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## Forward-Looking Family Law

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## FORWARD-LOOKING FAMILY LAW

Meredith Johnson Harbach\*

JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* (OXFORD UNIVERSITY PRESS 2014). PP. 272. HARDCOVER \$ 29.95.

CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* (OXFORD UNIVERSITY PRESS 2014). PP. 352. HARDCOVER \$ 47.95.

[T]he families of tomorrow [are] sources of investment in the future—in children’s capacity as adults.

-June Carbone and Naomi Cahn  
*Marriage Markets: How Inequality is Remaking the American Family*

[T]here is so much to be gained – on an individual level and a societal level—from strengthening families raising children.

-Clare Huntington  
*Failure to Flourish: How Law Undermines Family Relationships*

### I. INTRODUCTION

Open up just about any contemporary family law casebook and you are likely to find references to a dynamic time in which families, and the law that recognizes, organizes, and channels them, are in a state of flux. Marriage is on the decline, cohabitation is on the rise, and children increasingly are born to unmarried parents.<sup>1</sup> It is simply no

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1. Philip Cohen, Family Diversity is the New Normal for America’s Children: A Briefing Paper Prepared for the Council on Contemporary Families at 1-3; tbl. at 2, Sept. 4, 2014, <https://contemporaryfamilies.org/the->

longer possible to evoke a single model as representing the “typical” American family,<sup>2</sup> and the law governing these varied relationships struggles to keep up.

The increasing fluidity of family forms raises important questions for scholars of the family and family law, chief among them: How has the modern American family changed? What are the normative implications of these changes? What role has the law (or state influence, more generally) played in these changes? And if these changes are cause for concern, how might family law evolve to better support families going forward? Two important new books—*Marriage Markets*<sup>3</sup> by June Carbone and Naomi Cahn and *Failure to Flourish*<sup>4</sup> by Clare Huntington—take up these questions.

The dramatic changes within the American family are, of course, controversial.<sup>5</sup> In response, some cultural and scholarly critics look back wistfully to the idealized, “traditional” American family<sup>6</sup> expressing consternation over the “marriage and family law crisis.”<sup>7</sup> In contrast, *Marriage Markets* and *Failure to Flourish* enter the fray during this time of profound transition, but with a forward-looking orientation. Central to both projects is an acknowledgment that we cannot put the marriage genie back in the bottle; nor would a return to the norms and structures of traditional marriage be desirable. Consequently, rather than taking a regressive view of family life and family law, these two books look forward to new reforms that would accommodate and stabilize our new family forms. Perhaps most significantly, as reflected in the two quotations with which I open the essay, both projects advocate for the most forward-looking reforms—proactive investment in structural state supports—for the most forward-looking citizens: children.

This essay reviews both books, describing their core arguments and innovative reform proposals. Having surveyed their work, I agree with Carbone, Cahn, and Huntington that the most urgent and politically-tenable reforms to family law involve enhancing investments for structural supports benefitting children. Both books shore up the instrumental and normative cases for such investment, and they also show how a renewed focus on children can help tamp down the culture wars and construct reforms with broad-based appeal. Parts II and III summarize *Marriage Markets* and *Failure to Flourish*, respectively. In Part IV, I use childcare law and policy as a frame through which to explore one of the most significant commonalities between the books—the argument that as part of its family law reform project, the state must look forward by investing in systematic

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new-normal; Natalie Angier, *The Changing American Family*, N.Y. TIMES, Nov. 25, 2013, [http://www.nytimes.com/2013/11/26/health/families.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/11/26/health/families.html?pagewanted=all&_r=0).

2. Cohen, *supra* note 1, at 1.

3. JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* (2014).

4. CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* (2014).

5. See, e.g., Rich Morin, Pew Research Center, *The Public Renders a Split Verdict on Changes in Family Structure* (Feb. 16, 2011), <http://www.pewsocialtrends.org/2011/02/16/the-public-renders-a-split-verdict-on-changes-in-family-structure>.

6. See, e.g., Family Research Council, *Family Structure* (Jan. 4, 2015, 4:57 PM), <http://www.frc.org/family-structure> (“[C]hildren do best when raised by their own biological mother and father who are committed to one another in a lifelong marriage. . . . [A]dults thrive in this same family structure.”); see also ISABEL V. SAWHILL, *GENERATION UNBOUND: DRIFTING INTO SEX AND PARENTHOOD WITHOUT MARRIAGE* (2014).

7. See, e.g., DAN CERE, *THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA* 10-13 (2005).

supports to benefit children and support parents in childrearing.

Charting a way forward during this era of profound family heterogeneity is formidable. But as these two projects demonstrate, state support for children and their parents—via high quality childcare, to use my example—offers an opportunity to ensure that our children thrive in a variety of contemporary family settings, ultimately growing up to create healthy families of their own.

