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# Private Tragedies? Family Law as Social Insurance

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Anne L. Alstott\*

Family law is full of private tragedy. Case after case pits one family member against another in a zero-sum struggle for resources. Spouses battle over limited assets; parents clash over child support; and children fight each other for resources when parental income is stretched across multiple families. Bad choices and bad luck, it seems, precipitate calamity; and there is little that the law can do when families self-destruct amidst unemployment, poverty, mental illness, disability, substance abuse, domestic violence, child neglect, and other problems.<sup>1</sup>

By legal tradition, family law is private law: it governs relationships between individuals, rather than between individuals and the state.<sup>2</sup> On this view, family law, like other forms of private law, exists primarily to foster private order. On this view, family law should implement individuals' intentions—and should not redistribute risk and resources according to some public ideal. As private law, then, family law's core mission is to resolve disputes among family members when private order breaks down. Accordingly, functional families should have little to do with the law; they manage their own affairs without legal supervision. Dysfunctional families, by contrast, involve the law in inevitable tragedy. Once affective bonds have frayed and private order has failed, the courts must resolve disputes as best they can, and all too often any decision will harm one party or the other.

This Essay argues that this view of family law rests on an exaggerated distinction between private and public. Family law is more than a mechanism for implementing private preferences and resolving disputes when private order breaks down. Instead, family law forms part of a larger system of public law—a social insurance system that allocates the risk of life events like disability, family breakup, mental illness, substance abuse, and parental poverty. Family law does not simply pick up the pieces when individuals make bad choices or suffer bad luck. Instead, the law creates distributive rules that help determine which choices are bad ones and whose bad luck

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<sup>1</sup> For numerous examples of these problems in case law, see, for example, JUDITH AREEN & MILTON C. REGAN, JR., *FAMILY LAW* (5th ed. 2006).

<sup>2</sup> See generally ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 1 (1995) (describing private law as “connect[ing] two particular parties through the phenomenon of liability”). Not all elements of law taught in a typical family law course are “private law” in this sense: the constitutional law of reproductive rights, for instance, is public law. But divorce, alimony, property settlement, and child support—core topics taught in a standard introductory course on family law—are typically thought to be private law, because they settle the legal rights of spouses against each other.

carries ruinous consequences. Taking this view, it is not just the dysfunctional who live in law's domain: successful families flourish amidst legal rules that protect some from life's risks while leaving others vulnerable.

Put another way, family law rules that establish financial relationships and liability between individuals constitute a form of social insurance: the rules of family law supplement those of familiar public programs, like Social Security and Temporary Assistance to Needy Families (TANF), that address life risks including poverty, unemployment, and disability. For instance, family law confers a legal right to care and to financial support based on formalized marriage, biological and adoptive parenthood, and certain kinds of recognized and rewarded behavior during marriage. Social insurance in the United States also adopts categorical protections; and while these vary across programs, distinctions may reflect formal marital status, paid-employment history, and income level. The categories and their consequences may differ in the two regimes, but both systems of law adopt normative classifications that recognize some relationships (and not others) and protect against some risks (and not others). Further, both systems of law can be understood as distributing risks *ex ante*, rather than simply addressing failure *ex post*.

One apparent difference between the obviously *public* realm of social insurance and the purportedly *private* sphere of family law lies in the redistributive power of the two types of law. Family law typically limits support obligations to a small class of related people: it imposes alimony obligations on spouses and support duties on parents or children. And family law does not have access to the state's taxing power, no matter how great a spouse's or child's need. By contrast, social insurance deliberately uses the power of the state to effect broad redistribution—taxing workers, income earners, and consumers for the legal benefit of third parties.

But this difference too is often overstated. Some family law rules use state power to impose lasting obligations on people who are affective or literal strangers, who believe themselves to have contracted around responsibility, or who are actively hostile to one another. Think about the child support obligations of an estranged parent or a divorced stepparent, filial responsibility laws that tax children with the support of their aged parents, or alimony imposed on long-divorced spouses. One scholar has proposed a child support assurance plan that would blend the two regimes, expanding family law's mandate to include a claim on public funds if needed.<sup>3</sup> At the same time, some social insurance programs do not redistribute among individuals. They may simply extract a fee for services or regulate the purchase of certain goods, or they may create an intrapersonal obligation of an individual to her (older) self or to her own family. Think about private accounts proposed to replace Social Security or mandated benefits like family leave that may reduce workers' own wages.

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<sup>3</sup> See IRWIN GARFINKEL, ASSURING CHILD SUPPORT 45–50 (1994); discussion *infra* notes 54–58 and accompanying text.

In this Essay, I begin to integrate family law and social insurance, with the goal of gaining a better understanding of both regimes and their relationship to each other. To make the discussion concrete, I consider two cases—one involving spousal support and disability and the other involving child support for multiple families—and I demonstrate that they illustrate two points of overlap in family law and social insurance. First, both cases illustrate the interdependence of financial entitlements in family law and in social welfare. Both legal regimes make assumptions about the other and about the existence of family financial support and care. And the two regimes operate together to determine who suffers financial disaster when families break up and when disability and poverty strike.

Second, both cases demonstrate that a range of changes in family law, social welfare law, or other elements of law could alter the distribution of life's risks—and thus the likelihood and consequences of apparently private tragedies. For example, scholars have debated whether child support should be imposed on parents alone or shared by the state.<sup>4</sup> A social insurance analysis challenges the binary distinction (parent/state) and opens up new possibilities ranging from small income taxes on extended family members to taxation of the child's own (adult) earnings.

To be sure, present family law and social insurance address different, if sometimes co-occurring, life risks. Family law governs disruptions in what I term "affective life"—the realm of life including formalized family bonds of marriage and parenthood, as well as less formal but still important emotional relationships including cohabitation and potentially even friendship.<sup>5</sup> By contrast, social insurance addresses disruptions in working life—disability, unemployment, retirement, and low wages. It might seem, then, that the two bodies of law are distinct enough to occupy separate analytic categories.

But one agenda of this Essay is to challenge the split embodied in current law between large scale, *ex ante*, public protections for working life and smaller scale, *ex post*, purportedly private protections for affective life. Put another way, I want to frame as problematic the fact that conventional social insurance takes work disruption—and only work disruption—as its subject. The risks of working life are, indeed, major risks in a capitalist society. But an engagement with family law helps remind us that a wider range of risks can threaten adults' well-being and children's development. Disruptions in affective life can also threaten economic security and individual development: divorce, parental exit, and parental dysfunction, for instance, can lead to calamity just as surely as unemployment and disability.

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<sup>4</sup> This is an old and still debated question. For a discussion of the debate and a contribution, see ANNE L. ALSTOTT, *NO EXIT* (2004).

<sup>5</sup> For other scholarship recommending attention to what I term "affective life," see, for example, Clare Huntington, *Repairing Family Law*, 57 *DUKE L.J.* 1245 (2008) (recommending a deeper integration of psychoanalytic models of emotional development into family law in order to recognize the importance of emotional relationships outside formal legal boundaries); Laura A. Rosenbury, *Friends With Benefits?*, 106 *MICH. L. REV.* 189 (2007) (suggesting that family law should recognize relationships of care beyond those in marriage and marriage-like relationships).

My point, then, is that once we understand social insurance as the use of law to address, in a deliberate way, the major risks of life, then the focus of present programs on the risks of paid employment begins to seem oddly narrow. A first step, which I take here, is to show how family law operates—despite its traditional private-law label—as social insurance for affective life. A second step, which I defer to a larger project, is to ask whether public programs ought to address, more explicitly, the consequences of risks traditionally covered by family law—risks of divorce, nonmarriage, parenthood, and childhood.

Would it be sensible, feasible, or desirable for the conventional social insurance system to expand its mission to respond to disruptions in affective life as well as to disruptions in working life? A larger project will delineate in more detail the elements of present law that insure affective life. The Conclusion describes the scope of the project in more detail and acknowledges the hard normative and empirical questions it raises.

This Essay, and the larger project of which it is part, owes much to feminist scholarship connecting social welfare and family law and challenging distinctions between public and private and between work and care.<sup>6</sup> For instance, many scholars (and I am one) have recommended reforming social welfare and social insurance programs with the aim of improving the financial security of children and their caregivers.<sup>7</sup> This Essay aims to add to existing work on social welfare, families, and gender by suggesting how to map more fully the legal structures that allocate a wider range of life risks, including not only care work but disability, unemployment, domestic violence, substance abuse, and poverty.

In a larger sense, this Essay also builds on family law scholarship challenging the private/public distinction and situating the family in its full legal context. Thanks to the efforts of many scholars, family law today encompasses the study of gender, domestic violence, reproductive rights, and the regulation of sexuality—issues that span legal fields from constitutional law to torts to criminal law and beyond.<sup>8</sup> Like these scholars, I aim to situate the seemingly private tragedies of family life in a larger legal context.

