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# **IS THERE A WAY FORWARD IN THE “WAR OVER THE FAMILY”?**

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# Is There a Way Forward in the “War over the Family”?

FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS.  
By Clare Huntington. New York, New York: Oxford University Press,  
2014. 352 pages. \$45.00.

Linda C. McClain\*

## I. Introduction

### A. *Bringing Together Two Conversations About Marriage*

In a recent oral argument before the Seventh Circuit about the constitutionality of Indiana’s and Wisconsin’s laws barring marriage by same-sex couples and recognition of such marriages, Wisconsin’s assistant attorney general defended Wisconsin’s marriage laws as part of a “concerted Wisconsin policy to reduce numbers of children born out of wedlock.”<sup>1</sup> In response, one judge on the panel quipped: “I assume you know how that has been working out in practice?”<sup>2</sup> In a subsequent acerbic and witty opinion unanimously affirming the federal district court rulings invalidating Indiana’s and Wisconsin’s restrictive laws, Judge Posner also expressed incredulity at the argument that excluding same-sex couples from marriage cohered with the states’ interest in “channeling procreative sex into (necessarily heterosexual) marriage” to address “the problem of ‘accidental births’” and “unintended” and “unwanted children.”<sup>3</sup> If that channeling policy were succeeding, he reasoned, “we would expect a drop in the percentage of children born to an unmarried woman, or at least not an

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\* Professor of Law and Paul M. Siskind Research Scholar, Boston University School of Law. I am grateful to June Carbone for constructive comments on an earlier draft and to David Blankenhorn, Lynn Mather, and Andrew Shepard for instructive conversation about the issues addressed in this Review and for bibliographical suggestions. I presented an earlier draft at the workshop, *Theorizing the State: The Resources of Vulnerability*, held at Emory University School of Law, and received valuable comments from participants, including Clare Huntington. Thanks also to Stefanie Weigmann, Assistant Director for Research, Faculty Assistance, and Technology, Pappas Law Library, for valuable research assistance. A Boston University summer research grant supported this work.

1. Associated Press, *Judges Take Tough Tone at Gay Marriage Hearing*, N.Y. TIMES, Aug. 26, 2014, [http://www.nytimes.com/2014/08/27/us/judges-take-tough-tone-at-gay-marriage-hearing.html?\\_r=1](http://www.nytimes.com/2014/08/27/us/judges-take-tough-tone-at-gay-marriage-hearing.html?_r=1), archived at <http://perma.cc/9QXR-2RKZ>. The oral argument is available at: [http://media.ca7.uscourts.gov/sound/2014/rt.2.14-2526\\_08\\_26\\_2014.mp3](http://media.ca7.uscourts.gov/sound/2014/rt.2.14-2526_08_26_2014.mp3), archived at <http://perma.cc/QT7H-REQG>.

2. Associated Press, *supra* note 1.

3. *Baskin v. Bogan*, 766 F.3d 648, 655, 662–63 (7th Cir. 2014).

increase” since Indiana and Wisconsin adopted their restrictive laws.<sup>4</sup> Instead, each state—similar to “the nation as a whole”—has experienced about a 10% increase from 1997 to 2012, with over 40% of births to unmarried women.<sup>5</sup> Thus, “there is no indication” that the states’ marriage laws have had any “channeling” effect.<sup>6</sup>

One effect those laws *have* had, Posner observed, in seeming conflict with the states’ “concern” with accidental or unplanned births and “unwanted children,” is to bar from marriage the “homosexual couples” who are far more likely than heterosexual couples to adopt those children.<sup>7</sup> Indeed, ignoring adoption was an “extraordinary oversight” in the states’ argument.<sup>8</sup> If marriage between a child’s parents “enhances the child’s prospects for a happy and successful life,”<sup>9</sup> such that “marriage is better for children who are being brought up by their biological parents, [then] it must be better for children who are being brought up by their adoptive parents.”<sup>10</sup> “The state should *want* homosexual couples who adopt children,” as state law permits them to do, “to be married.”<sup>11</sup> Children, “natural conformists” and “upset” by being out of step “with their peers,” would thereby experience “emotional comfort” and security.<sup>12</sup> *United States v. Windsor*’s<sup>13</sup> child-focused “criticisms” of the Defense of Marriage Act (DOMA), Posner argued, apply even more forcefully to the complete denial of marriage to same-sex couples: “The differentiation . . . humiliates tens of thousands of children now being raised by same-sex couples . . . [and] makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”<sup>14</sup> Challenges to restrictive marriage laws, Posner concludes, while “[f]ormally” about discrimination, are, “at a deeper level, . . . about the welfare of American children.”<sup>15</sup>

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4. *Id.* at 664.

5. *Id.*

6. *Id.*

7. *Id.* at 654, 662–63.

8. *Id.* at 662.

9. *Id.* at 663.

10. *Id.* at 664.

11. *Id.* Judge Posner’s emphasis on adoption of “unwanted” children, while strategically effective, does not acknowledge other pathways to parenthood pursued by same-sex couples, such as the use of assisted reproductive technology and second parent adoption of one partner’s biological child. Stu Marvel, *The Surprising Resilience of the Traditional Family* 7–9 (Dec. 10, 2014) (unpublished manuscript) (on file with author).

12. *Baskin*, 766 F.3d at 663–64.

13. 133 S. Ct. 2675 (2013).

14. *Baskin*, 766 F.3d at 659 (quoting *Windsor*, 133 S. Ct. at 2694) (internal quotation marks omitted).

15. *Id.* at 654.

The Seventh Circuit oral argument and opinion bring together and illuminate two conversations about marriage, family law, and equality that too often proceed independently. In the first, in the numerous post-*Windsor* challenges to restrictive marriage laws taking place in courtrooms across the country, same-sex couples and the courts who rule in their favor emphasize the high stakes of exclusion by characterizing marriage as a highly esteemed, incomparable institution and a status that signals one's intimate commitment is worthy of equal respect and dignity.<sup>16</sup> Defenders of restrictive marriage laws narrow marriage's role to channeling otherwise irresponsible heterosexuals into a stable family form for the sake of the children their unions may produce.<sup>17</sup> That rationale puts same-sex couples—who cannot become parents by accident—beyond the concerns of the state, which “has no interest in ‘licensing adults’ love.”<sup>18</sup> Even this channeling argument, however, gives marriage an unrivaled role as *the* social institution designed to address a fundamental social problem and to anchor parental investment in children.<sup>19</sup> Judge Posner's opinion illustrates the twofold rejoinder to that argument: (1) this reductive view of marriage ignores the actual content of state marriage laws, which indicate that “[t]he state must think marriage valuable for something other than just procreation,” and (2) if the state regards marriage as the optimal family form for child rearing, then allowing same-sex couples to marry advances marriage's child-protective functions and spares children humiliation and tangible deprivations.<sup>20</sup> To be left out of marriage is to experience a second class form of family life and (as another federal appellate court put it) to be “prohibit[ed] . . . from participating fully in our society, which is precisely the type of segregation that the Fourteenth Amendment cannot countenance.”<sup>21</sup>

Parallel to this exaltation of marriage in rulings that bring more families under marriage's protective umbrella is a second discourse about the

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16. *Windsor* provides a template for this. See *Windsor*, 133 S. Ct. at 2693 (stating that DOMA interferes with “the equal dignity of same-sex marriages” conferred by New York's law); *id.* at 2692 (describing how marriage by a same-sex couple is a “relationship deemed by the State worthy of dignity in the community equal with all other marriages”).

17. See *Bostic v. Schaefer*, 760 F.3d 352, 381 (4th Cir. 2014) (discussing and rejecting “Proponents’ attempts to differentiate same-sex couples from other couples who cannot procreate accidentally”); *supra* note 3 and accompanying text.

18. *Bostic*, 760 F.3d at 394 (Niemeyer, J., dissenting) (quoting Virginia's argument).

19. In his influential account, Carl Schneider proposed: “[I]n the channelling function the law creates or (more often) supports social institutions [such as marriage and parenthood] which are thought to serve desirable ends.” Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 498 (1992); see also Linda C. McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channelling Function of Family Law*, 28 CARDOZO L. REV. 2133, 2135–37 (2007) (considering the continuing relevance of the channeling function in litigation over same-sex marriage and in challenges to “the conventional sequences of love, marriage, and the baby carriage”).

20. *Baskin*, 766 F.3d at 659, 662.

21. *Bostic*, 760 F.3d at 384.

disappearance of marriage from the lives of a growing number of people and communities in the United States.<sup>22</sup> “[T]he share of American adults who have never been married is at an historic high,” while the “shares of adults cohabiting and raising children outside of marriage have increased significantly.”<sup>23</sup> Too many young adults, policy analysts warn, are “drifting” into sex and parenthood unintentionally and outside of marriage.<sup>24</sup> Reports of a growing class-, race-, and gender-based marriage divide stress the urgency of this “other marriage equality problem.”<sup>25</sup> This discourse also warns of the “diverging destinies” of children born into or reared in marital versus nonmarital families<sup>26</sup> and of the “reproduction of inequalities” as these patterns continue across generations.<sup>27</sup> Policy analysts debate whether it is possible to close the marriage gap or whether changes in economic conditions, values (or social norms), and gender patterns are such that a more realistic policy is to move “beyond marriage” and to aim instead at cultivating a “new ethic of responsible parenthood.”<sup>28</sup>

The Seventh Circuit opinion brings together these two pieces of the marriage puzzle by examining the incentive effects, or influence, of state laws on patterns of family life. It also invites holistic consideration of whether a state’s family laws cohere as a whole and achieve the aims of securing “the welfare of American children.”<sup>29</sup> That the state laws at issue were those of Indiana and Wisconsin serendipitously introduces the

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22. See generally NAT’L MARRIAGE PROJECT & CTR. FOR MARRIAGE & FAMILIES, THE STATE OF OUR UNIONS: MARRIAGE IN AMERICA 2010: WHEN MARRIAGE DISAPPEARS: THE NEW MIDDLE AMERICA (2010); PEW RESEARCH CTR., THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES (2010).

23. WENDY WANG & KIM PARKER, PEW RESEARCH CTR., RECORD SHARE OF AMERICANS HAVE NEVER MARRIED: AS VALUES, ECONOMICS AND GENDER PATTERNS CHANGE 4 (2014), available at [http://www.pewsocialtrends.org/files/2014/09/2014-09-24\\_Never-Married-Americans.pdf](http://www.pewsocialtrends.org/files/2014/09/2014-09-24_Never-Married-Americans.pdf), archived at <http://perma.cc/H4SD-U2GT>.

24. Isabel V. Sawhill, Opinion, *Beyond Marriage*, N.Y. TIMES, Sept. 13, 2014, [http://nytimes.com/2014/09/14/opinion/sunday/beyond-marriage.html?\\_r=0](http://nytimes.com/2014/09/14/opinion/sunday/beyond-marriage.html?_r=0), archived at <http://perma.cc/Rf8B-FJY7> [hereinafter Sawhill, *Beyond Marriage*]. See generally ISABEL V. SAWHILL, GENERATION UNBOUND: DRIFTING INTO SEX AND PARENTHOOD WITHOUT MARRIAGE (2014) [hereinafter SAWHILL, GENERATION UNBOUND].

25. For this coinage, see Linda C. McClain, *The Other Marriage Equality Problem*, 93 B.U. L. REV. 921, 924 (2013).

26. See Sara McLanahan, *Diverging Destinies: How Children Are Faring Under the Second Demographic Transition*, 41 DEMOGRAPHY 607, 611, 614 (2004) (arguing that differences in the childbirth trajectories of the least- and most-educated women are leading to children of single mothers losing resources, while children born to more affluent (usually married) women are gaining resources).

27. See Sara McLanahan & Christine Percheski, *Family Structure and the Reproduction of Inequalities*, 34 ANN. REV. SOC. 257, 271 (2008) (“[T]he evidence suggests that recent changes in the family are contributing to the intergenerational persistence of inequality.”).

28. Sawhill, *Beyond Marriage*, *supra* note 24; see also WANG & PARKER, *supra* note 23, at 4–5 (attributing the rising share of never married to changes in values, economics, and gender patterns).

29. *Baskin v. Bogan*, 766 F.3d 648, 654 (7th Cir. 2014).

relevance of “welfare” to child welfare and family law: *Zablocki v. Redhail*,<sup>30</sup> in which the Supreme Court declared unconstitutional Wisconsin’s efforts to encourage responsible fatherhood by linking access to marriage to paying child support and keeping one’s children off welfare,<sup>31</sup> is a cornerstone in arguments in marriage equality litigation that the “fundamental” right to marry is “expansive” and “broad” rather than narrow.<sup>32</sup> In the 1990s, Tommy Thompson, Governor of Wisconsin, was a poster child for experimenting with welfare reform to encourage “individual responsibility.”<sup>33</sup> Indiana is the home state of former Vice President Dan Quayle, an iconic figure in the 1990s welfare debates who linked intergenerational poverty to a “poverty of values”<sup>34</sup> and invited endless commentary on whether he was “right” or “wrong” for criticizing television character Murphy Brown’s decision to have a nonmarital child as setting a bad example for young women to create fatherless families.<sup>35</sup>

In *Failure to Flourish: How Law Undermines Family Relationships*, family law scholar Clare Huntington issues a similar invitation to assess holistically the impact of family law on families and, particularly, on children. That inventory, she argues, yields dismal conclusions about the law’s failure to foster “family well-being” and “strengthen family relationships.”<sup>36</sup> Huntington indicts both “dispute-resolution family law”—that is, the “legal rules governing divorce, paternity, child abuse, and other

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30. 434 U.S. 374 (1978).