## II. MARRIAGE MARKETS

In their fascinating new project, *Marriage Markets*, June Carbone and Naomi Cahn compellingly “tell the story of what has happened to the American family.”<sup>8</sup> Their central thesis is that family structures, opportunities, and values now increasingly diverge along class lines.<sup>9</sup>

*Marriage Markets* documents these changes. It begins with an excavation of the structural and cultural changes underlying these transformations, seeking to better understand and explain their genesis. The authors’ focus is on how fluctuations in supply and demand of desirable partners in “marriage markets” impact family form, shared values, investments in family, and economic opportunity,<sup>10</sup> leading to increased stratification by class. They then turn to evaluate how well contemporary family law maps onto these changes.<sup>11</sup> Finally, they advocate for reforms to family law that would rebuild families from the top-down and bottom-up to stabilize all families and promote greater equality among them.<sup>12</sup>

### A. New Family Forms and New Family Terms

Carbone and Cahn begin by exploring the puzzles of today’s unequal family structures. The book opens by describing the ways in which families are changing such that choices about marriage, cohabitation, and childrearing increasingly sort the American population into three broad cohorts: college graduates; the “middle” of our population, which is less educated and may struggle but is not poor; and the poor and marginalized.<sup>13</sup> The upshot is that as a country, we no longer share a prototype of family form that transcends other demographic and cultural differences. Instead, divorce and non-marital births today are markers of—and vary by—class.<sup>14</sup>

In the 1960s, there was little diversity in family form, regardless of education levels or geographic location.<sup>15</sup> Most intimate partners were married and were having children within marriage, with little variation by education level, vocation, or income.<sup>16</sup> To-

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8. *Id.* at 4.

9. CARBONE & CAHN, *supra* note 3, at 8.

10. *Id.* at 7. “Marriage markets” is their shorthand for understanding how individuals choose partners.

11. *Id.* at 8-9.

12. *Id.*

13. CARBONE & CAHN, *supra* note 3, at 1, 5-6. They are clear to point out that their taxonomy does not precisely map onto labels used for class analysis in economic or political contexts.

14. *Id.* at 15.

15. *Id.* at 13.

16. *Id.*

day, college graduates continue the trend of marrying and raising children in two-parent households.<sup>17</sup> But the poor and marginalized have largely left marriage behind with large percentages of children being born outside marriage. And the middle of our population may reject an ill-advised marriage, while nevertheless supporting childbirth outside of marriage.<sup>18</sup> These class-based changes are also correlated to family norms and values.<sup>19</sup> The upper third of the population has tended to become more traditional in its views about divorce and premarital sex, while the bottom two-thirds have become less so.<sup>20</sup>

How did our families and our society get to such pronounced stratification? *Marriage Markets* not only challenges the conventional story about *how* families are changing but also complicates our understanding of *why*. Carbone and Cahn posit that the intersection of changing women's roles and rising economic inequality have stratified American families.<sup>21</sup> Working together, these two forces have segregated our population into discrete marriage markets that do not intersect.<sup>22</sup>

Dramatic changes in women's roles, both in the workplace and in the family, have enabled women to become more discerning about whether and whom they marry.<sup>23</sup> But alongside these changes, increasing economic inequality has sorted the population into the well-educated upper third, who postpone marriage and childbearing, and the bottom two-thirds, who are ready for family life earlier in adulthood.<sup>24</sup> Making marriage viable requires a "new family strategy": invest in both partners' earning capacities, avoid early marriage and childbirth, become economically independent, and find the right mate.<sup>25</sup> Those who are able to adopt this new strategy have the best chance for a successful marriage and the opportunity to increase opportunities for your children.<sup>26</sup> But for those who cannot, it is harder than ever to achieve family stability.<sup>27</sup>

Rising economic inequality also has dramatically altered the feasibility and desirability of marriage within the three cohorts.<sup>28</sup> The book hypothesizes that the disparities between the supply and demand of "available" (for marriage) men and women ("gender-ratios") in each marriage sub-market have had dramatic effects on romantic relationships and family formation.<sup>29</sup>

At the top, increasing disparities between the highest income earners and the rest of society has yielded a larger number of high-income men with a lingering gender gap.<sup>30</sup> Consequently, "eligible" men outnumber the women, creating a larger and more

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17. *Id.* at 14.

18. *Id.*

19. CARBONE & CAHN, *supra* note 3, at 19.

20. *Id.* at 15, 19.

21. *Id.* at 43.

22. *Id.*

23. *Id.* at 2-3, 45.

24. CARBONE & CAHN, *supra* note 3, at 57-58.

25. *Id.* at 46.

26. *Id.*

27. *Id.*

28. *Id.*

29. CARBONE & CAHN, *supra* note 3, at 51-53.

30. *Id.* at 65.

desirable supply of men from which high-income women can choose.<sup>31</sup> Something different has happened for the lower-income segments of the population. Here, too, there is a gender mismatch between men and women, but in the opposite direction.<sup>32</sup> For the bottom third, disparities between men's and women's education and employment prospects, as well as the effects of mass incarceration, exacerbate the mismatch.<sup>33</sup> With rising inequality and job loss, the middle third of the country is increasingly affected in the same ways. Consequently, these trends depress the supply of "marriageable" men in the middle and lower cohorts.<sup>34</sup>

Gender ratios thus impact the terms of romantic life and marriage within each market.<sup>35</sup> Men in the top third increasingly seek to marry from a smaller group of high-status women; these relationships are more stable and marriage-focused.<sup>36</sup> As the number of marriageable men declines relative to women in the middle and lower thirds, however, men are less choosy but less likely to commit, and the outnumbered women become less willing to settle.<sup>37</sup>