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<sup>6</sup> See, e.g., MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY* (1995) (arguing that the state and the family support inevitable dependency); LINDA C. MCCLAIN, *THE PLACE OF FAMILIES* (2006) (considering how the state should support family life); SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* (1989) (arguing that justice requires public attention to, and reform in, the purportedly private realm of family life); Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1 (2005) (addressing proposals for labor regulations to improve working conditions for parents).

<sup>7</sup> See ALSTOTT, *supra* note 4, at 171–204 (recommending new public programs to address the economic vulnerability of parents); FINEMAN, *supra* note 6, at 230–33 (recommending state support for mothers).

<sup>8</sup> See, e.g., JUDITH AREEN, *FAMILY LAW* (4th ed. 1999), at 136–80 (gender roles), 291–325, 1334–43 (domestic violence), 1029–56 (reproductive rights), 25–45 (sexual identity).

I. *IN RE MARRIAGE OF WILSON*: SPOUSAL SUPPORT AND DISABILITY

Spousal support (alimony) offers one divorced spouse a legal claim for continued financial support from the other. A California case, *In Re Marriage of Wilson*,<sup>9</sup> illustrates the interplay of spousal support with Social Security disability and shows how changing family law rules, social insurance entitlements, or other legal regimes might alter the seemingly zero-sum, private tragedy of the Wilson marriage.

A. *The Tragedy: Divorce and Disability*

Tom and Elma Wilson married in 1976, when he was thirty-six and she was thirty-eight.<sup>10</sup> Their marriage lasted a little less than six years. Four years into the marriage, in 1980, Elma fell and suffered severe brain damage and deficits in social judgment, common sense, and social intelligence. She could no longer work, and doctors predicted that the damage would be permanent. They divorced in 1982, and Tom paid Elma alimony of \$500 per month. Together with \$436 per month in Social Security disability benefits, Elma could just make ends meet.

But after paying spousal support for more than four years, Tom had had enough. He sued to stop paying alimony, and Elma contested. Their dispute, *Wilson v. Wilson*, exemplifies the kind of private tragedy family law routinely encounters. The trial court, and then the appellate court, faced a zero-sum game. Relieving Tom of his support obligation would leave the disabled Elma in need and with no capacity to support herself. But continuing Tom's support obligation would limit his capacity to make a fresh start in life. (Note that in *Wilson* and in this Essay, the technical term "spousal support" means legally mandated, post-separation or post-divorce payments; the term does not refer to the financial support offered to a spouse in an intact marriage.)

According to the trial court, *Wilson* posed a conflict between two lines of family law doctrine. On the one hand, the law treats marriage as a serious obligation with lasting consequences. Spouses are understood to be part of an economic community, so that a needy (former) spouse has a legitimate claim on a prosperous one, even after divorce. Of the eight factors to be weighed in spousal support cases under California law at the time, six of them implemented this principle of need: the factors gave weight to Elma's disability, her age, her employment prospects; and to Tom's greater earnings and assets, and his higher living standard.<sup>11</sup> On the other hand, the court

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<sup>9</sup> *In re Marriage of Wilson*, 247 Cal. Rptr. 522 (Cal. Ct. App. 1988).

<sup>10</sup> See *id.* at 524 (noting that in 1986, at the time of the support hearing, Tom was forty-six, and Elma was forty-eight).

<sup>11</sup> For a list of factors, see *id.*

noted, the law does permit marital dissolution,<sup>12</sup> and implicit in that decision must be a principle that at some point marital obligations cease so that each spouse may get on with his or her life.

The trial court asked, “[A]t what point in time does the obligation to assist Mrs. Wilson become one of society’s as distinguished from an obligation that is Mr. Wilson’s?” and found “that it is society’s at this point in time.”<sup>13</sup> The appellate court found that the trial court had not abused its discretion in balancing the equities and finding “under these circumstances the obligation to assist Elma should shift from Tom to society.”<sup>14</sup>

The appellate court mentioned, in passing, that Elma received \$436 per month in “Social Security” benefits. The reference, presumably, is to Social Security Disability Insurance (SSDI), which is payable to workers with a substantial work history. In 1986, when *Wilson* terminated Tom’s support obligation, the federal poverty threshold for one person was \$5,360.<sup>15</sup> With Tom’s support, Elma lived modestly but sustainably at about 200% of the official poverty line. Without Tom’s support, Elma’s \$436 per month (\$5,232 per year) would leave her below the official poverty line, a living standard that represents dire economic distress.<sup>16</sup>

*Wilson* remains good law, although its application to particular cases is uncertain given the multi-factor determinations necessary. A subsequent California case declined to read *Wilson* as establishing a broad public policy against long-term spousal support.<sup>17</sup> In that case, the appellate court reversed a trial court order terminating spousal support for a functionally disabled, fifty-nine-year-old woman after a marriage of nine years. The court cautioned that the *Wilson* holding should be considered in the specific context of the marriage at issue and called for a careful weighing of all the factors in each case.

*Wilson* takes place against the backdrop of legal reforms intended to protect displaced homemakers. These spouses, typically wives, spent years rearing children and subordinating their careers (if any) to ensure that their

<sup>12</sup> *Id.* For another case involving spousal support and disability, see *In re Marriage of Biderman*, 6 Cal. Rptr. 2d 791 (Cal. Ct. App. 1992) (upholding trial court’s termination of spousal support for clinically depressed and unemployed ex-husband).

<sup>13</sup> *Wilson*, 247 Cal. Rptr. at 524 (quoting trial court).

<sup>14</sup> *Id.* at 525–27.

<sup>15</sup> See U.S. DEP’T OF HEALTH & HUMAN SERVS., PRIOR HHS POVERTY GUIDELINES AND FEDERAL REGISTER REFERENCES (1986) (citing 51 Fed. Reg. 5105 (Feb. 11, 1986)), available at <http://aspe.hhs.gov/poverty/figures-fed-reg.shtml>.

<sup>16</sup> The official poverty measure is well-known to reflect a cumulation of analytic errors and questionable normative judgments. Constructed in the early 1960s with limited data, the poverty line has been updated only for inflation (and not for growth in national income and living standards) since then, with the result that the poverty line today represents extremely severe economic distress. Many social scientists (though not all) believe that the official poverty line is too low; they adopt instead a measure in the range of 200% of poverty in order better to approximate economic deprivation relative to the living standard in the modern United States. See Anne L. Alstott, *Why the EITC Doesn’t Make Work Pay*, 43 COLUM. J.L. & Soc. PROBS. (forthcoming 2009) (manuscript at 6–8, on file with the Harvard Law School Library).

<sup>17</sup> *In re Marriage of Heistermann*, 286 Cal. Rptr. 127, 130, 133 (Cal. Ct. App. 1991).

husbands could work full-time and develop their own careers. Upon divorce, these often middle-aged women found themselves at a disadvantage in the labor market, and yet, at one point, the doctrine of spousal support called for them to become self-supporting on the theory that the dissolution of a marriage properly leaves each party to subsist solely on his or her own earning power. In effect, the limitation of spousal support permitted the husbands to retain most of the value of their own earnings while consigning the wives to live on their own wages—typically at a far lower standard of living than they had while married.<sup>18</sup>

In response to criticism by scholars, lawmakers, and others, the law of spousal support developed, albeit unevenly, to incorporate protections for the displaced homemaker. We can see these protections in *Wilson*, where the court acknowledged the protections accorded to longer marriages, those with children, and those in which one spouse sacrificed for the other.

The irony, of course, is that the court in *Wilson* not only found these protections inapplicable to Elma but also made use of them to terminate her spousal support. Drawing a contrast to the long-married, self-sacrificing, good mother protected by the law, the appellate court described the *Wilson* partnership as “a childless marriage of short duration”<sup>19</sup> and referred to Elma as “a middle aged bartender with adult children.”<sup>20</sup> In the next sentence, the court implied that Elma did little to accommodate Tom, again drawing an implicit contrast with the family-centered homemaker who leaves her job: “[Elma’s] lifestyle was established [at the time of the marriage and did not change thereafter].”<sup>21</sup>

*Wilson* thus poses hard questions about the nature of marriage: Should the law presume that all marriages create solemn, life-long obligations? Or should the law, in effect, recognize a lesser category of companionate marriage, signaled by middle-aged entry and childlessness, and accommodated by the law with an easier-come, easier-go set of obligations?

At first glance, *Wilson* represents a classic private tragedy. The law of spousal support presents the courts with a zero-sum game: they can protect the needy Elma, but only by yoking Tom to a long-term financial burden that would limit his life options and deny him, perhaps, the ability to marry again.

The courts, then, must harm one party or the other, and perhaps for that reason, both the trial and appellate opinions adopt language that emphasizes Elma’s (risky) choices and bad luck: she is a “middle-aged bartender” with adult children whose father is no longer in the picture. Her bad luck—or perhaps her “drunken stupor”—left her with brain damage. At the same

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<sup>18</sup> See HARRY D. KRAUSE & DAVID D. MEYER, *FAMILY LAW IN A NUTSHELL* 297–98 (5th ed. 2007).

<sup>19</sup> *Wilson*, 247 Cal. Rptr. at 524.

