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## BOOK REVIEW

### THE FAMILY, IN CONTEXT

MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY. By June Carbone and Naomi Cahn. New York, N.Y.: Oxford University Press. 2014. Pp. vii, 258. \$29.95.

FAMILY LAW REIMAGINED. By Jill Elaine Hasday. Cambridge, Mass.: Harvard University Press. 2014. Pp. 307. \$45.00.

FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS. By Clare Huntington. New York, N.Y.: Oxford University Press. 2014. Pp. xix, 320. \$45.00.

*Reviewed by Maxine Eichner\**

Much of the family law scholarship of the 1970s and 1980s focused narrowly on the marital family itself. That scholarship considered the effects of marriage and divorce laws on families,<sup>1</sup> often with respect to sex equality.<sup>2</sup> It also considered the wisdom of laws governing child custody after the breakup of marriage,<sup>3</sup> as well as the extent to which

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<sup>1</sup> See, e.g., Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (arguing that law influences the way that out-of-court bargaining proceeds during divorce).

<sup>2</sup> For scholarship considering the effects of divorce on women's interests, see, for example, Martha L. Fineman, *Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce*, 23 FAM. L.Q. 279 (1989) (criticizing the presumption of equality in equitable distribution proceedings when women stand in inherently unequal positions at divorce); and Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103 (1989) (arguing that justice counsels viewing spouses as equally investing in and sharing the financial benefits of marriage); Lenore J. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181 (1981) (arguing that no-fault divorce imposes economic costs on women). For scholarship on the effect of custody proceedings on sex equality, see, for example, Katharine T. Bartlett & Carol B. Stack, *Joint Custody, Feminism and the Dependency Dilemma*, 2 BERKELEY WOMEN'S L.J. 9 (1986) (looking at "joint custody as an example of the complicated nature of women's dependency," *id.* at 9). For scholarship on the relationship between marriage law and gender equality, see, for example, Lenore J. Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169 (1974) (arguing that legal terms of marriage unfairly burden married women and suggesting regulation of adult relationships based on contract instead of marriage).

<sup>3</sup> See, e.g., Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, LAW & CONTEMP. PROBS., Summer 1975, at 226 (arguing that judicial determinations of the best interests of a child are almost wholly speculative in cases in which the decision is between two fit parents); Elizabeth S. Scott et al., *Children's Preference in Adjudicated Custody Decisions*, 22 GA. L. REV. 1035 (1988) (concluding that "the custodial choice of adolescent children should be adopted as a presumption," *id.* at 1038).

outsiders to the marital family should be given custody rights.<sup>4</sup> Continuing in this vein, we might think of the family law scholarship of the 1990s and the first decade of the 2000s in terms of the camera zooming back from the marital family in order to focus on the proliferation of families that diverge from the heterosexual marital norm — same-sex couples, nonmarital cohabitants, and single-parent families.<sup>5</sup> In these decades, scholars focused on whether and how such family forms should be recognized under the law, and particularly on how similarly these families should be treated to heterosexual marital families.

Judging by three new works from family law scholars — Professors June Carbone and Naomi Cahn's *Marriage Markets*, Professor Clare Huntington's *Failure to Flourish*, and Professor Jill Hasday's *Family Law Reimagined* — the camera is zooming back still further in the most recent family law scholarship. Fueled 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,<sup>6</sup> the emerging scholarship of the 2010s

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<sup>4</sup> See, e.g., JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 71–96, 131–33 (new ed. 1979).

<sup>5</sup> For scholarship discussing same-sex couples, see, for example, ANDREW KOPPELMAN, *SAME SEX, DIFFERENT STATES* (2006) (analyzing legal problems that arise when same-sex married couples cross state borders); and William N. Eskridge, Jr., *Three Cultural Anxieties Undermining the Case for Same-Sex Marriage*, 7 *TEMP. POL. & CIV. RTS. L. REV.* 307 (1998) (examining the cultural context behind anti-same-sex marriage arguments). For scholarship on nonmarital cohabitants, see, for example, Cynthia Grant Bowman, *Social Science and Legal Policy: The Case of Heterosexual Cohabitation*, 9 *J.L. & FAM. STUD.* 1 (2007) (arguing in favor of legal protections for nonmarital cohabitants modeled after the approaches used by some European countries); Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitation Obligation*, 52 *UCLA L. REV.* 815 (2005) (arguing that marital obligations should not be imposed on unmarried cohabitants unless they choose to make that commitment); and Margaret M. Mahoney, *Forces Shaping the Law of Cohabitation for Opposite Sex Couples*, 7 *J.L. & FAM. STUD.* 135 (2005) (arguing that U.S. law fails to provide adequate protection for nonmarital families, and considering reasons for this failure). For scholarship on single-parent families, see, for example, Nancy E. Dowd, *Stigmatizing Single Parents*, 18 *HARV. WOMEN'S L.J.* 19 (1995) (suggesting that single-parent families should be the model for family law and policy); and Joyce E. McConnell, *Securing the Care of Children in Diverse Families: Building on Trends in Guardianship Reform*, 10 *YALE J.L. & FEMINISM* 29 (1998) (proposing single parents be permitted “concurrent guardianship,” the sharing of guardianship rights with another adult who is not a legal parent).

<sup>6</sup> This turn in family law scholarship may be a response to the recent spate of social science articles demonstrating that a wide swath of American families is in crisis as a result of socioeconomic forces. See, e.g., Frank F. Furstenberg, *If Moynihan Had Only Known: Race, Class, and Family Change in the Late Twentieth Century*, 621 *ANNALS AM. ACAD. POL. & SOC. SCI.* 94, 95 (2009) (“[I]t is clear that many of the pressures on marriage and family formation that seemed uniquely relevant to blacks have been felt by low-income populations more generally.”); *id.* at 101 (“[Recent social science] work reflects a growing reality based on social demographic studies that white patterns of sexual behavior, family formation, and gender relations among lower-income

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situates families, including nontraditional families, within their surrounding world. Each book focuses on different facets of the surrounding world that could better support families. *Marriage Markets* explores the effects of the mushrooming economic inequality on U.S. families. *Failure to Flourish* zooms out even further beyond inequality to develop a unified theory of the ways that our existing social context fails to support families. Meanwhile, *Family Law Reimagined* identifies how our myths about family law as a narrow and cabined category continue to undermine our capacity to strengthen families. All three books argue for broadening our understanding of families to consider their surrounding contexts, and for ensuring that these contexts provide the conditions that families need not just to survive, but also to thrive.

The first three Parts of this Review address these new works of family law in turn: Part I discusses Carbone and Cahn's book; Part II comments on Huntington's book; Part III then turns to Hasday's book. Finally, Part IV argues that these works all recognize that the ways in which families function are not simply a given. Instead, the family is an institution profoundly affected by its surrounding context. In pressing for recognition of this fact, these books contest the ascendant neoliberal vision of government in the United States, which holds that all the government needs to do to ensure a vigorous society is to keep out of citizens' private lives and ensure the health of markets. All three suggest that we ignore the social and economic context of families to their peril, and indeed — given the importance of families to the health of society — to our collective peril. The Review closes by contending that, given the overwhelming evidence that market pressures are sapping the strength of families, the law should actively seek to buffer families from some of the most pernicious effects of the U.S. market system.

#### I. *MARRIAGE MARKETS*: REGULATING ECONOMIC INEQUALITY TO SUPPORT FAMILIES

In the first of these books, *Marriage Markets*, June Carbone and Naomi Cahn, law professors at the University of Minnesota and George Washington University respectively, argue that the increasing economic inequality in the United States is wreaking havoc on American families, creating a vast chasm in family patterns between the haves and the have-nots. In the 1960s, the authors observe, most families, regardless of class, took a similar form: they largely consisted of heterosexual marital couples raising children (p. 13). In the last dec-

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families increasingly resemble the family patterns that troubled Moynihan nearly a half century ago.”).

ades, however, this pattern has continued for those at the top of the economic ladder, but has been abandoned below that level. Much of this divergence, Carbone and Cahn point out, has been masked by research that analyzes trends based on the population as a whole. For example, researchers often report that U.S. divorce rates leveled off in the 1990s (p. 15). This description conceals two divergent trends: Divorce rates for college graduates have been declining steadily for marriages entered into since the 1980s (pp. 15–16). In contrast, when it comes to those without college degrees, although divorce rates fell for marriages entered into from 1980 through the late 1980s, divorce rates began to rise precipitously for marriages entered into since the late 1980s, and have now risen to unprecedented heights (pp. 15–16, 16 fig.1.1). In Carbone and Cahn’s words: “Marriage, once universal, once the subject of rebellion, has emerged as a marker of the new class lines remaking American society. Stable unions have become a hallmark of privilege” (p. 19). Carbone and Cahn’s project in *Marriage Markets* is to call attention to the recent emergence of disparate family patterns based on class, to tie the increasing disparities in family form to the mushrooming economic inequality in the United States, and to call attention to the way that law can, through reducing inequality, better support families.

#### A. *The Emergence of Family Patterns Based on Class*

Mustering a wealth of research to support their findings, the authors document the emergence of distinctive family patterns during the last decades in the United States that they tie to their conception of class. Carbone and Cahn’s use of the term “class,” they acknowledge, does not overlap completely with the term’s general usage in social or economic analyses since it is intended specifically to highlight divisions relevant to family formation and parenting (pp. 5–6). Instead, the authors distinguish among three groups that U.S. Census data show have increasingly adopted divergent family patterns (p. 6). The first of these groups does not consist of the very rich “one percenters” who have received most of the attention in the recent public discussion of inequality. Instead, when it comes to the emergence of distinct family patterns, Carbone and Cahn state that the top group consists of “college graduates[, who] are a group constituting roughly one-third of today’s young adults” (p. 6). Their second group represents the “middle” tier of the American population, composed of people who have high school but not college degrees and people who, “while perhaps struggling economically, are not poor. The group can be defined demographically: a household at the fiftieth percentile of the American population in 2011 earned a little over \$42,000, and the average American

adult graduated from high school and attended college but did not complete a four-year degree" (p. 6).<sup>7</sup> Finally, Carbone and Cahn's third group "is the poor or the marginalized. This group includes high school dropouts, but it is certainly broader than the 7.4 percent of those between the ages of sixteen and twenty-four who lack a high school degree. It includes most of the 15 percent of Americans below the poverty line" (p. 6).<sup>8</sup>

Carbone and Cahn make a convincing case that U.S. family patterns have increasingly diverged based on these classes. For those in the top stratum, populated by college graduates, marriage remains a thriving institution. In fact, the top five percent of women earners, Carbone and Cahn show, are the only group whose marriage rates rose in the last decades (p. 14). In 1970, women who graduated from college were less likely to be married than other women. Today, college-educated women are more likely to be married (p. 14). These marriages look different from the Ozzie-and-Harriet model of marriage of past decades: Today, these couples wait until they are older to marry, and are therefore more established in their careers when they do marry (pp. 17, 41). Further, women in this class work outside the home even after they have children, and husbands and wives share childrearing more equally (if still not completely equally) than in the past (pp. 86, 94-96). This new marital form works very well for this group: a rising percentage of white college graduates (from 58% in 1990 to 63% in 2010) describe themselves as very happily married (p. 19). Further, few in this class are pessimistic about marriage; in surveys, only 17% responded affirmatively that the institution has not worked for most of the people they know (p. 19).<sup>9</sup>

In stark contrast, men and women in the lowest socioeconomic stratum, composed in large part of those without high school degrees, have largely given up on marriage. In this group, marriage rates have dropped considerably in the last decades. In the 1970s, 67% of the least-educated adults between the ages of twenty-five and sixty were in intact first marriages; by the 2000s, that figure had dropped to 39%.<sup>10</sup> Instead of marrying, women in this socioeconomic tier are increasingly having children outside of marriage (p. 17 fig.1.2).<sup>11</sup> An astounding 96% of births to African American high school dropouts currently

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<sup>7</sup> A footnote has been omitted.