Alongside these class- and gender-based demographic changes, cultural norms—"scripts" as Carbone and Cahn call them—about the meaning and purpose of marriage have shifted as well.<sup>38</sup> Marriage norms have moved away from the traditional, gendered script and toward a new one. In place of women's subordination and gendered role differentiation, the new script substitutes mutual interdependence, mutual (though not necessarily identical) contributions, and joint responsibility for both finances and children.<sup>39</sup> Thus, despite the alarms sounding over the "deinstitutionalization" of marriage, the book maintains that marriage is in fact being re-institutionalized, just with a different script and on different terms.<sup>40</sup>

### *B. Family Law Confronts Contemporary Families*

Having explained the new, class-based divisions in marriage and family and described the new scripts that have emerged as a result, Carbone and Cahn turn their attention to family law and an examination of how well it can accommodate the dramatically divergent patterns in contemporary American family life.<sup>41</sup>

American family law has long privileged the marital family and marginalized single-parent families.<sup>42</sup> The law today continues the trend, reflecting new norms of the elite script but remaining largely tone-deaf to the needs of those families that cannot fol-

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31. *Id.*

32. *Id.* at 70.

33. *Id.* at 71.

34. CARBONE & CAHN, *supra* note 3, at 75.

35. *Id.* at 59.

36. *Id.*

37. *Id.* at 55, 59.

38. *Id.* at 90.

39. CARBONE & CAHN, *supra* note 3, at 92-93.

40. *Id.* at 94.

41. *Id.* at 8.

42. *Id.* at 109.

low that script.<sup>43</sup> The legal rules of marriage and divorce have replaced the breadwinner/homemaker model with a dual-earner model that recognizes spousal interdependence to some extent, but also expects both partners to have the ability to be financially independent should the relationship end.<sup>44</sup> Hand in glove with these changes, family law has evolved to reflect the new norms of shared parenting when child custody and support are at issue, encouraging parental involvement.<sup>45</sup> Thus, the new marital script in family law is one of mutual interdependence, mutual contributions, and joint responsibility for finances and children functions.<sup>46</sup>

This new, egalitarian approach functions fairly well for couples who follow the revised marital script, but is a poor fit for those who cannot.<sup>47</sup> Under this model, women in the lower two-thirds of the population might find themselves compelled to share finances and parenting with less-reliable and more dependent co-parents. Today's family law thus imposes "[e]quality on the [u]nequal,"<sup>48</sup> rendering marriage and co-parenting a potentially risky proposition for those outside the elite third.<sup>49</sup>

### C. Rebuilding Families and Family Law

The final task of *Marriage Markets* is to consider how law and policy might respond to the dramatic transformation in family life and to ensure greater equality.<sup>50</sup> Broadly speaking, Carbone and Cahn argue that the state must make a greater commitment to employment security (rebuilding from the top-down) and make greater provisions for children to protect them from the vicissitudes of family life (rebuilding from the bottom-up).<sup>51</sup>

Beginning at the top, Carbone and Cahn identify employment instability and wage inequality as the central drivers of family change.<sup>52</sup> The solution? Rebuilding and strengthening the middle class as a foundation that invests in future generations and acts as a backstop against elite overreach.<sup>53</sup> Reform must start at the very top and turn from "maximizing profits to maximizing community (and family) health."<sup>54</sup> These reforms would narrow the yawning inequality between the top and bottom of American society. Shoring up employment and providing greater protections to employees would also address the low "supply" of eligible men in the working class and lower-third sectors of the population. The book also recognizes that childrearing is increasingly stratified by

43. *Id.* at 109-10.

44. CARBONE & CAHN, *supra* note 3, at 113-14. And of course, the extent to which these elite marriages are truly egalitarian is relative. In many elite households, gendered divisions of labor persist and women continue to perform more work in the home and to care for children more than do their husbands.

45. *Id.* at 116-17.

46. *Id.*

47. *Id.* at 110.

48. *Id.* at 118.

49. CARBONE & CAHN, *supra* note 3, at 118-20.

50. *Id.* at 8.

51. *Id.* at 142-43.

52. *Id.* at 145-50.

53. *Id.* at 145.

54. CARBONE & CAHN, *supra* note 3, at 150-51.

class.<sup>55</sup> Addressing the widening achievement gap among children of different classes requires state scaffolding that supports children and families from birth through work-force entry.<sup>56</sup>

Turning to the bottom, Carbone and Cahn emphasize parenthood as a pragmatic new legal focal point that could bridge class differences and improve child outcomes.<sup>57</sup> The important remaining work for family law, then, is to reconsider how it regulates relationships implicating children via the law of parentage, custody, and support.<sup>58</sup> Central to this work is articulating a vision of gender bargains that can accommodate differing balances of power between men and women.<sup>59</sup> Carbone and Cahn advocate a new family law that can counter the impact of gender ratios to help produce more constructive relationship terms.<sup>60</sup> This new system would “lock in parental bargains that benefit children, nudge parents toward greater acceptance of the responsibilities that go with parenthood, and help forge new understandings . . . that promote family stability.”<sup>61</sup> Consequently, they propose a model that secures adult commitments to children based on functional parenting rather than simply biology or marriage.<sup>62</sup>