31. *Id.* at 388–91.

32. *Latta v. Otter*, Nos. 14-35420, 14-35421, 12-17668, 2014 WL 4977682, at \*12 (9th Cir. Oct. 7, 2014) (Reinhardt, J., concurring) (citing *Zablocki* as rejecting a “narrow” right to marry, such as “the right of fathers with unpaid child support obligations to marry”); *Bostic v. Schaefer*, 760 F.3d 352, 376 (4th Cir. 2014) (citing *Zablocki* to support a “broad right to marry that is not circumscribed based on the characteristics of the individuals seeking to exercise that right”).

33. *See States’ Perspective on Welfare Reform: Hearing Before the S. Comm. on Fin.*, 104th Cong. 18 (1995) (statement of Hon. Tommy G. Thompson, Governor of the State of Wisconsin) (characterizing welfare reform in Wisconsin as “demand[ing] individual responsibility from welfare recipients”). President George W. Bush subsequently appointed Thompson Secretary of the Department of Health and Human Services. Press Release, U.S. Dep’t of Health & Human Servs., Former Wisconsin Governor Tommy G. Thompson Becomes New Secretary of Health and Human Services (Feb. 2, 2001), available at <http://archive.hhs.gov/news/press/2001pres/20010202.html>, archived at <http://perma.cc/JF6A-9HJV>.

34. Vice President Dan Quayle, Speech on Cities and Poverty at the Commonwealth Club of California (May 19, 1992), in N.Y. TIMES, May 20, 1992, at A20, available at <http://www.nytimes.com/1992/05/20/us/after-the-riots-excerpts-from-vice-president-s-speech-on-cities-and-poverty.html>, archived at <http://perma.cc/9ETU-TUCD>.

35. Andrew Rosenthal, *Quayle Says Riots Sprang from Lack of Family Values*, N.Y. TIMES, May 20, 1992, at A1, A20, available at <http://www.nytimes.com/1992/05/20/us/after-the-riots-excerpts-from-vice-president-s-speech-on-cities-and-poverty.html>, archived at <http://perma.cc/M6HK-U4VG>. For an example of commentary, see generally Barbara Dafoe Whitehead, *Dan Quayle Was Right*, ATLANTIC MONTHLY, April 1993, at 47, available at <http://www.theatlantic.com/magazine/archive/1993/04/dan-quayle-was-right/307015/>, archived at <http://perma.cc/DR3X-5TT2>.

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

kinds of family conflicts<sup>37</sup>—and “structural family law,”<sup>38</sup> within which she includes not only the conventional subject matter of family law—such as rules about marriage and parenthood—but also the many forms of legal regulation that “influence[] the context for relationships”—such as zoning laws, employment discrimination laws, and criminal laws.<sup>39</sup> “[C]ontext matters,” Huntington argues, because “relationships do not exist in a vacuum.”<sup>40</sup> Huntington challenges readers to think holistically and broadly about the role of law in shaping family life.

Huntington enlists positive psychology to explain why relationships matter to individuals and society and under what circumstances such relationships develop.<sup>41</sup> Thus, the normative vision that should guide family law is “that family law in all of its aspects should nurture strong, stable, positive relationships.”<sup>42</sup> She contends that, while a “few narrow reforms” are moving family toward that vision, they will remain “haphazard, unconnected, and sometimes actively challenged” without the “overarching theory of family law” that she proposes to unite them “and encourage more complete change.”<sup>43</sup>

#### B. *A Propitious Juncture in the “War over the Family”?*

*Failure to Flourish* arrives at a peculiar, and perhaps propitious, juncture in long-running public conversations about the relationship among family life, family values, and family law when it is possible to ask about a way forward to end the “war over the family.”<sup>44</sup> For decades, a disturbing contradiction or paradox in state and federal family law and policy was that, even as government sought to shore up marriage and “responsible fatherhood” to address the “failure of families to form” (single-parent families) and the rise in “broken families” (due to divorce), it excluded same-sex couples from marriage to “defend” marriage and often hindered lesbians and gay men and their children from forming legally protected families.<sup>45</sup> That legal landscape is rapidly, although not uniformly, changing to welcome same-sex couples into the marriage fold. Yet, as the Seventh Circuit opinion’s appeal to demographic trends made clear, governments have not

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37. *Id.* at xi.

38. *Id.* at xii.

39. *Id.*

40. *Id.* at xi.

41. *Id.* at 6–11.

42. *Id.* at xvii.

43. *Id.* at xvi–xvii.

44. For more on this formulation, see generally BRIGETTE BERGER & PETER L. BERGER, *THE WAR OVER THE FAMILY* (1983); MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 121–30 (1991); DAVID POPENOE, *WAR OVER THE FAMILY* (2005).

45. On this paradox, see Linda C. McClain, *Federal Family Policy and Family Values from Clinton to Obama, 1992–2012 and Beyond*, 2013 MICH. ST. L. REV. 1621, 1624–25.



managed to halt or reverse those trends and bring everyone into the big marriage tent.

Sawhill proposes the terms “traditionalists” and “village builders” to capture a basic divide about how best to respond to the separation of marriage and parenthood and whether to try to bring everyone into that tent.<sup>46</sup> “Traditionalists” generally “share a deep concern about the fragmentation of the family and its implications for adults and especially for children” and, thus, view strengthening marriage and restoring a norm of childbearing and parenting within marriage as the best way forward.<sup>47</sup> They include many conservatives who believe that “government does more harm than good” and that its programs often undermine marriage and parental responsibility.<sup>48</sup> “Village builders” focus less on family form than on the basic proposition that “families exist within a larger society that must take some responsibility for helping parents to raise their children;” they insist that “[w]ithout the right supports from the larger community, . . . families”—particularly single-parent families—“will not flourish.”<sup>49</sup>

Where does *Failure to Flourish* position itself in this shifting landscape? Is Huntington more of a traditionalist or village builder? Like Judge Posner, Huntington invokes child well-being to condemn legal barriers to marriage for same-sex couples who *wish* to marry.<sup>50</sup> Like the attorneys defending Indiana’s and Wisconsin’s marriage laws, and like the traditionalists Sawhill describes, she also insists that family form matters for children, observing: “There is overwhelming evidence that children raised by single or cohabiting parents have worse outcomes than children raised by married, biological parents.”<sup>51</sup> Unlike them, she pulls back from championing marriage as the necessary or sole solution to the problem of anchoring parental commitment and cooperation in childrearing.<sup>52</sup> Instead, a “flourishing family law” should support a broad range of families and aim not at *marriage*, as such, but at stable and committed *relationships* between coparents, so that they “can meet the needs of their children.”<sup>53</sup> Huntington, thus, is emphatically a “village builder” as she details the many ways that the state should support families.<sup>54</sup>

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46. SAWHILL, GENERATION UNBOUND, *supra* note 24, at 7, 83–84.

47. *Id.* at 84–85.

48. *Id.* at 84.

49. *Id.* at 87. As an example of a village builder, Sawhill cites to Hillary Clinton’s *It Takes a Village*, discussed *infra* at note 67.

50. HUNTINGTON, *supra* note 36, at 171–73.

51. *Id.* at 31.

52. *See, e.g., id.* at 176 (“[T]he goal is not necessarily to increase the number of marriages but rather to increase the long-term commitment between parents, whatever the form.”).

53. *Id.* at 179–80.

54. For an informative exchange between Huntington and the author relating *Failure to Flourish* to Sawhill’s categories, compare Linda C. McClain, *On “Traditionalists,” “Village Builders,” and the Future of Children*, BALKINIZATION (Nov. 1, 2014, 5:36 PM), <http://balkin.blogspot.com/2014/11/on-traditionalists-village-builders-and.html>, archived at

In this Review, I will explore whether *Failure to Flourish* offers a viable way forward beyond the “war over the family” by offering a new baseline for conversation. I will also argue that, while *Failure to Flourish* persuasively insists that “context matters,” it is surprisingly acontextual in ways that limit its ambitious effort to guide family law. *Failure to Flourish* is, at times, admirably fine grained, using portraits of particular families to illustrate how family law shapes their lives and describing specific initiatives as harbingers of a flourishing family law.<sup>55</sup> On the other hand, the book articulates a normative vision of the “pervasive state” fostering “strong, stable and positive relationships” without considering the context of decades of calls by various social movements to “strengthen families” and state and federal policies aimed at doing so. It gestures toward an ecological approach to families and family law, even calling for a relationship impact statement by analogy to an environmental impact statement when considering law and policy, without situating that call in the context of decades of calls for a shift from family policy to family ecology.<sup>56</sup> The book cautions that government cannot do it all, gesturing toward the vital role of neighborhoods, religious organizations, and other nongovernmental actors but does not engage with the significant turn in recent decades to enlist civil society and public–private partnerships to help families and address problems government alone can’t solve. Readers could better appreciate and evaluate Huntington’s vision of a pervasive state properly directed in aid of human flourishing if they had a better sense of how she situates her own project in the context of these numerous other ones. At this point in the family law–family values conversation, there is no clean slate on which to write. Context, indeed, matters.

This Review will also argue that *Failure to Flourish*’s critique of dispute-resolution family law as negative, adversarial, and destructive of family relationships is acontextual. With respect to divorce and family dissolution, for example, prominent trends—or even revolutions—in family law in the direction Huntington favors date back twenty years or more. Huntington does not explain why she regards as “islands in a sea of dysfunction”<sup>57</sup> reforms in this area that other family law scholars identify as institutionalized enough to represent a paradigm shift from an adversary model of warring attorneys and parents to a problem-solving model aimed at

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<http://perma.cc/9RZP-DY5L>, with Clare Huntington, *Tempered Support for a Cultural Change Agenda*, BALKINIZATION (Nov. 3, 2014, 10:12 PM), <http://balkin.blogspot.com/2014/11/tempered-support-for-cultural-change.html>, archived at <http://perma.cc/C5FF-SEA8>.

55. See HUNTINGTON, *supra* note 36, at 55–58 (sketching portraits of three families to illustrate how “the state is present in the lives of all families”); *id.* at 165–85 (offering examples of how to implement a “flourishing family law”).

56. For discussion, see *infra* Part III.

57. HUNTINGTON, *supra* note 36, at 108.

facilitating coparenting and reducing parental conflict.<sup>58</sup> As it were, this shift aims at a way forward not in the war *over* the family, but in handling acrimony and conflict *between* family members in a way more conducive to peaceful coparenting and child well-being.<sup>59</sup> The impulse to call for sweeping away a harmful paradigm to make way for a better one is understandable but somewhat misdirected and unnecessary. If family law, in significant ways, has shifted in the direction Huntington advocates, then it might be more fruitful to focus on how better to instantiate that positive vision and what obstacles may hinder its realization. Indeed, whether or not *Failure to Flourish* presents an accurate diagnosis, many of its prescriptions are appealing and could be pushed even further. The book is more useful, I will suggest, in describing the foundation of a new system, already in place, that should be extended than in its description of the current system as mired in the past.

In Part II, I explicate some features of Huntington's argument and highlight valuable contributions the book makes. In Part III, I will attempt to situate Huntington's diagnosis of the state of the family and her call to action in the context of certain developments in the "war over the family." I will ask whether her prescriptive vision goes far enough. In Part IV, I will argue that her critique of dispute-resolution family law is too negative and will try to situate her call for flourishing family law in the context of well-established trends in family law.

## II. From Negative to Flourishing Family Law

Families matter—or, as Huntington puts it, "relationships matter"—to the individuals in them as well as to society.<sup>60</sup> The prominent rhetorical place given to families in every presidential campaign amply demonstrates the common premise that (as I have written elsewhere) "a significant link exists between the state of families and the state of the nation, and that strong, healthy families undergird a strong nation," while "the weakening of families both reflects and leads to moral and civic decline and imposes significant

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58. See *infra* Part IV. To be clear: in this Review I am focusing primarily on dispute-resolution law concerning family dissolution, that is, divorce and post-dissolution rules concerning coparenting. I am not evaluating Huntington's diagnosis of dispute-resolution family law in the context of child welfare or adoption and surrogacy proceedings. For a review focused on the child welfare context, see generally Wendy A. Bach, *Flourishing Rights*, 113 MICH. L. REV. (forthcoming Apr. 2015), available at <http://ssrn.com/abstract=2519722>, archived at <http://perma.cc/EM2U-5A8F>.

59. My inspiration for this imagery is Andrew Schepard, *War and P.E.A.C.E.: A Preliminary Report and a Model Statute on an Interdisciplinary Educational Program for Divorcing and Separating Parents*, 27 U. MICH. J.L. REFORM 131 (1993).