<sup>8</sup> A footnote has been omitted.

<sup>9</sup> The authors cite W. Bradford Wilcox, *When Marriage Disappears: The Retreat from Marriage in Middle America*, in THE NAT'L MARRIAGE PROJECT, THE STATE OF OUR UNIONS: THE SOCIAL HEALTH OF MARRIAGE IN AMERICA, 2010, at 13, 40 fig.16 (W. Bradford Wilcox ed., 2010), <http://stateofourunions.org/2010/SOOU2010.pdf> [<http://perma.cc/7DTQ-FRZC>].

<sup>10</sup> *Id.* at 21 fig.3.

<sup>11</sup> The authors cite Wilcox, *supra* note 9, at 23 fig.5.

happen outside marriage (p. 14). In the era of the Moynihan Report,<sup>12</sup> the rise of children born outside of wedlock was seen to be a problem mostly limited to African American families (pp. 22–23). Since then, though, it has become clear that nonmarital children are a phenomenon associated with the underclass regardless of race.<sup>13</sup> Thus, in 2008, the nonmarital birth rate approached 42% for white high school dropouts (p. 18). Most of this least-educated group are skeptical of marriage: A declining percentage of the relatively rare married men and women in this group report that they are “very happy” in their marriages (from 59% in the 1970s to 52% in the 2000s).<sup>14</sup> Furthermore, of all adults without high school degrees, more than half — 53% — say that marriage has not worked out for most people they know (p. 19).

Between the lower tier and the upper tier lie those families in the middle, composed of those with high school but not college degrees, a group that until the end of the twentieth century was dominated by the white working class (p. 3). Although families in this middle tier in past decades adopted family patterns far closer to the top tier’s, increasingly this group’s patterns have veered toward the lower tier’s.<sup>15</sup> Individuals with only high school degrees used to be among the most likely to marry, but no longer: In the 1970s, 73% of adults in this group between the ages of twenty-five and sixty were in intact first marriages — the same percentage as in the highly-educated tier.<sup>16</sup> By the 2000s, that percentage had dropped to 45%, compared to 56% of the highly educated.<sup>17</sup> Further, marriages in this group are significantly more likely to end in divorce than in the past, and remarriage and blended families are rife (pp. 15–16, 79, 126).

For this middle tier, the relationship between childbearing and marriage has also changed, as have attitudes about marriage. In the early 1980s, women with a high school education had rates of nonmarital childbearing that were not very far from college graduates’ rates (13%, compared to 2%).<sup>18</sup> In recent years, however, the middle tier’s nonmarital birth rate has risen to 44% — a rate far closer to that of high school dropouts (54%), than of the college educated (6%).<sup>19</sup> Furthermore, when members of this group do marry, their rates of marital happiness, which in the 1970s looked closer to that of college

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<sup>12</sup> OFFICE OF POLICY PLANNING & RESEARCH, U.S. DEP’T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965), <http://www.dol.gov/oasam/programs/history/webid-meynihan.htm> [<http://perma.cc/7E9M-ZH6V>].

<sup>13</sup> See Furstenberg, *supra* note 6, at 108.

<sup>14</sup> Wilcox, *supra* note 9, at 20 fig.2.

<sup>15</sup> See *id.* at 15.

<sup>16</sup> *Id.* at 21 fig.3.

<sup>17</sup> See *id.*

<sup>18</sup> See *id.* at 23.

<sup>19</sup> See *id.* at 23–24.

graduates, have increasingly diverged from that group: In contrast to the consistently high rates in the top stratum of persons who describe themselves as very happily married (69% in both the 1970s and the 2000s), the percentage of the middle tier who describe themselves as very happily married decreased from 68% to 57% between the 1970s and the 2000s.<sup>20</sup> In addition, 43% of those with moderate education polled in 2008 agreed that marriage had not worked for most of the people they know, in contrast to the 17% of highly educated respondents who agreed with this sentiment.<sup>21</sup>

Carbone and Cahn tie these changes in families to changes in the U.S. economy beginning in the 1990s (p. 75). A rich range of research from other scholars has for decades documented the ways in which economic struggles have profoundly affected the form and function of poor and minority families.<sup>22</sup> For example, in his 1987 book, *The Truly Disadvantaged*, William Julius Wilson linked the rising rates of out-of-wedlock births in African American inner-city communities with the disappearance of industrial jobs in cities.<sup>23</sup> Wilson argued that gender ratios among the African American population in inner cities were already skewed because of men's high mortality and incarceration rates.<sup>24</sup> Men's unemployment, Wilson contended, skewed these ratios even more as men who were unemployed would not be considered marriageable by prospective partners since they could not carry their own financial weight in the family.<sup>25</sup> Wilson calculated that excluding unemployed and imprisoned African Americans from the pool left under fifty "marriageable" men for every hundred African American women between the ages of twenty and twenty-four in 1982.<sup>26</sup>

Carbone and Cahn convincingly extend this line of analysis to recent changes in the middle tier of families. They demonstrate that labor market shifts in the past few decades have had a particularly eco-

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

<sup>21</sup> *Id.* at 40-41.

<sup>22</sup> See, e.g., WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED* 83 (1987); Kathryn Edin & Joanna M. Reed, *Why Don't They Just Get Married? Barriers to Marriage Among the Disadvantaged*, *FUTURE CHILD*, Fall 2005, at 117, 122-23, [http://futureofchildren.org/futureofchildren/publications/docs/15\\_02\\_07.pdf](http://futureofchildren.org/futureofchildren/publications/docs/15_02_07.pdf) [<http://perma.cc/UD5G-TEFJ>]; Kristen Harknett & Sara S. McLanahan, *Racial and Ethnic Differences in Marriage After the Birth of a Child*, 69 *AM. SOC. REV.* 790, 803 (2004); Sara McLanahan, *Diverging Destinies: How Children Are Faring Under the Second Demographic Transition*, 41 *DEMOGRAPHY* 607, 617-18 (2004). As Carbone and Cahn point out, the most infamous example of a study that tied changes in family form to the economy was the report written by Daniel Moynihan in 1965, which argued that the waning of blue-collar jobs in inner cities was ravaging African American families in these areas, leading to instability and female-headed families (pp. 22-23) (citing OFFICE OF POLICY PLANNING & RESEARCH, *supra* note 12).

<sup>23</sup> See WILSON, *supra* note 22, at 63-92.

<sup>24</sup> *Id.* at 83.

<sup>25</sup> See *id.* at 82-84.

<sup>26</sup> *Id.* at 83, 86 fig.3.3.

nomically destabilizing effect on blue-collar men, who have faced increasing underemployment and instability in employment (pp. 75–77). In the same way that inner-city men’s employment issues skewed marriage rates in the lower tier decades ago, Carbone and Cahn argue that men’s employment travails are now affecting marriage rates among the middle class by dramatically reducing the number of men whom women consider to be marriageable (pp. 75–76). To boot, when men in this class do marry, their declining wages make it more likely that their wives will need to join them in the workplace (p. 100). This tends to decrease happiness in these marriages since middle-tier women generally find their jobs less rewarding and less flexible when it comes to family responsibilities than do more-educated women, and are therefore more likely to wish that they did not work (pp. 99–100). Furthermore, families in the middle group cannot afford to pay for time- and labor-saving services, like nannies and house-cleaning services, to ease the strain of two working parents that the upper tier of families can afford (p. 100). All this, Carbone and Cahn make the case, creates significant strife in working-class families that contributes to their rising rates of divorce and nonmarital children (pp. 100–01).

*B. Inequality’s Effect on Relationship Norms — Marriage Markets*

Carbone and Cahn persuasively demonstrate that increasing economic inequality and insecurity are negatively affecting the basic structure and the most important functions of a large segment of American families. The authors also make the case that increased economic inequality not only directly influences family forms through disqualifying men from marriage by making them economically unstable prospective partners, but also indirectly influences family forms by changing the norms surrounding relationships. Their argument on this score seeks to counter conservative critics like Charles Murray, who contend that the weakening of working-class and poor families is caused not by the economy, but by the development of maladaptive cultural norms in these groups that fail to hold individuals responsible for their lives and choices (as well as government programs that support these norms).<sup>27</sup> Carbone and Cahn counter that any such norms are themselves pervasively influenced by increased economic inequality (pp. 50, 199).

There are a number of plausible ways that inequality could influence relationship norms, and the authors make the case for several of

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<sup>27</sup> See generally CHARLES MURRAY, *COMING APART: THE STATE OF WHITE AMERICA 1960–2010* (2012).



them. One way, as Carbone and Cahn observe, is that, because there are so few men who are deemed marriageable in the lower and middle tiers, over time unmarried parenthood may come to be seen as increasingly acceptable (pp. 74-75, 79). Another way is through the increased rates of alcoholism, drug abuse, and domestic violence associated with men's increasing economic instability; all of these, Carbone and Cahn argue, may create problems in relationships that over time contribute to decreased trust between the sexes (pp. 74-75, 100-01). Further, poor single mothers may be so overwhelmed by their daily harsh economic struggles for survival that they seek to shield themselves from the possible exploitation that could accompany a relationship (pp. 73-74). In making these cases, the authors present a rich and convincing picture of the complex ways that economic realities can influence social norms (pp. 60-75).

While Carbone and Cahn put some weight on all these explanations, the explanation they focus on most for how inequality affects relationship norms is a strategic-choice model involving bargaining between genders. There are three steps in the authors' argument for how such "marriage markets" have resulted in the development of different relationship norms within the different socioeconomic strata (pp. 58-59). First, they contend, greater economic inequality has increasingly segmented the different pools from which men and women choose partners (pp. 58-59). Whereas men and women were comparatively more likely to marry outside of their own class in the middle part of the last century, in recent decades, they have become increasingly likely to marry someone from their own socioeconomic stratum (pp. 58-59). Second, they argue, the economic changes of the last decades have disparately affected the positions of men and women in these pools (pp. 58-59). Women have moved from the bottom to the middle of the pool, giving them increasing economic independence (pp. 58-59). At the same time, these changes have had a bimodal effect on men. Working-class and poor men have been pushed toward the bottom of the socioeconomic pool, while men in the top tier have risen still further toward the top (pp. 58-59). This means women at the bottom and in the middle have been left with fewer desirable marriage prospects, since many of their potential partners have been made unmarriageable because they cannot contribute enough financially, while women in the top tier have increasingly desirable marriage prospects (pp. 4, 8, 59). Third and finally, they argue, the gender ratios within each distinct "market" have affected the norms regarding dating, sex, and marriage within that market (p. 59).

