an intrinsic part of our liberal welfare state. See GØSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* 55-76 (1990).



the extent the state is using nonstate institutions to further this work, publicization is troubling as well.

The point here is not to resolve these dilemmas but rather to argue that descriptive accounts of family law's institutions enrich and add important nuance to the debate about family autonomy, demonstrating the many ways the state extends its power as well as pointing towards opportunities for muting that power.

B. *Institutional Choice: Functional Parenthood*

Institutional choice is fundamentally about *who* decides *what*, and this question is relevant to virtually every doctrinal issue in family law. The doctrine of functional parents provides an apt example. As families become more fluid, many adults act like a parent to a child but do not have a biological, adoptive, or marital tie to the child and thus are not automatically considered a legal parent.<sup>229</sup> As courts and legislatures across the country are deciding whether and how to grant legal recognition to these functional parents,<sup>230</sup> family law scholars are making significant contributions to this debate. They assess the constitutional rights of functional and legal parents,<sup>231</sup> evaluate legislative proposals that would enable legal recognition,<sup>232</sup> and compare doctrinal approaches across legal systems.<sup>233</sup>

Bringing an analysis of institutional choice to this debate adds a critical—and missing—element: a consideration of the different institutions that might decide claims by functional parents. Thus far, the debate has assumed that parties

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<sup>229</sup> See NeJaime, *supra* note 167, at 2264.

<sup>230</sup> See *id.* at 2331-58, 2370 app. C (summarizing laws, decisions, and debate about functional parenthood).

<sup>231</sup> See David D. Meyer, *What Constitutional Law Can Learn from the ALI Principles of Family Dissolution*, 2001 BYU L. REV. 1075, 1089-90 (analyzing ALI's standard for de facto parenthood through constitutional lens and arguing in favor of more nuanced understanding of gradations of parental categories); Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261, 319-43 (2020) (arguing for recognition of constitutional rights for functional parents); Gregg Strauss, *What Role Remains for De Facto Parenthood?*, 46 FLA. ST. U. L. REV. 909, 920-30 (2019) (arguing that recognition of functional parents diminishes constitutional rights of existing legal parents).

<sup>232</sup> See Mary Coombs, *Insiders and Outsiders: What the American Law Institute Has Done for Gay and Lesbian Families*, 8 DUKE J. GENDER L. & POL'Y 87, 95-100 (2001) (describing with approval ALI's standard and its protection for LGBTQ families); Robin Fretwell Wilson, *Trusting Mothers: A Critique of the American Law Institute's Treatment of De Facto Parents*, 38 HOFSTRA L. REV. 1103, 1110 (2010) (critiquing de facto parenthood standard adopted by ALI because it does not account for risks posed by former live-in partners who have abused child); Gregory A. Loken, *The New "Extended Family"—"De Facto" Parenthood and Standing Under Chapter 2*, 2001 BYU L. REV. 1045, 1055-63 (critiquing ALI standard because it does not give enough primacy to legal parents).

<sup>233</sup> See SOCIAL PARENTHOOD IN COMPARATIVE PERSPECTIVE (Clare Huntington, Courtney Joslin & Christiane von Bary eds.) (forthcoming) (on file with author).

seeking legal recognition will litigate claims in court.<sup>234</sup> But many would-be parents, especially low-income parents, cannot afford lawyers or do not see the court system as an effective tool for resolving their problems.<sup>235</sup> Indeed, in a related context—second-parent adoptions, which is one legal path for functional parents to protect their rights—the cost of the legal proceedings is a significant barrier for low-income families.<sup>236</sup> The problem is compounded because of the concentration of nonmarital children in low-income families: the families most in need of legal protection are the least able and likely to use the court system.<sup>237</sup>