60. See HUNTINGTON, *supra* note 36, at 6–7 (describing the correlation between close interpersonal relationships and individual well-being).

costs on society.”<sup>61</sup> Thus, when Huntington, after inventorying the challenges facing different types of American families, concludes “[t]he state of the American family is not good,”<sup>62</sup> she joins a sizeable roster of observers from across the political spectrum and across the decades who have sounded the alarm about American families in crisis and the implications of that crisis for the social and political order.<sup>63</sup> Huntington justifies her primary focus on “the family relationships that affect and involve children” because it is for children (particularly young children) that family relationships are so influential.<sup>64</sup> When she contends that “[t]he problem facing society . . . is that too often families are unable to provide children with the kinds of relationships that are essential for healthy development and in turn create engaged, productive citizens,”<sup>65</sup> she echoes arguments made by family law scholars and social movements that stress the formative role played by families in fostering the capacity of children for “responsible democratic and personal self-government.”<sup>66</sup> Reminiscent of Hillary Rodham Clinton, Huntington invokes the proverb “[i]t takes a village to raise a child,” arguing that families depend upon neighborhoods, communities, workplaces, and the state in order to flourish.<sup>67</sup>

A distinctive feature of Huntington’s call to action on behalf of families is her enlisting of the insights of positive psychology. Children need “strong and stable relationships,” as the literature on human attachment teaches.<sup>68</sup> They also need “positive” relationships that are not abusive and in which the parent is “responsive” to the child’s needs “much of the time.”<sup>69</sup> Adults, too, she argues, need strong, stable, and positive relationships, and a critical element of child well-being is that coparents have such a relationship.<sup>70</sup>

To support “strong” relationships, family law should grant legal recognition to a “broader range of families” than the traditional nuclear family, such as same-sex couples who seek to marry and families formed through assisted reproductive technology.<sup>71</sup> Huntington continues:

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61. LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY 1* (2006).

62. HUNTINGTON, *supra* note 36, at 54.

63. *See generally* MCCLAIN, *supra* note 61 (surveying the concerns regarding the weakening of families in the civil society revival movement, the marriage movement, and the welfare reform debates).

64. HUNTINGTON, *supra* note 36, at xvi.

65. *Id.* at 1.

66. MCCLAIN, *supra* note 61, at 15–17.

67. HUNTINGTON, *supra* note 36, at 158; *see also* HILLARY RODHAM CLINTON, *IT TAKES A VILLAGE* (10th anniversary ed. 2006).

68. HUNTINGTON, *supra* note 36, at 18.

69. *Id.* at 20.

70. *Id.* at 20–21.

71. *Id.* at xv.

To foster *stable* relationships, structural family law should encourage long-term commitment between parents—commitment to each other or at least commitment to the shared work of raising children. To foster *positive* relationships, structural family law should make subtle but crucial changes to the context in which families live . . . [to] increase family interaction and build social ties between families and the larger community.<sup>72</sup>

Huntington proposes that family law be informed by appreciation of psychoanalyst Melanie Klein’s idea of the “cycle of intimacy,” which people experience “repeatedly” in their lifetimes:<sup>73</sup>

A widespread human experience is that individuals experience love, inevitably transgress against those they love, feel guilt about the transgression, and then seek to repair the damage. Individuals experience this cycle repeatedly throughout their lifetimes, with transgressions ranging from the minor, such as parents raising their voices to their children, to the more egregious, such as an individual undermining a marriage. In healthy parent-child and adult relationships, a person is able to acknowledge the transgression and then seeks to repair the damage.<sup>74</sup>

Measured by that framework, family law, “[w]ith a few exceptions, . . . is fundamentally negative.”<sup>75</sup> Instead of helping with the work of repair, dispute-resolution family law focuses on “rupture without repair.”<sup>76</sup> Custody battles are zero sum and fail to help parents repair their relationship so they can successfully coparent after the legal divorce.<sup>77</sup>

Structural family law, the numerous ways in which law structures family life, takes a “largely reactive stance toward family well-being, expecting families to build [strong, stable, positive] relationships on their own” and then “wait[ing] for a crisis and then interven[ing] in a heavy-handed manner.”<sup>78</sup>

Huntington acknowledges “narrow reforms” to structural and dispute-resolution family law in the direction she recommends.<sup>79</sup> She contends, however, that these “are best understood as islands in a sea of dysfunction.”<sup>80</sup> A “basic reorientation” and new vision are in order: a “flourishing” family

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72. *Id.*

73. *Id.* at 21, 235 n.138.

74. *Id.* at 21.

75. *Id.* at 108.

76. *Id.* at 83.

77. *Id.* at 88–91.

78. *Id.* at 92–93. As noted above, I will focus on Huntington’s critique of the family dissolution aspect of dispute-resolution family law rather than the child welfare, abuse and neglect, and other aspects.

79. *Id.* at 106.

80. *Id.* at 108.

law “should strive to foster strong, stable, positive relationships from the beginning.”<sup>81</sup> This entails “changing . . . the way the state resolves the inevitable conflicts that mark family life”—dispute-resolution family law—and changing “the broader structural relationship between families and the state”—structural family law.<sup>82</sup>

*Failure to Flourish* deserves praise for urging a broader conception of family law that includes the numerous ways the state influences families and family life. That broader definition, Huntington argues, is “essential if we want to think more creatively about how the state can nurture strong, stable, positive relationships.”<sup>83</sup> A related valuable feature of *Failure to Flourish*: the idea of the pervasive state, which reaches the family not only through “direct regulation,” but also “influences families indirectly through incentives and subsidies, ‘choice architecture,’ myriad laws and policies seemingly unrelated to the family, and by shaping social norms.”<sup>84</sup> Perceiving that “state regulation of family life is deep and broad,”<sup>85</sup> Huntington argues, is “essential for rethinking how the state *should* influence families.”<sup>86</sup> Thus, the fruitful debate is not *whether* or not the state is pervasive or that it is acting; instead, “[t]he goal is to figure out how best to redirect this pervasive state so that it encourages strong, stable, positive relationships within the family.”<sup>87</sup> These insights about the pervasive state are a useful addition to a significant body of theoretical work by family law scholars on the state, including, for example, Maxine Eichner’s argument for a “supportive state” and Martha Fineman’s theory of the “responsive state.”<sup>88</sup>

### III. Enlisting the State to Encourage Strong Family Relationships: Some Context

If the public policy debates and initiatives of the last several decades yield any lessons, one might be to ponder whether and how the pervasive state can nurture or encourage strong, stable, and positive relationships.

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81. *Id.* at 109.

82. *Id.*

83. *Id.* at 58.

84. *Id.* at 63.

85. *Id.* at 58.

86. *Id.* at 68.

87. *Id.* at 80.

88. See MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA’S POLITICAL IDEALS* 4–9 (2010) (developing a liberal democratic “normative account of the family-state relationship” that amends liberalism to “recognize the dependency of the human condition” and the role of the state in “supporting caretaking and human developments . . . so that citizens can lead full, dignified lives, both individually and collectively”); Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 262–63, 273–75 (2010) (critiquing the universal and autonomous “liberal subject” and liberal conceptions of autonomy and arguing for grounding conception of a “responsive” state and of how societal institutions allocate resources around the “vulnerable subject”).

Given the pervasive theme of “strengthening families” in several social movements and developments in law and policy, it would be instructive to know what Huntington thinks these efforts got right or wrong, and what lessons, if any, we might glean from these earlier and ongoing initiatives about family flourishing. Is the failure to promote flourishing families a failure of vision or of implementing the vision?

A. *Is It Finally Time for a Shift from “Family Policy” to “Family Ecology”?*

An attractive feature of Huntington’s normative vision is its interest in the social environments that allow children to flourish and also, in the face of adversity, to be resilient. She uses imagery of a “web of care” that “provides critical support for parents in their caregiving responsibilities” and cautions that “too often the web is frayed by environments that do not help neighbors build social connections.”<sup>89</sup> Another attractive feature is her recognition that government can’t do it all and that institutions of civil society play an important part.<sup>90</sup> “The saying ‘[i]t takes a village to raise a child’ is shopworn,” she concedes, “but the basic idea is sound.”<sup>91</sup>

Readers may have a sharp sense of déjà vu with respect to this appeal to an ecological model and the need to enlist civil society and “the village” to help families. For example, in 1991, family law scholar Mary Ann Glendon proposed “a shift from family policy to family ecology.”<sup>92</sup> She asked whether it was possible to move from “the war over the family”—between the “cultural right” and “cultural left”<sup>93</sup>—toward a “sensible American family policy” that would put “children at the center” in recognition of “the high public interest in the nurture and education of citizens.”<sup>94</sup> Glendon frequently used imagery of “fraying” social networks and environment to highlight the urgent need to take an ecological perspective.<sup>95</sup>

Enlisting Urie Bronfenbrenner’s work on the ecology of human development, she urged that public deliberation about families should focus on “interconnected environments” and how “[j]ust as individual identity and well-being are influenced by conditions within families, families themselves

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89. HUNTINGTON, *supra* note 36, at 158.

90. *See id.* at 146–49 (examining the mutual dependency of the state and families in successfully achieving the essential work of raising children).

91. *Id.* at 158.

92. MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 130 (1991) (emphasis omitted).

93. *See id.* at 121 (exploring the political battle over family policy between the “cultural right,” which defends and imagines, as the “basic social unit,” the “traditional” family based on marriage between a husband–breadwinner and wife–homemaker, and the “cultural left,” which rejects the traditional family as patriarchal and oppressive and instead views the individual as the basic social unit and speaks more of “families” as including nontraditional forms of family).

94. *Id.* at 126.

95. *E.g., id.* at 135.

are sensitive to conditions within surrounding networks of groups—neighborhoods, workplaces, churches, schools, and other associations.”<sup>96</sup> Glendon urged that taking this “more comprehensive view” would be a helpful way to move beyond a “verbal war over the family to . . . reasoning together about conditions of family life.”<sup>97</sup> As does Huntington, Glendon stresses the important implications for an ecological approach of the famous thirty-year study of nearly 700 infants born in the Hawaiian state of Kauai,<sup>98</sup> one-third of which were “classified as high-risk because of exposure to perinatal stress and other factors such as poverty, low parental education, an alcoholic or mentally ill parent, or divorce.”<sup>99</sup> As Huntington reports, “[d]espite these life circumstances, a third of the children in the high-risk category developed into competent, caring adults” and the “distinguishing factor” for those better outcomes was that the children “had emotional support from extended family, neighbors, teachers, or church groups, and they had at least one close friend.”<sup>100</sup> For Glendon:

[T]he Kauai study challenges us to reflect on the relative absence of public deliberation concerning the state of the social structures within which we learn the liberal virtues and practice the skills of government; . . . [and] the diverse groups that share with families the task of nurturing, educating and inspiring the next generation.<sup>101</sup>

Other family law scholars, notably Barbara Bennett Woodhouse, have developed a child-centered ecological approach to family and child welfare law.<sup>102</sup> I focus on Glendon because her environmental or ecological approach subsequently shaped two social movements in which she participated: the

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96. *Id.* at 130.

97. *Id.*

98. *See id.* at 130–33 (emphasizing that the study’s conclusions about what helped children overcome adversity show “the importance of keeping . . . interacting social subsystems in view” in public deliberations about the family).

99. HUNTINGTON, *supra* note 36, at 12.

100. *Id.* Thus, Huntington praises the efforts of a reformer deeply influenced by Urie Bronfenbrenner’s idea of “human ecology and the networks that form among parents and others who care for children.” *Id.* at 166 (internal quotation marks omitted).

101. GLENDON, *supra* note 92, at 134.

102. *See* Barbara Bennett Woodhouse, *A World Fit for Children Is a World Fit for Everyone: Ecogenerism, Feminism, and Vulnerability*, 46 HOUS. L. REV. 817, 818–19 (2009) (linking the well-being of children with other vulnerable groups and arguing that by providing for the needs of children and their caregivers, all will benefit).



“responsive communitarian” movement, launched in 1991,<sup>103</sup> and the civil society revival movement of the late 1990s.<sup>104</sup>

Like Huntington, these movements worried about the well-being of children and argued that family form matters for parents engaging in, as Huntington puts it, their “critical child-development work.”<sup>105</sup> Although the civil society movement did not speak precisely of strong, stable, and positive relationships, it stressed the formative role of families in teaching basic qualities important for relationships and for citizenship.<sup>106</sup> Noting the risks of a weakened social ecology, civil society movement leaders urged: “As a nation, we must commit ourselves to the proposition that every child should be raised in an intact two-parent family, whenever possible, and by one caring and competent adult at the very least.”<sup>107</sup> The marriage movement emphasized better (on average) child outcomes as well as the better social health of married adults as reasons why all levels of government should “[m]ake supporting and promoting marriage an explicit goal of domestic policy.”<sup>108</sup>

To be sure, Huntington would quickly distance her own position from at least some aspects of these family- and child-focused social movements, noting that flourishing family law’s goal of fostering stable, strong, and positive relationships between coparents and parents and children does not equate simply to promoting marriage.<sup>109</sup> Fair enough. My point is that Huntington’s implicit embrace of an ecological approach to family

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103. See generally AMITAI ETZIONI, *The Responsive Communitarian Platform: Rights and Responsibilities*, in THE SPIRIT OF COMMUNITY 251 (1993) [hereinafter *Communitarian Platform*] (outlining the Communitarian perspective on the family, education, communities, and the polity and identifying Mary Ann Glendon as a coauthor of the platform issued on November 18, 1991).