To make their case that the altered gender ratios in the socioeconomic ordering (the second step in their analysis) have influenced the

norms of “marriage markets” (the third step) in all three tiers, the authors borrow a hypothesis developed in 1983 by two sociologists, Marcia Guttentag and Paul Secord.<sup>28</sup> According to Guttentag and Secord, where women outnumber men in a society in which women generally have less power than men do, men’s ready access to women leads men to be less likely to commit to any one woman and more likely to be unfaithful when they do commit (p. 53).<sup>29</sup> In response, women feel exploited and distrustful of men, and therefore, in turn, are less likely to commit themselves (p. 53). All this, the sociologists posited, spurs creation of a “vicious cycle” that dampens marriage norms (p. 53). In contrast, the sociologists theorized, where men outnumber women in a society in which women have comparatively less power, men will begin to compete for access to women, a competition that makes them more likely to commit to these women, and which fosters the development of marriage-oriented norms (pp. 52–53).<sup>30</sup> This situation promotes a “virtuous cycle,” in which pro-marriage norms make men more likely to commit, which in turn yields more stable marriages and increased parental investment in children (pp. 52–53).<sup>31</sup>

Carbone and Cahn argue that Guttentag and Secord’s hypothesis, in concert with increasing economic inequality, explains the divergence of relationship norms among their three socioeconomic strata (p. 58). In the bottom tier, they contend, the few marriageable men left in the pool after unemployment, imprisonment, and so forth have a larger number of possible choices for partners, which leaves them with a stronger bargaining hand to avoid a relationship commitment (p. 73). Indeed, the authors marshal empirical evidence demonstrating that in the bottom socioeconomic stratum, skewed gender ratios have had a significant, negative effect on relationship norms. Because of these norms, women give up looking for committed relationships despite still wanting them. In turn, men are less likely to commit and, when they do, are more likely to be unfaithful because they believe that there are ample alternative women waiting for them (pp. 70–75).<sup>32</sup> Carbone and Cahn also make a plausible case that the skewing of gender ratios in the middle tier “marriage market” is producing a similar transformation in relationship norms (pp. 75–79).

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<sup>28</sup> See generally MARCIA GUTTENTAG & PAUL F. SECORD, *TOO MANY WOMEN?* (1983).

<sup>29</sup> The authors cite GUTTENTAG & SECORD, *supra* note 28, at 190.

<sup>30</sup> The authors cite GUTTENTAG & SECORD, *supra* note 28, at 28–30.

<sup>31</sup> At first blush, Guttentag and Secord’s hypothesis may appear to be based on discredited sociobiological notions that men naturally seek to sow their seed, while women seek commitment. However, Guttentag and Secord are careful to attribute these tendencies to men only in conditions in which men have more societal power than women. They argue that women would behave the same way in conditions in which women had more societal power than men. See *id.* at 24–27.

<sup>32</sup> See, e.g., WILSON, *supra* note 22, at 82–83; Edin & Reed, *supra* note 22, at 117, 122–23; Harknett & McLanahan, *supra* note 22, at 803–04; McLanahan, *supra* note 22, at 619.

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Yet Carbone and Cahn stand on shakier ground when they argue that skewed gender ratios are also driving the relationship norms in the top stratum, this time in favor of marital commitment. To make this argument, the authors contend that the rising numbers of men at the top of the economic spectrum mean that these men are competing for fewer, similarly situated high-earning women (pp. 50–59, 70). The mismatch of more men to fewer women in this group, the authors contend, means that these men will be more likely to become marriage-oriented, and that relationships in this tier will become more stable as men increasingly invest in them (p. 59).

The authors' arguments regarding marriage norms in the top tier turn on there being significantly more marriageable men in that category than women. Yet throughout much of the book, Carbone and Cahn define this top tier in terms of college graduates (pp. 6, 16–19) — a group that for decades has included significantly more women than men (p. 66). So how can Carbone and Cahn claim that the gender ratios in this group are skewed in favor of men? By switching from defining this tier in terms of college education to defining it based on income: whereas more women receive college degrees, certainly more men than women are at the top of the income ladder in the United States (p. 66). Carbone and Cahn provide some justification for switching the top tier definition from education to income when it comes to marriage: Given that couples are marrying later, many waiting several years after college, the authors argue that men and women in the elite market are increasingly sorting themselves based on income rather than education (pp. 69–70). As proof, they cite the fact that men and women increasingly say that they look for economic success in a potential partner (pp. 69–70). Having redefined the top tier in this way, “high-income women enjoy a larger number of high-income men to choose from” (p. 66).

There is little doubt that couples getting married in the United States are increasingly sorting themselves by income, education, and social backgrounds.<sup>33</sup> Yet critical to Carbone and Cahn's marriage-market thesis is not just that this sorting takes place, but also that, for upper-tier men, income is the critical factor driving their choices rather than, say, education or common social background or some combination of these factors.<sup>34</sup> If any of these other factors has a role in driving this assortative mating, from the perspective of upper-tier men, the

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<sup>33</sup> See Megan M. Sweeney & Maria Cancian, *The Changing Importance of White Women's Economic Prospects for Assortative Mating*, 66 J. MARRIAGE & FAM. 1015, 1026 (2004).

<sup>34</sup> The assertion made in the text is not one that Carbone and Cahn make directly; indeed, they cite to studies showing, for example, that men and women from elite colleges tend to marry one another. Instead, this Review asserts that the authors' argument about skewed gender ratios logically requires that income be the driving factor in upper-tier men's choices.

gender ratios of the pool of potential mates would not be skewed more heavily toward men. Carbone and Cahn muster little evidence to suggest that upper-tier men are choosing mates based solely on income rather than these other factors. Data suggesting that American men are increasingly looking for women who can pull their own weight financially<sup>35</sup> lend some support to the authors' hypothesis, but are a relatively slender reed on which to rest this heavy claim. Indeed, sociologists who study this issue are still struggling to sort out which factor or combination of factors is driving the increasing association of earnings between spouses at the time of marriage.<sup>36</sup>

What is more, Carbone and Cahn's theory requires not only that a potential spouse's comparably high income be a motivating factor in high-income men's marital choices, but also that it be an absolute requirement in the sense that, if it is not met, it would completely eliminate potential spouses from high-income men's pool of possible partners. Unless potential partners with lower incomes are completely disqualified, rather than simply disadvantaged with respect to other potential mates in the pool, the skewed gender ratios necessary to instantiate pro-marriage norms under Guttentag and Secord's hypothesis would not result. Yet here too there is little evidence to support the proposition that high-income men would not only prefer to marry women with similarly high incomes, but that they would also disqualify all women without such incomes from the pool of potential mates. In fact, a fair amount of evidence suggests the contrary. For example, we know that most upper-tier men marry women who earn somewhat less than they do (p. 98).<sup>37</sup> We also know that men who do not find an acceptable partner, rather than simply not marrying, tend to relax their standards for a partner over time.<sup>38</sup> One potential example of this

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<sup>35</sup> See David M. Buss et al., *A Half Century of Mate Preferences: The Cultural Evolution of Values*, 63 J. MARRIAGE & FAM. 491, 499–500 (2001).

<sup>36</sup> See, e.g., Christine R. Schwartz, *Earnings Inequality and the Changing Association Between Spouses' Earnings*, 115 AM. J. SOC. 1524, 1527–28 (2010) ("Even if economic considerations have not become increasingly important factors in choosing one's mate, increased sorting on earnings may be the result of increased sorting on other dimensions. For example, previous research has shown that the odds that spouses share the same educational attainment increased by about 25% between 1960 and 2003. To the extent that men and women are sorting on education as a proxy for 'lifestyles' (e.g., values, beliefs, interests) rather than as an indicator of 'life chances' (i.e., future earnings), increases in the association between spouses' earnings may be the result of increased matching on education rather than a result of direct sorting on earnings." (citation omitted)); Christine R. Schwartz, *Trends and Variation in Assortative Mating: Causes and Consequences*, 39 ANN. REV. SOC. 451, 464 (2013) ("[T]he literature has not yet fully grappled with how to conceptualize and measure marriage markets.").

<sup>37</sup> Carbone and Cahn observe that "[i]n families with dual earners, the wife earns more than the husband in 70 percent of marriages in the bottom quintile of families in comparison with 34 percent of wives in families with incomes in the top 20 percent" (p. 98).

<sup>38</sup> See Robert D. Mare, *Five Decades of Educational Assortative Mating*, 56 AM. SOC. REV. 15, 27–29 (1991); see also Susan K. Lewis & Valerie K. Oppenheimer, *Educational Assortative*

phenomenon is that, while upper-tier men on average marry similarly educated women, those who marry later than average are more likely to marry women with less education.<sup>39</sup> While these pieces of evidence are certainly not conclusive, together they suggest that the segmentation of the marriage market from the perspective of upper-tier men is not nearly as complete as Carbone and Cahn's theory would demand to create their skewed gender ratios in the upper tier.<sup>40</sup> Note that, in contrast, there are better reasons to believe that the segmentation among marriage markets is more complete in the lower-income stratum and that the skewed gender ratios in the bottom stratum are therefore more fixed: Poor women are unlikely to be able to trade up to the middle tier to find a partner when there are already more middle-tier women seeking partners than there are middle-tier men. Furthermore, the skewed gender ratios in the bottom tier are not simply a product of personal inclination: the missing men are truly unavailable in the sense that they are dead, are imprisoned, or would make poor spouses because of substance-abuse problems or unemployment (pp. 70–79).

Carbone and Cahn also have difficulty using the gender-imbalance hypothesis to account for the very phenomenon they seek to explain: how marriage-driven norms emerged among the upper-tier men in the first place. Assortative mating based on income is relevant only in a culture in which men are seeking to commit — it cannot explain why such norms of commitment arose. If, as Guttentag and Secord posit, in conditions of gender inequality in society, pro-marriage norms develop only when women are scarce, and then only in order to ensure that men have continued sexual access to women, why wouldn't men at the top of the income chain, prior to the emergence of these norms, simply have selected from the abundant numbers of women below them in terms of income? Put another way, only once pro-relationship norms are in place should a prospective partner's earning potential matter to these men in the first place. Without such norms, there should be no segmentation of the marriage market that would cause men to perceive a shortage of women. It may be the case that Carbone and Cahn believe that men are seeking to enter marriage for other reasons besides ensuring that they have access to women — say be-

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*Mating Across Marriage Markets: Non-Hispanic Whites in the United States*, 37 DEMOGRAPHY 29, 36–37 (2000).

<sup>39</sup> Kevin Shafer & Zhenchao Qian, *Marriage Timing and Educational Assortative Mating*, 41 J. COMP. FAM. STUD. 661, 679 (2010).

<sup>40</sup> Presumably, Carbone and Cahn could argue that the entire upper tier is actually segmented into different marriage markets based on income, and that it is only in the more elite levels of the upper tier that the gender ratios are skewed toward men. This would not explain, however, why college graduates generally evidence pro-marriage norms.

cause they are truly looking for a life-long partner to love, or because they want the best partner with whom to raise successful children. Yet if this is the case, it is unclear why they rely on the Guttentag and Secord hypothesis about unbalanced gender ratios at all, since the men who want these things would probably seek to marry regardless of whether gender ratios are skewed.

Carbone and Cahn's shift to defining the upper tier by income rather than education to explain the embrace of pro-marriage norms among that tier is also unsuccessful for one last reason: the high marriage rates and solid marriage norms that Carbone and Cahn seek to explain are, as they make clear throughout most of the book, characteristic of college graduates generally, rather than confined to the much smaller group composed of those at the top income levels.<sup>41</sup> To explain the development of relationship norms in this larger group, a different phenomenon must therefore be at work than the skewed gender ratios that affect only those at high income levels.