Alongside these modifications to the law and policy of parentage, the authors stress that a complete response to the changes in family life will require a more robust social safety net and increased support for childrearing. Consequently, they advocate increased state resources for maternal health and newborn assistance, early childhood education and care, primary and secondary education, and post-secondary education.<sup>63</sup>

The Carbone and Cahn collaboration is one of the most generative and influential in contemporary family law scholarship, and *Marriage Markets* continues that trajectory. Remarkably ambitious in scope and at times almost wonkish in detail, the book provides family law’s “rest of the story” antidote to the ubiquitous narrative about the changing American family. Indeed, as I discuss the changing demographics and patterns of family life with my students, I often find myself referencing Carbone and Cahn’s work as a way of more deeply understanding today’s families. But perhaps the book’s (and authors’) greatest contribution in this project is their ability to serve as scholars of *both* the family *and* family law. They combine social science on economic inequality and changing social roles with family law expertise to paint a more complete picture of how and why the American family is changing in ways that track class, and what the state should do about it.

### III. FAILURE TO FLOURISH

Clare Huntington’s thoughtful and provocative project, *Failure to Flourish*, offers

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55. *Id.* at 158.

56. *Id.* at 158-59.

57. *Id.* at 178-80.

58. *Id.* at 178-80.

59. CARBONE & CAHN, *supra* note 3, at 185.

60. *Id.* at 187.

61. *Id.* at 188.

62. *Id.* at 191.

63. *Id.* at 160-64.



a more focused critique of contemporary family law: despite the pervasiveness of state interaction with American families, family law pays far too little attention to family well-being.<sup>64</sup> Both in resolving particular family disputes and in structuring family life, the law tends to destabilize relationships and families rather than nurture them.<sup>65</sup> Huntington's project is to offer a new, overarching theory of family law's purpose and function—"Flourishing Family Law"—as a way to understand the state's role vis-à-vis families and guide family law reform.<sup>66</sup>

The book begins with an in-depth exploration of the significance of relationships for individual, family, and societal well-being and tracks how many American families struggle to establish strong, stable, positive relationships.<sup>67</sup> Huntington then turns to consider the state's interaction with families, explaining that although state intervention pervades family life, it is almost exclusively negative in nature—focusing more on rupture than repair and taking a reactive rather than proactive stance toward family well-being.<sup>68</sup> Finally, she proposes a new normative vision for the state and families: flourishing family law, in which the state restructures families and family choices with an eye toward repair, with the overarching goal of nurturing strong, stable, positive relationships.<sup>69</sup>

#### A. Families and Flourishing

If Carbone and Cahn begin their project with a puzzle, Huntington begins hers with a premise: relationships matter, and they matter for individuals, families, and society.<sup>70</sup> She grounds her premise in the relatively new field of positive psychology, which studies the correlation between close interpersonal relationships and individual well-being.<sup>71</sup> Surveying a rich array of scientific literature (both the familiar and the novel), Huntington shows how the quality of interpersonal relationships affects the full breadth of family contexts: child development, adult well-being, individual health, healing, and also increases social capital.<sup>72</sup> To reap these benefits, interpersonal relationships—between parents and children, and between adults—must be strong, stable, and positive.<sup>73</sup>

Having established the significance of strong, stable, and positive relationships, Huntington catalogues how modern families struggle to supply them. Children increasingly are living in single-parent households.<sup>74</sup> Family forms are also fluid, with many children experiencing what sociologist Andrew Cherlin has characterized as the "marriage-go-round,"<sup>75</sup> evoking *The Brady Bunch*, except with more complexity and less sta-

64. HUNTINGTON, *supra* note 4, at xiii.

65. *Id.* at xii.

66. *Id.* xvii.

67. *Id.* at xii.

68. *Id.*

69. HUNTINGTON, *supra* note 4, at xii-xiii.

70. *Id.* at 6.

71. *Id.* at 6-7.

72. *Id.* at 7.

73. *Id.* at 15-22.

74. HUNTINGTON, *supra* note 4, at 28-29.

80. ANDREW CHERLIN, *THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY* (2009).

bility.<sup>76</sup> What is more, same-sex relationships are receiving increasing recognition, and more same-sex couples are raising children.<sup>77</sup> And accompanying these new family forms are new forms of parentage, many created through donated gametes and/or surrogates, which can lead to more expansive “kin networks.”<sup>78</sup>

What result for family relationships? Research suggests children living with single or cohabiting parents outside of marriage tend to have worse outcomes than those living with married, biological parents.<sup>79</sup> And in the case of divorce, high-conflict litigation and loss of parental contact can impair child well-being.<sup>80</sup> The question of family form and causation is far more complex, but recent research findings point to family structure as an independent causal factor in child well-being.<sup>81</sup> Likewise, multiple partners and multi-partner fertility make it more difficult for parents to provide strong, stable, positive relationships for their children.<sup>82</sup>

