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THE PLACE OF FLOURISHING FAMILIES

Nestor M. Davidson^{*} & *Clare Huntington*[†]

Legal scholars have produced a rich literature exploring how law shapes cities. These scholars have examined the authority and autonomy of municipal governments,¹ the nature of urban community,² and the geography of inequality.³ Another set of legal scholars has produced an equally rich literature exploring how law shapes families. These scholars have analyzed how marriage laws systematically disadvantage African Americans and other marginalized groups,⁴ how family law reinforces conceptions of

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1. See, e.g., David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255 (2003); Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990).

2. See, e.g., GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITY WITHOUT BUILDING WALLS (2001); Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371 (2001).

3. See, e.g., Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 UCLA L. REV. 1095 (2008); Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985 (2000); Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365 (1997).

4. See, e.g., KATHERINE FRANKE, WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY (2015); R.A. Lenhardt, *Marriage as Black Citizenship?*, 66 HASTINGS L.J. 1317 (2015).

traditional families,⁵ and how the absence of marriage equality led courts to recognize functional parents.⁶

These discourses rarely overlap.⁷ Until this Colloquium. We brought together a range of scholars from multiple fields, inside and outside law, to talk about the intersection of urban law and family law. The inspiration for the Colloquium was a book by one of us, *Failure to Flourish: How Law Undermines Family Relationships*.⁸ Professor Huntington argues in the book that family relationships—especially parent-child relationships—are essential for human flourishing and societal flourishing, but the law too often undermines these relationships.

One of the central insights of *Failure to Flourish* is that family law must be understood much more capaciously than it has traditionally been conceptualized. At its core, family law concerns the set of rules that structures the legal family—who can get married, the effect of an adoption on the legal rights of birth parents, the consequences of ending a marriage, and so on. But family law is also the set of legal rules outside that core, including doctrines that regulate family interactions, such as domestic violence and child abuse laws. Most importantly, there is an even broader outer circle of family law: the legal rules, systems, policies, and subsidies that influence family life. This outer circle affects family functioning, but we do not necessarily see it as “family law.” Through sentencing and policing decisions, for example, the criminal justice system determines whether children can see their mothers and fathers or whether these adults are incarcerated. Housing law determines whether a family can live in a safe, integrated neighborhood with good public schools. And workplace law determines whether a new parent will have time off to

5. See, e.g., MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER: THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995); Laura Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189 (2007). For a broad based discussion of how the law assumes the state has limited affirmative responsibility for family functioning, to the detriment of both families and society, see MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS* (2010).

6. See, e.g., Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185 (2016).

7. For one notable exception, see Katharine B. Silbaugh, *Women's Place: Urban Planning, Housing Design, and Work-Family Balance*, 76 FORDHAM L. REV. 1797, 1825–26 (2007); see also Sarah Swan, *Home Rules*, 64 DUKE L.J. 823 (2015) (exploring municipal ordinances that seek to compel parents and other heads of household to control people connected with the home).

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

bond with a newborn, make a living wage, and have a predictable schedule.

Once we see this broad legal domain as family law, it is easier to see how the law can harm familial relationships. The decision to sentence defendants to prison, rather than a community-based alternative, means that 1.7 million children have a parent in prison.⁹ This has a disproportionate impact on families of color, especially African Americans,¹⁰ affecting the availability of fathers and the ability of men to help support children. Similarly, the choice to build subsidized housing in neighborhoods of concentrated poverty reinforces racial segregation and makes it harder for low-income families to access good schools, adequate libraries, safe playgrounds, and so much more, with profound effects on inequality.¹¹ Finally, when the legal system prioritizes at-will employment and the putative freedom to contract, lack of regulation of the low-wage workforce makes parenting a constant challenge. Employers offer few benefits and can engage in practices such as just-in-time scheduling plans, which means parents may receive their schedule only a day or two in advance and thus must scramble to find day care, often relying on an unqualified family member or neighbor.

Too often, policymakers do not appreciate the degree to which decisions in seemingly unrelated fields affect family life, and, most crucially, child development. And because we do not see the connection, we do not appreciate that the state's influence on family life is often negative. At heart, using a family law lens means asking how government choices affect family functioning. There are multiple and often competing goals, but policymakers and other legal actors should at least ask how their choices will affect families.

Understanding family law to be the law that influences families opens up the space for this Colloquium's exploration of how place—and particularly an urban environment—matters for families. It is a fair question to ask why we are raising this in an *urban* law journal. Is

9. See LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU JUST. STAT., U.S. DEP'T JUST., PARENTS IN PRISON AND THEIR MINOR CHILDREN 1–2 (rev. 2010).