None of this is to deny that economic inequality is affecting relationship norms in the top stratum of men and women — it is simply unlikely that it is doing so through the gender ratio-driven bargaining that Carbone and Cahn propose. Indeed, throughout much of the rest of their book, Carbone and Cahn provide a likelier explanation for the way that economic inequality is affecting norms at the top through their description of the considerable investment that top-stratum parents make in their children (pp. 85–87) and the fact that such children have an excellent chance of being reared in happy, two-parent marital families (pp. 14–16). Both of these factors make it far more likely that, when these children become adults, both the men and the women in this group will have the desire to marry, the judgment to seek out stable, successful partners, and the emotional and financial wherewithal to maintain these relationships.<sup>42</sup>

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<sup>41</sup> For example, Carbone and Cahn note that divorce rates drop for those with college degrees (p. 16), that the age at first birth has continued to rise for college graduates alongside the rise in the age at marriage (p. 17), that college graduates continue to have low nonmarital birth rates (p. 17), and that a higher percentage of white college graduates describe themselves as being in “very happy marriages” than in the past (p. 19).

<sup>42</sup> See generally Paul R. Amato & Alan Booth, *The Legacy of Parents' Marital Discord: Consequences for Children's Marital Quality*, 81 J. PERSONALITY & SOC. PSYCHOL. 627 (2001) (finding that low-quality parental marriages related to low-quality marriages for adult children); Mick Cunningham & Arland Thornton, *The Influence of Parents' Marital Quality on Adult Children's Attitudes Toward Marriage and Its Alternatives: Main and Moderating Effects*, 43 DEMOGRAPHY 659 (2006) (finding that the transmission of positive attitudes about marriage from parents to children was correlated with parental marital satisfaction).

*C. The Effects of Family Classes on Children*

Carbone and Cahn argue that the biggest problem with these increasingly divergent family patterns comes from the decreased resources that the middle- and lower-tier classes have to make available to children. A half-century ago, the effects of the disintegration of the marital family were limited to a small group. Today, however, the authors argue, “the destruction of community and familial bonds affects a much larger portion of American society and increases the gaps between the top, the middle, and the bottom. The result is the reproduction of class through its impact on children from their first days of life” (p. 83).

Much of the gap between children from upper-stratum families and those from all other families, Carbone and Cahn contend, comes from the fact that well-off parents have the resources to secure excellent childcare when they are away at work, including carefully selected nannies and preschool teachers in the children’s early years, and to focus intensively on their children when they are not working (pp. 85–86). In the 1960s, there was little disparity between the test scores of white children from different classes, though there was a large disparity between the test scores of black children and those of white children (p. 83). Now the overall gaps in test scores among children are larger than they used to be and are more closely associated with income than with race (p. 83).<sup>43</sup>

Economic disparities also advantage children from the upper tier in other ways. These parents have the money to send their children to stimulating camps, get them athletic coaches who will help them make teams, find tutors if they are struggling in school, and so forth (p. 85). As a result of these advantages, combined with their higher test scores, the children of upper-stratum families are more likely to get into and go to college, and to wait until they have stable relationships, careers, and economic resources before they have children (p. 87). Meanwhile, the children of working-class and poor women, who grow up with fewer resources and attention, are less likely to get married and are more likely to have children outside of marriage in their late teens and early twenties than are the children of upper-class families (p. 87). Carbone and Cahn convincingly make the case that the consequence of these disparate patterns is that, for the first time in U.S. history, the current generation of children from all classes cannot be expected to do better than their parents. Instead, this cycle of low investment in

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<sup>43</sup> The authors cite Sean F. Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, in *WHITHER OPPORTUNITY?: RISING INEQUALITY, SCHOOLS, AND CHILDREN’S LIFE CHANCES* 91 (Greg J. Duncan & Richard J. Murnane eds., 2011).

children of lower-tier families and high investment in children of upper-tier families means that existing inequalities will become amplified in future generations (p. 89).

*D. Using Law to Rebuild Thriving Families*

Unsurprisingly for a book that considers as broad an issue as the relationship between economic inequality and families, Carbone and Cahn's prescription for addressing the issues raised by family classes is also broad. First of all, the authors call for a national commitment to reduce inequality. In their words, what will make a difference to the future of American families is simple: "greater equality that creates more accessible pathways into the economic opportunities of tomorrow and the stable families children need" (p. 142). Such a program, they argue, should provide stable employment for all able adults, support parents' ability to care for their children, and increase societal provision for children from all strata (p. 201). The authors also call for re-making the pathways to parenthood in order to ensure that parents are better prepared to parent their children. To do so, they argue, requires increased access to birth control and increased education for youths about the responsibilities of parenting (pp. 174–82).

In the meantime, until these inequalities are eliminated, Carbone and Cahn call for a reformed family law that recognizes and responds to the differences among family patterns in ways that best support children's well-being. Contemporary family law, they show, is modeled on the expectation of the marital family. When this family law collides with the realities of contemporary non-elite family patterns, the authors demonstrate, the mismatch can be particularly harmful to children (pp. 105–06). For example, the rule that fathers should automatically receive custody rights and be obligated to pay child support, while appropriate after the breakup of a marital family, often redounds to children's detriment when applied to other family forms. In the case of nonmarital fathers, such a rule often increases enmity between parents and destroys the informal agreements that such parents negotiate to support their children, which generally contribute more to children's well-being than the court-ordered support (pp. 126–28, 131–32). Carbone and Cahn therefore argue for laws that give more leeway to this kind of informal bargaining (pp. 138–39, 192–93). The goal of their reformed family law is to more systematically do for all family classes what family law used to do for most families and continues to do for upper-tier families: "lock in parental bargains that benefit children, nudge parents toward greater acceptance of the responsibilities that go with parenthood, and help forge new understandings, whether express or implied, that promote family stability" (p. 188).



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## II. *FAILURE TO FLOURISH*: THE MULTIPLE WAYS THAT LAW CAN SUPPORT FAMILIES

If *Marriage Markets* focuses on the ways that the United States' failure to regulate economic inequality is undermining families, Professor Clare Huntington's *Failure to Flourish* pulls the focus of the camera back still further to demonstrate the many other ways that American law fails to support strong families. Like Carbone and Cahn, Huntington, a law professor at Fordham, musters a convincing array of evidence to demonstrate that a substantial swath of American families is in trouble. She focuses not just on the rising rates of single-parent families and the worse outcomes of children in these families compared to children in marital families, but also on the high rates of family violence, substance abuse, incarceration, and teen pregnancy in American families (pp. 27–54). Huntington persuasively argues that American law contributes to this crisis by generally failing to consider the well-being of families. The root cause of this legal dysfunction, she contends, is the continued dominance of the myth that healthy families should properly stand on their own (p. 80). Huntington dispels this myth by demonstrating the many ways that law inevitably affects families, arguing that it makes no sense to conceptualize families as standing autonomously apart from the law (pp. 55–80). This recognition, Huntington counsels, opens up consideration of how the state can best support families. To do so, she calls for U.S. law to routinely support the health of families across a range of substantive areas (pp. 145–64). Furthermore, when families do have crises that require state intervention, she argues that the state should intervene in ways that allow family members to restructure their relationships in as healthy a manner as possible (pp. 113–22).

Some of the theoretical terrain that Huntington works here has been mined before. Professor Martha Fineman, in *The Autonomy Myth*, soundly critiqued the idea that autonomy is an attainable state for either individuals or families.<sup>44</sup> Dependency, Fineman pointed out, is a universal and inevitable feature of human life.<sup>45</sup> As a consequence, no human being can go completely through life without significant caretaking. Given that the state relies on families' caretaking to meet its citizens' dependency needs, she contends, this caretaking creates a "societal debt" to caretakers that should be repaid through laws that provide them compensation and structural accommodation in the labor market.<sup>46</sup>

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<sup>44</sup> MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH* (2004).

<sup>45</sup> *Id.* at 35.

<sup>46</sup> *Id.* at 263.

In my own book, *The Supportive State*, I take up where Fineman leaves off: with the recognition of dependency and the way that this recognition alters the responsibilities expected of government.<sup>47</sup> This recognition, the book points out, complicates the usual picture of the state's proper role: in addition to safeguarding citizens' liberty and equality — the tasks generally expected of government — the state must also ensure adequate caretaking and human development.<sup>48</sup> Ensuring caretaking and human development requires attention to the family, the principal, albeit not only, institution in which these tasks are accomplished. Contrary to the prevailing myth of family autonomy, the book argues, "the ways in which families function are always deeply and inextricably intertwined with government policy."<sup>49</sup> This requires careful attention on the part of the state to develop public policies that support families. Put another way, healthy families do not spring up like mushrooms after a rain; instead, they are an achievement that must be pursued jointly on the part of citizens and government.<sup>50</sup>

*The Supportive State* then calls for public policy that truly supports families. Under such policy, while families properly bear the bulk of the responsibility for caring for (or arranging for the care for) their members, the state has the responsibility for structuring societal institutions to support families in this caretaking. This means, among other things, ensuring that welfare assistance, child welfare programs, early childhood education, the workplace, and schools support families in their caretaking and human-development tasks.<sup>51</sup> Measured against this responsibility, *The Supportive State* argues that U.S. public policy falls far short. In particular, it faults U.S. policy for expecting families to meet their members' needs by themselves, in the absence of institutions that support families, and then blaming families for failing — and, in the case of children, sometimes coercively intervening to address this failure — when families cannot meet their members' needs on their own.<sup>52</sup>

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<sup>47</sup> MAXINE EICHNER, *THE SUPPORTIVE STATE* (2010). Professor Linda McClain's excellent book, *The Place of Families*, makes the related point that families have an important place in our constitutional and political order because they help form "persons into capable, responsible, self-governing citizens." LINDA C. MCCLAIN, *THE PLACE OF FAMILIES* 3 (2006). McClain explores the contours of both families' and government's responsibilities for carrying out what she calls the "formative project," and argues that government policies should seek to promote citizens' "capacity, equality, and responsibility." *Id.* at 10–11.

<sup>48</sup> EICHNER, *supra* note 47, at 11.

<sup>49</sup> *Id.* at 55.

<sup>50</sup> *Id.* at 11.

<sup>51</sup> *Id.* at 71–84.

<sup>52</sup> *Id.* at 117–42.

*A. From the Inevitability of Dependency to the Need for Attachment*

From the first pages of her book, Huntington's consideration advances the conversation on the state's role in supporting families in important ways. To begin with, the earlier conversation in the literature about the importance of families, following on Fineman's pathbreaking work,<sup>53</sup> focused on families' role in dealing with human dependency, and therefore on the caretaking and human development that families provide. While these functions are critically important, they capture only some of the reasons that family attachments play such a vital role in individual and societal well-being. Huntington enlarges this perspective by making the case that humans seek attachment not just for caretaking and human development, but also because long-term attachments themselves contribute to flourishing in a variety of ways. For example, she points out that adults, like children, seek out attachment figures when they feel threatened or stressed, not simply when they need caretaking, and that such attachment relationships help people reduce stress and self-regulate emotions (p. 19). To support this point, she draws together research as diverse as studies of the well-being of children in German orphanages during World War II (pp. 5–6), Harry Harlow's experiments with baby monkeys instinctively seeking attachment (pp. 15–17), findings from positive psychology, and research on juvenile delinquency.

*B. A Unified Theory: Structural and Dispute-Resolution Family Law*

Huntington not only broadens understandings of why family relationships are important, but also enlarges understandings of the scope of laws that influence the well-being of families. The earlier analyses of government policies that affect families, described above,<sup>54</sup> largely focused on welfare-state policies. These analyses considered such issues as income supports for caretakers, child welfare, work-and-family policies, as well as which groups should be identified as families for the purpose of receiving welfare-state supports. By contrast, Huntington divides the universe of law relevant to families into two large categories. In the first is the law that we have traditionally thought of as "family law," which deals with what happens when family members have conflicts among themselves. Huntington calls this category "dispute-resolution family law" (p. xi). This is the law that governs divorce, paternity, child abuse, and child custody.

