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FAMILY LAW'S EXCLUSIONS

*Clare Huntington**

As Fordham Law School commemorates the hundredth anniversary of women in its ranks, the school is also acknowledging the ways it has excluded women. For this special Issue celebrating scholarship by the women of Fordham, I see a similar theme echoing in my work. From my first article,¹ published soon after I graduated from law school, through my most recent work,² I have identified and explored the exclusions riddling family law.

At a fundamental level, family law fails to recognize core attributes of the human experience, most notably emotion. Through an extensive body of interdisciplinary research, we know a lot about the emotional arc of family relationships, but family law often does not reflect this knowledge. To address this exclusion, I argued for the introduction of the study of law and emotion in family law.³ With a few exceptions, family law scholars pay scant attention to emotion, missing the potential for generating insights using the methods of law and emotion.⁴ In my own work in the field, I have focused on theories of human relationships that posit a predictable cycle of emotions in close relationships. Individuals feel love for another, inevitably transgress, intentionally and unintentionally, against those they love, feel guilty about the transgression, and then seek to repair the damage.⁵ In the family, this cycle marks relationships between adults as well as between parents and children. Some transgressions are minor, including verbal disagreements, and some transgressions are serious, including recurrent violence. Unfortunately, family law's rules, processes, and practice are largely at odds with the cycles of emotions that are the hallmark of most relationships.⁶ Across a range of contexts, including divorce, adoption, and child welfare, family law recognizes love and transgression but does not adequately account for guilt or foster, when appropriate, the drive to reparation. There are some

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1. See generally Clare Huntington, *Welfare Reform and Child Care: A Proposal for State Legislation*, 6 CORNELL J.L. & PUB. POL'Y 95 (1996).

2. See generally Clare Huntington, *Early Childhood Development and the Law*, 90 S. CAL. L. REV. 755 (2017).

3. For my first foray, see Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245 (2008).

4. See *id.* at 1255–57.

5. See, e.g., *id.* at 1262.

6. *Id.*

exceptions, such as the use of mediation in divorce, but there is far more that can be done. Even the reforms that are taking root are undertheorized and incomplete and thus, not surprisingly, sometimes actively challenged.

I proposed a reparative model of family law to undergird nascent reforms and encourage other innovations. The reparative model recognizes that family-like relationships often persist even after legal relationships are altered. It thus leads to new substantive rules that recognize and support these liminal relationships. The reparative model encourages reforms to the process of family law by de-emphasizing adversarial procedures. And it fosters changes to the practice of family law by asking family law attorneys to be more attuned to the potential for repair. There are limits to reparation, of course, with family violence a critical area for caution. But, ultimately, the reparative model would bring about a sea change in family law, providing a framework for the law to account for the full range of human experience and the cyclical nature of emotion in familial relationships.

Even when family law does try to engage more broadly with the human experience, it can leave out or marginalize entire categories of relationships. Until only a few years ago, our legal system failed to recognize same-sex relationships. In my scholarship, I identified a mechanism family law uses to reinforce traditional relationships. Drawing on the work of Erving Goffman and others, I argued that family law reflects and endorses narrow images of families—social fronts, in Goffman's terms—requiring those who seek legal recognition to fit within the existing social front.⁷ This constraining mechanism means that even as family law draws new relationships within its ambit, it requires the individuals to satisfy dominant norms. Indeed, the U.S. Supreme Court relied on this mechanism when it recognized the right of same-sex couples to marry.⁸ Writing for the majority, Justice Kennedy emphasized the many ways that same-sex couples are similar to different-sex couples and thus deserving of state recognition.⁹ In this way, the success of marriage equality was marred by the re-inscription of traditional family norms.

In recent years, my scholarship has focused on another far-reaching, but far less studied, exclusion: family law's failure to address the needs of nonmarital families. Family law is designed for families with married parents, despite the reality that 40 percent of children are born to unmarried parents, most of whom will never marry.¹⁰ Although family law no longer penalizes "illegitimate" children, the marital family continues to dominate family law. Substantive rules draw a clear distinction between married and unmarried couples, affecting issues as fundamental as parental rights for fathers and property rights for cohabitants. Family law's institutions assume

7. Clare Huntington, *Staging the Family*, 88 N.Y.U. L. REV. 589, 627 (2013).

8. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

9. *Id.* at 2599–601; *see generally* Clare Huntington, *Obergefell's Conservatism: Reifying Familial Fronts*, 84 FORDHAM L. REV. 23 (2015).

10. Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167 (2015).

couples ending their relationships will go through the court system, as marital families must, but unmarried families typically do not. And significant consequences flow from this institutional myopia, such as unmarried couples not having the benefit of a clear order determining when each parent will see their child. Family law's norms reinforce traditional notions of married family life, with the father as the breadwinner and the mother the caregiver, even though this does not describe the reality of nonmarital family life.

Family law's exclusion of nonmarital families works to the serious detriment of these families, undermining already tenuous bonds and contributing to negative outcomes for children. I proposed a new approach to family law that would downplay the significance of marriage.¹¹ As a foundation, I offered a new theory of state regulation, built on the insight that it is possible to separate marriage, but not relationships, from parenthood. The state should thus help unmarried parents become effective co-parents, especially after their relationship ends, so they can provide children with the healthy relationships crucial to child development. This requires new rules, new institutions, and new social norms.¹²

Finally, family law does not only leave out important relationships, it also excludes critical issues. My most recent focus, building on this insight, has been early childhood development.¹³ A wealth of interdisciplinary research demonstrates that early childhood is critical for the development of cognitive abilities, language, and psychosocial skills; the parent-child relationship plays a pivotal role in the development of these skills; and early childhood relationships and experiences have a deep and lasting impact on a child's life trajectory, meaning that disadvantages during early childhood replicate inequality. Despite the critical importance of this period of development, the law does not adequately account for the particular needs of children and families during early childhood. Family law's rules tend to lump children into an undifferentiated category, regardless of age. In almost every state, child custody rules are not age specific, ignoring the particular needs of very young children.¹⁴ And the rules governing the placement of children in foster care similarly do not account for age. Instead, one overarching rule—that the state should move to terminate parental rights for a child who has been in foster care for fifteen of the most recent twenty-two months—applies regardless of whether the child is two or twelve.¹⁵

Recognizing that the field of family law needs to engage much more fully with remedying this critical gap, I proposed a new subdiscipline of early childhood development and the law. One goal of the subdiscipline is to encourage family law scholars to explore numerous legal issues related to early childhood development such as: (1) the distinctiveness of the state

11. *Id.* at 212–36.

12. *Id.*

13. Huntington, *supra* note 2.

14. *See id.* at 772–74.

15. 42 U.S.C. § 675(5)(E) (2012); *see also* Huntington, *supra* note 2, at 875 (noting that this is the federal baseline and that some states have tightened this rule even further, and a few states do have slightly different rules based on age).

interest in early childhood; (2) an assessment of the many ways the state fails to support families with very young children and the possibilities for a more active state role; (3) an intersectional analysis of dangers inherent in this more active state role; and (4) the possibilities for doctrinal reform across a host of legal fields, including criminal law, employment law, housing law, social benefits law, and family law. A second goal of the subdiscipline is to create a bridge to scholars in other disciplines and introduce lawyers and legal scholars into the emerging policy debates on fostering early childhood development. This subdiscipline is beginning to take root, with a group of legal scholars meeting and exploring the many ways family law can support families and foster early childhood development.¹⁶

In all these ways, my work has identified family law's exclusions. I have been fortunate to be able to shine a light on these exclusions and try to fill these holes by offering new theories as well as reforms to the substance, process, and practice of family law. Just as we celebrate one hundred years of women at Fordham Law School, I look forward to the time when family law is celebrating one hundred years of incorporating a full range of human experiences, recognizing a broad range of families, and addressing a wide range of issues.

16. See, e.g., Clare Huntington, *A Promising Start for Early Childhood Development and the Law*, 71 FLA. L. REV. 71 (2019), http://www.floridalawreview.com/wp-content/uploads/Huntington_Publish.pdf [<https://perma.cc/CV8G-3QBF>]. The Law and Society Association has scheduled a roundtable on Early Childhood Development and the Law for May 2019.