Complicating the contemporary family context, many American families are confronting other challenges that make it difficult to cultivate these strong, stable, positive relationships.<sup>83</sup> Huntington inventories the myriad factors that lead to family crisis. Family violence, substance abuse, poverty and unemployment, labor market transitions, parental incarceration, teen pregnancy, social isolation, and gendered divisions of labor all erect barriers to parents’ ability to provide children with the relationships that would allow them to flourish.<sup>84</sup>

### *B. Negative Family Law*

The state, of course, is not simply a bystander to these phenomena. Instead, the state interacts with families in scores of ways that can either foster or hinder healthy relationships.<sup>85</sup> Family law, then, comprises the full panoply of contexts in which the state influences families directly and indirectly,<sup>86</sup> not just through standard “domestic relations” fare like the law of marriage, divorce, and custody, but also via zoning laws, the tax code, and employment discrimination laws.<sup>87</sup> Most directly, the state acts as a gatekeeper to monitor which collectives of individuals count as “families” and the many rights, benefits, and responsibilities that accompany family status.<sup>88</sup> The child welfare system also directly regulates families in situations where child abuse or neglect is suspected or confirmed, and the criminal law intervenes in instances of adult domestic vio-

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76. HUNTINGTON, *supra* note 4, at 30.

77. *Id.* at 30-31.

78. *Id.* at 31.

79. *Id.*

80. *Id.* at 35.

81. HUNTINGTON, *supra* note 4, at 42-43.

82. *Id.* at 43-44.

83. *Id.* at 27, 44.

84. *Id.* at 44-50.

85. *Id.* at 67-68.

86. HUNTINGTON, *supra* note 4, at 58.

87. *Id.*

88. *Id.*

lence.<sup>89</sup> But the state also affects families indirectly by incentivizing or subsidizing particular choices, as well as by strategically structuring choices families face and more broadly influencing social norms.<sup>90</sup>

From Huntington's perspective, both dispute resolution family law and structural family law are predominantly negative in nature and orientation, thereby impeding, rather than facilitating, the formation of strong, stable, positive relationships. The arm of family law that resolves disputes between and among parents, children, and the state is based on the standard adversarial model of commercial litigation.<sup>91</sup> In substance, process, and practice, this zero-sum, adversarial approach is ill-equipped to address the intense emotions, ongoing relationships, and need for reconciliation that are hallmarks of family disputes.<sup>92</sup> Although this model ultimately will bring some form of resolution to the basic dispute, it too often does so to the great detriment of all involved.<sup>93</sup> This system is antithetical to the relationships necessary for human flourishing.<sup>94</sup>

Likewise, the structural arm of family law that supports the family and shapes family choice reacts too late to family dysfunction rather than creating strong, stable, positive relationships on the front end, before problems ensue.<sup>95</sup> Family autonomy norms undermine a more proactive orientation toward state support for family flourishing.<sup>96</sup> Once the state does get involved, it too often takes on the role of adversary and judge rather than partner and collaborator.<sup>97</sup> Moving beyond policies that channel family decisions, some structural family law actively undermines families by denying them recognition, status, and support.<sup>98</sup>

### C. *Flourishing Family Law*

In the second part of her book, Huntington pivots from her diagnosis of the current conditions of the American family and family law to her vision for family law reform. Her reforms would focus on facilitating the strong, stable, positive relationships children and adults need to flourish—flourishing family law.<sup>99</sup>

For the negative model of dispute resolution family law, the book prescribes three overarching reforms: adopting a future-oriented posture toward family restructuring; facilitating relationship reconciliation and continuity; and ensuring the safety of family members.<sup>100</sup> To adopt a future-oriented posture, dispute resolution family law must, in some ways, reimagine its task. While the immediate goal of a particular legal interaction will be the resolution of a (more or less) discrete dispute, dispute resolution family law

89. *Id.* at 61.

90. *Id.* at 62-67.

91. HUNTINGTON, *supra* note 4, at 82.

92. *Id.* at 84-91.

93. *Id.* at 91.

94. *Id.*

95. *Id.* at 82.

96. HUNTINGTON, *supra* note 4, at 91-92, 99-100.

97. *Id.* at 94.

98. *Id.* at 102-05.

99. *Id.* at 109.

100. *Id.* at 115.

must step away from assumptions that, as is often the case in the arms-length context, relationships will dissolve when the dispute ends.<sup>101</sup> A future-oriented dispute resolution would account and make space for intense emotions, provide opportunities for reparation, and create conditions for healing and relationship transformation. This orientation would also recognize the gradations of family relationships rather than the existing zero sum approach;<sup>102</sup> imagine a dimmer switch rather than an on-off switch. Yet despite this future orientation toward repair and re-growth, the state must ensure the safety of all family members.<sup>103</sup>

But the book is far more ambitious than simply advocating reform to dispute resolution family law. To truly enable families to flourish, the state must get out ahead of the ruptures that lead to disputes and better support families so as to head-off these ruptures.<sup>104</sup> We must begin by recognizing the mutual dependence of families and the state, which means that the state necessarily shares responsibility for promoting family well-being.<sup>105</sup> This recognition also undercuts the family autonomy narrative that Huntington shows to be “descriptively inaccurate and prescriptively unenlightening.”<sup>106</sup> Her vision for a flourishing structural family law entails the pursuit of four foundational state goals: (1) recognize a broader range of relationships as familial; (2) encourage long-term commitment between parents to each other and to joint childrearing; (3) mindfully restructure the physical backdrops of family life to promote interaction; and (4) support parents in child-development work.<sup>107</sup> She offers a broad and innovative array of examples for this new model of state-family partnerships.<sup>108</sup>