While previous scholars have critiqued what Huntington calls "dispute-resolution family law" for exacerbating existing tensions

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<sup>53</sup> FINEMAN, *supra* note 44.

<sup>54</sup> See *supra* notes 44–52 and accompanying text.

among family members,<sup>55</sup> *Failure to Flourish* serves the most thorough indictment yet. Huntington faults the current dispute-resolution system for “both freez[ing] the relationship at the moment of breakdown and fuel[ing] the conflict with the adversarial process” (p. 84). Huntington lays out particular family law features that contribute to these negative outcomes, including the legal system’s win–lose approach to conflict; its general in-or-out approach to family membership, which misses the many in-between relationships that occur in the real world; and its scorched-earth dispute-resolution process for divorce, which weakens prospects for future co-parenting (pp. 87–89). She also criticizes existing child-support laws for imposing unrealistic obligations that fail to take into account low- or no-income fathers’ actual earnings and that contribute to friction between parents (p. 104).

The remainder of the law that affects families falls into Huntington’s second category, which she calls “structural family law” (p. xii). In this category she includes not only the welfare-state supports considered in the earlier conversation, but also other areas of law that affect the well-being of families, including zoning and land-use laws and incarceration policies (pp. 98–105). All these areas of law, she demonstrates, have a profound effect on the soundness of family relationships and therefore, she argues, should be considered “family law.”

By bringing both “structural family law” and “dispute-resolution family law” together, Huntington provides a unified theory of the way that the state should support family relationships. She picks up the earlier scholarship’s point that the state should support families as a matter of course rather than only after families are in crisis, and merges it with the recognition that, after such a crisis has occurred, the state must restructure families with an eye toward preserving and repairing relationships and avoiding future conflicts. Huntington calls for a vision of positive family law that reforms today’s “negative family law,” which ignores families’ well-being until they fall apart, at which point dispute-resolution family law intervenes in a manner that often makes things worse (p. 83). Huntington also calls for laws that allow adults to restructure their relationships in a manner that fosters

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<sup>55</sup> See, e.g., Christy M. Buchanan & Parissa L. Jahromi, *A Psychological Perspective on Shared Custody Arrangements*, 43 WAKE FOREST L. REV. 419, 439 (2008) (concluding that legal policies that promote alternative dispute resolution and require parents to attend parenting education programs “are in children’s best interests because such policies are likely to reduce conflict between parents”); Joan B. Kelly, *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice*, 10 VA. J. SOC. POL’Y & L. 129, 129 (2002) (analyzing “divorce education programs, custody mediation, arbitration, and group programs for chronic high conflict parents”); Elizabeth J. Smith, *Non-Judicial Resolution of Custody and Visitation Disputes*, 12 U.C. DAVIS L. REV. 582, 582, 603 (1979) (examining the problems created by adversary judicial resolution of child custody and visitation disputes, and concluding that “mediation is the method most appropriate for family dispute resolutions,” *id.* at 582).

continued positive relationships with children (p. 122). In Huntington's words: "Restructuring families with an eye to the future, preserving and repairing relationships when possible, and keeping family members safe will go a long way toward fostering and maintaining strong, stable, positive relationships" (p. 115).

*C. The State's Proper Stance Toward Unmarried  
and Single-Parent Families*

Huntington's book, like Carbone and Cahn's, pays significant attention to the growing number of families that diverge from the heterosexual, marital norm. Her discussion of these issues deepens the conversation regarding the stance that the state should take with respect to these families. Earlier treatments of how the state should deal with nontraditional families have tended to fall into two camps. One camp has relied on social science evidence showing that children do better in marital families to argue that the two-parent marital family should be privileged over other family forms.<sup>56</sup> The other has contended that the poorer outcomes for nontraditional families result from the absence of state support for these families, and has argued that that the state should support all families (or no families) equally.<sup>57</sup> Huntington's clear-sighted thinking on this issue moves the conversation well beyond these two positions. She carefully considers a wealth of data to tease apart the intrinsic disadvantages of these family forms from other correlating factors, as well as to discern how much these negative effects result from the absence of state support (pp. 35-42). She concludes that "numerous related factors influence child outcomes, and a few of these factors are driven by family structure" (p. 42). Further, she marshals research to demonstrate that at least some of the intrinsic disadvantages of single-parent families can be alleviated through, for example, high-quality parenting and continued involvement of both parents (p. 42). In doing so, Huntington, with clear good sense, cuts through a tremendous amount of rhetoric that has been expended by others on this issue in the past.

Huntington's perspective on how public policy should respond to this evidence is equally clear-sighted. While she argues that the state should try to encourage family forms that will improve children's well-

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<sup>56</sup> See, e.g., Margaret F. Brinig, *A Case for Integrated Parenthood*, in WHAT IS PARENTHOOD? 147 (Linda C. McClain & Daniel Cere eds., 2013); William A. Galston, *Public Morality and Public Policy: The Case of Children and Family Policy*, 36 SANTA CLARA L. REV. 313 (1996); Judith A. Seltzer, *Families Formed Outside of Marriage*, 62 J. MARRIAGE & FAM. 1247 (2000); Robin Fretwell Wilson, *Evaluating Marriage: Does Marriage Matter to the Nurturing of Children?*, 42 SAN DIEGO L. REV. 847 (2005).

<sup>57</sup> See, e.g., FINEMAN, *supra* note 44, at 140-41; NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE (2008); Dowd, *supra* note 5, at 81-82.

being, she is equally adamant that the state must still support multiple family forms with the recognition that some may face greater and different challenges when it comes to meeting children's needs (pp. 44, 154–55). In her words, “the challenge for family law is to strengthen the many different kinds of families living in America today” (p. xv). Put another way, “flourishing comes in many stripes, and family law can support flourishing in diverse family forms, not just in traditional, nuclear families” (p. xix).

Huntington does not just pay lip service to government support of a diverse array of family forms. Instead, *Failure to Flourish* suggests specific measures to improve current public policies that negatively affect families who diverge from the marital norm. For example, she faults the use of outmoded definitions of parenthood in cutting children off from adults with whom they have close relationships. Far better than a black-and-white definition of parenthood serving as the only route to a continued relationship with the child, she argues, would be an inquiry that recognizes that a child can have a broad array of positive, stable relationships with adults that contributes to his or her well-being (pp. 153–54). She also pushes for the law to grant greater recognition to cohabiting relationships in order to encourage a long-term commitment between parents (p. 177). She points out that although marriage is on the decline in Scandinavian countries, nonmarital cohabiting relationships in those countries are not only more stable than nonmarital cohabiting relationships in the United States, but they are also more stable than marital relationships in the United States (pp. 177–78). This may be, she suggests, due to the institutional recognition that the laws of these countries provide, which encourage norms of long-term commitment in cohabiting couples (pp. 177–78).

In considering family diversity, Huntington shares with Carbone and Cahn a particular attention to issues of class. She traces out the intersecting ways that economic difficulties can thwart positive family relationships. Huntington, however, resists Carbone and Cahn's conclusion that any simple link can be drawn between the economy and marriage. Drawing on the empirical work of Professors Sara McLanahan, Kathryn Edin, and Maria Kefalas, Huntington asserts that although marriage rates and income are related, the interaction is complex (pp. 173–75). In her words, “there is little evidence that simply raising incomes will raise marriage rates” (p. 174). *Failure to Flourish's* program to address fragile families therefore extends beyond improving the economic prospects for low-income parents (pp. 175–77). Huntington argues that the state should actively seek to deter single-parenthood by both ensuring access to methods of long-term birth control (a proposal not dissimilar to Carbone and Cahn's plan to remake the pathways to parenthood) and enacting measures that foster long-term commitments between parents (pp. 176–77).

*D. Public Policies that Support Families*

A key contribution that Huntington makes to the conversation on state support for families comes from her thorough and thoughtful consideration of public policy. The earlier scholarship was focused on articulating a theory of why government has a responsibility to support families, and on describing the contours of that responsibility.<sup>58</sup> Although this conversation paid some attention to public policy, it did not engage deeply with practical policy issues. Huntington does that here, working in detail through an array of public policy literature to consider how existing policies affect families and to make clear recommendations for how to better support them. For example, she musters research showing that the most critical time to support children for academic success is before kindergarten, rather than when they reach public school (pp. 149–51). In these early years, she points out, the state does not have the direct access to most children that it will have when they reach school age. As a result, she argues that the best support the state can give children in these critical early years is through supporting their families' caregiving (pp. 151–52). She then proposes specific policy interventions that would serve this function (pp. 159–63).

Huntington's discussion of the ways that government can foster positive family relationships through altering the physical context of family life is particularly insightful (pp. 157–58, 180–85). Huntington describes the way that the geographical triangle formed by home, workplace, and school can have profound effects on the time that family members have for one another and the ways that they interact (p. 181). So does the presence of playgrounds, sidewalks, and parks (p. 181). Huntington argues that in constructing roads and highways and in planning neighborhoods, the state should give specific thought to promoting family time and interactions (pp. 180–81). At the same time, she maintains, public policies must also seek to ensure that families are firmly embedded in communities, since parents and other caregivers need the support of others to sustain themselves in their caregiver roles (p. 181).

*III. FAMILY LAW REIMAGINED*

In *Family Law Reimagined*, Jill Hasday, a law professor at the University of Minnesota, argues that how family law is conceptualized shapes family life and social organization, often in unnoticed ways. Like Huntington, Hasday defines family law broadly: "Family law extends far beyond statutes, judicial opinions, and regulations that are

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<sup>58</sup> See *supra* notes 44–53 and accompanying text.

explicitly and officially classified as family law to run through tort law . . . employment law, labor law, immigration law, citizenship law, international relations law . . . and more” (p. 2). Hasday’s central argument is that family law’s “canon,” by which she means the dominant narratives and ideas that legal actors and commentators use to “describe and explain family law’s governing principles,” “misdescribes the reality of family law” in critical ways (pp. 2, 3). As a result, she contends, this canon “misshapes the policies that courts, legislatures, and advocates pursue,” to the detriment of citizens (pp. 3, 3–6).

#### A. *Myths Regarding Family Law’s Exceptionalism*

The first part of Hasday’s book explores canonical narratives about “family law exceptionalism,” by which she means the narratives that treat family law as a field distinct from the rest of law, in which the normal rules governing other legal areas do not apply. One of these narratives is that family law is solely a matter of state law — the rare area in which the federal government fails to assert control. Hasday notes that this rationale has been used by judges, legislators, and commentators to oppose an array of federal laws regulating families (pp. 6–7, 17–38). It has also been invoked in recent decades by the U.S. Supreme Court in constructing federalism doctrine (pp. 21–31).<sup>59</sup> Indeed, Justice Kennedy explored this theory in the oral argument of *Windsor v. United States*,<sup>60</sup> although in his subsequent judicial opinion he backed away from using principles of federalism as the ultimate ground for invalidating section 3 of the Defense of Marriage Act (pp. 31–38).<sup>61</sup>

Yet, Hasday demonstrates, the contention that family law is largely a matter of state law is used extremely selectively by opponents of various federal laws and proposed laws that affect families (pp. 22–38). In fact, federal law defining which relationships count as family relationships, and the legal rights and responsibilities that turn on these relationships, is both well established and extensive (p. 18). Such family law, Hasday points out, runs through areas of federal law that include employment, labor, retirement, Social Security, immigration, citizenship, international relations, taxes, and bankruptcy, among others (pp. 45–60). The pervasive extent of federal family law makes opposition to new laws on federalism grounds incoherent (p. 60). Instead, Hasday counsels, “[t]he live questions in family law are not about

<sup>59</sup> See, e.g., *United States v. Lopez*, 514 U.S. 549, 564–65 (1995).