<sup>20</sup> *Id.* at 526.

<sup>21</sup> *Id.* The court also repeats, in a footnote, Tom’s charge that Elma fell while in a “drunken stupor” and Elma’s rather incoherent response to the effect that she had a hunch, but no distinct memory, that Tom had been involved in her fall. *Id.* at 523 n.1.



time, the courts implicitly treat Tom's (better) choices and luck as equally private and personally owned. Elma did not, says the court, make sacrifices to further Tom's career; nor did they have children together. In the end, the courts resolve the private tragedy by appealing to public law. Tom's private obligation to Elma, the courts find, has come to an end, and so Elma must become a state responsibility, a public charge.

But a closer look at the legal context of *Wilson* reveals how Tom's and Elma's choices and luck occurred amidst two social insurance systems—the law of marriage and the Social Security program. We do not always think of legal marriage as a form of social insurance, and of course marriage represents more than that. Still, the financial support and in-kind care obligations that attend marriage (as well as those that persist following divorce) represent a significant potential resource for people with disabilities. The scope of marital obligation is clearly the issue presented in *Wilson*, and the trial court addressed it head-on: in the court's view, Elma had exhausted the social insurance entitlement accruing to her particular marriage and would now become the state's responsibility.

But the decision in *Wilson* likely did not qualify Elma for any additional state support—despite her dire situation. Social Security disability insurance is categorical, meaning that only those suffering severe work disability can qualify, and those who return to employment can no longer claim benefits. But the program is not income-tested, meaning that benefits do not rise if the beneficiary's income drops. Thus, Elma's monthly cash benefit was determined by her own earnings and work history, and it would not increase if her other sources of income disappeared.<sup>22</sup>

Supplemental Security Income (SSI) is a means-tested program that can supplement Social Security disability benefits, but it assists only those in extreme poverty. While SSDI provides a benefit based solely on past earnings (and thus is paid without regard to current income), SSI is means-tested and paid only to those in the direst financial circumstances. In 1982, Elma would most likely have been ineligible for SSI, which, during this period, provided maximum benefits for a single person amounting to less than seventy-five percent of the individual poverty line.<sup>23</sup>

Strikingly, then, and despite the court's rhetoric, the denial of spousal support in Elma's situation did not impose any additional responsibility on the state. Instead, the decision left Elma to live in dire poverty, subsisting on

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<sup>22</sup> At age sixty-two, Elma's situation might improve—or it might not. She could not qualify for higher benefits based on Tom's earnings record since they were married less than ten years. If she had been married before (a matter not clear from the opinion), and if her first marriage had lasted ten years or more, she might at age sixty-two qualify for a higher retirement benefit if her former husband's earnings were high enough. Her intervening marriage to Tom would not affect eligibility since the marriage ended in divorce.

<sup>23</sup> See STAFF OF THE HOUSE COMM. ON WAYS & MEANS, 110TH CONG., 2008 GREEN BOOK: BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS § 3-17 tbl.3-3 (Comm. Print 2008), available at <http://waysandmeans.house.gov/media/pdf/110/ssi.pdf>. SSI benefits are reduced dollar-for-dollar by Social Security benefits. See *id.* at § 3-22 tbl.3-5, § 3-23 tbl.3-6.

her SSDI income alone, unless she could marry again or prevail upon her adult children for assistance.

Another striking feature of the family law/social insurance system is that spousal support following divorce is frankly redistributive in a way that social insurance may not be. Tom's spousal support represented redistribution from a better-off individual to a worse-off one, and it took place between two now-unrelated people hostile to each other. But Elma's SSDI benefit to some degree represented a return of her own earlier payroll tax contributions, which purchased retirement savings and an insurance contract against disability. To be sure, Social Security does redistribute income by giving lower-wage workers a relative bargain compared to a purely actuarial insurance premium.<sup>24</sup> Still, Elma's public benefits had a substantial private component—just as if she were drawing down savings or had purchased private disability insurance.

### *B. Spousal Support as Social Insurance*

Putting family law and social welfare law together, we can see that the nominally private tragedy of *Wilson* occurred amidst two legal sources of social insurance: a family-law entitlement to spousal support and a public entitlement to Social Security. Stepping back from *Wilson* to generalize, Table 1 depicts the combined family law/social welfare system for adults<sup>25</sup> who develop disabilities. The table describes the individual's legally enforceable rights (and omits consideration of voluntary financial support and care by affective partners, children, and others).

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<sup>24</sup> See Jeffrey B. Liebman, *Redistribution in the Current Social Security System* 1–2 (Nat'l Bureau of Econ. Research, Working Paper No. 8625, 2001) (noting the higher replacement rates for low wage workers but noting that shorter life expectancy and other factors tend to reduce the average redistribution from higher- to lower-wage workers).

<sup>25</sup> Adults whose disabilities developed in childhood are treated as children for purposes of Social Security: they qualify for benefits (or not) based on their parents' earnings history. Soc. SEC. ADMIN., PUB. NO. 05-10026, BENEFITS FOR CHILDREN WITH DISABILITIES 10–11, *available at* <http://www.ssa.gov/pubs/10026.pdf>.

TABLE 1: FAMILY LAW AND SOCIAL INSURANCE PROVISION FOR ADULTS (UP TO AGE SIXTY-TWO) WITH DISABILITIES.<sup>26</sup>

	Potential Benefits	Potential Risks
<b>Married</b>	<ul style="list-style-type: none"> <li>• Individual's spouse has unlimited, though minimally enforceable, obligation of support.<sup>27</sup></li> <li>• SSDI provides benefits based on the individual's own work history.</li> <li>• SSDI may provide additional benefits to the spouse if the spouse is rearing the working individual's young children.</li> </ul>	<ul style="list-style-type: none"> <li>• Spouse's income is low or spouse withholds support or care (within legal boundaries).</li> <li>• Individual has no young children, eliminating SSDI spousal benefit.</li> <li>• Individual is poor but not poor enough to qualify for SSI.</li> </ul>
<b>Divorced; Performed Child-Rearing Work</b>	<ul style="list-style-type: none"> <li>• Spouse may have extended obligation of support following divorce.</li> <li>• SSDI provides benefits based on the individual's own work history.</li> </ul>	<ul style="list-style-type: none"> <li>• Former spouse's income too low for spousal support award.</li> <li>• Low SSDI payments due to individual's low earnings or intermittent work history.</li> <li>• Individual is poor but not poor enough to qualify for SSI.</li> </ul>
<b>Divorced; Never Performed Child-Rearing Work</b>	<ul style="list-style-type: none"> <li>• Spouse may have time-limited obligation of support following divorce.</li> <li>• SSDI provides benefits based on the individual's own work history.</li> </ul>	<ul style="list-style-type: none"> <li>• Former spouse's income too low for spousal support award.</li> <li>• Spousal support not awarded or terminates.</li> <li>• Low SSDI payments due to individual's low earnings or intermittent work history.</li> <li>• Individual is poor but not poor enough to qualify for SSI.</li> </ul>
<b>Never Married</b>	<ul style="list-style-type: none"> <li>• SSDI provides benefits based on the individual's own work history.</li> </ul>	<ul style="list-style-type: none"> <li>• No legal claim for support from any former partners, except for "palimony" claims.</li> <li>• Low SSDI payments due to individual's low earnings or intermittent work history.</li> <li>• Individual is poor but not poor enough to qualify for SSI.</li> </ul>

Elma Wilson fell into one of the most vulnerable categories: she was divorced after a short-term, childless marriage. Her work and earnings history qualified her for a modest SSDI benefit, so she was luckier than those with lower earnings or a sporadic work record. And Tom's middle-

<sup>26</sup> At age sixty-two, a disabled worker may qualify for a higher benefit based on her spouse's work history or the work history of a former spouse (if the marriage lasted ten years or more and if the worker is at age sixty-two unmarried, even if remarried and divorced in the intervening years). 42 U.S.C. § 402 (2006).

<sup>27</sup> See, e.g., *McGuire v. McGuire*, 59 N.W.2d 336, 342 (Neb. 1953); see also KRAUSE & MEYER, *supra* note 18, at 91–93.

class earnings supported an award of spousal support for nearly five years. Taken together, Elma's spousal support of \$500 per month plus her Social Security of \$436 per month gave her \$11,232 per year, or just above 200% of the poverty line and less than half the median income. Still, even that income left Elma at a far lower standard of living than middle-class Tom, whose \$38,400 income<sup>28</sup> put him at over 700% of the poverty line and at 150% of the median income of \$24,897.<sup>29</sup> The termination of spousal support left Elma in severe economic distress—below the poverty line.