Considering institutional choice prompts scholars to think beyond the court system and identify a broad range of decision-making institutions. Rather than assuming courts will adequately meet the needs of functional parents, comparative institutionalism invites analysis of the range of possible institutions that might serve this role, enabling scholars to assess the advantages and disadvantages of each.<sup>238</sup> Informal processes, for example, would not create enforceable legal rights, but they would help functional parents gain access to their children as a practical matter.<sup>239</sup>

Further, an analysis of institutional choice surfaces the reality that any substantive rule governing legal recognition, no matter how well articulated, will be filtered differently by different institutions. Courts, formal dispute-resolution mechanisms such as court-based mediation, informal dispute-resolution processes such as community- and faith-based processes, and state and local

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<sup>234</sup> See, e.g., Fretwell Wilson, *supra* note 232, at 1110-11 (focusing exclusively on judicial treatment of claims by de facto parents); see also NeJaime, *supra* note 231, at 261 (focusing specifically on revisiting judicial precedents regarding claims of de facto parents); Strauss, *supra* note 231, at 912 (arguing “de facto parenthood is either redundant or unconstitutional” based on a survey of relevant case law).

<sup>235</sup> See Huntington, *Postmarital Family Law*, *supra* note 3, at 209-12. Access to justice is a significant problem in family law cases. See, e.g., *id.* at 210; ELKINS FAM. L. TASK FORCE, JUD. COUNCIL OF CAL., FINAL REPORT AND RECOMMENDATIONS APRIL 2010, at 10 (2010) (stating over “75 percent of family law cases, in many communities, have at least one self-represented party”); see also CYNTHIA COOK, INST. FOR CT. MGMT., JACKSON CNTY. CIR. CT., SELF-REPRESENTED LITIGANTS IN FAMILY LAW CASES IN JACKSON COUNTY, MISSOURI 15-16 (2007) (citing statistics from other states and localities reflecting high numbers of self-represented litigants).

<sup>236</sup> See Press Release, New York State, Governor Cuomo Unveils 16th Proposal of 2020 State of the State: Legalizing Gestational Surrogacy (Dec. 30, 2019), <http://web.archive.org/web/20210713041452/https://www.governor.ny.gov/news/governor-cuomo-unveils-16th-proposal-2020-state-state-legalizing-gestational-surrogacy> (proposing legislation to overcome “burdensome expenses, including lawyer’s fees, court fees and fees for the mandatory home visit from a social worker that can cost up to \$5,000”).

<sup>237</sup> See Huntington, *Postmarital Family Law*, *supra* note 3, at 209-12.

<sup>238</sup> See *supra* text accompanying notes 85-88 (describing Neil Komesar’s methodology and argument that “single institutional analysis” is problematic).

<sup>239</sup> For example, Australia created community-based, extralegal Family Resource Centres, which help parents resolve issues informally. See Huntington, *Postmarital Family Law*, *supra* note 3, at 231-33.

agencies will each apply the same rules at times in significantly different ways. Comparative institutional analysis would highlight these differences, showing the advantages and disadvantages of each institution for different populations.

In short, once surfaced, it is hard to imagine discussing the doctrine of functional parents without this kind of institutional analysis, even though the debate has proceeded thus far without it.

### C. *Institutional Design: Child Support*

Scholars have identified serious concerns with the current approach to child support, showing that the rules penalize low-income fathers, who often cannot afford even modest child support payments,<sup>240</sup> that the system contributes to mass incarceration,<sup>241</sup> and that many fathers are obligated to pay child support without a corresponding court order allowing them to see their child.<sup>242</sup> These critiques are important contributions to an understanding of family law, but the assessments and prescriptions generally ignore the inner workings of the institutions that impose and enforce child support orders.<sup>243</sup>

Adding analysis of institutional design generates new insights into these problems. Take just one of these issues: the absence of custody orders. In many states, the legislature empowered administrative agencies to issue child support orders, but the legislature did not also authorize these agencies to decide child custody, leaving this issue solely in the province of the judiciary.<sup>244</sup> This institutional bifurcation of child support and child custody means that noncustodial parents, usually fathers, often pay child support without a right to see their child.<sup>245</sup> To secure custody or visitation, the noncustodial parent must initiate a parallel proceeding in family court, which many do not.<sup>246</sup> And even in those states that consolidate child support and child custody in court proceedings, only one state—Texas—regularly considers child custody at the same time it imposes a child support order.<sup>247</sup>

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<sup>240</sup> See Kohn, *supra* note 2, at 531-33.