The fourth cornerstone—supporting parental childrearing—is especially critical to realizing her new vision of structuring family relationships. In this context, she articulates five broad goals in supporting parents: assistance with family planning; assistance with transitions to parenthood; encouraging the involvement of fathers; providing developmental opportunities in preschool; and responding to economic constraints.<sup>109</sup>

Given this broad menu of promising reforms, particularly in the area of structural family law, why have we not seen more movement in these new directions? Huntington’s answers to these questions are the subject of her final chapter.<sup>110</sup> Political resistance is a central hurdle, and Huntington readily admits that some of her reform proposals would be politically challenging.<sup>111</sup> Indeed, reform proposals to both dispute-resolution and structural family law are frequent flashpoints in America’s political discourse. Because many issues of family and state rest at the heart of our culture wars, making progress and finding common ground is daunting. To overcome these hurdles,

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101. HUNTINGTON, *supra* note 4, at 115.

102. *Id.* at 117.

103. *Id.* at 120.

104. *Id.* at 146.

105. *Id.*

106. HUNTINGTON, *supra* note 4, at 146.

107. *Id.*

108. *Id.* at 165-202.

109. *Id.* at 159, 185.

110. *Id.* at 203.

111. HUNTINGTON, *supra* note 4, at 203-04.

the book recommends bypassing the red-state/blue-state divide by “[t]alking purple”—pragmatically reframing certain issues to increase resonance across cultural divides and design programs that have broad appeal.<sup>112</sup>

Finally, the book acknowledges both the limitations of flourishing family law and the limits of legal change, more generally. Beyond law, many other social, religious, and civic institutions play an important role in shoring up family relationships, and these types of initiatives often have broad political appeal.<sup>113</sup>

Accessible and elegantly-crafted, Huntington’s book is a terrific complement to traditional family law casebooks. Her project provides sophisticated answers to the guiding questions I pose at the beginning of every semester in family law: Why does the state care about families, and how should the law interact with them? For students and scholars alike, *Failure to Flourish* provides a compelling look at contemporary American families and family law, advancing a pointed critique of family law’s current negative orientation, while also sounding a note of cautious optimism about the promise of a new, flourishing family law.

#### IV. LOOKING FORWARD: INVESTING IN CHILDREN

The ultimate question posed by both books is where and how the state should focus its energies, particularly in our climate political discord and limited resources. Although they differ in scope and starting point, *Marriage Markets* and *Failure to Flourish* share a number of commonalities, particularly within their proposals for law reform. One of the most important is their joint conclusion—and one which I share—that for purposes of family law reform, the advancement of children’s interests is especially urgent. Consistent with their focus on looking forward, both projects argue for increased investment in children and child development beginning in the prenatal period and spanning until adulthood.

As an example of why and how the state might strengthen its investment in children, consider childcare.<sup>114</sup> Second to the family itself, childcare is the most important developmental context for many of America’s children.<sup>115</sup> But not all childcare is created equal, and childcare quality is enormously consequential. High quality care promotes children’s social, emotional, and cognitive development, as well as school readiness and academic achievement.<sup>116</sup> Poor quality childcare can have adverse effects.<sup>117</sup> And child-

112. *Id.* at 211-13. The book also recognizes the potential for state involvement to exacerbate biases, reinforcing stereotypes about low-functioning families. She cautions that in designing family law reforms, law and policymakers must be wary of these pitfalls, and leave room for family autonomy (despite the “myth”) and pluralism. *Id.* at 213-14.

113. *Id.* at 219-22.

114. By “childcare,” care provided to children under age six provided by someone other than parents or legal guardians. See NAT’L ASS’N OF CHILD CARE RES. & REFERRAL AGENCIES, CHILD CARE: LIKE THE MILITARY, IS IT TIME FOR SHARED RESPONSIBILITY? 6 (2011), [http://nacccra.com/sites/default/files/publications/naccrra\\_publications/2012/child\\_care\\_like\\_the\\_military.pdf](http://nacccra.com/sites/default/files/publications/naccrra_publications/2012/child_care_like_the_military.pdf) [hereinafter LIKE THE MILITARY]. The primary categories of non-family care are childcare centers, group home childcare, family childcare, and in-home childcare. See also Child Care and Development Fund, 45 C.F.R. § 98.2 (2014).