104. See generally COUNCIL ON CIVIL SOC’Y, A CALL TO CIVIL SOCIETY: WHY DEMOCRACY NEEDS MORAL TRUTHS 6 (1998) [hereinafter A CALL TO CIVIL SOCIETY] (describing “civil society” as the best “conceptual framework” for “the moral renewal” of democracy).

105. HUNTINGTON, *supra* note 36, at 159–63; see also *Communitarian Platform*, *supra* note 103, at 257 (“[T]he weight of the historical, sociological, and psychological evidence suggests that on average two-parent families are better able to discharge their child-raising duties if only because there are more hands—and voices—available for the task.”).

106. A CALL TO CIVIL SOCIETY, *supra* note 104, at 7.

107. NAT’L COMM’N ON CIVIC RENEWAL, A NATION OF SPECTATORS: HOW CIVIC DISENGAGEMENT WEAKENS AMERICA AND WHAT WE CAN DO ABOUT IT 13 (1998).

108. INST. FOR AM. VALUES, THE MARRIAGE MOVEMENT: A STATEMENT OF PRINCIPLES 10, 22 (2000) [hereinafter THE MARRIAGE MOVEMENT], available at <http://americanvalues.org/catalog/pdfs/marriagemovement.pdf>, archived at <http://perma.cc/5KQ8-NMRV>.

109. HUNTINGTON, *supra* note 36, at 176–80. I have engaged critically elsewhere with all three of these movements. See JAMES E. FLEMING & LINDA C. MCCLAIN, ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES 20–48 (2013) (challenging dichotomous treatment of rights and responsibilities in the responsive communitarian movement); *id.* at 93–106 (posing questions about several core tenets of the civil society revival movement); MCCLAIN, *supra* note 61, at 62, 75 (critiquing the civil society movement for its inattention to inequality within the family and its ambivalence about sex equality); *id.* at 118–54 (critiquing the marriage movement and governmental marriage promotion for inattention to the relationship between marriage quality and sex equality and failing to embrace sex equality as a component of “healthy marriage”).

flourishing has some striking antecedents. Does she see any connection between her vision and these prior prescriptions? Further, to the extent that those earlier proposals influenced concrete family policy—for example, calls for marriage education and promotion, responsible fatherhood initiatives, and divorce reform—what, if anything, might we learn about successes or failures of a “pervasive state” at fostering relationships?

B. *“Putting the Brakes on” Divorce: Why Not Do More to Encourage Reconciliation?*

If family law, as Huntington urges, should do more to repair relationships, then the tantalizing question arises: do earlier proposals to do more to save marriages warrant reconsideration? Over two decades ago, political philosopher and presidential advisor William Galston (prominent in the communitarian, civil society, and marriage movements) argued that given the effects of divorce on children, “it would be reasonable to introduce ‘braking’ mechanisms that require parents contemplating divorce to pause for reflection.”<sup>110</sup> Even if that “pause for reflection” did not “succeed in warding off divorce,” it afforded time for the couple to “resolv[e] crucial details of the divorce,”<sup>111</sup> with their “first obligation to decide the future of their children before settling questions of property and maintenance.”<sup>112</sup> Further, “[b]y encouraging parents to look at the consequences of a family breakup rather than at the alleged cause or excuse for it,” the hope is that “couples will improve their prospects of saving the marriage.”<sup>113</sup>

Perhaps a family law focused on repair *should* do more to save marriages for the sake of the children. On the one hand, Huntington resists this, characterizing the requirement in some states that courts “attempt to reconcile a couple filing for divorce” as a “superficial attempt to ‘repair’ the relationship.”<sup>114</sup> She reasons that “[b]y the time one person in the couple has initiated divorce proceedings, the time for reconciliation is typically over,” so that “[t]he real focus for the repair should be on the future relationship of the couple as coparents.”<sup>115</sup> On the other hand, in the following passage she ponders what the state might do when “[i]t may be in a child’s interests for

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110. WILLIAM A. GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE 286 (1991).

111. *Id.* at 286–87 (quoting Marilyn Gardner, *Putting Children First—The New English Precedent*, CHRISTIAN SCI. MONITOR, Mar. 30, 1990, at 14, available at <http://www.csmonitor.com/1990/0330/pgar30.html>, archived at <http://perma.cc/JWC8-EHFY>) (internal quotation marks omitted).

112. *Id.* at 286.

113. *Id.* (quoting Gardner, *supra* note 111) (internal quotation marks omitted).

114. HUNTINGTON, *supra* note 36, at 117–18.

115. *Id.* at 118.

the mother and father to stay together . . . but not necessarily in the parents' interests".<sup>116</sup>

Setting aside a case of domestic violence, where separation makes good sense, commitment between adults is one of the situations where family law should first try to align the interests of the family by encouraging the parents to develop a stronger relationship with each other. But in the absence of that, family law should still prioritize the child's needs. "Staying together for the sake of the children" may seem outdated, but given the alternatives for the child, there is something to this intuition. This is not to say that the state should require couples to stay together or make it particularly difficult for them to exit a relationship, but there are more indirect ways for the state to encourage long-term commitment . . . .<sup>117</sup>

Family law students, in my experience, typically react with disbelief to the argument that, from the perspective of child outcomes, it is better in a low-conflict marriage that parents do not divorce and that it may even be better, eventually, for adults.<sup>118</sup> Surely, they argue, children will sense if their parents are unhappy! What kind of an example will such parents set for forming healthy adult relationships? Nonetheless, if family law should encourage long-term adult commitment, including postdissolution, so that children benefit from a strong coparenting relationship, why not do more to discourage divorce and heal marriages? Why not try, given the "marriage-go-round"—that those who divorce often remarry or repartner, leading to children experiencing one or more family transitions with new adults in the household and attendant instability?<sup>119</sup>

What might Huntington say about the more extensive vision of family repair offered in the recent Institute for American Values report, *Second Chances: A Proposal to Reduce Unnecessary Divorce*, coauthored by William J. Doherty, a family studies scholar and experienced family therapist, and Leah Ward Sears, former chief justice of the Georgia Supreme Court?<sup>120</sup> The authors counter the premise that divorce "happens only after

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116. *Id.* at 156–57.

117. *Id.* at 157.

118. See generally LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY 148 (2000) ("[R]esearch suggests that marriage is a dynamic relationship; even the unhappiest of couples who grimly stick it out for the sake of the children can find happiness together a few years down the road.").

119. See ANDREW J. CHERLIN, THE MARRIAGE-GO-ROUND 10–11 (2009) (arguing that conflicting American cultural ideals about marriage lead to a cycle of marriage, divorce, and remarriage that results in a less stable home environment and worse outcomes for children).

120. WILLIAM J. DOHERTY & LEAH WARD SEARS, INST. FOR AM. VALUES, SECOND CHANCES: A PROPOSAL TO REDUCE UNNECESSARY DIVORCE (2011), available at <http://americanvalues.org/catalog/pdfs/second-chances.pdf>, archived at <http://perma.cc/5L54-LHA4>.

a long process of misery and conflict.”<sup>121</sup> Instead, research finds that “[m]ost divorced couples report average happiness and low levels of conflict in their marriages,”<sup>122</sup> such that “divorces with the greatest potential to harm children occur in marriages that have the greatest potential for reconciliation.”<sup>123</sup> Filling a gap in research, Doherty and his colleagues asked nearly 2,500 divorcing parents, after they had taken their required parenting classes, “if they would be interested in exploring marital reconciliation with professional help.”<sup>124</sup> The study found that “[a]bout one in four individual parents indicated some belief . . . that their marriage could still be saved, and in about one in nine couples both partners did.”<sup>125</sup> If a “significant minority” of individuals and couples “expressed interest in learning more about reconciliation” that far into the divorce process, Doherty and Sears suggest, then “the proportion of couples open to reconciliation might be even higher at the outset of the divorce process—before the process itself has caused additional strife.”<sup>126</sup> For example, another study by Doherty and colleagues found that “about one-third of married people who had ever reported low marital happiness later on experienced a turnaround.”<sup>127</sup>

Doherty and Sears propose that states adopt a one-year waiting period for divorce, and, if the couple has children, they must complete a marriage-dissolution program before filing for divorce.<sup>128</sup> That program must include, along with “information on constructive parenting in the dissolution process” and skills to “increase cooperation and diminish conflict” and information on alternatives to litigation, “information on the option of reconciliation” and resources to assist interested couples with reconciliation.<sup>129</sup> With such measures, family law could return to an earlier (but short-lived) focus by family court professionals on reconciliation.<sup>130</sup> This type of education seems consistent with Huntington’s emphasis on repair. After all, as Huntington mentions, the original vision of no-fault divorce was therapeutic:<sup>131</sup> people in

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121. *Id.* at 10.

122. *Id.* at 11 (emphasis omitted) (citing Paul R. Amato & Bryndl Holmann-Marriott, *A Comparison of High- and Low-Distress Marriages that End in Divorce*, 69 J. MARRIAGE & FAM. 621 (2007)).

123. *Id.* at 11 (emphasis omitted) (quoting Alan Booth & Paul R. Amato, *Parental Predivorce Relations and Offspring Postdivorce Well-Being*, 63 J. MARRIAGE & FAM. 197, 211 (2001)) (internal quotation marks omitted).

124. *Id.* at 15–16 (emphasis omitted) (citing William J. Doherty et al., *Interest in Marital Reconciliation Among Divorcing Parents*, 49 FAM. CT. REV. 313, 313–14 (2011)).

125. *Id.* at 16.

126. *Id.*

127. *Id.* at 17, 19 (discussing Jared R. Anderson, Mark J. Van Ryzin & William J. Doherty, *Developmental Trajectories of Marital Happiness in Continuously Married Individuals: A Group-Based Modeling Approach*, 24 J. FAM. PSYCHOL. 587 (2010)).

128. *Id.* at 20, 33–34.

129. *Id.* at 46–47.

130. *Id.* at 15.

131. HUNTINGTON, *supra* note 36, at 274 n.119.

“dead” marriages should be able to end them without having to allege fault, and courts and helping professions should focus their energies on saving marriages that could be saved.<sup>132</sup> Isn’t Huntington’s advocacy of a cycle of intimacy all the more reason to prevent divorce, when possible, by helping people save—repair—their marriages, particularly when they have children? What might Huntington think of another measure proposed by Doherty and Sears, an Early Notification and Divorce Prevention Letter, which would start the clock running on the one-year waiting period, while informing the other spouse that the marriage “has serious problems” that may lead to separation and divorce; stating that the sender wants the marriage “to survive and flourish”; and asking whether the other spouse is willing to work on the problems in the marriage with appropriate professional help, “save” the marriage, and make it healthy?<sup>133</sup>

Of course, there is an important gender dimension to this prescription: women initiate the majority of unilateral divorces.<sup>134</sup> One reason is that women’s happiness, health, and other benefits from marriage are more sensitive to marriage quality.<sup>135</sup> There is also a class dimension, since, as one marriage movement document reports, “more educated and affluent Americans are now markedly more likely to succeed in marriage than their less privileged fellow citizens.”<sup>136</sup>

C. *Limits to What Government Can Do: Enlisting Civil Society and Public–Private Partnerships*

Familiar slogans in family-values rhetoric, particularly in presidential speeches of recent decades, are that government doesn’t raise children, parents do, *and should*; government can’t love and nurture.<sup>137</sup> Another slogan—that there are problems that government alone can’t solve<sup>138</sup>—has

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132. J. HERBIE DIFONZO, *BENEATH THE FAULT LINE: POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA* 118 (1997).

133. DOHERTY & SEARS, *supra* note 120, at 29 (emphasis added).

134. *Id.* at 22–23.

135. MARGARET F. BRINIG, *FAMILY, LAW, AND COMMUNITY: SUPPORTING THE COVENANT* 60, 69 (2010); FLEMING & MCCLAIN, *supra* note 109, at 100; INST. FOR AM. VALUES & NAT’L MARRIAGE PROJECT, *WHY MARRIAGE MATTERS: THIRTY CONCLUSIONS FROM THE SOCIAL SCIENCES* 31–32 (3d ed. 2011) [hereinafter *WHY MARRIAGE MATTERS*]; MCCLAIN, *supra* note 61, at 134–35.

136. *WHY MARRIAGE MATTERS*, *supra* note 135, at 16.