10. For every one-hundred African American women not in prison, there are only eighty-three African American men not in prison, as compared with ninety-nine white men not in prison for every one-hundred white women not in prison. See Justin Wolfers et al., *1.5 Million Missing Black Men*, N.Y. TIMES (April 20, 2015) (describing these statistics and noting that the discrepancy for African Americans is because of incarceration and premature deaths).

11. See Raj Chetty et al., *Where is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States* (Nat'l Bureau of Econ. Research, Working Paper No. 19843, 2014).

it a different project to use a family law lens in a place like New York City, with a population of nearly 8.5 million,¹² than it is in a rural community with a population of 8000 or 800? On one level, there is no real difference when thinking about the intersection of law, place, and families. Wherever the government is acting, it should enquire into family functioning. The same tools—seeing the multiple ways government decisions affect family life—are relevant regardless of population density. We should be looking at policing, housing, employment, and local governance through a family law lens regardless of geographic context. But the density, complexity, and diversity of cities make the trade-offs for families particularly stark. Limited physical space, for example, means a city might have to choose between installing a playground and building more subsidized housing units. These factors raise the stakes of the government's decisions.¹³

One of the goals of *Failure to Flourish* was to spark debate across numerous fields. As the articles and responses in this Colloquium demonstrate, looking at urban law through a family law lens, and family law through an urban law lens, leads to great insights. To begin, Sean Williams examines local governance structures and argues for an innovative role for localities in deciding family law rules, or at least rules of thumb. As he shows, family law is based on broad standards that give tremendous discretion to local judges, leading to both dis-uniformity and unpredictability. Moreover, Williams shows that different localities will reach different value judgments about proper parenting and custody rules. To solve this, Williams suggests that localities adopt rules of thumb to guide the exercise of judicial discretion, thus creating more predictability and giving expression to localized values.

Naomi Schoenbaum shows how concerns about gender—a perennial concern of family law scholars—take on a new light in the sharing economy, an emerging largely urban phenomenon.¹⁴ Schoenbaum argues that the sharing economy often involves intimate

12. See New York City Department of Planning, Current Population Estimates, <http://www1.nyc.gov/site/planning/data-maps/nyc-population/current-future-populations.page> (last visited March 13, 2016).

13. Of course cities, like other places, are also home to single people and other living configurations (roommates, etc.), and we are not saying that cities should be governed only or necessarily even primarily for family considerations. But the absence of a meaningful discourse on family, cities, and the legal system makes familial concerns harder to surface in urban law.

14. See Nestor M. Davidson & John J. Infranca, *The Sharing Economy As An Urban Phenomenon*, 34 YALE L. & POL'Y REV. 215 (2016).

spaces, from a home to a car, and that the transactions require a degree of trust. Both factors increase the saliency of sex, with parties on both ends of the transaction often preferring a certain gender for the other end of the transaction. Schoenbaum points to the many ways traditional sex discrimination law cannot adequately address this challenge, raising serious concerns for sex equality.

Raphael Bostic brings a keen political scientist's eye to the interplay of family law and urban law. Bostic argues that a central goal of urban policies is to maintain social order. Housing codes, for examples, were an effort to ensure that landlords provided tenants with safe, sanitary housing. But often, urban policies have a negative effect on families. Urban renewal programs, for example, might increase property values and the overall appeal of a city, but they have also displaced tight-knit communities of low-income families of color. Bostic identifies institutional and academic silos as part of the problem and identifies promising examples of breaking down these silos to serve a holistic approach to urban policy and families.

Katharine Silbaugh, who pioneered the intersection of family law and urban law a decade ago,¹⁵ continues her work, this time with insights about changing family forms and housing law and policy. After describing the enormous changes in family forms—including multigenerational families, blended families, and nonmarital families with ties across multiple households—Silbaugh notes that a new theme in family life is churn, with family members coming together and moving apart in multiple combinations over a lifetime. And yet housing policies generally do not reflect this reality. She proposes two key interventions: prioritizing the ties of someone outside the home such that, for example, a noncustodial father would be eligible for a housing priority that places him near the homes of his children. Similarly, Silbaugh proposes changing the actual design of housing units so that they can expand and contract and combine as a family may need over time.

Finally, Peggy Cooper Davis returns us to the core of family law, revisiting the classic cases in family law, from *Meyer v. Pierce* to *DeShaney v. Winnebago*. Davis asks us to see these cases in a new light—that of human dignity—which calls for so much more than the paltry support the government currently provides. Davis thus emphasizes the theme of human flourishing, asking how family law doctrine can do more to nurture strong, stable, positive relationships.

15. See Silbaugh, *supra* note 7, at 1825-26.

As these brief descriptions indicate, combining family law and urban law is a fruitful endeavor. Law matters to place and place matters to families. How we shape our environments—urban and otherwise—shapes how parents interact with children, how children develop, and how all families function. Too often law has been a barrier to what is most important in our most intimate relationships, but a flourishing city can foster flourishing families. This Colloquium points the way.