115. EDWARD ZIGLER ET AL., THE TRAGEDY OF CHILD CARE IN AMERICA 1 (2009).

116. *Id.* at 9-10; Julie Cohen & Erica Lurie-Hurvitz, *Seizing the Potential*, ZERO TO THREE, Feb. 2009, at 5,

care's effects—whether positive or negative—have the most significant consequences for low-income children.<sup>118</sup>

Despite all we now know about the significance of quality, the overall quality of care in the United States is no better than mediocre, and far too few children receive high-quality care.<sup>119</sup> Many parents struggle to access childcare of the quality and type they prefer, often because of resource constraints, and sometimes because of childcare “deserts.”<sup>120</sup> The American childcare system is failing, and children, families, and society feel the effects.<sup>121</sup> Recognizing the significance of high quality care, both projects advocate increased support for quality childcare services.<sup>122</sup>

Using childcare law and policy as a case study, in this final part I elaborate both books' emphasis on family law reforms that invest in children and childrearing, explaining both the instrumental and moral cases for this investment, and showing how such investments have the potential to overcome cultural and political gridlock.

#### A. *The Instrumental Case for Investing in Children*

Both *Marriage Markets* and *Failure to Flourish* recognize that child development and well-being have tremendous implications for society. Healthy, happy, well-educated children grow up to be more productive and economically productive adults. Early, targeted interventions for children are cost effective and yield long-term societal benefits.<sup>123</sup> Consequently, there is a strong instrumental (and economic) argument for investing in structural family supports that benefit children.

Returning to childcare, I have argued elsewhere that high quality childcare generates significant social spillovers.<sup>124</sup> As discussed above, children and their families certainly reap the rewards of high quality childcare. But they are not the only ones. The benefits of high quality care spill over to society more broadly—to classmates, neighbors, partners, future children, colleagues, employers, and the taxpaying public. Economists have shown that quality care enhances social capital and generates fiscal benefits.

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<http://www.buildinitiative.org/WhatsNew/ViewArticle/tabid/96/ArticleId/519/Seizing-the-Potential-Quality-Infant-Toddler-Child-Care.aspx>; see also Meredith Johnson Harbach, *Childcare Market Failure*, 2015 UTAH L. REV. 659, 68-82 & n.130 (2015) (discussing research).

117. Cohen & Lurie-Hurvitz, *supra* note 116, at 1.

118. ZIGLER ET AL., *supra* note 115, at 9-10; Cohen & Lurie-Hurvitz, *supra* note 116, at 1, 5.

119. Meredith Harbach, *Childcare Market Failure*, *supra* note 116, at 659-60; Meredith Johnson Harbach, *Nudging Parents*, 19 J. GENDER, RACE & JUST. (forthcoming 2016) (manuscript at 2-3) (on file with author).

120. CHILD CARE AWARE OF AMERICA, PARENTS AND THE HIGH COST OF CHILD CARE: 2015 REPORT 11, 29-33 (2015), <http://www.usa.childcareaware.org/advocacy-public-policy/resources/reports-and-research/costofcare>.

121. See Harbach, *Childcare Market Failure*, *supra* note 116, at 659-60; Meredith Johnson Harbach, *Nudging Parents*, *supra* note 119.

122. CARBONE & CAHN, *supra* note 3, at 161-62; HUNTINGTON, *supra* note 4, at 161-62. Importantly, simply increasing funding for childcare subsidies will not be sufficient to solve our childcare problems. As I have argued elsewhere, the childcare market suffers from both classic and behavioral market failure. In addition to increased funding, childcare law and policy must be reformed to account for spillovers, information problems, and the heuristics and biases that manifest in childcare decisionmaking. Harbach, *Childcare Market Failure*, *supra* note 116, at 705-10; Harbach, *Nudging Parents*, *supra* note 119 (manuscript at 67-80) (on file with author).

123. CARBONE & CAHN, *supra* note 3, at 89; HUNTINGTON, *supra* note 4, at xiii-xvii.

124. Harbach, *Childcare Market Failure*, *supra* note 116, at 682-84.

In short, quality childcare is a sound investment in society's future: it yields significant financial returns, increases economic growth, and more than offsets public investment in early childcare.<sup>125</sup>

### B. *The Moral Case for Investing in Children*

Moving beyond economic efficiency and positive spillovers, investing in children is also a moral imperative. As compellingly described in *Marriage Markets*, rising inequality inhibits children's ability to develop and thrive.<sup>126</sup> The ripple effects are felt not only in school performance, but also, more broadly, in children's social and civic participation and their prospects for higher education.<sup>127</sup> The state has a responsibility to support the vulnerable, and to ensure that the inequality so many parents face today is not revisited on their children.

The state has long recognized a special interest in and obligation to children. Acting as *parens patriae*,<sup>128</sup> the state has both the authority and obligation to provide the care and support necessary to ensure child well-being. More broadly, Martha Fineman's vulnerability theory posits that the state has a responsibility to structure conditions in which all individuals have equal opportunities to realize their potential—to make available “the all-American promise of equality of opportunity and equal access to the American dream.”<sup>129</sup>

Returning to childcare, when family or market conditions are such that families alone cannot provide or secure quality childcare, the state has an interest and responsibility to ensure the availability of that care. High quality care can help counteract the consequences of inequality. Exposure to higher quality care leads to improved cognitive, social, and health outcomes for children, and these children grow up to be more productive and economically stable adults.<sup>130</sup> The moral case for investing in quality care for all American children is based on its capacity to level the playing field and provide future generations with more equal opportunities to develop and thrive. Thus, as I have argued elsewhere, increasing financial and structural supports for childcare is not just a matter of instrumental benefits and social spillovers; this investment in our children is also the right thing to do.<sup>131</sup>

### C. *Investing in Children as a Common Ground Strategy*

Finally, both *Marriage Markets* and *Failure to Flourish* recognize family law reform will be politically difficult because of the divergent values and priorities between

125. *Id.*

126. CARBONE & CAHN, *supra* note 3, at 82.

127. *Id.* at 87-88.