137. *See, e.g.*, Proclamation No. 7456, 3 C.F.R. 255 (July 21, 2001) (“Government cannot replace the love and nurturing of committed parents that are essential for a child’s well-being.”); President George H.W. Bush, Remarks Accepting the Presidential Nomination at the Republican National Convention (Aug. 20, 1992) (transcript available at <http://www.presidency.ucsb.edu/ws/?pid=21352>), *archived at* <http://perma.cc/75FJ-VFQC> (“[W]hen it comes to raising children, Government doesn’t know best; parents know best.”).

138. *See* Governor William J. Clinton, Address Accepting the Presidential Nomination at the Democratic National Convention (July 16, 1992) (transcript available at <http://www.presidency>

translated into intense interest in public–private partnerships in recent decades. It is a puzzle why Huntington does not situate her vision of family flourishing in the context of these trends, explaining points of continuity and discontinuity. For example, she clarifies that she is not arguing that “the state can and should do everything.”<sup>139</sup> Rather: “Other entities and institutions play a significant role in helping families flourish. For example, faith communities, informal support networks, and community groups play essential roles in nurturing strong, stable, positive relationships.”<sup>140</sup> She offers a positive example of the nonprofit organization KaBOOM! becoming a partner with communities to build playgrounds.<sup>141</sup> Noting that the United States has a long history of “this kind of community effort,” she argues that “[t]he most important role for the state in this context is to support, not supplant, this civic engagement.”<sup>142</sup>

Huntington’s brief statement that government should “support, not supplant” echoes a prominent theme in numerous calls to enlist civil society and public–private partnerships to build social capital, strengthen families and communities, and deliver goods and services.<sup>143</sup> For example, the responsive community and civil society movements called for the use of public–private partnerships to empower vulnerable communities and cautioned that government should *support* rather than *replace* social subsystems.<sup>144</sup> Huntington’s vision also resonates with the idea of subsidiarity—“that the smallest possible unit should . . . address a problem and a larger unit should step in to provide aid only if that smaller unit otherwise would fail”<sup>145</sup>—an inspiration for President George W. Bush’s faith-based initiative.<sup>146</sup> President Bill Clinton insisted that there are certain tasks that government simply cannot do, or certainly cannot do as well as nongovernmental actors.<sup>147</sup> Drawing on Bronfenbrenner, Hillary Clinton—

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.ucsb.edu/ws/?pid=25958), archived at <http://perma.cc/7ZV3-ZCTR> (“There is not a program in government for every problem . . .”).

139. HUNTINGTON, *supra* note 36, at 220.

140. *Id.*

141. *Id.* at 220–21.

142. *Id.* at 221.

143. See FLEMING & MCCLAIN, *supra* note 109, at 104–06 (arguing that “[c]ivil society should support democratic self-government, not supplant it”); Linda C. McClain, *Unleashing or Harnessing “Armies of Compassion”? Reflections on the Faith-Based Initiative*, 39 LOY. U. CHI. L.J. 361, 368–69 (2008) (describing President George W. Bush’s “faith-based initiative” as calling for a more coordinated national effort to enlist public–private partnerships to meet social needs in America’s communities).

144. FLEMING & MCCLAIN, *supra* note 109, at 104–06.

145. *Id.* at 105. Some family law and child welfare scholars also appeal to this principle. See generally Jessica Dixon Weaver, *The Principle of Subsidiarity Applied: Reframing the Legal Framework to Capture the Psychological Abuse of Children*, 18 VA. J. SOC. POL’Y & L. 247 (2011).

146. See McClain, *supra* note 143, at 366–67 (describing how proponents of faith-based initiatives appeal to subsidiarity).

147. Clinton, *supra* note 138.

Sawhill's prime example of a "village builder"<sup>148</sup>—called for an "ecological or environmental approach" or "child in the village model" that looked at all the different ways civil society and government could support the well-being of children.<sup>149</sup>

By now, the call for enlisting civil society in public–private partnerships has transformed the federal government itself, which has an Office of Faith-Based and Neighborhood Partnerships that coordinates with related "centers" in a number of federal agencies.<sup>150</sup> If the pervasive state should "support" civic engagement in ways that contribute to families' positive relationships and "foster pluralism . . . by supporting a variety of different nonprofit institutions,"<sup>151</sup> then some evaluation of government's actual deployment to date of these partnerships and funding of various nongovernmental organizations would be instructive.

#### D. *A New Baseline for Argument About Family Forms?*

Back in the 1990s, at the height of the "family values" wars, many feminist and left/liberal family scholars and commentators warned about appeals to a social science "consensus" about either family form or family values and the risks of generalizations.<sup>152</sup> They wrote books in defense of single-parent families and against constructing single mothers as pathological or deviant.<sup>153</sup> Sociologists and journalists offered fine-grained empirical accounts of the lives of single mothers in America and why they

148. SAWHILL, *GENERATION UNBOUND*, *supra* note 24, at 87.

149. CLINTON, *supra* note 67, at 314–15 (internal quotation marks omitted).

150. *About the Office of Faith-Based and Neighborhood Partnerships*, OFF. FAITH-BASED & NEIGHBORHOOD P'SHIPS, <http://www.whitehouse.gov/administration/eop/ofbnp/about>, archived at <http://perma.cc/NTK8-YXMG>.

151. HUNTINGTON, *supra* note 36, at 221.

152. *See, e.g.*, Judith Stacey, *The Father Fixation*, *UTNE READER*, Sept.–Oct. 1996, at 72, 72 [hereinafter Stacey, *Father Fixation*], available at <http://www.utne.com/politics/fretting-about-fatherlessness-american-nuclear-family.aspx#axzz3MHP4DG5e>, archived at <http://perma.cc/RJ32-TFJJ> ("As a sociologist, I can attest that there is absolutely no consensus among social scientists on family values, on the superiority of the heterosexual nuclear family, or on the supposed evil effects of fatherlessness."); Judith Stacey, *The New Family Values Crusaders*, *NATION*, July 25–Aug. 1, 1994, at 119, 119–22 (criticizing arguments on family values claimed to be based on social science consensus).

153. *See, e.g.*, NANCY E. DOWD, *IN DEFENSE OF SINGLE-PARENT FAMILIES* xi–xix (1997) (recounting her own decision to become a single parent and calling for a shift from stigmatizing to supporting single-parent families); MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 21–24, 101–06 (1995) (arguing that the dominant patriarchal ideology constructs "family" around heterosexual monogamous marriage, rendering as "deviant" mothers outside of that family form); DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 217–25 (1997) (challenging the "conservative vision" of single mothers, particularly of black, single mothers, as immoral and harmful and critiquing "myths about welfare and reproduction" that drove punitive welfare reform in the 1990s).

separated motherhood from marriage.<sup>154</sup> Family historians and social scientists countered the rhetoric of the crisis of “fatherless America” as harming children and driving America’s most urgent social problems<sup>155</sup> with positive accounts of family diversity and calls for more inclusive social values reflecting support and respect for diverse families.<sup>156</sup>

*Failure to Flourish* signals a new baseline for and tenor of conversation about family form. To be sure, Huntington embraces values of diversity and pluralism and an “ecumenical” approach to family form, which does not insist on the marital family as the normative model.<sup>157</sup> Nonetheless, her book contains many passages about the advantages and better outcomes for children of a stable, marital, biological, two-parent family and the disadvantages and worse outcomes experienced by children in single parent and “complex family structures” that could readily be found in position papers and calls to action by many traditionalists groups concerned with shoring up marriage and intact, two-parent families for the sake of child well-being<sup>158</sup>—statements to which feminist and left-of-center scholars and advocates reacted.<sup>159</sup> For example, she asserts: “As much as liberals might

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154. See, e.g., KATHRYN EDIN & LAURA LEIN, MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK 16–19 (1997) (exploring the issues faced by unskilled single mothers earning wages below the poverty line); MELISSA LUDTKE, ON OUR OWN: UNMARRIED MOTHERHOOD IN AMERICA xi–xii (1997) (using the author’s personal experiences as a single mother as an entry into examining the experiences of unmarried teen mothers and older, unwed mothers). Although the book was not published until 2005, the findings of Kathryn Edin’s coauthored book with Maria Kefalas, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE (2005), influenced later welfare-reauthorization debates. See MCCLAIN, *supra* note 61, at 143–44 (noting Edin’s congressional testimony).

155. DAVID BLANKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM I (1995).

156. See STEPHANIE COONTZ, THE WAY WE REALLY ARE: COMING TO TERMS WITH AMERICA’S CHANGING FAMILIES 3, 9 (1997) (breaking down negative misconceptions about family diversity); Stacey, *Father Fixation*, *supra* note 152, at 73 (arguing that “family diversity is here to stay” and pointing to evidence of positive outcomes for children reared by gay and lesbian parents).

157. See HUNTINGTON, *supra* note 36, at xix (“Accordingly, this book addresses relationships that go beyond the traditional nuclear family of a married mother and father living with their biological or adopted children.”).

158. Compare *id.* at 31–34 (canvassing the “overwhelming evidence that children raised by single or cohabiting parents have worse outcomes than children raised by married, biological parents”), with THE MARRIAGE MOVEMENT, *supra* note 108, at 10–11 (summarizing social science research that “children do better, on average, when they are raised by their own two married parents” and that children raised in single-parent households are more likely to have a range of negative outcomes).

159. See *supra* text accompanying notes 152–56. Among those reactions, I include my own earlier criticism of the marriage movement and governmental marriage promotion:

The marriage movement’s repeated references to a “consensus” on the benefits of marriage and the harms of nonmarital family forms may illustrate a “feedback loop”: a group of social scientists cite repeatedly to each other’s work so that a certain set of claims is presented as an “uncontested” consensus, even if there is credible social science to the contrary.

MCCLAIN, *supra* note 61, at 128.



wish otherwise, there is mounting evidence that family structure is a causal factor, among others, affecting child outcomes.”<sup>160</sup> Another striking parallel to earlier discourse about strengthening families is her frequent warnings that society will either “pay now or pay later” to help families and that “we are already paying for the costs associated with poorly functioning families.”<sup>161</sup>

Once again, the intersection of the two sides of the marriage equality issue (highlighted by the Seventh Circuit oral argument) is notable. Huntington concludes: “[T]here is ample evidence that, *with the exception of families headed by same-sex couples*, children raised by two married, biological parents have better outcomes than children raised in other family structures.”<sup>162</sup> Thus, as same-sex couples challenging state restrictions on marriage argue, and as judges conclude, there is a robust consensus that quality of parenting, not gender, is what matters for child outcomes.<sup>163</sup> And those couples do not attempt to dethrone marriage as the primary social institution for rearing children. To the contrary, taking a cue from Justice Anthony Kennedy, they argue that their children suffer harm, humiliation, and stigma where their parents’ relationship is not dignified as a marriage.<sup>164</sup>

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160. HUNTINGTON, *supra* note 36, at 204.

161. *Id.* at xvii. On the appeal to “costs” in this earlier discourse, see Linda C. McClain, “Irresponsible” Reproduction, 47 HASTINGS L.J. 339, 360 (1996) (“In the rhetoric of irresponsible reproduction, one charge common to all three targets described above—single mothers, welfare mothers, and teen mothers—is that such family forms are costly for children, for society, and for men’s roles as fathers.”).

162. HUNTINGTON, *supra* note 36, at 35 (emphasis added).

163. *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 761 (E.D. Mich. 2014) (favorably quoting testimony that “quality of parenting” rather than “gender” is the key), *rev’d*, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, 83 U.S.L.W. 3608 (Jan. 16, 2015) (No. 14-574); *id.* at 771 (“[T]he overwhelming weight of the scientific evidence supports the ‘no differences’ viewpoint.”). In reversing the federal district court, the Sixth Circuit majority opinion accepted the responsible procreation rationale as satisfying rational basis review for constitutionality, while observing that evidence (such as that presented at trial) about the capacity of “gay couples” to raise children supported the “policy argument” for extending marriage laws to such couples. *DeBoer v. Snyder*, 772 F.3d 388, 404–08 (6th Cir. 2014), *cert. granted*, 83 U.S.L.W. 3608 (Jan. 16, 2015) (No. 14-574). By contrast, the dissent quoted *Baskin*’s sharp critique of the responsible procreation rationale as “so full of holes that it cannot be taken seriously.” *Id.* at 430 (Daughtrey, J., dissenting) (quoting *Baskin v. Bogan*, 766 F.3d 648, 656 (7th Cir. 2014)) (internal quotation marks omitted). The dissent also concluded that the extensive trial record about child outcomes supported the district court’s determination that “the amendment [barring marriage by same-sex couples and marriage recognition] is in no way related to the asserted state interest in ensuring an optimal environment for child-rearing.” *Id.* at 424–27.

164. Specifically, Justice Kennedy’s *Windsor* majority opinion. *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (“[The Defense of Marriage Act] humiliates tens of thousands of children now being raised by same-sex couples.”); *see also* *Hamby v. Parnell*, No. 3:14-CV-00089-TMB, 2014 WL 5089399, at \*2 (D. Alaska Oct. 12, 2014) (“The Plaintiffs argue that the laws’ effect stigmatizes same-sex couples and their children by relegating them to a ‘second class status’ . . .”). Illustrative is a complaint filed shortly after *Windsor*, which cited the crucial language from Justice Kennedy’s opinion. First Amended Complaint for Declaratory and Injunctive Relief at para. 10, *Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014) (No. 1:13-CV-1861). As the Complaint alleges:

And a nearly unbroken stream of federal courts agree, including Judge Posner, as discussed above.