<sup>60</sup> 133 S. Ct. 2675 (2013); see Transcript of Oral Argument at 59, *Windsor*, 133 S. Ct. 2675 (No. 12-307), [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/12-307\\_c18e.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-307_c18e.pdf) [<http://perma.cc/MMU7-U42A>].

<sup>61</sup> See *Windsor*, 133 S. Ct. at 2693; see also *id.* at 2692 (“[I]t is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution.”).



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whether the federal government can or should be involved at all” (p. 9). The genuine questions “are about whether any particular family law policy is substantively desirable on its own merits and about which level of government is best situated . . . to effectuate that specific policy” (p. 9).

Hasday also takes on the myth that family law is exceptional in that it bans economic exchanges that are allowed in other areas of law (pp. 9, 75–86). She argues that this myth tends to focus debate on whether family law’s prohibition on economic exchanges is well founded or not. Thus, “pro-market” and “anti-commodification” scholars debate whether the existing law’s refusal to enforce economic agreements between intimates is a good thing or a bad thing (p. 68). Hasday points out that this debate misses the fact that family law already allows a great number of economic exchanges within the family. For example, spouses are permitted to contract regarding how they divide property and earnings between themselves during and after their relationship (pp. 9, 75–76). Further, courts enforce agreements that one spouse will compensate the other for the birth of a child (p. 77). Yet despite allowing these exchanges, courts selectively decline to uphold other exchanges associated with domestic services (pp. 69–70). For example, courts refuse to enforce interspousal contracts involving domestic labor on the ground that to do so would allow economic exchanges between the spouses (p. 70). The selective use of this narrative, Hasday contends, usually operates to reinforce market inequalities in areas associated with family law, including wives’ domestic labor, adoption, and surrogacy (pp. 86–90).

Ultimately, Hasday argues that the narrative of prohibition on economic exchange turns the legal conversation away from what should be the real issue: not whether such exchanges should be allowed, “but about when to permit and enforce such exchange, in what forms, for what purposes, and to what ends” (p. 9). Hasday then shows what intelligent legal analysis would look like in this area, without leaning on the crutch of the oversimplified platitude that family law bans all economic exchanges. For one thing, she contends that legal conversation would focus on the extent to which prohibition of market transactions or regulation of such transactions would either increase or help prevent exploitation of vulnerable parties (pp. 91–94). On the issue of whether to enforce interspousal contracts for domestic services, for example, because denying enforcement of such contracts generally reinforces the dependence of married women (who perform most domestic services) on their husbands, the goal of preventing exploitation would likely lead to these contracts being enforced, albeit with safeguards to protect against the presence of stark power differentials in bargaining (pp. 91–92). Similar consideration might result in relaxing the prohibition on economic exchange within adoption and surrogacy law in order to provide more resources to birth mothers and surrogates, who tend

to be the least powerful persons in these transactions (pp. 92–93). Carefully drafted adoption and surrogacy regulations could better protect the dignity and autonomy of birth and surrogate mothers by shifting some burdens and risks to the more economically powerful parties in these transactions. For example, states might prohibit lawyers and doctors from collecting fees unless the birth or surrogate mother has been fully informed of potential risks and provided with her own legal counsel at the other parties' expense if she so chooses (p. 93).

### B. *Family Law's Progress Narratives*

In the second part of *Family Law Reimagined*, Hasday debunks the narratives in which family law is presented as having kept pace with societal changes. Among the most interesting of these progress narratives is the story that family law has transitioned from applying principles of status to principles of contract. According to this narrative, family law once largely regulated relationships by applying status-based rules, which meant that the state set the terms of relationships; now, however, the law allows couples to set the terms of their relationships themselves through the state's application of contract principles (p. 121). Hasday rejects this characterization: “[T]he canon’s status to contract story is descriptively oversold and normatively underdefended” (pp. 11, 124–30). She points out that law continues to impose many features on family relationships that individuals cannot agree among themselves to alter, including, for example, rules about who is eligible to marry whom (pp. 124–28).

Furthermore, Hasday contends, like the canon that family law prohibits economic transactions between spouses, the status-to-contract progress narrative distracts attention away from evaluating the benefits and costs of applying status- or contract-based rules in particular contexts (pp. 130–32). Although the narrative equates the application of contract principles with progress, Hasday argues that this equation is not nearly so clear. She points out that in some situations unwaivable status rules better protect important state interests. For example, by prohibiting particular bargains, status-based rules can protect individuals against unfair or unconscionable deals, and can also further public goods such as equality, dignity, liberty, and caregiving (pp. 130–31). For these reasons, she argues, there are good reasons to make child-support obligations and prohibitions on marital violence unwaivable (p. 131). In contrast, she contends, there are no legitimate public interests that support a status prohibition on same-sex marriage; instead, contract rules that give consenting adults freedom to enter into such marriages support not only autonomy, but also equality, dignity, and liberty (p. 131).

*C. Omissions from the Family Law Canon*

In the last section of the book, Hasday explores issues missing from the family law canon that, she asserts, should properly be included. For one thing, she argues, family law doctrine focuses too narrowly on marriage and parenthood, and more recently on other conjugal statuses besides marriage, to the exclusion of doctrine protecting other types of relationships, including those between children and aunts, uncles, grandparents, and siblings (pp. 161–64). To demonstrate the extent to which the narrow focus on marriage and parenthood fails to support these other relationships, Hasday takes sibling relationships as her test case. She points out that the federal Family and Medical Leave Act (FMLA),<sup>62</sup> which entitles employees to unpaid leave to care for family members, protects care for a spouse, child, or parent with a serious health condition, but extends no protection to caretaking for other family members, including siblings (p. 163).<sup>63</sup> Furthermore, sibling relationships among children also receive little legal protection despite considerable evidence of their importance in children’s lives (and later in their adult lives) (pp. 166–68). For example, divorce courts regularly award “split custody” of siblings between parents, perhaps out of judges’ desire to give each parent something they seek in trial proceedings (pp. 176–77).

Hasday makes the case that a focus within the family law canon on the importance of sibling relationships would lead to far better support for them. She points out a number of simple ways that the law could better support sibling relationships (pp. 184–94). For example, state law could specify the reasonable efforts that adoption agencies should take to keep siblings together, as well as require adoption agencies to make efforts to support contact among siblings separated by adoption (pp. 184–91). She concludes her argument on sibling relationships with the persuasive statement that:

The reform possibilities that this chapter has considered suggest just some of the myriad policy choices that emerge when we free ourselves from the reflexive assumption that family law should be oriented around only marriage, parenthood, and their equivalents. . . . Family law’s narrow focus on marriage and parenthood, inherited from the common law and then endlessly replicated, has constrained critical thinking in family law for too long. (p. 194)

The portion of Hasday’s work on the family law canon that has drawn the most notice is her observation that the canon has been con-

<sup>62</sup> 29 U.S.C. §§ 2601–2654 (2012).

<sup>63</sup> See *id.* § 2612(a)(1).

structed in a manner that omits the legal regulation of poor families.<sup>64</sup> Hasday points out that such legal regulation, even though it structures the formation or dissolution of family relationships or determines rights and responsibilities that turn on family status, is generally conceptually demarcated as welfare law rather than family law (p. 196). This demarcation, Hasday argues, “has helped judges and lawmakers avoid acknowledging and discussing why the legal regulation of poor families is so different from the legal regulation of other families” (p. 13). Contrary to the family law applicable to nonpoor families — which is premised on the importance of familial privacy and parental prerogatives to raise children without second-guessing by government officials, and which seeks to reduce the disruption of family relationships — Hasday observes that welfare law assumes the appropriateness of close government scrutiny of family life, is suspicious of parents’ judgment and parenting skills, and readily interferes in family relationships (pp. 196–98).

For example, Hasday points out, in administering Temporary Assistance for Needy Families (TANF), the primary federal-state program providing benefits to poor families, states often include punitive measures specifically designed to reshape family life. These measures include caps on benefits if families have additional children while receiving aid, and provisions withdrawing benefits if parents fail to ensure that their children go to school (which may be difficult for parents, since TANF requires them to work), or receive proper immunizations (pp. 211–13). No comparable requirements exist in aid programs for nonpoor citizens, such as Social Security dependent benefits (pp. 208–09). Moreover, courts have upheld state laws capping benefits if welfare recipients bear another child on the ground that states have a legitimate interest in discouraging poor women from bearing nonmarital children (p. 216). Yet the view that the state may effectuate this goal by imposing intense economic pressure on poor women contrasts sharply with the zone of autonomy that courts have traditionally enforced around women’s reproductive decisions (p. 216).<sup>65</sup> Further, contrary to the presumption prevailing in family

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<sup>64</sup> Hasday first pointed this out in her original article on the family law canon. Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 892–96 (2004). Her observation has since been widely cited in family law casebooks. See, e.g., DOUGLAS E. ABRAMS ET AL., *CONTEMPORARY FAMILY LAW* 31 (3d ed. 2012); IRA MARK ELLMAN ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS* 19 (5th ed. 2010).

<sup>65</sup> However, recent decisions suggest that courts are increasingly less willing to safeguard women’s autonomy to make reproductive decisions. See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 159, 168 (2007) (holding that preventing women from regretting a particular abortion procedure could permissibly be part of Congress’s rationale for banning it); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 584 (5th Cir. 2012) (vacating a preliminary injunction staying the enforcement of a Texas statute requiring an ultrasound that displays a fetal image to a

law that parents are assumed fit unless shown otherwise, the Supreme Court has upheld state laws requiring unannounced visits to families receiving public assistance on the ground that state officials should be able to inspect welfare homes for evidence of child abuse (pp. 200–02).<sup>66</sup> The presumption of fitness apparently applies only to nonpoor parents, whom authorities can visit only if they have a warrant and some showing of child abuse (p. 200).

Hasday is certainly not the first to recognize that the state adopts a more supportive and less adversarial stance when it comes to the middle and upper classes as compared to the poor.<sup>67</sup> She is, however, the first to notice the way that considering middle- and upper-class families, but not poor families, as subjects of family law occludes recognition of this disparate treatment. Focusing on this issue shifts the frame of arguments about welfare from the standard question of “how much welfare the government should supply” to the question of “why the provision of welfare, no matter how stingy, should cause the legal principles governing family relations to reverse course so dramatically” (p. 219). This differential treatment of poor families and all other families, she convincingly maintains, requires either “explanation and justification, or elimination” (p. 220).

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pregnant woman before she can get an abortion regardless of whether she wants to view the image).

<sup>66</sup> The author cites *Wyman v. James*, 400 U.S. 309 (1971).