128. The Latin translation of *parens patriae* is “parent of the county.” *Parens patriae*, BLACK'S LAW DICTIONARY (10th ed. 2014). The doctrine of *parens patriae* refers to the state in its capacity to provide for or protect those who are unable to do so themselves. *Id.*

129. Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 274-75 (2010).

130. Harbach, *Childcare Market Failure*, *supra* note 116, at 680-82.

131. *Id.* at 691-92.

“red” and “blue” Americans that fuel our ongoing culture wars.<sup>132</sup> To overcome these obstacles, Huntington advocates “talking purple” by pragmatically reframing proposed reforms through the lens of family functioning and child well-being.<sup>133</sup> Similarly, Carbone and Cahn suggest that recasting certain reforms in terms of preparation for parenthood would offer promise for political compromise.<sup>134</sup>

Recent developments in federal childcare law and policy confirm that investing in children and child development can engender broad, bipartisan appeal. In Fall 2014, President Barack Obama signed the Child Care and Development Block Grant Act of 2014 (the “2014 Act”) into law,<sup>135</sup> reauthorizing and expanding the federal childcare subsidy program. The 2014 Act represents a major step forward in channeling resources toward the provision of high quality childcare for many of America’s most underprivileged children. The new law sets out a number of quality-based subsidy, regulatory, and information reforms that will enhance and increase the provision of quality childcare in the United States.<sup>136</sup> Most significantly for our purposes here, this legislation, while a remarkable step forward, was politically uncontroversial.<sup>137</sup> The Senate bill was heralded as a significant bipartisan victory, and the original Senate version out of committee passed by a vote of 96–2.<sup>138</sup> An amended version passed the House of Representatives by unanimous consent,<sup>139</sup> and the House version ultimately passed the Senate by a vote of 88–1.<sup>140</sup> This new development in federal childcare law and policy offers support for the authors’ instincts that framing reforms in terms of investments in child well-being has the potential to overcome political and cultural divides.

In sum, investing in structural supports for children and childrearing is instrumentally and morally sound. And a focus on children offers the best of hope of finding political common ground and effecting family law reform that can help respond to the challenges contemporary American families face.

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132. CARBONE & CAHN, *supra* note 3, at 184–86; HUNTINGTON, *supra* note 4, at 204–07.

133. HUNTINGTON, *supra* note 4, at 211–13.

134. CARBONE & CAHN, *supra* note 3, at 170, 178–81.

135. Child Care and Development Block Grant Act of 2014, Pub. L. No. 113-186, 128 Stat. 1971 (2014), <https://www.congress.gov/bill/113th-congress/senate-bill/1086/actions> [hereinafter *Major Actions*].

136. Harbach, *Childcare Market Failure*, *supra* note 116, at 712–17.

137. See 160 CONG. REC. H7475 (daily ed. Sept. 15, 2014) (statement of Rep. George Miller) (“We . . . recognize a growing national bipartisan consensus about the value of children being placed in high-quality, safe environments during their early learning years.”); see also Allie Bidwell, *Child Care Grant Program to Sail Through Senate*, U.S. NEWS & WORLD REPORT, Nov. 17, 2014, <http://www.usnews.com/news/articles/2014/11/17/federal-child-care-and-development-block-grant-program-to-pass-senate>.

138. See *Major Actions*, *supra* note 135.

139. See Sen. Barbara A. Mikulski, *Mikulski Calls on Senate to Pass Her Bipartisan Bill to Help American Families Access Safe, Affordable and Quality Child Care*, Nov. 12, 2014, <http://www.mikulski.senate.gov/newsroom/press-releases/mikulski-calls-on-senate-to-pass-her-bipartisan-bill-to-help-american-families-access-safe-affordable-and-quality-child-care>.

140. See Sen. Barbara A. Mikulski, *Mikulski Heralds Senate Passage of Her Bipartisan Bill to Help American Families Access Safe, Affordable, Quality Child Care that Gets Kids Ready for School*, Nov. 17, 2014, <http://www.mikulski.senate.gov/newsroom/press-releases/mikulski-heralds-senate-passage-of-her-bipartisan-bill-to-help-american-families-access-safe-affordable-quality-child-care-that-gets-kids-ready-for-school>.



V. CONCLUSION

The American family has undergone profound change, and a conflation of social, economic, and legal forces has rendered many of our families less stable and less equal than ever before. Family law must adapt to accommodate and respond to these changes. *Marriage Markets* and *Failure to Flourish* offer thoughtful and innovative templates for family law's renewal. Looking forward, investment in structural supports for children will be critical. Investing in our future can help buffer families from some of the most bruising effects of demographic and economic changes, foster stability in the new flowering of families, and promote more equal opportunity for all of America's children.