Will this exaltation of marriage for same-sex couples who are parents create a “new illegitimacy” for other pathways to parenthood and forms of family life?<sup>165</sup> Will the availability of marriage for same-sex couples lead to even more emphasis on the importance of two-parent families?

What is the new consensus about family form that should guide a flourishing family law? Might it end the “war over the family”? What is the place of marriage in that new consensus? Huntington emphasizes encouraging “long-term commitment” between parents in coparenting relationships, not encouraging marriage *per se*.<sup>166</sup> Marriage equality discourse emphasizes the wrongful exclusion of same-sex couples from “the common vocabulary of family life and belonging that other[s] [] may take for granted,”<sup>167</sup> a rhetoric that affirms rather than challenges the favored place of marriage as a setting for adult commitment and child rearing. As the Ninth Circuit recently put it, stressing the role of marriage not only in bringing, but in keeping, a couple together: “Raising children is hard; marriage supports same-sex couples in parenting their children, just as it does opposite-sex couples.”<sup>168</sup>

In a significant turning point in the war over the family, David Blankenhorn, president of the Institute of American Values and a prominent leader of the marriage movement who publicly announced he now supported same-sex marriage, has joined with journalist and same-sex marriage proponent Jonathan Rauch to call for a “new conversation” about strengthening marriage that supports marriage for same-sex couples and a marriage opportunity agenda to address the growing marriage divide.<sup>169</sup> Is this a sound way to help foster strong, stable, and positive relationships that Huntington could support? Or is policy analyst Isabel Sawhill, a veteran of

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[Plaintiffs] and their children are stigmatized and relegated to a second class status by being barred from marriage. The exclusion ‘tells [same-sex] couples and all the world that their relationships are unworthy’ of recognition. [*Windsor*] at 2694. And it ‘humiliates the . . . children now being raised by same-sex couples’ . . . . *Id.*

*Id.*

165. Melissa Murray, *What’s So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL’Y & L. 387, 389 (2012).

166. HUNTINGTON, *supra* note 36, at 177 (“Deciding that the state should encourage a long-term commitment between parents does not necessarily mean that the state should focus only on marriage.”).

167. *Latta v. Otter*, No. 14-35420, 14-35421, 12-17668, 2014 WL 4977682, at \*3 (9th Cir. Oct. 7, 2014) (quoting Plaintiffs’ Memorandum in Opposition to Defendant Governor Otter’s Motion for Summary Judgment at 1, *Latta v. Otter*, 19 F. Supp. 3d 1054 (D. Idaho 2014) (No. 1:13-cv-00482-CWD)) (internal quotation marks omitted).

168. *Id.* at \*6.

169. Inst. for Am. Values, *A Call for a New Conversation on Marriage*, PROPOSITIONS, Winter 2013, at 1, 2–5, available at <http://americanvalues.org/catalog/pdfs/2013-01.pdf>, archived at <http://perma.cc/6EZF-BH5E>.

the 1990s welfare and “family values” debates and a leader in efforts to end teen and unplanned pregnancy, correct that the “genie is out of the bottle” with respect to the separation of marriage and parenthood, so that, rather than seeking to restore marriage as “the standard way to raise children,” the aim should be “a new ethic of responsible parenthood”?<sup>170</sup> Naomi Cahn and June Carbone have also called for a “responsible parenthood” model, although they have observed that when people follow that model of investing in education and avoiding early pregnancy and parenthood, they tend to have children within marriage.<sup>171</sup>

If it is a fool’s errand to try to reconnect marriage and parenthood because both limited economic prospects and changed social norms are at work (which government programs have not done much to alter), then perhaps the focus should be on the front end, or prevention: facilitating greater access to the most effective and much better contraception and instilling an ethic that means “not having a child before you and your partner really want one and have thought about how you will care for that child.”<sup>172</sup> Or, as Blankenhorn counters, perhaps it is too soon to give up on marriage—which, rather than “disappearing, [is] fracturing along class lines”—and it may be more realistic to try to promote a responsible parenthood ethic with the assistance of the social institution of marriage than as simply a matter of individual responsibility?<sup>173</sup> Why not pair, Rauch argues, Sawhill’s emphasis on effective contraception with improving access to marriage and strengthening a marriage culture?<sup>174</sup>

A valuable role that *Failure to Flourish* may play in this new landscape is to invite a holistic look at family formation and parenthood and the aims of a flourishing family law. The argument, made in marriage equality litigation, that marriage channels all those casual heterosexual relationships that result in accidental pregnancy and childbearing into stable, marital families is a fantasy not, as Posner observed, borne out in reality.<sup>175</sup> Nonetheless, the underlying social problem of unstable family circumstances that impact child well-being is real and warrants attention.

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170. Sawhill, *Beyond Marriage*, *supra* note 24.

171. See NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE 170–89 (2010) (discussing the benefits of improved sex education and contraception access).

172. Sawhill, *Beyond Marriage*, *supra* note 24.

173. David Blankenhorn, *Don’t Give Up on Marriage Now*, DESERET NEWS, Oct. 10, 2014, <http://www.deseretnews.com/article/print/865612822/Dont-give-up-on-marriage-now.html>, archived at <http://perma.cc/C2B5-S4A3>.

174. Jonathan Rauch, *Don’t Give Up on Marriage Yet*, SOC. MOBILITY MEMOS, BROOKINGS INST. (Oct. 16, 2014, 1:50 PM), <http://www.brookings.edu/blogs/social-mobility-memos/posts/2014/10/16-dont-give-up-on-marriage-rauch>, archived at <http://perma.cc/8L8L-35PG>. For Huntington’s qualified support for Sawhill’s approach, see Huntington, *supra* note 54.

175. See *supra* notes 3–6 and accompanying text.

Huntington, like some other family law and feminist scholars, seeks to attend more to the plight of unmarried fathers and to encourage stable and positive coparenting relationships without necessarily aiming at marriage.<sup>176</sup> The vivid ethnographic stories of the lives and worldviews of the low-income fathers profiled by Kathryn Edin and Timothy J. Nelson in *Doing the Best I Can: Fatherhood in the Inner City* are inspiring such work.<sup>177</sup>

Given this concern over low-income fathers, it would be useful to know what lessons, if any, Huntington thinks that a flourishing family law might glean from the intense focus since the 1990s on using welfare funds as a tool to strengthen families by promoting “responsible fatherhood” as “integral to successful child rearing and the well-being of children.”<sup>178</sup>

Those efforts target father absence and articulate the premise that a healthy start for a child requires the nurture and support of both parents. Just as Huntington urges that fathers matter for more than economic contributions, one recent White House report by the Obama Administration defined responsible fatherhood as “actively contributing to a child’s healthy development, sharing economic responsibilities, and cooperating with a child’s mother in addressing the full range of a child’s and family’s needs.”<sup>179</sup> The George W. Bush Administration similarly declared that fathers have “emotional” as well as “financial commitments” and that “[d]ads play indispensable roles that cannot be measured in dollars and cents: nurturer, mentor, disciplinarian, moral instructor, and skills coach, among other roles.”<sup>180</sup> Huntington acknowledges (in a footnote) that funding for healthy marriage and responsible fatherhood traces back to the Deficit Reduction Act of 2005.<sup>181</sup> However, there is a much longer history of governmental and

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176. HUNTINGTON, *supra* note 36, at xiv–xv, 190–92; see also Laurie S. Kohn, *Engaging Men as Fathers: The Courts, the Law, and Father-Absence in Low-Income Families*, 35 CARDOZO L. REV. 511, 513 (2013) (offering an inventory of the “barriers to father-presence for nonresident low-income court-involved men” and proposing ways the legal system could address those barriers). An earlier work attending to low-income fathers and supporting a model of fatherhood focused more on active parenting than financial support is NANCY E. DOWD, *REDEFINING FATHERHOOD* (2000).

177. KATHRYN EDIN & TIMOTHY J. NELSON, *DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY* (2013). On the influence of this book, see, for example, HUNTINGTON, *supra* note 36, at 190–92 (discussing the dynamic in nonmarital relationships); Kohn, *supra* note 176, at 522–23 (discussing the “light” the book sheds on relationships between unmarried parents). Nancy Dowd, who has long championed redefining fatherhood around caretaking rather than breadwinning, also finds Edin and Nelson’s book inspiring in terms of fathers’ engagement with their children. Remarks at Workshop on Theorizing the State at Emory University School of Law (Dec. 6, 2014).

178. CARMEN SOLOMON-FEARS, CONG. RESEARCH SERV., RL31025, *FATHERHOOD INITIATIVES: CONNECTING FATHERS TO THEIR CHILDREN 1* (2014) (quoting Personal Responsibility and Work Opportunity Reconciliation Act of 1996, H.R. 3734, 104th Cong. § 101 (1996) (enacted)) (internal quotation marks omitted).

179. OBAMA ADMINISTRATION, *PROMOTING RESPONSIBLE FATHERHOOD 2* (2012).

180. SOLOMON-FEARS, *supra* note 178, at 2 (quoting EXEC. OFFICE OF THE PRESIDENT, *A BLUEPRINT FOR NEW BEGINNINGS: A RESPONSIBLE BUDGET FOR AMERICA’S PRIORITIES 75* (2001)).

181. HUNTINGTON, *supra* note 36, at 292 n.32.

nongovernmental efforts, at various levels, to encourage responsible fatherhood, and it would be useful to consider whether any lessons or best practices emerge from that experience.<sup>182</sup> For example, her call to focus not on marriage but on stable coparenting relationships has important precedents in debates about how best to encourage responsible fatherhood: through promoting marriage as the proper site of such fatherhood or through “strengthening families as they exist,” including addressing education and economic barriers to healthy relationships, which will benefit adults and children even if such efforts do not lead to marriage.<sup>183</sup> This latter approach, which focused more on capacity building, resonates with Huntington’s and certainly makes sense given what she calls challenges facing the “complex family structures” of families formed by unmarried parents.<sup>184</sup>

Underlying this issue, however, are questions of class and power. In *Marriage Markets: How Inequality is Remaking the American Family*, June Carbone and Naomi Cahn observe that part of what has made marriages “healthier” at the top of the income spectrum is the fact that high-income men outnumber the high-income women the men view as desirable partners.<sup>185</sup> This creates a better relationship market for the most successful women while the men, who invest more time and money in their children than the fathers of a half century ago, also enjoy greater rights at divorce, including shared parenting.<sup>186</sup> The combination of the two encourages marriage, deters divorce, and promotes family stability.

Carbone and Cahn argue that, in contrast, women find men without jobs to be poor candidates for marriage; in communities in which the women greatly outnumber the men who make good partners, relationship quality, married or unmarried, suffers.<sup>187</sup> The women, who increasingly outearn the men and still do more for the children, gain greater relationship power the more that they control access to children.<sup>188</sup> Carbone and Cahn object that most of the efforts to promote paternal involvement come at the expense of

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182. See McClain, *supra* note 161, at 389 & n.209 (observing the emergence of “a new ‘social movement’ . . . calling for ‘responsible fatherhood’ and diagnosing ‘fatherlessness’ as a central, if not the ‘most urgent,’ social problem driving an array of other social ills” and listing associated organizations, including the National Fatherhood Initiative, National Institute for Responsible Fatherhood, Family Revitalization, and Promise Keepers).

183. McCLAIN, *supra* note 61, at 141 (quoting Ronald Mincy, *What About Black Fathers?*, AM. PROSPECT, Apr. 7, 2002, <http://prospect.org/article/what-about-black-fathers>, archived at <http://perma.cc/5LQJ-YFGF>) (internal quotation marks omitted).

184. HUNTINGTON, *supra* note 36, at xviii.

185. JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* 62–63 (2014).

186. *Id.* at 118.

187. See *id.* at 72–73 (summarizing sociological research that shows a decline in relationship quality among unmarried couples when male-to-female ratios fall).

188. See *id.* at 130–31 (finding that an unmarried father’s “continuing relationship with his children depends on how he manages the relationship with the mother” and the mother’s “willingness to allow access” depends on economic and noneconomic factors).

women's hard fought autonomy.<sup>189</sup> "Repairing" relationships is unlikely to work in the face of a mismatch between men and women.