Treating family law as social insurance may seem to gloss over legal and substantive differences in the two regimes. After all, Tom is Elma's ex-husband, not a stranger; he is supporting his former life partner, not paying taxes to the state. But these distinctions—like most legal dualisms—are overstated. The law mandated Tom's obligations, just as it sets the terms of taxation. After the divorce, Tom was in some sense a stranger to Elma—he no longer had day-to-day obligations toward her. And both he and the courts framed his spousal support very much as an income "tax"—a financial burden calibrated by Tom's income to pay for someone else's benefit. The court ultimately concluded that the tax on Tom weighed too heavily and should be spread more widely. On Elma's side, as we have seen, her seemingly public benefits had a substantial private component, since SSDI reflects payroll tax contributions as well as state subsidies (and the amount of the subsidy varies from positive to negative—some people receive less, in actuarial terms, than if they had purchased a private insurance policy).

On the benefits side, we can also analyze spousal support in the same terms we would use for a social insurance program. Table 2 compares spousal support and SSDI along six dimensions.

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<sup>28</sup> In 1986, Tom had \$2,200 per month in salary and \$1,000 in Navy retirement. *In re Marriage of Wilson*, 247 Cal. Rptr. 522, 524 (Cal. Ct. App. 1988).

<sup>29</sup> See U.S. Census Bureau, Historical Income Tables: Table H-6, <http://www.census.gov/hhes/www/income/histinc/h06ar.html> (on file with the Harvard Law School Library).

TABLE 2: COMPARING SPOUSAL SUPPORT AND SSDI.

	Spousal Support	SSDI
<b>Categorical</b>	<ul style="list-style-type: none"> <li>• Formal marriage.<sup>30</sup></li> <li>• Lengthy marriage.</li> <li>• Childcare or other sacrifice of earning power.</li> </ul>	<ul style="list-style-type: none"> <li>• Permanent, severe disability.</li> <li>• Work history.</li> </ul>
<b>Work Test</b>	<ul style="list-style-type: none"> <li>• Support may be reduced or eliminated if employable.</li> </ul>	<ul style="list-style-type: none"> <li>• Benefits cease if employable.<sup>31</sup></li> </ul>
<b>Means Test</b>	<ul style="list-style-type: none"> <li>• Need for support taken into account along with earnings capability.</li> </ul>	<ul style="list-style-type: none"> <li>• No.</li> </ul>
<b>Eligibility Determination</b>	<ul style="list-style-type: none"> <li>• Individualized determination by a judge (unless a negotiated contract is valid).</li> </ul>	<ul style="list-style-type: none"> <li>• Individualized disability determination by caseworkers and an Administrative Law Judge.</li> </ul>
<b>Time Limit</b>	<ul style="list-style-type: none"> <li>• Yes, particularly if a short marriage, if no children, and if no demonstrable sacrifice to build the spouse's earning power.</li> </ul>	<ul style="list-style-type: none"> <li>• No.</li> </ul>
<b>Conditional on an Ex-Spouse's Income</b>	<ul style="list-style-type: none"> <li>• Yes.</li> </ul>	<ul style="list-style-type: none"> <li>• No.</li> </ul>

Table 2 suggests substantial similarities. Both spousal support and SSDI are legally enforceable entitlements, not voluntary transfers. Both are categorical programs with individualized eligibility determinations. Both terminate support when the recipient is—or could be—self-supporting through employment. In the end, both family law and Social Security provide cash transfers that may meet the needs of people with disabilities—or fall short of meeting need, depending on the circumstances.

One important legal distinction between the two regimes does not appear in Table 2. Spousal support can be negotiated, either before the marriage in a prenuptial agreement or at divorce in a separation agreement. Depending on state law, the substantive terms of the agreement, and the situation of the parties, these private agreements may be enforceable, which is to say they can negate application of the default rules applied in *Wilson*.<sup>32</sup> By contrast, SSDI taxes are mandatory for nearly all U.S. workers, and there is no opportunity for customization by contract. This formal difference is

<sup>30</sup> Support obligations to unmarried ex-partners are recognized by the law, but outcomes vary, depending on the state and the degree to which the parties made express promises of support. See KRAUSE & MEYER, *supra* note 18, at 67–73.

<sup>31</sup> See STAFF OF THE HOUSE COMM. ON WAYS & MEANS, *supra* note 23, § 1, available at <http://waysandmeans.house.gov/media/pdf/111/ssgb.pdf> (discussing substantial gainful employment rules and exceptions).

<sup>32</sup> See KRAUSE & MEYER, *supra* note 18, at 81–87, 337–42 (explaining the general legal conditions for upholding antenuptial and separation agreements).

probably less significant than it may first appear, however, to the extent that the parties bargain in the shadow of the baseline entitlements set by the law.

The conventional distinction between private and public benefits may rest on the entries in the last column on the right. An individual's entitlement to spousal support depends on the ex-spouse's income, while the entitlement to SSDI does not. To be sure, the distinction is not entirely crisp. If an ex-spouse is sufficiently well-off, his income is not a major limitation on the claimant's benefit. And not all social welfare programs are entitlements: block grants, for instance, may deny services to eligible individuals simply because government funding falls short of demand.

Still, in the ordinary range of cases, the distinction has some bite: if the ex-spouse is poor, even the most deserving claimant for spousal support will walk away with nothing. Put another way, the family law portion of the social insurance system awards entitlements of varying "credit quality"—those formally married to rich partners have AAA-quality claims, while others have financially contingent entitlements.<sup>33</sup>

The two systems of social insurance—family law and Social Security—each take account of the other, but the legal mechanisms are different. Family courts generally may (or must) take need into account in determining spousal support, as in *Wilson*; and so Elma's SSDI entitlement would tend to reduce her spousal support, all else equal. But, just as in *Wilson*, when the entitlement to spousal support ends, the spouse's level of income becomes irrelevant. The *Wilson* decision left Elma below the federal poverty line—a measure social scientists view as representing dire poverty.<sup>34</sup> The court does not mention the poverty level, nor does it recognize that living below the poverty line likely means severe deprivation. Instead, the appellate court endorses the trial court's conclusion that Elma's well-being is now the state's obligation—without giving much consideration to the content of that obligation.

By contrast, SSDI benefits are set without a means test for the recipient and so do not explicitly take account of other income. Implicitly, however, SSDI sets benefits for some workers low enough that, to escape poverty, beneficiaries functionally must maintain or form a family relationship—or make a successful claim on an ex-spouse.

To summarize, the law creates a combined system of social insurance that distributes the risk of disability in a distinctive way: all else equal, high-earning workers with intact marriages (or divorces after long-term, child-rearing marriages) to high earners receive the largest benefits awards. Low-earning workers (without children) whose marriages dissolve fare less well, and low-earning, never-married workers have the fewest legal protections.

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<sup>33</sup> A parallel insight in the child support context led Irwin Garfinkel to propose child support assurance, in which parents would pay child support determined under standard rules, but if parents could not pay, the state would top up so that the child received the full amount. Garfinkel termed the proposal an "addition" to Social Security. GARFINKEL, *supra* note 3, at 51.

<sup>34</sup> See Alstott, *supra* note 16, at 7–10.

Analyzed from an *ex ante* perspective, Elma Wilson was vulnerable long before her fall in 1980. Given her marital situation, her child-rearing situation, and her earnings, she faced substantial financial risk if divorce or disability struck. Had her low wages been connected to child-rearing duties or a long marriage, she could have fared better in the family-law portion of the system (qualifying for long-term spousal support). And had her earnings been higher, she could have fared better in the public, SSDI portion of the system (qualifying for higher benefits).<sup>35</sup>

Perhaps it is not surprising that high-income people with long-term marriages and traditional gender roles fare best under both family law and Social Security. The law often perpetuates privilege and reproduces underlying inequalities. Still, an integrated view of family law and SSDI helps us see the extent to which the social insurance system as a whole mitigates—or fails to mitigate—the risks created by marriage and the labor market.

Both family law and Social Security allocate the consequences of life risks amidst other legal structures that entrench privilege and vulnerability. Consider two elements of U.S. law that we often take for granted. First, U.S. labor and employment laws influenced Elma's work history and working conditions. Bartending tends to pay relatively low wages and provide few benefits; thus, Elma apparently was left without access to the *third* portion of the U.S. social insurance system—private insurance benefits for disability and retirement. We sometimes speak of the labor market as if it exists in some natural space outside law. But economists know that the law structures market interactions. Thus, there are multiple possible forms of a “free” labor market, corresponding to an array of possible legal-institutional choices about matters like collective bargaining and legal mandates for wages, working conditions, fringe benefits, and so on.<sup>36</sup>

Second, Elma's disability and marital breakup occurred amidst a legal context that required her—and nearly everyone else—to purchase most goods in the marketplace at prices set by the market. Housing, food, clothing, and transportation all had to be funded after the *Wilson* ruling out of Elma's \$436 per month SSDI benefit. We have already seen that Elma was unlikely to qualify for SSI, and without children she could not collect federally sponsored welfare benefits (then called Aid to Families with Dependent Children (AFDC), and now called TANF). The major supplemental benefit she would receive was Medicare, which would, after a waiting period, pay for a major portion (though not all) of Elma's medical care.<sup>37</sup>

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<sup>35</sup> When a worker is disabled, his or her spouse may also claim derivative benefits if he or she is still married, under age sixty-two, and caring for children or if married or divorced and age sixty-two or over.