<sup>67</sup> See, e.g., LINDA GORDON, PITIED BUT NOT ENTITLED 1–13, 37, 275–76 (1994) (finding that government welfare policies created a two-track system of public aid, in which single mothers received highly stigmatized “welfare” while other groups, such as the aged and the unemployed, received “entitlements”); SUZANNE METTLER, THE SUBMERGED STATE 4–7 (2011) (demonstrating that most Americans do not realize that government benefits help more affluent Americans than lower-class citizens); SANDRA MORGEN, JOAN ACKER & JILL WEIGT, STRETCHED THIN: POOR FAMILIES, WELFARE WORK, AND WELFARE REFORM 178–79 (2010) (documenting how welfare reform’s imposition of strict work requirements and time limits on poor families results in inadequate support for low-income families); Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 YALE J.L. & FEMINISM 317, 320 (2014) (arguing that state regulation for poor women seeking support disproportionately subjects them to extraordinary surveillance and a far-reaching set of civil and criminal regulatory systems); Linda Gordon, *Who Deserves Help? Who Must Provide?*, 577 ANNALS AM. ACAD. POL. & SOC. SCI. 12, 21–23 (2001) (concluding that U.S. welfare policy in the twentieth century considered poor women who raised children undeserving of public aid); Pamela Herd, *Reforming a Breadwinner Welfare State: Gender, Race, Class and Social Security Reform*, 83 SOC. FORCES 1365, 1389 (2005) (finding that welfare benefits “connected to marital status, even those intended to offset the costs of marital dissolution, still favor wealthier white women”); Stephen D. Sugarman, *Reforming Welfare Through Social Security*, 26 U. MICH. J.L. REFORM 817, 827 (1993) (arguing that the state treats children with absent parents differently from children with deceased, disabled, or retired parents); Jacobus tenBroek, *California’s Dual System of Family Law: Its Origin, Development, and Present Status*, 16 STAN. L. REV. 257, 257–58 (1964) (demonstrating how California’s public-aid laws on the one hand and family law codes on the other created two systems of family law: one for “underprivileged and deprived families” and one for the more fortunate, *id.* at 258).

#### D. *Family Law Without Oversimplification*

While Hasday provides significant evidence that the principles she critiques are often treated as canonical by courts and legislators, most family law academics, despite perhaps sometimes referring to these principles uncritically as fact, will have already recognized that at least some of them are oversimplifications. For example, few mainstream legal academics would accept as simple fact the notion that family law has moved completely from status to contract, or that coverture, read as sex inequality, has been eliminated from the law. Yet legal academics still have much to gain from *Family Law Reimagined* through Hasday's take on what the field of family law might look like, and how it would regulate, once liberated from the overly simplistic truisms that too often serve as inadequate conceptual crutches. In her prescriptions for moving forward, Hasday gives a clear sense of the more nuanced conversations that could be had about the ways that law can and should regulate family relationships. When this conversation is no longer focused on easy, albeit incorrect answers, Hasday shows, law seldom presents simply a dichotomous either-or choice, as between, for example, whether to impose status or contract, or whether to allow market transactions or ban them. While the state may sometimes choose one of these options to serve particular purposes — for example, banning certain market transactions in order to protect vulnerable individuals against exploitation — Hasday's discussion demonstrates that there are myriad other ways to regulate such transactions, depending on the public goods that the state seeks to privilege. As Hasday shows, regulation that lets go of easy truisms can begin to focus on the truly important goods at stake in the regulation of family relationships: encouraging caretaking and human development, helping to protect deep and stable attachments between persons, and protecting against exploitation and vulnerability.

#### IV. PUTTING THE NEW SCHOLARSHIP IN CONTEXT

All of these books recognize that the ways in which families function are not simply givens. Instead, the family is an institution profoundly affected by its context, including, as all three note, both the legal system and the market. All three argue that we ignore the ways that these other institutions are interacting with families to families' peril, and indeed, given the importance of families to the health of society, to our collective peril. Moreover, both Carbone and Cahn's and Huntington's books argue that this peril is not merely speculative, but is in fact bearing (tainted) fruit: families are in crisis across a large segment of the American population.

In seeking to enlarge the purview of what is considered family law and to call attention to the many ways that the state can and should regulate to support families, all three of these books push back against

the ascendant “neoliberal” vision of the role of the government when it comes to families.<sup>68</sup> In this vision, all that the government needs to do to ensure a vigorous society is to ensure the health of markets, in addition to safeguarding individual citizens’ liberty and security. If the government does these things, but no more, according to this theory of regulation, a vigorous society populated by vigorous families will follow. Thus, former Senator Rick Santorum, a primary advocate of welfare reform in the late 1990s, lauded conservatives because they “believe in the power of markets more than they do the power of government.”<sup>69</sup> Government policies that shield families from the full effects of market forces, in this view, artificially prop up families against the correct, natural, free-market state of affairs.<sup>70</sup> Indeed, any broader role for the state in supporting the conditions that healthy families need is written off as improper social engineering.<sup>71</sup> This theory allows the state to adjudicate disputes among family members — what Huntington calls “dispute-resolution family law” — but permits no broader state regulation to support families.

<sup>68</sup> Wendy Brown provides a useful definition of the term:

In ordinary parlance, neo-liberalism refers to the repudiation of Keynesian welfare state economics and the ascendance of the Chicago School of political economy — von Hayek, Friedman, et al. In popular usage, neo-liberalism is equated with a radically free market: maximized competition and free trade achieved through economic de-regulation, elimination of tariffs, and a range of monetary and social policies favorable to business and indifferent toward poverty, social deracination, cultural decimation, long term resource depletion and environmental destruction.

Wendy Brown, *Neo-Liberalism and the End of Liberal Democracy*, 7 THEORY & EVENT (2003).

<sup>69</sup> RICK SANTORUM, IT TAKES A FAMILY 121 (2005).

<sup>70</sup> This indeed was the primary argument for the 1996 welfare reform. In Santorum’s words: Traditional liberal welfare policy is all about transferring income to individuals in such a way that their dependence on government is increased and their dependence on family decreased. We need to change these safety net programs so that they lead not only to independence from the government but also create incentives for the formation and maintenance of families.

*Id.* at 126. As a number of commentators have noted, the term “free market” is a misnomer, as markets require a considerable amount of regulation to keep them “free.” As Professor David Harvey points out:

The state has to guarantee, for example, the quality and integrity of money. It must also set up those military, defence, police, and legal structures and functions required to secure private property rights and to guarantee, by force if need be, the proper functioning of markets. Furthermore, if markets do not exist . . . then they must be created, by state action if necessary.

DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 2 (2005). Nevertheless, I use the term “free market” here as a shorthand way to refer to a market or markets that are not regulated with social welfare objectives in mind.

<sup>71</sup> Former Representative Michele Bachmann demonstrated this logic when she objected to the Internal Revenue Service’s decision that breast pumps should be tax deductible: “While noting that she had breast-fed the five children she gave birth to, Ms. Bachmann said, ‘To think that government has to go out and buy my breast pump — You want to talk about nanny state, I think we just got a new definition.’” Kate Zernike, *A Breast-Feeding Plan Mixes Partisan Reactions*, N.Y. TIMES, Feb. 18, 2011, at A14.

This straitened view of the role of government is relatively recent. For much of the United States' history, a key function of government was seen to be protecting families from market forces when these forces failed to create conditions that support thriving families.<sup>72</sup> Indeed, imposing adequate buffers on the market to support families' well-being was a major motivation underlying the twentieth-century welfare state.<sup>73</sup> This commitment has weakened in the years since the 1970s as a result of two key changes. The first of these involved rising numbers of women entering the workforce and remaining there after having children.<sup>74</sup> Women's increasing employment was taken as a sign that existing welfare-state protections, which were largely premised on women's staying at home to care for children, were unnecessary.<sup>75</sup> Second, the last decades of the twentieth century were marked by the ascendance of the belief in the power of free markets, which was fueled by neoclassical economic thought.<sup>76</sup> These two phenomena in tandem were taken as grounds for believing that families no longer needed buffers from the market.

The absence of these buffers has been disastrous for a large swath of American families, as *Failure to Flourish* and *Marriage Markets* explain. But, although families in the bottom tiers of American social life have certainly been the losers of this restricted view of regulation, few families, even at the top, can be said to be winners in being required to submit to unadulterated market forces. The American workplace, absent this regulation, is one in which full-time workers work more hours than do workers in any other industrialized coun-

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<sup>72</sup> See Maxine Eichner, *The Marketized Family* 47–55 (Jan. 19, 2015) (unpublished manuscript) (on file with the Harvard Law School Library). Feminist historians, most prominently Professor Alice Kessler-Harris, have already demonstrated that the welfare state was premised on a “gendered imagination,” ALICE KESSLER-HARRIS, *IN PURSUIT OF EQUITY* 18 (2001), insofar as it assumed that women would provide caretaking on an unpaid basis — a model premised on the ideology of separate spheres. See *id.* at 13–14, 18.

<sup>73</sup> See THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS* 2 (1992).

<sup>74</sup> Between 1975 and 2012, the percentage of women in the U.S. workforce with children under the age of six years grew from 39% to 65%. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, REPORT NO. 1049, *WOMEN IN THE LABOR FORCE: A DATABOOK* 24 tbl.7 (2014), <http://www.bls.gov/cps/wlf-databook-2013.pdf> [<http://perma.cc/E53X-ZY9E>]. Women with children between the ages of six and seventeen increased their participation in the workforce from 55% in 1975 to 76% in 2012. *Id.* at 23 tbl.7.

<sup>75</sup> See Eichner, *supra* note 72, at 55–56; see also Ann Shola Orloff, *From Maternalism to “Employment for All”: State Policies to Promote Women’s Employment Across the Affluent Democracies*, in *THE STATE AFTER STATISM* 230, 241 (Jonah D. Levy ed., 2006).

<sup>76</sup> See DANIEL T. RODGERS, *AGE OF FRACTURE* 41–76 (2011) (charting “the rediscovery of the market” in the late twentieth century). Professors Jacob Hacker and Paul Pierson date the rise of the narrow, probusiness vision of government to the 1970s, when big business began to organize politically, as well as to pump millions of dollars into think tanks that disseminated probusiness ideology to the public. See JACOB S. HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS* 116–36 (2010).



try.<sup>77</sup> Even in the countries at the higher end of the hours spectrum, Canada and the United Kingdom, full-time employees work roughly the equivalent of six fewer weeks each year than do their American counterparts.<sup>78</sup> Furthermore, Americans are working continually more hours in recent decades, in contrast to workers in comparable European countries where gains in productivity have been funneled into decreasing work hours (in the United States, gains in productivity have largely been funneled into the pockets of the wealthiest one percent).<sup>79</sup> Women's entry into this demanding labor market in the absence of state regulation significantly increased the total hours that U.S. parents spend performing paid work. In 1965, married mothers with children worked an average of six paid hours per week; by 2000, they worked 23.8 hours a week.<sup>80</sup> While work hours for married fathers have slightly declined in that same period, from 47.8 to 42.5 hours, this decrease does not begin to offset the increase in mothers' hours.<sup>81</sup> As a consequence, the total paid workload of two-parent families on average has increased by twelve hours per week; total hours outside of work have, obviously, decreased correspondingly.<sup>82</sup>

The result is that American parents spend much more time in the sphere of work than parents in other countries do. In the mid-1990s, American parents in two-earner families together were spending an average of eighty hours a week at their jobs, compared to seventy-one hours for dual-earner couples in the United Kingdom, and sixty-nine hours per week in Sweden.<sup>83</sup> Particularly remarkable is the high percentage of American couples working very long hours. Almost two-thirds of married parents who both work full-time report joint work weeks of eighty hours or more.<sup>84</sup> By the count of one reputable study, except for in Canada, no more than one-third of couples in eleven comparison countries spent as much time working.<sup>85</sup> What's more, in

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<sup>77</sup> JANET C. GORNICK & MARCIA K. MEYERS, *FAMILIES THAT WORK* 59 (2003).