*E. Marriage Education: Worth a Second Look?*

Like Huntington and some other family law and feminist scholars, I have been skeptical about governmental promotion of marriage and responsible fatherhood, particularly given some of the gender role assumptions of marriage and fatherhood agendas and (until recently) the exclusion of same-sex couples.<sup>190</sup> When the federal government dedicated funds to marriage *promotion*, I argued that "[f]acilitating the relationship decisions of persons considering marriage, and teaching them skills that may contribute to a successful marriage, differs from trying to persuade persons not seeking to marry to do so."<sup>191</sup>

Nonetheless, if one takes to heart *Failure to Flourish's* call for a more preventive family law that does more at the front end to promote strong, stable, and positive relationships, perhaps efforts at relationship education and marriage education deserve another look as a means of helping both adult-adult and parent-child relationships. In 2006, the Deficit Reduction Act of 2005 opened up dedicated streams of funding for such efforts.<sup>192</sup> By now, many states have marriage commissions and initiatives and produce educational materials, and the federal government funds a National Healthy Marriage Resource Center.<sup>193</sup> The marriage movement also championed such education, both through the efforts of faith communities and through government subsidies, as a way to improve marital quality and reduce divorce.<sup>194</sup>

A basic premise of such education is that the skills and knowledge necessary for a healthy relationship can be taught and that, as a Florida booklet for marrying couples puts it: "Once relationship skills are learned, they are generalized to parenting, the workplace, schools, neighborhoods, and civic relationships."<sup>195</sup> Pertinent to Huntington's proposed focus on the cycle of intimacy, which recognizes the inevitability of conflict, these materials typically stress that all relationships have conflicts; how people

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189. *Id.* at 133.

190. MCCLAIN, *supra* note 61, at 117–19.

191. *Id.* at 130.

192. *See supra* note 181.

193. NAT'L HEALTHY MARRIAGE RESOURCE CENTER, <http://www.healthymarriageinfo.org/index.aspx>, archived at <http://perma.cc/3CJJ-6PRP>.

194. THE MARRIAGE MOVEMENT, *supra* note 108, at 20–23.

195. FAMILY LAW SECTION OF THE FLA. BAR, FAMILY LAW HANDBOOK 1, available at [http://www.flclerks.com/PDF/2000\\_2001\\_pdfs/7-99\\_VERSION\\_Family\\_Law\\_Handbook.pdf](http://www.flclerks.com/PDF/2000_2001_pdfs/7-99_VERSION_Family_Law_Handbook.pdf), archived at <http://perma.cc/G9ZW-S2MR>; see also Diane Sollee, *Where Are We Going?, in MARRIAGE: JUST A PIECE OF PAPER?* 372, 376, 381 (Katherine Anderson et al. eds., 2002) (urging that we think of marriage as a "skill-based relationship" and that a "skills set" can help people to keep marriages together).

handle conflict in a relationship distinguishes healthy from unhealthy relationships.<sup>196</sup> At first, some of these materials were laughable (whether or not intentionally so),<sup>197</sup> but by now states are producing booklets written by respected experts in sociology, family studies, and family and marriage education and counseling.<sup>198</sup> Indeed, Carbone and Cahn conclude that “effective” marriage education that “encourage[s] students to look for the warning signs of domestic violence, learn how to keep the lines of communication open, and insist on mutual respect” might contribute to “relationship stability.”<sup>199</sup> It would be instructive to see how Huntington might grade these materials measured against her vision for what the “pervasive” state should be doing. Are these materials overly intrusive on a couple’s relationship, which is none of government’s business? Or simply ineffectual? Or might they be, as one of my married Family Law students put it, “pure gold,” when it comes to preparing young people for the challenges of married life?

#### IV. Dispute-Resolution Family Law: Islands in a Sea of Dysfunction or a Velvet Revolution?

*Failure to Flourish* views dispute-resolution family law as fundamentally negative. This is a baffling diagnosis at least with respect to the family dissolution process where divorcing parents have minor children. Huntington argues that dispute-resolution family law uses an inapt adversary model, does little to repair relationships to foster coparenting, and that lawyers practicing family law are particularly destructive of relationships.<sup>200</sup> Far more persuasive is Jana Singer’s observation that “[o]ver the past two decades, there has been a paradigm shift in the way the legal system handles most family disputes—particularly disputes involving children”—from a “law-oriented and judge-focused adversary model” to a “more collaborative, interdisciplinary, and forward-looking family dispute resolution regime.”<sup>201</sup>

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196. See, e.g., Sollee, *supra* note 195, at 377 (“The most important skill set is how to handle disagreement, since all couples fight.”).

197. My personal favorite is a video, *The Marriage News You Can Use*, in which the fictional news station C-Wed featured reporters giving marriage advice. Video tape: *The Marriage News You Can Use* (Utah Department of Workforce Services 2002) (on file with author).

198. See, e.g., OFFICE OF FAMILY SUPPORT, LA. DEP’T OF SOC. SERVS., MARRIAGE MATTERS!: A GUIDE FOR LOUISIANA COUPLES, available at <http://www.dss.state.la.us/assets/docs/searchable/OFS/GuideMarriageChild/MarriageMatters.pdf>, archived at <http://perma.cc/RU5F-3TKP>. Theodora Ooms was the senior consultant on the project that produced MARRIAGE MATTERS!, and the coauthors were Ooms, Scott Stanley, Paul Amato, and Barbara Markey. *Id.* at 2.

199. CARBONE & CAHN, *supra* note 185, at 180.

200. HUNTINGTON, *supra* note 36, at 83–88.

201. Jana B. Singer, *Dispute Resolution and the Postdivorce Family: Implications of a Paradigm Shift*, 47 FAM. CT. REV. 363, 363 (2009).

Singer identifies several “related components” of this paradigm shift, or what she calls a “velvet revolution.”<sup>202</sup> Some of those components feature in Huntington’s book as exemplary of the direction in which Huntington would like dispute-resolution family law to move.<sup>203</sup> Family law scholars and practitioners are likely to view these components as far enough established as to be institutionalized rather than “a few narrow reforms.”<sup>204</sup>

Huntington acknowledges (in a footnote) that Singer argues that these reforms “are more comprehensive”<sup>205</sup> but does not explain why she implicitly resists Singer’s evaluation. Some of the changes that Singer details, such as the shift to alternative dispute resolution (ADR), reflect trends that began forty or fifty years ago.<sup>206</sup> Pertinent to Huntington’s concerns about post-dissolution cooperative parenting, at the Pound Conference—a “defining event” in the ADR movement held in April 1976—participants stressed mediation as “better for litigants who had continuing relationships after the trial was over because it emphasized their common interests rather than those that divided them.”<sup>207</sup> Other developments in this paradigm shift, such as court-affiliated parent education programs, date back to the 1990s and have taken hold more strongly since then.<sup>208</sup> Singer also makes the intriguing observation that changes in substantive family law toward this new paradigm have facilitated changes in that direction in dispute-resolution family law and vice versa.<sup>209</sup> Directly relevant to Huntington’s focus on the negative impact of both types of family law on children, Singer argues that the shift from the sole-custody paradigm to an “unmediated best-interests” of the child standard has facilitated a shift “from adversarial to nonadversarial resolution of divorce-related parenting disputes,” even as “the shift from adversarial to nonadversarial dispute resolution” has affected the legal norms governing custody cases, with a shift from custody judgments to parenting plans.<sup>210</sup>

It is illuminating—and illustrative of the perceived link between strong, healthy families and a strong nation—that nearly all of the elements Singer

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202. *Id.* For elaboration of these components, see *infra* notes 215–48 and accompanying text.

203. See HUNTINGTON, *supra* note 36, at xvi (listing several reforms that embody principles advocated by Huntington, including laws allowing joint custody, the “widespread use of mediation,” and that “some lawyers already adopt a more conciliatory, cooperative approach to family conflicts”).

204. *Contra id.* (arguing that these “few narrow reforms” are still “haphazard, unconnected, and sometimes actively challenged”).

205. *Id.* at 276 n.135.

206. See ANDREW L. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 50 (2004).

207. *Id.*

208. *Id.* at 68–69.

209. Jana B. Singer, *Bargaining in the Shadow of the Best-Interests Standard: The Close Connection Between Substance and Process in Resolving Divorce-Related Parenting Disputes*, 77 LAW & CONTEMP. PROBS. 177, 177–78 (2014).

210. *Id.*



identifies as part of the paradigm shift featured in the recommendations for a “family-friendly court” made in a 1996 report by the U.S. Commission on Child and Family Welfare, *Parenting Our Children: In the Best Interests of the Nation*.<sup>211</sup> The report recommends, for example, changing the nomenclature away from custody and visitation to language of parenting time and responsibility, requiring parents to draft parenting plans, involving mediation in contested custody cases, requiring parent education, and improving access to the courts for unmarried parents.<sup>212</sup> Notably, similar to Huntington’s call for an assessment of the impact of law on relationships, the Commission recommends: “Governments at all levels should evaluate laws and policies with respect to their effects on families.”<sup>213</sup> The report also offers many recommendations about the vital role of communities in empowering families, both with respect to family formation, parenting, and mentoring, as well as to “support the development and public awareness of effective community-based, non-court, dispute resolution, and family support programs that can help family members resolve disputes and address the consequences of divorce.”<sup>214</sup>

Many of the reforms recommended in *Parenting Our Children* are now part of the paradigm shift Singer detects in family law. First is “a profound skepticism about the value of traditional adversary procedures” as “ill suited for resolving disputes involving children.”<sup>215</sup> Influenced by social science findings about the critical role parents’ behavior during and after separation plays on children’s adjustment, “academics and court reformers have argued that family courts should abandon the adversary paradigm in favor of approaches that help parents manage their conflict and encourage them to develop positive postdivorce coparenting relationships.”<sup>216</sup> Moreover, family courts have “embraced this insight” by adopting “an array of nonadversary dispute resolution mechanisms designed to avoid adjudication of family cases.”<sup>217</sup>

The paradigm shift is also evident in the practice of family lawyers, who, in increasing numbers, have “rejected the adversary paradigm, in favor of a collaborative law model.”<sup>218</sup> In the early 1990s, for example, the American Academy of Matrimonial Lawyers (AAML) adopted standards of conduct for divorce lawyers, *Bounds of Advocacy*,<sup>219</sup> out of a conviction that there

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211. U.S. COMM’N ON CHILD & FAMILY WELFARE, *PARENTING OUR CHILDREN: IN THE BEST INTERESTS OF THE NATION* 3–5 (1996) [hereinafter *PARENTING OUR CHILDREN*].

212. *Id.* at 29–43.

213. *Id.* at 62.

214. *Id.* at 52–56.

215. Singer, *supra* note 201, at 363.

216. *Id.*

217. *Id.* at 364.

218. *Id.*

219. AM. ACAD. OF MATRIMONIAL LAWYERS, *BOUNDS OF ADVOCACY* (1991).

was a tension between the zealous advocacy required by existing professional responsibility rules and the realities of divorce practice and that competent representation could include a problem-solving approach mindful of the client's children and family.<sup>220</sup> The aspirational guidelines the AAML adopted are very much in keeping with Huntington's vision. They recognize that divorce presents human and emotional problems as well as legal problems and recommend that attorneys advise their clients about the economic and emotional impact of divorce and explore "the possibility or advisability of reconciliation."<sup>221</sup>

Recognizing that a cooperative resolution of matrimonial disputes is "desirable," an attorney should consider ADR methods;<sup>222</sup> and, if representing a parent, "should consider the welfare of, and seek to minimize the adverse impact of the divorce, on minor children."<sup>223</sup> In *Divorce Lawyers at Work*, Lynn Mather and her colleagues found that divorce attorneys understand advocacy by reference to a model of the "reasonable lawyer," which, although it differs by community of practice, generally finds the zealous advocacy model inapt for family law disputes.<sup>224</sup> Their research confirms prior work finding that "divorce lawyers dampen legal conflict far more than they exacerbate it and generally try to avoid adversarial actions."<sup>225</sup> By contrast, Huntington relies on one study finding "that family-law practitioners are far more likely to engage in relationship-destroying, adversarial behavior than lawyers in any other type of practice."<sup>226</sup> That study, however, is problematic both for its small sample size and ambiguity about how it defined family lawyers.<sup>227</sup> Huntington's critique of family lawyers misses the significance of context. If a family lawyer in a high-stakes divorce, with lots of assets or contested custody and lots of resources with which to wage battle, faces an opponent with a winner-take-all or zero-sum mentality or is negotiating with a very aggressive opponent, then that lawyer

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220. LYNN MATHER ET AL., *DIVORCE LAWYERS AT WORK* 113 (2001).

221. AM. ACAD. OF MATRIMONIAL LAWYERS, *supra* note 219, R. 2.12.

222. *Id.* R. 1.4 cmt.

223. AM. ACAD. OF MATRIMONIAL LAWYERS, *BOUNDS OF ADVOCACY* R. 6.1 (2000).

224. MATHER ET AL., *supra* note 220, at 111.

225. *Id.* at 114.