<sup>36</sup> See RICHARD B. FREEMAN, *AMERICA WORKS* 7–19 (2007).

<sup>37</sup> The court in *Wilson* noted that the initial spousal support order included medical insurance coverage. *In re Marriage of Wilson*, 247 Cal. Rptr. 522, 523 (Cal. Ct. App. 1988). The opinion does not clarify the terms of the insurance or whether it continued when Elma became Medicare eligible.

C. *Legal Reforms: Family Law and Beyond*

Armed with this map of family law, SSDI, and other legal structures, we can now see at least four entry points for legal reforms. Changes in family law, in Social Security, in labor markets, and in the distribution of primary goods could all change the tragic nature of the court's choice in *Wilson* by altering the ex ante distribution of the risks of disability and/or marital dissolution. To be sure, I have not—and will not here—offer a normative argument that would support any specific reform, or indeed any reform at all. My goal here is not to prescribe the proper form of the social insurance system; rather, I mean only to offer options for discussion that illustrate some counterintuitive legal choices.

Family law represents one avenue for reform. In response to *Wilson*, the courts or legislatures might mandate longer-lasting obligations for spousal support when severe disability and extreme need combine. Instead of distinguishing between child-rearing marriages, on the one hand, and companionate marriages, on the other, the law might—contrary to the approach the court adopted in *Wilson*—treat all marriages as an explicit form of social insurance against disability, with marital obligations lasting for a lengthy, even permanent, time after divorce.

This direction for legal reform would, of course, mark a major change in the present understanding of marriage and divorce. At present, divorce offers a fresh start, with the exception being long-term, child-rearing marriages with one spouse shouldering the care work and sacrificing market opportunities. Changing the result in *Wilson* would usher in a new approach, and one that raises many questions. At present, the United States has a high degree of serial monogamy, with a high rate of divorce and remarriage.<sup>38</sup> Extending the alimony obligation could stand at odds with that cultural pattern, tying ex-spouses together financially for the long term. And of course, there is the deeper normative question: *should* marriage involve long-term income insurance by each spouse to the other? Operational questions arise as well: Should very short marriages be excepted? Should spouses be permitted to opt out via prenuptial agreements?

I do not offer here a concrete proposal for legal reform. Instead, my limited point at this stage is that we can conceive of such a change in social-insurance terms. An extended alimony obligation would award a longer-term, means-tested benefit to the ex-spouse suffering a disability, funded by an income “tax” on her former spouse.

The SSDI program is another candidate for legal reform. Higher SSDI benefits would improve the situation of people with disabilities—and, along the way, set a higher floor for the loss of other income, including spousal support. Alternatively, the program could adopt an income-tested supplement—or could expand SSI benefits. Such a change would, of course, pull SSDI in the direction of becoming a welfare program, a direction that many

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<sup>38</sup> See ANDREW J. CHERLIN, *THE MARRIAGE-GO-ROUND* 4–5 (2009).



defenders of Social Security have (historically) rejected for political reasons.<sup>39</sup>

A different approach would alter SSDI to pay more to those without family and less to those who can count on family financial support. That approach would not require a full-scale means test, which is administratively complex and carries the whiff of welfare that Social Security supporters fear. Instead, the benefits schedule could simply be adjusted in some rough way to reflect the presence or absence of another adult in the household. This reform would stand in tension with Social Security's traditional approach, which treats a second adult in the family as a dependent rather than a source of support. Today, SSDI today pays more to a married couple than to an unmarried worker if the worker's spouse is caring for the worker's minor children.<sup>40</sup>

Adjusting benefits categorically for the presence or absence of family might or might not be a desirable direction, and I do not attempt here to articulate the normative case for it or to work out administrative details. (Would any other adult count as providing family support, even if the relationship is short-term, informal, or self-consciously casual? Would such a rule authorize intrusions into personal privacy?) Instead, the point is to question the assumptions about family life built into our social insurance system: today, the primary concern is for workers unable to support dependents. There is a blind spot—or perhaps a deliberate gap—for those who work but are not well-off and who neither support dependents nor qualify for support by anyone else.

Looking beyond formal social insurance programs, changes in deeper legal structures could also change the stakes in cases like *Wilson*. Labor market changes, ranging from collective bargaining that could raise wages to legal mandates for fringe benefits, could improve Elma's financial profile and her access to private, supplemental disability insurance. Programs that weaken the link between market income and access to primary goods could also help Elma's SSDI check stretch further: expanded housing and transportation assistance, for example, would change the significance of the SSDI benefit, transforming it into a meaningful cash supplement after basic necessities are provided for, rather than a woefully inadequate all-in-one benefit.

In the end, the private tragedy of *Wilson* reflects public decisions about the distribution of social risks. Without children, without a long marriage, and with limited earnings, Elma's risk profile was dire: disability, especially in combination with divorce, meant financial disaster.

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<sup>39</sup> See, e.g., THEODORE R. MARMOR ET AL., *AMERICA'S MISUNDERSTOOD WELFARE STATE* 156–60 (1990).

<sup>40</sup> 42 U.S.C. § 402(b) (2007).

## II. *BROWN V. BROWN*: CHILD SUPPORT AND MULTIPLE FAMILIES

Family law frames child support, too, as a private matter. Parents have an obligation to support their children, and when parents default, children must suffer. Or so it seems.

To be sure, the state will intervene to place children in foster care in cases of severe hunger or dire physical danger. But within a wide range, the law permits parental choices to govern children's living conditions. A Wisconsin case, *Brown v. Brown*,<sup>41</sup> illustrates the problems that arise when divorced or never-married parents remarry and start a second family—and parental earnings cannot adequately support both.

### A. *The Tragedy: Divorce and Multiple Families*

Sheldon and Sharon Brown married in 1984 and divorced three years later. Sharon took custody of their child. Wisconsin guidelines required Sheldon to pay seventeen percent of his gross income in child support. Later, Sheldon remarried and had three children with his new wife, and he petitioned the courts for a reduction in his child support payments due to his obligation to support his new children. The appellate court denied the petition, holding that the Wisconsin rules for “serial family payers” could not be applied to reduce support owed to an earlier-born child.<sup>42</sup>

*Brown v. Brown* does not initially seem to present the heart-wrenching tragedy of *Wilson*. The appellate court's opinion offers only a spare recitation of facts and devotes most of its analysis to the language and structure of the Wisconsin child support guidelines. The opinion does not reveal whether Sharon or Sheldon or their respective families were well-off or economically marginal. It is not clear whether Sheldon's second family was having trouble making ends meet—or whether Sheldon was just taking advantage of a legal loophole that could reduce his child support.

Still, there is a private tragedy lurking here, and it has divided courts across the country.<sup>43</sup> The nature of the tragedy emerges in the few paragraphs the *Brown* appellate opinion devotes to policy. Sheldon, the court emphasizes, has made a (bad) choice, and it is “good public policy” for him to bear the financial consequences: “a parent's voluntary reduction

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<sup>41</sup> *Brown v. Brown*, 503 N.W.2d 280 (Wis. Ct. App. 1993).

<sup>42</sup> *Id.* at 281.

<sup>43</sup> See Martha Minow, *How Should We Think About Child Support Obligations?*, in *FATHERS UNDER FIRE* 302, 302 (Irwin Garfinkel et al. eds., 1998). For a summary of several states' approaches to multiple families, see Emma Casper, *Review of Child Support Policies for Multiple Family Obligations* (Sept. 2006) (unpublished manuscript, on file with the Harvard Law School Library), available at <http://www.irlp.wisc.edu/research/childsup/cspolicy/pdfs/Casper-Task4A-2006.pdf>. See also Adrienne Jennings Lockie, *Multiple Families, Multiple Goals, Multiple Failures*, 32 *HARV. J.L. & GENDER* 109, 111, 152–63 (2009) (proposing a system of “limited equalization” that would steer a middle path).

of the ability to support a family by having more children should not automatically penalize the earlier born children.”<sup>44</sup>

But, as in every private tragedy, there is another side to the story: what about the second wife and the second set of children? Consider, for instance, a New York case, *Lonsdale v. McEwen*.<sup>45</sup> After a second marriage and the birth of twins, Mark McEwen petitioned the courts to reduce the child support he owed to a child from his first marriage. A sympathetic appellate court ordered a hearing on the merits, concluding that “[r]egardless of whether defendant [father] can fairly be blamed for remarriage and raising children with his new spouse . . . his infant sons are blameless and [the trial court] should not have been so dismissive of defendant’s need to provide for them.”<sup>46</sup>

Working within the zero-sum constraint, the law has typically endorsed one of two approaches, which Martha Minow terms “first families first” and “equal treatment.”<sup>47</sup> “First families first” is the approach adopted in *Brown*: the law gives priority to the financial needs of the first-born set of children. The “equal treatment” approach, by contrast, emphasizes the equality of earlier- and later-born children and seeks to equalize their standard of living.<sup>48</sup> Any aspiration to equalization raises numerous questions: for instance, should a stepparent’s earnings be taken into account in the equalization calculation?<sup>49</sup> Still, the aspiration to equalize living standards across the first and second family contrasts, in concept, with “first families first.”