<sup>241</sup> See Ann Cammett, *Deadbeats, Deadbrokes, and Prisoners*, 18 GEO. J. ON POVERTY L. & POL'Y 127, 141-53 (2011).

<sup>242</sup> See Huntington, *Postmarital Family Law*, *supra* note 3, at 182-84.

<sup>243</sup> *But see* Tonya L. Brito, *Producing Justice in Poor People's Courts: Four Models of State Legal Actors*, 24 LEWIS & CLARK L. REV. 145, 172-89 (2020) (describing results of qualitative empirical study of child support cases in family court).

<sup>244</sup> See *supra* note 170 (listing examples of states with statutes allowing administrative agencies to establish and enforce awards of child support).

<sup>245</sup> See Huntington, *Postmarital Family Law*, *supra* note 3, at 182-84.

<sup>246</sup> *Child Support and Parenting Time Orders*, NAT'L CONF. OF STATE LEGISLATURES (Sept. 5, 2019), <https://www.ncsl.org/research/human-services/child-support-and-parenting-time-orders.aspx> [<https://perma.cc/E8XP-NNXQ>] (describing institutional bifurcation and noting that “[t]he separate process for setting the two orders can pose an obstacle to parents, particularly unmarried parents”).

<sup>247</sup> See *id.* (“Texas has been setting parenting time responsibilities (or ‘possession’ as it is used in statute) at the same time as child support orders for nearly 30 years.”).

Surfacing and addressing the institutional bifurcation of child support and child custody—that is, the institutional design of the child support system—highlights the shortcomings of the system and points towards useful reforms. Helping fathers gain access to their children has been shown to increase child support payments, encourage paternal engagement, and improve the relationship between the parents.<sup>248</sup> Thus, consolidating child support and child custody would encourage a virtuous cycle: when fathers are involved in their children’s lives, they are more likely to pay child support, and when they pay child support, they are more likely to stay involved.<sup>249</sup>

As this example demonstrates, examining institutional design is often an essential piece of so many family law puzzles, and better understanding design deepens an understanding of the problem and suggests potential solutions.

#### D. *Institutional Friction: Juvenile Detention and Universal Pre-K*

The fourth question in this Article’s framing of institutional analysis examines institutional friction—identifying the institutions that will impede or advance law reform. This is an essential part of any law reform proposal because developing a policy proposal is only part of the work. A description of two reform efforts illustrates the importance of anticipating which institutions are likely to resist the reform and which institutions will support it.

Beginning with resistance, despite widespread support for closing juvenile detention facilities in New York State, doing so proved surprisingly difficult.<sup>250</sup> All the pieces were in place for a shift in policy. Advocates convinced policymakers to embrace community-based treatment,<sup>251</sup> drawing on research establishing that detention does not improve public safety and harms adolescents.<sup>252</sup> A gubernatorial task force in New York recommended closing many detention facilities in the state.<sup>253</sup> Mayor Michael Bloomberg refused to

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<sup>248</sup> See James McHale, Maureen R. Waller & Jessica Pearson, *Coparenting Interventions for Fragile Families: What Do We Know and Where Do We Need to Go Next?*, 51 FAM. PROCESS 284, 289-90 (2012) (reviewing states’ efforts under Access and Visitation Program); U.S. DEP’T OF HEALTH & HUM. SERVS., CHILD ACCESS AND VISITATION PROGRAMS: PARTICIPANT OUTCOMES PROGRAM ANALYSIS 49-68 (2006) (assessing outcomes of state access and visitation programs).