226. HUNTINGTON, *supra* note 36, at 88.

227. E-mail from Lynn Mather, Professor, SUNY Buffalo Law School, to author (Sept. 20, 2014, 12:28 EST) (on file with author). Lynn Mather reviewed the 2006 study on which Huntington relies, Andrea Kupfer Schneider and Nancy Mills, *What Family Lawyers Are Really Doing When They Negotiate*, 44 FAM. CT. REV. 612 (2006), and observed certain weaknesses in the study. First, the sample sizes are too small; out of 578 attorneys surveyed, only 10.6% (or 61) were "family lawyers," and only 14.8% (or 9) of those family lawyers were "unethically adverse." *Id.* at 616 tbl.4; see also E-mail from Lynn Mather, *supra*. Second, the study does not indicate clearly how it defines family lawyers, so that generalist lawyers handling family law cases, who are more likely to get caught up in the emotions of their client and behave adversarially, may be skewing the results. E-mail from Lynn Mather, *supra*.

will “play the game,” but it may not be the game the lawyer prefers.<sup>228</sup> Apart from such high-stakes cases, family lawyers practice mindful of the fact that the parties will be dealing with each other on an ongoing basis concerning children.<sup>229</sup>

The second element, Singer observes, is “the belief that most family disputes are not discrete legal events, but ongoing social and emotional processes.”<sup>230</sup> When family disputes are thus “recharacterized,” they “call *not* for zealous legal approaches, but for interventions that are collaborative, holistic, and interdisciplinary because these are the types of interventions most likely to address the families [sic] underlying dysfunction and emotional needs.”<sup>231</sup>

The third element in the paradigm shift is a “reformulation of the goal of legal intervention in the family” from a “backward-looking process, designed primarily to assign blame and allocate rights” to a paradigm in which a judge “assume[s] the forward-looking task of supervising a process of family reorganization.”<sup>232</sup> Indeed, family law teachers readily will recognize that the goal of family “reorganization” is pervasive in discussions of the tasks that legal and nonlegal professionals face in helping “families in transition,” including preparing divorcing or never-married parents for coparenting.<sup>233</sup> The slogan, “parents are forever, even if marriages are not,”<sup>234</sup> captures this idea and stands in sharp contrast to the “clean break” idea that informs other aspects of divorce.<sup>235</sup> This forward-looking, reorganizing approach applies not only to divorcing couples with children but also to never married parents. This development seems particularly resonant with Huntington’s call for a flourishing state to help foster strong, stable, and positive relationships and to repair relationships so that they can help parents to coparent and children to flourish. Therapeutic jurisprudence (a movement praised by Huntington) “embodies this forward-looking

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228. MATHER ET AL., *supra* note 220, at 128–30 (describing how family lawyers may prefer a cooperative negotiation style, but instead adopt an adversarial style in response to an adversarial opponent).

229. Lynn Mather & Craig A. McEwen, *Client Grievances and Lawyer Conduct: The Challenges of Divorce Practice*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT* 63, 79 (Leslie C. Levin & Lynn Mather eds., 2012) (finding that many family law specialists “held strong views, consistent with the AAML, that the interests of children should temper zealous advocacy on behalf of a client”).

230. Singer, *supra* note 201, at 364.

231. *Id.*

232. *Id.*

233. See, e.g., Rebecca Love Kourlis et al., *IAALS’ Honoring Families Initiative: Courts and Communities Helping Families in Transition Arising from Separation or Divorce*, 51 *FAM. CT. REV.* 351, 353, 370 (2013) (explaining the risks involved during transitional times when families are reorganizing after separation or divorce).

234. SCHEPARD, *supra* note 206, at 45 & 193 n.149 (quoting a sign on a wall of a Los Angeles mediation program office).

235. Singer, *supra* note 201, at 366.

orientation” so that “legal intervention in the family strives not merely to resolve disputes, but to improve the material and psychological well-being of individuals and families in conflict.”<sup>236</sup>

The fourth element follows from the third: “[T]o achieve these therapeutic goals, family courts have adopted systems that deemphasize third-party dispute resolution in favor of capacity-building processes that seek to empower families to resolve their own conflicts.”<sup>237</sup> This focus on capacity building seems akin to Huntington’s argument, in the child-welfare context, to focus on the strengths that families have and to empower them to solve their problems.<sup>238</sup>

Many developments in family law and family courts illustrate this emphasis on helping family members resolve their own conflicts in a way that will foster child well-being and reduce hostility between parents. These programs may not explicitly use the language of “repairing” relationships but seem in keeping with a flourishing family law’s aim of facilitating cooperative coparenting relationships between people who are no longer intimate partners. It is puzzling that, although Huntington acknowledges that some of these programs exist, her book does not suggest the extent to which these programs are not simply islands of reform but institutionalized as a new approach to family conflict.

Consider parent education programs. A recent inventory of parent education in the family courts dated the “first documented parent education programs” to the late 1970s and early 1980s, with the first court-mandated program in 1986.<sup>239</sup> Parent education programs “proliferated rapidly in the 1990s”; by 1998, a national survey reported “that 44 states had state or local laws authorizing courts to require attendance at a program.”<sup>240</sup> Today, with such programs “operating in 46 states” and popular with courts and users, parent education is institutionalized and part of the present-day landscape of dispute-resolution family law.<sup>241</sup>

A primary reason for requiring parent education plans is to ameliorate the effects of parental conflict on children.<sup>242</sup> *Parenting Our Children*, for example, quoted Judith Wallerstein: “Conflict can destroy . . . [.] What protects the child is a civil, rational, responsible relationship between [the]

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236. *Id.* at 364.

237. *Id.*

238. HUNTINGTON, *supra* note 36, at 131–37 (describing family group conferences as premised on the principle that “families have strengths and are capable of changing the problems in their lives”).

239. Peter Salem et al., *Taking Stock of Parent Education in the Family Courts: Envisioning a Public Health Approach*, 51 FAM. CT. REV. 131, 132 (2013).

240. *Id.*

241. *Id.* at 133.

242. *Id.* at 135.

parents and realistic planning that is sensitive to the [needs of the] growing child.”<sup>243</sup>

The pervasiveness of parent education programs does not, admittedly, guarantee that such programs actually are lessening parental conflict or fostering healthy relationships.<sup>244</sup> Some literature on parent education explicitly embraces a public health or ecological model, speaking of the role parent education can play in changing some of the most important risk and protective factors for children from divorce, since high levels of parental conflict and a “poor co-parenting relationship” are among those factors.<sup>245</sup> The focus on educating parents about risk and protective factors suggests an ecological approach.

Finally, the “fifth component of the paradigm shift is an increased emphasis on predispute planning and preventive law.”<sup>246</sup> This component seems particularly in keeping with Huntington’s critique of family law for being too focused on the back end, when a family is in crisis, rather than on preventative and facilitative measures.<sup>247</sup> Parenting plans, long proposed by the AAML and more recently by the American Law Institute, have this future-directed, dispute-prevention focus, including “a mechanism for periodic review or a process for resolving future disagreements” by means, ideally, that do not involve court intervention.<sup>248</sup>

Related developments in family law that Huntington views more as a hopeful sign than as a significant shift are the move away from the language of custody and visitation to the language of parenting responsibility and parenting time and the shift from the sole custody model to shared parenting.<sup>249</sup> Proponents of such changes argued that the changes would “have a positive impact on parental cooperation and the well-being of children.”<sup>250</sup>

As Singer notes, this paradigm shift brings with it some concerns and challenges relevant to Huntington’s reparative model. Consider shared parenting. Context and class matter in assessing the place and impact of this norm in family law. Carbone and Cahn argue that what they call the “upper third,” married, college-educated parents, follow a new marital script in which “[m]en are expected to play a larger role in their children’s lives, and while women are freer to leave unhappy relationships, they no longer control access to the child in the process of doing so,” given the legal regime favoring

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243. PARENTING OUR CHILDREN, *supra* note 211, at 32 (quoting Judith Wallerstein).

244. Salem et al., *supra* note 239, at 135–36.

245. *Id.* at 139–40.

246. Singer, *supra* note 201, at 365.

247. *See supra* notes 75–78 and accompanying text.

248. *Id.* at 364–65.

249. HUNTINGTON, *supra* note 36, at 124–26, 130–31.

250. PARENTING OUR CHILDREN, *supra* note 211, at 30.

shared parenting.<sup>251</sup> But what of unmarried parents or parents in an unstable marriage? Feminist readers of Huntington might fear that in a world of flourishing family law, a pervasive state encouraging coparenting will, in effect, force mothers who do not want to deal with the biological fathers of their children to deal with them as legal coparents and will not yield much by way of positive benefits to the children, while limiting such women's ability to choose a man who has taken responsibility for the child to be the legal father.<sup>252</sup>

Another concern is whether, in the case of children born to young people who "drift" into parenthood and lack a stable relationship, the goal of cementing a long-term, coparenting relationship is realistic. Huntington herself acknowledges that factors like "family instability and multipartner fertility make it harder for parents and children to maintain strong, stable, positive relationships."<sup>253</sup> Selectivity in picking "the right partner" contributes, Cahn and Carbone argue, to relationship stability; what can the "pervasive state" do to address the problem that "many intimate relationships today are characterized by 'quick entrees, partners gathering little evidence about trustworthiness, limited interdependence, and an emphasis on partners meeting specific immediate needs'?"<sup>254</sup> Is "parallel parenting," in which parents each rear a child in appropriate ways and do not undermine each other, rather than a model of parents actively communicating and sharing responsibility for major decisions, a better aim?<sup>255</sup> Certainly, parallel parenting may lead to cooperative parenting, but it may not.<sup>256</sup> But it is not clear "repair" is the operative concept.

In sum, Singer seems to have the more persuasive argument that a paradigm shift has occurred. Undeniably, there is a shortfall between the normative commitments to a new paradigm and practical realities on the ground. On the one hand, many innovative programs are in place in family courts, in communities, and in family law practice that have moved from an adversarial paradigm to a problem-solving or collaborative model. On the other hand, material constraints like budget cuts threaten such programs and overcrowded dockets also tax the court system. Moreover, the rise of pro se representation means more people will not have legal representation.<sup>257</sup> But that does not mean a new normative paradigm is needed. Huntington's

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251. CARBONE & CAHN, *supra* note 185, at 126–27.

252. *Id.* at 136–40 (discussing approaches to the marital presumption and pointing out how some approaches control women and impinge on their decision-making authority).

253. HUNTINGTON, *supra* note 36, at 156.

254. CARBONE & CAHN, *supra* note 185, at 180 (quoting Linda M. Burton et al., *The Role of Trust in Low-Income Mothers' Intimate Unions*, 71 J. MARRIAGE & FAM. 1107, 1122 (2009)).

255. SCHEPARD, *supra* note 206, at 35–36, 101–02.

256. *Id.*

257. For a sobering account of the potential causes and impact of the rise in pro se representation, see Kourlis et al., *supra* note 233, at 357.

positive vision for flourishing family law fits more or less comfortably into shifts already under way. As one scholar recently concluded, “the challenge fundamentally is one of translation” so that the benefits of the family law revolution are more widely available, particularly to the “high proportion” of participants in family court who lack an attorney or have “limited to modest resources.”<sup>258</sup>

## V. Conclusion

In this Review, I have argued that it is a propitious time to consider whether there is a way forward in the war over the family. I have situated *Failure to Flourish* within the context both of previous calls to strengthen families as well as two present-day conversations about marriage, family law, and equality that too often proceed parallel to, but independent of, each other. Through her invitation to focus on why family relationships matter and the conditions under which children in particular flourish, Huntington, a “village builder,” nonetheless finds some common ground with “traditionalists.” Her arguments about how to deploy the pervasive state—and family law—to foster flourishing *relationships* are a useful complement to other theories of the state, such as Fineman’s vulnerability theory, focused on the role of societal *institutions* in providing resources and building resilience and of the state in bringing into being and maintaining those institutions.<sup>259</sup> Moving forward, both the relational and institutional focus are vital and, in a sense, are another way to think about the channeling function of law in creating and supporting social institutions that allow realization of important goods or ends.<sup>260</sup>

I have disagreed with parts of Huntington’s critique of “negative” family law, countering that, at least with respect to dispute resolution family law in the context of family dissolution involving minor children, there is a concerted shift toward reducing “war” between family members to make peaceful legal proceedings and coparenting possible. Nonetheless, in my view, most of her positive agenda, from (as Sawhill proposes) encouraging young people to delay childbearing and parenting until they are ready and capable, to supporting parents in their “critical work” of child development, to attending to the environments in which families live, is sound and unobjectionable. It is similar to many progressive calls for a new family agenda. I support a marriage plus agenda that declines to move completely

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258. Deborah Cantrell, *The Role of Equipose in Family Law*, 14 J.L. & FAM. STUD. 63, 64–65, 96 (2012).

259. Martha Albertson Fineman, *Equality, Autonomy, and the Vulnerable Subject in Law and Politics*, in VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS 13, 20–26 (Martha Albertson Fineman & Anna Grear eds., 2013).

260. *See id.* at 25 (“The state is always at least a residual actor in the formation and functioning of society and should accept some responsibility in regard to the effects and operation of those institutions it brings into being and helps to maintain.”).

“beyond marriage” but instead supports marriage while nurturing other family and relationship forms.<sup>261</sup> Perhaps *Failure to Flourish* will invite conversation about why, with so many decades of calls not just to talk about family values but to implement policies that “value families,” there is still such a shortfall and how it may be possible to better realize those values.

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261. See MCCLAIN, *supra* note 61, at 191–219 (arguing for a model that supports many different kinds of familial relationships).