Just as in *Wilson*, then, the problem of supporting multiple families seems to pose an insoluble dilemma created by bad luck and bad choices. When parents do not earn enough to support two families, the law cannot create something out of nothing. Either one set of children wins at the expense of the other, or else the law splits a less-than-adequate income between the two families, spreading equal suffering to both.

### B. *Child Support as Social Insurance*

But, as in *Wilson*, a closer look suggests that family law and social insurance operate together to determine which choices are risky and which are safe. Table 3 outlines the major legal rules and the risks they create from a child’s perspective.

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<sup>44</sup> *Brown*, 503 N.W.2d at 283.

<sup>45</sup> *Lonsdale v. McEwen*, 821 N.Y.S.2d 155 (N.Y. App. Div. 2006).

<sup>46</sup> *Id.* at 158.

<sup>47</sup> See Minow, *supra* note 43, at 309.

<sup>48</sup> See, e.g., *Lonsdale*, 821 N.Y.S.2d at 159 (holding that the birth of twins to a father’s current family constitutes an unanticipated event with concomitant need, potentially justifying a downward revision in the payments required by a support agreement entered into with the mother of a child from a prior marriage).

<sup>49</sup> See Ira Mark Ellman & Tara O’Toole Ellman, *The Theory of Child Support*, 45 HARV. J. ON LEGIS. 107, 153–59 (2008).

TABLE 3: FAMILY LAW AND SOCIAL INSURANCE FOR CHILDREN.

	Potential Benefits	Potential Risks
<b>Child of Married Parents</b>	<ul style="list-style-type: none"> <li>• Both parents have a legal obligation to support the child.</li> <li>• The state provides a free public education of varying quality.</li> <li>• Small, time-limited welfare benefits are available if the family encounters dire poverty, plus food stamps and possibly State Children’s Health Insurance Program (SCHIP, subsidized health insurance).</li> <li>• Small per-child tax benefits.</li> <li>• Social Security provides benefits to the parents and the child if a parent dies or suffers a severe disability, contingent on the parent’s work history.</li> </ul>	<ul style="list-style-type: none"> <li>• Parents do not earn enough to support their children.</li> <li>• Parents fail to (or cannot) provide care.</li> </ul>
<b>Child of Divorced or Never-Married Parents</b>	<ul style="list-style-type: none"> <li>• Both parents have a legal obligation to support the child, subject to legal process (the custodial parent must obtain a court order).</li> <li>• Depending on state law, a parent’s second family may reduce support payable to a first set of children.</li> <li>• Small, time-limited welfare benefits are available if the family encounters dire poverty, plus food stamps and possibly SCHIP.</li> <li>• Small per-child tax benefits.</li> <li>• Social Security provides benefits to the parents and the child if a parent dies or suffers a severe disability, contingent on the parent’s earnings history.</li> </ul>	<ul style="list-style-type: none"> <li>• Custodial parent has low income, and noncustodial parent has low income or fails to pay child support.</li> <li>• Custodial parent fails to (or cannot) provide care.</li> <li>• Noncustodial parent fails to provide care and in-kind support.</li> <li>• A custodial or noncustodial parent has multiple families and insufficient income to support them both (depending on state law, this risk may fall on one set of children or both).</li> </ul>

Family breakup, low income, and serial families thus create financial risks for children. Parental unwillingness or incapacity to provide care creates a risk of neglect. The U.S. social insurance system offers few protections for these risks. A free K–12 public education ensures at least minimal access to basic education, but housing prices correlate with school quality, and postsecondary schooling is costly. Small, largely symbolic tax credits provide, at most, a few thousand dollars, and time-limited, means-tested TANF benefits assist only families in dire circumstances. For children, these financial risks pose developmental risks, since poverty can lead to nutritional deprivation, health deprivation, and stress that adversely affect develop-

ment.<sup>50</sup> The child welfare system is notoriously poor at detecting neglect until it reaches major proportions and is obvious to outsiders; the system relies on third-party reports and, even when neglect is reported, the state may not act absent immediate grave danger.<sup>51</sup>

By contrast, Social Security provides greater financial support when a child's parent dies or suffers a severe disability, provided that the parent had a sufficient history of paid work and earnings. SSDI pays monthly benefits not only to the worker but also to her minor children, even if the parent is noncustodial, and so does Social Security Survivors Insurance (a form of public life insurance purchased with the same payroll taxes that fund the more familiar Social Security Old Age and Disability Insurance program).

Just as in *Wilson*, this distribution of risk also reflects other elements of the law. The law structures labor markets with few protections for workers: in these markets, some parents earn low wages and face few options for improving their earnings. And the law consigns to another marketplace the allocation of primary goods like health care, food, and shelter. Taken together, the labor market and the market for goods create predictable vulnerability for low-earning parents and for parents with high costs of living.

### C. *Legal Reform: Family Law and Beyond*

Just as in *Wilson*, a comprehensive map of the legal landscape helps highlight several entry points for legal reform. The following discussion assumes—without justifying—the objective of ensuring adequate material support for all children.<sup>52</sup> A different goal would, of course, motivate different reforms; the following analysis serves just to illustrate the kinds of questions one might ask.

Typical discussions treat the level of support required of noncustodial parents as the primary variable for family law reform. Given that assumption, and accepting the constraint of parental income as the sole source of funds available for children, the equal treatment approach seems to serve the goal of material equality for children. If the motivating norm is equal regard for all children, the policy implication would be to define parental resources broadly (including, for instance, the earnings of new spouses) and equalize the living standard for both sets of children.<sup>53</sup>

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<sup>50</sup> There is a large literature establishing a connection between poverty and poor health, poor academic achievement, and risks of school dropout and early child bearing. See, e.g., CONSEQUENCES OF GROWING UP POOR (Greg J. Duncan & Jeanne Brooks-Gunn eds., 1997) (offering a collection of essays establishing the effects of poverty on child development). There is debate among social scientists about the extent to which poverty itself causes these outcomes and whether income transfers alone could reverse them. See generally SUSAN E. MAYER, WHAT MONEY CAN'T BUY (1997).

<sup>51</sup> JANE WALDFOGEL, THE FUTURE OF CHILD PROTECTION, at chs. 1–2 (1998).

<sup>52</sup> For a normative argument for equality of developmental resources, see Anne L. Alstott, *Is the Family at Odds With Equality? The Legal Implications of Equality for Children*, 82 S. CAL. L. REV. 1 (2008).

<sup>53</sup> See Minow, *supra* note 43, at 316. For a discussion of the complexities of an aspiration to equal treatment, see Ellman & Ellman, *supra* note 49.

But equal regard for all children stands at odds with the limitation of child support to parental income. Recognition of children's blamelessness militates in favor of adequate developmental resources for each child, a goal served uneasily when legal reform is constrained by parental income and when it takes as its benchmark an ad hoc measure like the first family's original or later standard of living, or the second family's current one.

The law might respond by loosening the budget constraint, for instance by expanding the circle of adults with financial responsibility for children. The law could, in principle, obligate stepparents and grandparents or even aunts and uncles to contribute to a child's support. This nontraditional approach would push family law further along the spectrum toward taxation, to be sure, and would pose questions of fairness, incentives, and administration. Would it be fair to require a financial contribution from people who had chosen not to have children? Would the system discourage remarriage? Would the legal apparatus now in place for "deadbeat dads" have to ramp up to pursue "deadbeat grandmas" and "absconding aunts"? Or might a broader legal support obligation improve children's welfare while spreading the financial burden in a way that lessens pressure on parents?

Another reform might be to obligate children themselves to contribute to their support. Rest assured that I am not proposing child labor or an *Oliver Twist*-type workhouse. Instead, the law could conceptualize children's support as something to be supplied by the state during childhood and paid back by the adult over her lifetime. Many designs are possible: Should the state/child pay the full amount of her support, or only any shortfall in what the family can provide? Should the grown person be liable for a fixed debt, repayable even at the cost of financial distress? Or should she have to repay her support only if her income comfortably permits it, perhaps via an income tax?

I will not offer here a full analysis of either an extended-family support obligation or an intertemporal transfer to children from their adult selves. Both reforms seem radical, but both illustrate a conceptual point. Understanding family law as social insurance reveals—and calls into question—the assumption that only parents should contribute to a child's support. Shifting the support obligation to an extended family or to the child herself illustrates that child support funding can have a narrow base (two parents only) or a broader one (parents plus extended family) or the broadest one (the state, which is to say some larger group of taxpayers).