<sup>249</sup> See U.S. DEP’T OF HEALTH & HUM. SERVS., OFF. OF CHILD SUPPORT ENF’T, CHILD SUPPORT FACT SHEET SER. NO. 3, ENGAGEMENT OF FATHERS FROM BIRTH 1 [hereinafter CHILD SUPPORT FACT SHEET], [https://www.acf.hhs.gov/sites/default/files/documents/ocse/engagement\\_of\\_fathers.pdf](https://www.acf.hhs.gov/sites/default/files/documents/ocse/engagement_of_fathers.pdf) [<https://perma.cc/V7FH-3EMK>] (last visited Feb. 4, 2022).

<sup>250</sup> See *infra* text accompanying notes 251-55.

<sup>251</sup> CHILD SUPPORT FACT SHEET, *supra* note 249, at 2.

<sup>252</sup> Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1387-90, 1399 (2020) (describing this consensus and underlying research; further noting expense of detention was a factor).

<sup>253</sup> See generally GOVERNOR DAVID PATERSON’S TASK FORCE ON TRANSFORMING JUV. JUST., CHARTING A NEW COURSE: A BLUEPRINT FOR TRANSFORMING JUVENILE JUSTICE IN NEW

send adolescents to the facilities, and a state commissioner decided the facilities should be shut.<sup>254</sup> The closures dragged on for years, however, because of strong resistance from the labor union representing the workers in the upstate detention facilities.<sup>255</sup> If scholars had focused more on institutional friction, they might have anticipated this institutional point of resistance and developed an affirmative strategy to address it.

Institutional analysis also helps explain the success of some law reform efforts, as illustrated by the universal prekindergarten movement.<sup>256</sup> Every level of government, including states across the political spectrum, have embraced prekindergarten as an effective means for combating poverty and preparing children for school.<sup>257</sup> An institutional account demonstrates that a broad range of institutions played a role in promoting this beneficial reform. Academic research established the profound and long-lasting benefits of preschool, which are measurable into adulthood; it also showed these investments are cost-effective.<sup>258</sup> Foundations provided funding for pilot programs, advocacy, research, and communications, and gathered support from other institutions, including law enforcement and teachers' unions.<sup>259</sup> Think tanks prepared reports documenting that full-day preschool led to more mothers participating in the workforce.<sup>260</sup> And economic institutions, including business leaders and others

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YORK STATE (2009) (recommending reduced use of institutional placement, downsizing and closing underutilized facilities, and reinvesting in communities).

<sup>254</sup> *Bloomberg Pushes for Control of Juvenile Justice System*, GOTHAM GAZETTE <https://www.gothamgazette.com/index.php/archives/752-bloomberg-pushes-for-control-of-juvenile-justice-system> [<https://perma.cc/6K3F-MK39>] (last visited Feb. 4, 2022); David W. Chen, *New York City Sues State over the Cost of Housing Juveniles in Prisons*, N.Y. TIMES, Dec. 10, 2010, at A30; *New ACS Commissioner Gladys Carrión*, N.Y. PUB. RADIO (Feb. 12, 2014), <https://www.wnyc.org/story/new-acs-commissioner-gladys-carrion> [<https://perma.cc/8ZYG-ZGBR>].

<sup>255</sup> See Cindy Rodriguez, *Report Finds Problems Plague State-Run Juvenile Detention Centers*, N.Y. PUB. RADIO (Dec. 14, 2009), <https://www.wnyc.org/story/72715-report-finds-problems-plague-state-run-juvenile-detention-centers/> [<https://perma.cc/H8WP-YAYZ>].

<sup>256</sup> I have detailed this story elsewhere. See generally Clare Huntington, *Early Childhood Development and the Replication of Poverty*, in HOLES IN THE SAFETY NET: FEDERALISM AND POVERTY 130 (Ezra Rosser ed., 2019) (describing differences in early child development care across states).