<sup>78</sup> *Id.*

<sup>79</sup> See LAWRENCE MISHEL, ECON. POLICY INST., *ISSUE BRIEF NO. 348, VAST MAJORITY OF WAGE EARNERS ARE WORKING HARDER, AND FOR NOT MUCH MORE 2* (2013); see also HACKER & PIERSON, *supra* note 76, at 24-27.

<sup>80</sup> SUZANNE M. BIANCHI ET AL., *CHANGING RHYTHMS OF AMERICAN FAMILY LIFE* 55 tbl.3.4 (2006).

<sup>81</sup> *Id.*

<sup>82</sup> See *id.* at 48; Michael Hout & Caroline Hanley, *The Overworked American Family: Trends and Nontrends in Working Hours, 1968-2001*, at 11 (June 2002) (unpublished manuscript), [http://ucdata.berkeley.edu/rsfcensus/papers/Working\\_Hours\\_HoutHanley.pdf](http://ucdata.berkeley.edu/rsfcensus/papers/Working_Hours_HoutHanley.pdf) [<http://perma.cc/9Z84-HXLU>].

<sup>83</sup> GORNICK & MEYERS, *supra* note 77, at 60, 61 fig.3.2.

<sup>84</sup> *Id.* at 60-61.

<sup>85</sup> *Id.* at 61. The comparison countries included Belgium, Canada, Denmark, Finland, France, Germany, Luxembourg, the Netherlands, Norway, Sweden, and the United Kingdom. *Id.* at 60 fig.3.1.

the United States, 13% of dual-earner couples with children work more than one hundred hours a week.<sup>86</sup>

If we add to these hours of paid work the hours of unpaid work that parents perform, the average American family is on overload: in middle-class families where both parents work full-time, the combined total workload of paid and unpaid work is 135 hours a week, with men working sixty-seven hours to women's sixty-eight hours.<sup>87</sup> That is, incredibly, a workload that is close to ten hours a day, seven days a week for each parent.<sup>88</sup> The workload is even heavier for single parents.<sup>89</sup>

Furthermore, the schedules of American families are geared more to the dictates of work and the market than to domestic needs. For example, a 2007 UNICEF report<sup>90</sup> ranked the United States twenty-third out of twenty-five OECD<sup>91</sup> countries in terms of the percentage of fifteen-year-olds who eat dinner with their parents several times a week, an indicator of parent-child interaction that the report found to be an important determinant of children's well-being.<sup>92</sup> And not only do American workers receive less time off to care for the medical needs of family members than do their European counterparts, but they also cannot afford to take off all their available time.<sup>93</sup> Seventy-eight percent of the employees who do not take the full leave that is available to them under the FMLA do so because they cannot afford the unpaid leave.<sup>94</sup> Furthermore, U.S. employees are increasingly being hired without being given regular, predictable hours so that they can plan for family responsibilities, as new, high-tech scheduling systems maximize employer profits by moving workers from place to

<sup>86</sup> Jerry A. Jacobs & Kathleen Gerson, *Overworked Individuals or Overworked Families?: Explaining Trends in Work, Leisure, and Family Time*, 28 WORK & OCCUPATIONS 40, 57 tbl.4 (2001).

<sup>87</sup> BIANCHI ET AL., *supra* note 80, at 57, 116-17.

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

<sup>89</sup> *See id.* at 55 tbl.3.4.

<sup>90</sup> INNOCENTI RESEARCH CTR., UNICEF, REPORT CARD 7: CHILD POVERTY IN PERSPECTIVE (2007), [http://www.unicef-irc.org/publications/pdf/rc7\\_eng.pdf](http://www.unicef-irc.org/publications/pdf/rc7_eng.pdf) [<http://perma.cc/K6NF-2LV6>].

<sup>91</sup> The Organisation for Economic Co-Operation and Development (OECD) is an organization of thirty-four countries, most of which are regarded as having high-income economies; the United States is a member. *See Members and Partners*, OECD, <http://www.oecd.org/about/membersandpartners> (last visited Mar. 29, 2015) [<http://perma.cc/ECH7-8JCW>].

<sup>92</sup> INNOCENTI RESEARCH CTR., *supra* note 90, at 22, 24 fig.4.2(a). The most recent update of this report no longer uses parent-child interaction as a measure of child well-being. In this update, the United States ranked twenty-sixth of twenty-nine developed countries on child well-being, ahead of only Lithuania, Latvia, and Romania. UNICEF OFFICE OF RESEARCH, INNOCENTI REPORT CARD 11: CHILD WELL-BEING IN RICH COUNTRIES 2 (2013), [http://www.unicef-irc.org/publications/pdf/rc11\\_eng.pdf](http://www.unicef-irc.org/publications/pdf/rc11_eng.pdf) [<http://perma.cc/5HCZ-TE7Z>].

<sup>93</sup> GORNICK & MEYERS, *supra* note 77, at 119, 121-33.

<sup>94</sup> U.S. Dep't of Labor, *Foreword* to DAVID CANTOR ET AL., BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: FAMILY AND MEDICAL LEAVE SURVEYS, 2000 UPDATE, at x (2001), <http://www.dol.gov/whd/fmla/foreword.pdf> [<http://perma.cc/3QWT-TX8R>].

place and time to time to match customer demand. As one recent *New York Times* story recounted, employees' family lives are frequently shredded by these schedules.<sup>95</sup>

The relatively unregulated market in the United States creates pressure to work not only directly, through the absence of paid leave and other formal protections for workers, but also indirectly, as inequality and economic insecurity create a culture focused on work. As labor economist Richard Freeman argues, the growing gap between good jobs and bad jobs in the United States, combined with increasing economic inequality and insecurity, create both a carrot and a stick that push Americans to work long and hard.<sup>96</sup> Driven by fear of losing their jobs and motivated by the high rewards of success, Americans keep working harder. This culture means that not only can American employers legally offer American workers significantly less vacation time than do employers in other advanced countries — the United States' average is two weeks, compared to four to six weeks in other advanced countries where vacation is guaranteed by law — but also, when employers do offer vacation, a large portion of Americans do not take all of their time.<sup>97</sup> One study conducted in 2010 found that only 57% of American workers took all of their available vacation time; in contrast, 89% of French workers took all of their vacation time.<sup>98</sup> As Freeman notes, employees are significantly less likely to take all of their vacation time the more insecure they feel about their jobs.<sup>99</sup>

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<sup>95</sup> Jodi Kantor, *Working Anything but 9 to 5: Scheduling Technology Leaves Low-Income Parents with Hours of Chaos*, N.Y. TIMES (Aug. 13, 2014), <http://www.nytimes.com/interactive/2014/08/13/us/starbucks-workers-scheduling-hours.html>.

<sup>96</sup> RICHARD B. FREEMAN, *AMERICA WORKS* 59 (2007). Greater worker insecurity is not often openly acknowledged as serving the interests of the neoliberal economy. One exception came in then-Federal Reserve Chair Alan Greenspan's testimony before Congress in 1997, in which he stated that one of the bases of the "quite favorable" economy he was overseeing was "greater worker insecurity," which was keeping worker pay down, keeping workers in their jobs, and decreasing worker protests against wages and job conditions. *Federal Reserve's First Monetary Report for 1997: Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs*, 105th Cong. 6 (1997) (statement of Alan Greenspan, Chairman, Board of Governors of the Federal Reserve System), [https://fraser.stlouisfed.org/docs/historical/senate/cmp/1990s/CMP\\_105S\\_02261997.pdf](https://fraser.stlouisfed.org/docs/historical/senate/cmp/1990s/CMP_105S_02261997.pdf) [<https://perma.cc/W3UD-284J>].

<sup>97</sup> See GORNICK & MEYERS, *supra* note 77, at 179–81.

<sup>98</sup> See *French Most Likely to Use All Vacation, Japanese Least: Poll*, REUTERS (Aug. 6, 2010, 12:45 PM), <http://www.reuters.com/article/2010/08/06/us-vacations-poll-idUSTRE6753LI20100806> [<http://perma.cc/VGL6-38BT>].

<sup>99</sup> FREEMAN, *supra* note 96, at 60. Economics Professor Robert Frank attributes the trend of Americans taking less vacation time to societal emphasis on productivity over leisure and a hierarchy based on relative over absolute wealth. Frank describes the individualistic mentality as "smart for one, dumb for all." See ROBERT H. FRANK, *LUXURY FEVER: WHY MONEY FAILS TO SATISFY IN AN ERA OF EXCESS* 157 (1999).

The result is a culture in which those with economic wherewithal work the longest hours. Several decades ago, the highest-paid workers in the United States tended to work fewer hours than those paid much less. As of 2006, however, this had flipped: highly paid workers tended to work longer hours than did their lower-paid counterparts.<sup>100</sup> A 2008 Harvard Business School survey found that 94% of professionals worked fifty hours or more a week; almost half of the survey respondents worked sixty-five or more hours a week.<sup>101</sup> The result is that American families are significantly stressed. Of spouses employed full time, most — 59% of wives and 45% of husbands — would prefer to work fewer hours than they do or not at all.<sup>102</sup> Parents' lives have been significantly emptied of most things besides parenting and work. Marital quality has been affected by this: In 2000, married couples were substantially less likely than couples two decades before to dine together, socialize with friends together, or engage in leisure activities or home projects together.<sup>103</sup> And married persons who believed that their own or their spouse's paid work interfered with their family life reported less satisfaction with their marriage.<sup>104</sup> Further, 71% of married mothers and 78% of single mothers reported that they have too little free time for themselves.<sup>105</sup> In addition, 46% of employed mothers reported "always feeling rushed."<sup>106</sup> It is no wonder that approximately three in ten American women stated that they use sleep medication several times a week, and 80% of American women report that stress is the trigger for their sleeplessness.<sup>107</sup> Indeed, these figures suggest that the losers and winners of the lack of market regulation supporting families may best be viewed not in terms of poor families on the one hand and rich families on the other; instead, it may well be that families generally are on the losing side, while capitalism alone stands to win from the absence of buffers between families and the market.

Together, *Marriage Markets*, *Failure to Flourish*, and *Family Law Reimagined* are a clarion call to think more carefully about the importance of families and the conditions necessary for stable family ties in an era in which so much about the world is in flux and destabilizing. They are an invitation to rethink our conceptual maps of the le-

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<sup>100</sup> James Surowiecki, *The Cult of Overwork*, NEW YORKER, Jan. 27, 2014, <http://www.newyorker.com/magazine/2014/01/27/the-cult-of-overwork> [<http://perma.cc/U8XV-7WF2>].

<sup>101</sup> *Id.*

<sup>102</sup> See PAUL R. AMATO ET AL., *ALONE TOGETHER* 112–13 (2007).

<sup>103</sup> *Id.* at 67.

<sup>104</sup> *Id.* at 122.

<sup>105</sup> BIANCHI ET AL., *supra* note 80, at 135.

<sup>106</sup> *Id.* at 137.

<sup>107</sup> See Pamela Paul, *Sleep Medication: Mother's New Little Helper*, N.Y. TIMES, Nov. 6, 2011, at ST1.

gal world, suggesting that we expand the realm of family law across categories we had previously labeled in other terms, and regulate these other areas with the importance of families in mind. Among other things, this means recognizing that markets must be ordered toward the end of maintaining sound families. These books also point the way forward to thinking in more sophisticated and nuanced ways about how the state can better support these critical relationships.