A second legal lever for reform is the formal social insurance system. Here, the law operates outside the constraint of parental earning power, and so it can more readily achieve financial equality—or a decent minimum—for all children. Irwin Garfinkel has proposed a system of "child support assurance," which would guarantee each child of divorced or unmarried parents a fixed minimum child support payment.<sup>54</sup> The child support would be funded by the noncustodial parent in the first instance, but if the parent

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<sup>54</sup> GARFINKEL, *supra* note 3.

failed to pay (whether because of inability or unwillingness), the state would pay for each child up to the minimum benefit. Garfinkel termed his proposal an addition to Social Security,<sup>55</sup> and he argued that the program would address children's risks arising from divorce, nonmarriage, nonpayment of child support, and parental poverty.<sup>56</sup> Garfinkel's idea was both to improve child support collections (an agenda that has been widely adopted since the initial publication of his idea) and to supplement parental contributions (an idea that has proved less popular).<sup>57</sup>

Garfinkel's proposal does not fit neatly into family law or social insurance. Child support assurance would require a legal determination of child support by a court, and the level of payments would be based on parental income and a standard child-support formula. Thus, as in family law, parents would remain the primary obligors, and actual child support amounts could vary among children. Only the minimum would be fixed, ensuring that each child would receive something, even if parents could pay but evaded their responsibility.

Garfinkel's proposal could, of course, be expanded to cover children in all families whose parents—whether absent or present—cannot provide the children with adequate support. Garfinkel declined to extend his program in this direction: he aimed to address only the problem of child support for children whose parents are divorced or unmarried, and he deliberately sought some distance from traditional welfare.<sup>58</sup> The cost, of course, is that child support assurance could leave children of poor, divorced, or unmarried parents better off than children of poor, married ones.

Legal reforms might also look to other elements of the law. Today, a child's opportunities and access to primary goods depend heavily on her parents' market earnings. The law could change labor market structures to raise wages and improve working conditions at the bottom;<sup>59</sup> additional reforms might improve the labor market position of parents engaged in care work.<sup>60</sup>

Yet another approach would seek to weaken, even sever, the link between parental earning power and children's access to primary goods. It would be possible, for instance, for the state to guarantee a universal set of primary goods—housing, food, clothing, medical care, supplemental child care—to every child, without regard to parental income. Such a system would transform the obligations of parenthood, removing the component of financial responsibility while retaining the emotional, social, and moral responsibilities of the role. This is, of course, a radical idea in the American context, though less so compared to European welfare states, which provide

<sup>55</sup> *Id.* at 51.

<sup>56</sup> *Id.* at 50–55.

<sup>57</sup> See Thomas Corbett, *The Wisconsin Child Support Assurance System: From Plausible Proposals to Improbable Prospects*, in *CHILD SUPPORT ASSURANCE* 27, 27–29 (Irwin Garfinkel et al. eds., 1992).

<sup>58</sup> GARFINKEL, *supra* note 3, at 50–51.

<sup>59</sup> See FREEMAN, *supra* note 36, at 141–48.

<sup>60</sup> See JODY HEYMANN, *THE WIDENING GAP* 15–66 (2000).

more generous support for children.<sup>61</sup> In other work, I have addressed in some detail the justifications for such a system as well as objections to it.<sup>62</sup>

Like Elma Wilson, children of parents with low earnings and multiple families live with a high level of risk long before disaster strikes. A child whose parents do not earn enough to support two families is vulnerable to family breakup, if she is in the first family, or to the existence of a prior family, if she is in the second one. The deprivation such children experience reflects not only parental choices and luck but also the allocation of risks mandated by law. Adults, too, face risks determined by law. Present law casts nonpaying parents with multiple families as “deadbeat parents” who “victimize[ ]” their children.<sup>63</sup> But the tragic nature of such situations reflects the legal distribution of financial responsibility for children. In a legal system that guaranteed adequate developmental resources for all children, we would no longer make parental success depend on parents’ fate in the labor markets. In such a system, even low-earning parents could succeed in their chosen role, and a deadbeat would be one who abandons or neglects his children rather than one who fails to pay.

### III. CONCLUSION: FAMILY DISRUPTION AND SOCIAL INSURANCE

By tradition, family law and social insurance occupy different legal fields. Family law, taught in one set of courses, focuses on the adjudication of tragic cases. A typical family law course illustrates in exhaustive (and emotionally exhausting) fashion the range of risks that can destroy family life. Divorce, parental exit, mental illness, poverty, disability, substance abuse, domestic violence—all can produce financial and personal ruin.

Social insurance, if taught at all in American law schools, is taught in a course on social welfare policy or poverty law or in a clinical setting. Academic courses focus on the rules insuring workers against work disruption due to unemployment, disability, and early death. The central problem for the law, it often seems, is moral hazard: how can programs cushion risk without encouraging workers to take risky jobs, forgo training, prolong unemployment, or exaggerate disability?<sup>64</sup>

In this Essay, I have suggested that family law can be understood as one part of the social insurance system and that scholars can apply some of the same analytical tools and categories used in social insurance to family law. *Wilson* and *Brown* illustrate how the two systems operate together to

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<sup>61</sup> See Alstott, *supra* note 16, at 19–20 (summarizing comparative data on public support for working-age parents and their children).

<sup>62</sup> Alstott, *supra* note 52.

<sup>63</sup> See, e.g., *State v. Oakley*, 2001 WI 103, ¶¶ 9, 20, 45 Wis 2d 447, 629 N.W.2d 200.

<sup>64</sup> See Jerry L. Mashaw & Virginia Reno, *Social Security Disability Insurance: A Policy Review*, in *NEW APPROACHES TO DISABILITY IN THE WORKPLACE* 245, 247 (Terry Thomason et al. eds., 1998) (summarizing data finding poor economic outcomes among people who claim disability insurance benefits but are found ineligible); Alstott, *supra* note 16, at 19 (summarizing data on the prevalence of work-related disability among people not receiving SSI or SSDI).



distribute the risks of disability and family disruption—and how changes in either regime might alter that risk profile.

The analysis here also raises the question whether the concerns animating family law might have important application to social insurance. Family law puts front and center the risks of disruptions in two functions of the family—financial support and hands-on care. When families dissolve or fail to form, or when seemingly intact families fail to fulfill the responsibilities of support and care assigned to them by law, tragedy can result.

In an ongoing project, I ask whether social insurance could and should do more to recognize and address disruptions in affective life. Social insurance now insures the role of worker/breadwinner, and benefits aim to replace lost paychecks. But disruptions in affective life can have consequences just as serious as those of work disruption.

The law often presumes that individuals exist within families. As in Elma Wilson's case, social insurance benefits for individuals, including SSDI, are often inadequate in amount—absent family contributions. Family law presumes that spouses in an ongoing marriage provide financial and hands-on care.<sup>65</sup> And parents are presumed to be fit custodians absent strong proof to the contrary.<sup>66</sup> These legal presumptions often operate even when family is absent or fails to fulfill its functions, with dire consequences for adults and for children's development.<sup>67</sup>

To be sure, current law cushions family disruption to varying degrees, depending on circumstances. Social Security, in particular, is a major source of financial support for families, but it does not—because it is not designed to—address financial shortfalls that arise from sources other than work disruption. A working-age person without disabilities has no claim on the system, even if she is unable to support herself or her dependents due to family disruption. Beyond social insurance, a variety of means-tested programs assist families and children that fall into poverty. Parents (whether divorced or not) can turn to TANF or general assistance if poverty is dire. Medicaid and SCHIP expansions offer health insurance to many poor and near-poor chil-

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<sup>65</sup> See Rosenbury, *supra* note 5, at 191.

<sup>66</sup> See *Santosky v. Kramer*, 455 U.S. 745, 760 (1982).

<sup>67</sup> See Adam P. Romero, *Living Alone: New Demographic Research*, in *TRANSCENDING THE BOUNDARIES OF LAW* (Martha A. Fineman ed., forthcoming 2009) (manuscript at 3–4, on file with the Harvard Law School Library). For an illustration of the consequences of the law's presumption of parental fitness, see, for example, *In re Eden F.*, 741 A.2d 873 (Conn. 1999) (terminating the parental rights of a mentally-ill mother of a child with special needs). For years, the child, Eden, bounced between foster homes and her mother's care. Special education and other services were often disrupted, and the mother received inadequate treatment for her own mental illness and inadequate support services during attempts at reunification. By the time the termination case reached the courts, Eden had developed an attachment disorder—a lasting emotional disability with potentially severe consequences. Although the mother, by the court's account, sincerely loved her child, she needed significant support due to her disability. Existing social insurance protections—a patchwork of SSI, foster care, Medicaid, and school-based special education—failed the child and the mother too.

dren.<sup>68</sup> SSI for the elderly and disabled and state general assistance programs as well as food stamps also assist the poor. General and special education programs also supplement parental care for children. But, once again, these are generalized anti-poverty programs rather than tailored efforts to address the absence or dysfunction of family.

One preliminary insight, which merits further exploration, builds on the idea of the two-tier welfare state often invoked in discussions of women's care work.<sup>69</sup> Present law accords family disruption—like care work—a lower priority and a lesser status, offering patchwork protections that address only dire poverty. In the case of failures of family care, adults have no legal claim to care unless the absence of care leads to a medically-cognizable condition that authorizes hospitalization or nursing home care. Failures of family care for children—child neglect—theoretically trigger state action, but in practice neglect must be severe, lasting, detectable by an outsider, and acted upon by the state, with many gaps in the system.<sup>70</sup>

Perhaps current protections are sufficient: perhaps it is adequate simply to protect against the direst form of poverty. But it begs the important normative questions: Should people be insured against family failure only at the poverty level? Or should they have some claim to a higher standard of living or less-stigmatizing support?