<sup>257</sup> For a summary of these investments, including the political diversity, see *id.* at 146-50.

<sup>258</sup> See DAVID L. KIRP, *THE SANDBOX INVESTMENT: THE PRESCHOOL MOVEMENT AND KIDS-FIRST POLITICS* 50-135 (2007) (summarizing this research from multiple fields, including education, economics, and neuroscience).

<sup>259</sup> *Id.* at 153-78 (describing work of Pew Charitable Trusts and Packard Foundation: Pew began with several states—both conservative and liberal—and identified receptive policymakers and advocacy groups willing to collaborate and also actively courted support from business community, while Packard concentrated efforts on prekindergarten in California and used many of the same strategies).

<sup>260</sup> Rasheed Malik, *The Effects of Universal Preschool in Washington, D.C.: Children's*

in the private sector, supported the investments, convinced of the workforce benefits.<sup>261</sup>

As these two examples demonstrate, studying institutional friction helps explain why some reforms flounder and seemingly uphill battles can succeed. Institutionalism prompts a comprehensive analysis by scholars, advocates, and policymakers of the relevant institutional stakeholders, veto points, political economy, and other aspects of the mechanisms of change. Understanding this institutional friction is essential to any proposal for law reform and provides a potential blueprint for other reform efforts—demonstrating the value of foregrounding institutional friction in any analysis.<sup>262</sup>

#### E. *A Synthesis: Covenant Marriage*

To round out this Part's illustration of the value of the institutional turn in family law, it is important to note that scholars need not engage the core questions of institutional analysis discretely. Instead, scholars can synthesize the elements of institutional analysis, as illustrated by a brief examination of covenant marriage. Louisiana was the first state to pioneer covenant marriage—which allows couples to opt into a more binding form of marriage<sup>263</sup>—and Arkansas<sup>264</sup> and Arizona<sup>265</sup> soon followed. To enter a covenant marriage, a couple must engage in premarital counseling and agree to limited grounds for divorce, the least onerous of which is a two-year separation.<sup>266</sup> The couple also affirms their belief that marriage is a lifelong commitment.<sup>267</sup>

Most family law scholars dismiss covenant marriage as a failed attempt to revive traditionalism and undo no-fault divorce.<sup>268</sup> Very few couples have entered into covenant marriages, and no additional states have adopted the law.<sup>269</sup> The issue thus has not been a source of much scholarly engagement. But

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*Learning and Mothers' Earnings*, CTR. FOR AM. PROGRESS (Sept. 26, 2018), <https://www.americanprogress.org/issues/early-childhood/reports/2018/09/26/458208/effects-universal-preschool-washington-d-c/> [https://perma.cc/98D2-DSCK].

<sup>261</sup> KIRP, *supra* note 258, at 76.

<sup>262</sup> See *supra* Section III.D.

<sup>263</sup> LA. STAT. ANN. §§ 9:272 to -275.1 (2021).

<sup>264</sup> ARK. CODE ANN. §§ 9-11-801 to -811 (2021).

<sup>265</sup> ARIZ. REV. STAT. ANN. §§ 25-901 to -906 (2021).

<sup>266</sup> See, e.g., LA. STAT. ANN. §§ 9:272 to -273.

<sup>267</sup> See, e.g., *id.* § 9:272.

<sup>268</sup> See JUDITH AREEN, MARC SPINDELMAN, PHILOMILA TSOUKALA & SOLANGEL MALDONADO, *FAMILY LAW: CASES AND MATERIALS* 850 (Saul Levmore et al. eds., 7th ed. 2019); D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW: CASES AND MATERIALS* 524 (6th ed. 2016).