The same questions arise in traditional, employment-related social insurance, and in that context, society offers a different response. When a breadwinner retires or suffers disability or early death, his fate triggers an array of standard social insurance protections that aim not only to keep him out of poverty but to prevent a massive drop in living standard.<sup>71</sup> The bene-

<sup>68</sup> For data on health insurance coverage, see U.S. Census Bureau, Current Population Survey (CPS): Table HI02, [http://www.census.gov/hhes/www/macro/032008/health/h02\\_001.htm](http://www.census.gov/hhes/www/macro/032008/health/h02_001.htm) (on file with the Harvard Law School Library); U.S. Census Bureau, Current Population Survey (CPS): Table HI03, [http://www.census.gov/hhes/www/macro/032008/health/h03\\_001.htm](http://www.census.gov/hhes/www/macro/032008/health/h03_001.htm) (on file with the Harvard Law School Library); U.S. Census Bureau, Current Population Survey (CPS): Table HI04, [http://www.census.gov/hhes/www/macro/032008/health/h04\\_001.htm](http://www.census.gov/hhes/www/macro/032008/health/h04_001.htm) (on file with the Harvard Law School Library).

<sup>69</sup> See, e.g., LINDA GORDON, *PITIED BUT NOT ENTITLED* 293–99 (1994) (describing a dichotomy in U.S. social provision between social insurance and public assistance). *But see* CHRISTOPHER HOWARD, *THE WELFARE STATE NOBODY KNOWS* 29–31 (2007) (arguing that the two-tier claim exaggerates differences among social welfare programs).

<sup>70</sup> See WALDFOGEL, *supra* note 51, at chs. 1–2.

<sup>71</sup> As Elma Wilson's case demonstrates, the system does not necessarily operate in quite that way for every earner; but for workers with long-term stable earnings, the system today provides an above-poverty-level income. In 2007, a long-term minimum-wage worker would have received a monthly benefit of \$845.70 or an annual benefit of \$10,148 at retirement. A worker earning seventy-five percent of average earnings would receive \$13,922 per year at retirement. SOC. SEC. ADMIN., OFFICE OF RETIREMENT AND DISABILITY POLICY: BULLETIN ANNUAL STATISTICAL SUPPLEMENT (2008), <http://www.ssa.gov/policy/docs/statcomps/supplement/2008/2a20-2a28.html#table2.a20> (follow "Table 2.A26" hyperlink) (on file with the Harvard Law School Library). The 2007 poverty threshold for one person (over age sixty-five) was \$9,944. U.S. Census Bureau, Poverty Thresholds for 2007, <http://www.census.gov/hhes/www/poverty/threshld/thresh07.html> (on file with the Harvard Law School library). For a long-term low earner, Social Security now replaces about sixty percent of the retired worker's wages. See Patricia P. Martin, *Comparing Replacement Rates Under Private and*

ficiaries include the worker, his young children, his spouse (if children are young), and possibly his former spouse(s). The benefits are funded as an entitlement by the federal government, and they are awarded as a package by a single agency. Not every disabled or retired worker qualifies;<sup>72</sup> but benefits are relatively generous for those who do.

Feminists have challenged present social insurance on two primary grounds. First, they have noted that Social Security takes as its model a long-married breadwinner with a long-term, stable work history and a dependent spouse. Scholars have pointed out that wives in two-earner couples pay disproportionately high taxes and that women whose work history includes periods of unpaid care work may qualify for lower benefits.<sup>73</sup> Second, scholars have noted that unemployment insurance and Social Security do not protect against work disruption due to family care obligations.<sup>74</sup>

Feminists have also labored to improve the status of women after divorce. Although the magnitude of financial distress suffered by women after divorce is contested, family dissolution does seem to produce long-term disadvantage. A large literature extending over several decades has proposed reforms in family-law rules governing alimony, property division, and child support.<sup>75</sup>

By contrast, my project will consider whether social insurance should address family disruption directly. There is some overlap with existing concerns: insurance for disruptions in affective life would assist care workers who find themselves without family support—like the divorced, never married, and widowed women identified as needy by the first set of scholars. But social insurance for disruption in family life would challenge the work-disruption model rather than work within it. It would also call attention to a broader class of people, addressing not only care workers but also people who depend on family financial support and care work.

In the broadest terms, then, my question is whether the law could and should expand the social roles and risks that qualify for social insurance beyond the role of worker and the risks of work disruption. Would it be

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*Federal Retirement Systems*, 65 SOC. SECURITY BULL. 1 (2003/04), available at <http://www.ssa.gov/policy/docs/ssb/v65n1/v65n1p17.html>.

<sup>72</sup> See Mashaw & Reno, *supra* note 64, at 247.

<sup>73</sup> Existing protections for care workers presume a long marriage to a male breadwinner, a presumption increasingly at odds with the realities of many women's lives. The result is that never-married, divorced, and widowed women often find themselves with less security than others. Scholars have proposed to integrate care work into the employment-based model of social insurance—for instance, by offering earnings credit in Social Security for years spent in care work.

<sup>74</sup> Leaving work to care for a child or a spouse, for example, has traditionally disqualified the worker for unemployment compensation. National family leave benefits cover only about half the workforce and provide only unpaid leave. See U.S. Department of Labor, Wage and Hour Division: Appendix A1 Tables, <http://www.dol.gov/whd/fmla/APPX-A-1-TABLES.htm> (scroll to Table A1-3.1) (on file with the Harvard Law School library). Scholars have proposed to expand paid family leave and child care assistance programs.

<sup>75</sup> See generally AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2000).

feasible, would it be desirable, and what would it mean to enact social insurance to protect adults and children expressly against the risks of disruptions in affective life?

A host of normative and technocratic issues come to mind. Some might object that people bring family disruption on themselves through personal choices—to marry despite incompatibility, to have children on a limited income, or to depend on an undependable partner. Would it be fair to expect people with different religious or personal beliefs about family to subsidize one another's most intimate decisions? Would it be fair to burden successful families with the outcomes of ill-advised or risky unions? What would benefits look like? How can the state insure against an event as common as divorce—and what would benefits look like? What form of taxation should support the system?

Moral hazard represents another major challenge: Would people marry and divorce too casually, further endangering the fragile American family? Would people have children too readily? Would the system rely on formal relationships—like marriage, divorce, and parenthood—or would it attempt to recognize other relationships of support and care, and if so how?

And what about people without families? The health care and social welfare systems, just to take two examples, often assume that individuals have family members prepared to advocate for their interests and provide hands-on care.<sup>76</sup> But what about individuals who lack family support? The law presently treats the absence of family as private matter, and it leaves individuals to bear the consequences. But an alternative legal regime might treat the absence of family differently: the law might expand, beyond formal marriage and parenthood, the categories of privileged caregivers. Or it might take into account the absence of family in determining social benefits, paying—for instance—higher benefits to an individual with a disability who lives alone (like Elma Wilson).

But, once again, the prospect of insuring the absence of family raises hard questions. Should we conceptualize the absence of family as an individual choice? Some people, after all, have personal traits (irritability or rigidity) or habits that alienate others. Or should we take into account that the absence of family can arise in different ways—and often reflects a mixture of luck, personal traits, and the larger social situation?

At first, it may seem uncomfortable to conceive of personal relationships as a matter for state concern. It may seem obviously unfair for those who form relationships easily and persist in them to subsidize those who are hostile, prickly, or just peripatetic in their relationships. But a moment's thought suggests that analogous concerns arise in insuring work disruption. For instance, some worry that unemployment insurance subsidizes people who bring unemployment on themselves by choosing the wrong career, the wrong boss, or a failing company. Others object that workers in low-risk

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<sup>76</sup> See Romero, *supra* note 67, at 3–4.

jobs must pay for others who choose riskier jobs. Still others worry that social insurance for unemployment and disability may lead the opportunistic to remain unemployed too long.

But these are all considered tractable—if not entirely soluble—problems in social insurance directed at work disruption, and we can bring the same theoretical and technical tools to bear in analyzing disruptions in affective life. Cultural and moral cross-subsidies are pervasive in the modern states, and there are normative theories that address when it is—and is not—permissible to ask one group of people to bear risks undertaken by others. Moral hazard permeates every form of insurance, and while severe moral hazard can preclude insurance altogether, there are a host of tools for managing it, including copayments, categorical eligibility, delayed benefits, limited benefits, self-financing, and so on.

While these questions await a more sustained treatment, this Essay has aimed to plant the first seed: family tragedy is not simply a product of private failings, private choices, and private luck. Instead, family distress reflects legal structures that allocate risks and define the obligations of citizens to one another. To alter present patterns of privilege and vulnerability, we must look to reforms in family law, in social insurance, and in other legal structures.