<sup>269</sup> See Peter Feuerherd, *Why Covenant Marriage Failed to Take Off*, JSTOR DAILY (Feb. 11, 2019), <https://daily.jstor.org/why-covenant-marriage-failed-to-take-off/> [https://perma.cc/9BTA-CLLM] (“In practice, however, couples in [Louisiana, Arkansas, and Arizona] largely ignored the option. Covenant marriage never comprised more than five percent of all

institutional analysis of covenant marriage shows that it can be a rich site for generating lessons about marriage and family law more generally.

Descriptively mapping the institutions of covenant marriage shows that reformers purposefully engaged multiple institutions. Supporters of covenant marriage turned to legislatures to enact the law and courts to enforce the provisions, but they also made an explicit effort to bring other institutions, especially the church, into the public square.<sup>270</sup> By requiring premarital counseling and specifying that it could be done by religious entities,<sup>271</sup> reformers codified the belief that religion has a central role to play in marriage.

This empirical institutional foundation lays the groundwork for analyzing institutional choice. Reformers chose one route—secular marriage laws—to revive a traditional understanding of marriage, but a consideration of institutional choice shows that other options might have been more effective, depending on the goal. If the intention was to further a religious belief in lifelong marriage, then religious entities could have contemplated alternative, religion- and community-based means for helping couples stay together. If the goal was to create a stickier marriage contract with legal roadblocks to divorce, then reformers needed to think through the problem that one person in the marriage could easily circumvent the divorce restrictions by establishing residency in another state and using that state’s more liberal divorce laws.<sup>272</sup> And if the objective was symbolic action, then arguably, the chosen means were successful—covenant marriage is on the books, highlighting the easy nature of no-fault divorce. Depending on the aim, then, comparative institutionalism might show that there was a mismatch between the religious goal of encouraging lifelong commitment and the chosen means of engaging the legal system outside the religious setting. Or it might show that the effort was surprisingly successful.

An analysis of institutional design demonstrates that covenant marriage was, at its core, an effort to shore up the institution of marriage. Advocates of

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marriages.”); Sheri Stritof, *Pros and Cons of a Covenant Marriage: A New Trend in Marriage Reform or a Trap for Women?*, SPRUCE (Jan. 5, 2020), <http://web.archive.org/web/20210318045200/https://www.thespruce.com/covenant-marriage-pros-and-cons-2300528> (reporting that only 1% of marriages in Louisiana between 2000 and 2014 were covenant marriages and “only one-fourth of one percent of couples getting married in Arizona select the covenant marriage option”).

<sup>270</sup> Katherine Shaw Spaht, *Louisiana’s Covenant Marriage: Social Analysis and Legal Implications*, 59 LA. L. REV. 63, 75 (1998) (“Another less obvious objective of the legislation, which is reflected in who may perform the mandatory pre-marital counseling, is to revitalize and reinvigorate the ‘community’ known as the church. Reinvigoration results from inviting religion back ‘into the public square . . . .’”).

<sup>271</sup> ARIZ. REV. STAT. ANN. § 25-901 (2021); ARK. CODE. ANN. § 9-11-804 (2021); LA. STAT. ANN. §§ 9:272 to -273.

<sup>272</sup> As any student of family law knows, if one person in the couple establishes residency in a state, the state court has jurisdiction and will apply that state’s divorce laws. *See, e.g.*, ALA. CODE § 30-2-5 (2021); N.J. STAT. ANN. § 2A:34-10 (West 2021). Thus, a person with a covenant marriage in Louisiana can move to another state and circumvent the restrictions on divorce. LA. CODE CIV. PROC. ANN. art. 10(A)(7) (2021).

covenant marriage were resisting social changes to the institution and trying to return to a traditional conception of it.<sup>273</sup> Institutional design highlights this effort, but it also helps scholars understand the institution of marriage as it is and might be. Protecting spouses from the risks of divorce is not inherently traditionalist. A long-standing feminist criticism of no-fault divorce is that it disadvantages the partner who invests in the family rather than a career.<sup>274</sup> Covenant marriage was intended to reinforce traditional gender norms, but it *could* have been done with sensitivity to pluralism, power dynamics within couples, and sticky norms about caregiving and breadwinning. This, of course, is exceptionally difficult, but a focus on institutional design encourages the conversation.

Finally, analysis of institutional friction invites a debate about the challenges of changing a mixed social and legal institution through legislation. The sociological literature on institutions describes the difficulty of reforming entrenched institutions.<sup>275</sup> On the one hand, the limited uptake of covenant marriage<sup>276</sup> suggests a mismatch between an anticipated demand for covenant marriage and the actual demand. Alternatively, perhaps the effort was always intended to be symbolic and was not a serious attempt to change the contours of the institution of marriage. Either way, studying institutional friction is a fertile path of inquiry, revealing a new understanding of the intentions of the reformers and the potential for future reform.

As this example demonstrates, institutional analysis brings together the core questions in the methodology, training a new lens on familiar conversations and generating new insights, research agendas, and possibilities for reform.

#### CONCLUSION

Institutionalism is deeply and fruitfully entrenched as a methodology across the legal academy, but far too many family law scholars—including myself, until this Article—have failed to embrace its value, to the detriment of family law. Identifying the breadth of institutions that shape family law opens new avenues for debate and research. Analyzing institutional choice surfaces important questions about which institutions are better positioned to decide substantive rules, resolve disputes, and distribute resources. Exploring questions of institutional design deepens understanding of relevant institutions and opens the door for framing institutional improvements. And examining institutional

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<sup>273</sup> As historians documented in the marriage equality debate, the institution of marriage is evolving, not fixed, with many changes over the last few centuries. *Obergefell v. Hodges*, 576 U.S. 644, 659-60 (2015) (citing NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 9-17 (2000)).

<sup>274</sup> See, e.g., FINEMAN, *supra* note 8, at 25-28, 161-64.

<sup>275</sup> See ALBISTON, *supra* note 19, at 27-28; Albiston, *Institutional Perspectives*, *supra* note 104, at 408-12.

<sup>276</sup> See *supra* note 269 and accompanying text (describing limited use of covenant marriages).



frictions reveals the many institutional levers that can be pulled to achieve or resist change, illuminating pathways for law reform.

Institutionalism need not be an integral part of every scholarly project in family law, of course, and the degree of institutional engagement will vary.<sup>277</sup> Sometimes, an agenda-setting piece will simply mention institutional issues.<sup>278</sup> Often, however, it will be important for scholars to go deeper by identifying relevant institutions and foregrounding institutional analysis. At the very least, institutional concerns should be considered in most family law scholarly projects. In this way, institutionalism is analogous to empirical legal studies, which is so thoroughly integrated into legal scholarship that it is an integral part of the dialogue. Even if an article is not empirical, the scholar knows to at least allude to this tool, asking if there is empirical evidence on a given question.<sup>279</sup> Institutionalism should be the same, with family law scholars asking whether institutionalism would add a missing layer of the analysis. Whatever the degree of engagement, by foregrounding institutions and engaging in intentional, rigorous, holistic institutional analysis, family law scholars will add important new perspectives to legal debates and law reform.

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<sup>277</sup> See, e.g., Fineman, *supra* note 98, at 1-15, 12 n.31 (arguing for reassessment of institutions that manage these inherent vulnerabilities, including analysis of how “asset-conferring institutions,” such as those governing health, education, and employment, ensure that all individuals are receiving societal goods necessary for well-being; further contending policy analysis must look at institutions because they “are simultaneously constituted by and producers of vulnerability”).

<sup>278</sup> Relatedly, scholars can calibrate both the level of specificity and the breadth of the relevant institutions for different projects and different aspects of institutional analysis.

<sup>279</sup> See Huntington, *Empirical Turn*, *supra* note 8, at 235-66 (describing this but also noting downsides of empiricism in family law).