

Flourishing Families
Harnessing Law to Foster Strong, Stable, Positive Relationships

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Introduction

Walk down the self-help aisle in a local bookstore and you will see a wealth of titles about improving relationships. There's ready advice about finding loving partners, raising responsible children, salvaging foundering relationships, and ending marriages with as little acrimony as possible. Typically, these books imply that creating strong relationships, or ending them gracefully, is something we do purely as individuals.

But relationships do not exist in a vacuum. Neighborhoods matter. Raising a child in a community with safe streets, adequate playgrounds, and good schools means a parent's job is that much easier. Families matter. The relationships we grow up with as children influence our experience in school as well as the kinds of relationships we envision for ourselves as adults. And the workplace matters. Whether a job pays enough to support a family and whether an employer makes it possible to meet family responsibilities affect relationships at home.

Beneath neighborhoods, families, and workplaces, however, there is an even deeper, more pervasive influence on relationships: the law. The law's effect may be intuitive when we think of the legal rules governing divorce, paternity, child abuse, and so on (what this book calls "dispute-resolution family law"). In this context, the impact of the law is readily apparent. A visitation order specifying which days a father can see his child clearly affects that relationship.

But there is another kind of law—what this book calls "structural family law"—that has just as much, if not more, of an influence on all of our most intimate relationships. Structural family law decides who is a family in the first place, with some groupings, such as same-sex couples in a majority of states, losing out. Structural family law also determines what family members owe each other, such as a parent's duty to support a child financially, and who will make important decisions for children—parents or the various institutions of the government.

Sweeping even more broadly, structural family law influences the context for relationships. Zoning laws specifying the layout of a community influence access to safe play spaces and interaction among neighbors. Employment discrimination laws that make it possible for women and people of color to work and develop successful careers influence a family's income. And criminal laws that emphasize punishment over rehabilitation mean that many children grow up without fathers in their daily lives. In these and so many other ways, the invisible hand of the law shapes families and family life.

The core argument of this book is that this broad system of family law—both in resolving familial disputes and in setting the structural framework for families—fails to nurture the strong, stable, positive relationships that are the key to individual and societal flourishing. Acting in its dispute-resolution mode, the law intervenes in a heavy-handed and adversarial fashion, often exacerbating family conflicts by pitting one family member against another in a zero-sum, win-lose battle. When a parent abuses a child, for example, the government removes the child from the home, and puts the matter in the hands of a court, with each party represented by a lawyer. The ensuing proceedings, which are all too often filled with acrimony and reproach, do little to heal the relationship between the parent and child, and often intensify problems, even though the child is likely to return home after the stay in foster care. The same can be said of the legal system governing conflicts over divorce, child custody, adoptions, and parentage.

This approach to family disputes ignores the reality that even as legal relationships change—from spouse to former spouse, from parent to non-parent—familial connections typically endure. Divorced spouses continue to co-parent, many adopted children maintain relationships with their biological parents, and the majority of children placed in foster care will return to their biological families.¹ Even children who have “aged out” of the foster care system

often return to live with their families after they turn 18 or 21.² But maintaining good relations in all these contexts is so much harder in the wake of a pitched legal battle. The ex-spouses who are fighting in court today must attend a parent-teacher conference tomorrow, and their oppositional stance will inevitably carry over from one setting to the other.

As a structural matter, the law pays scant attention to strengthening relationships to avoid these conflicts in the first place. Instead of bolstering relationships long before marriages break down, teenagers become pregnant, or parents gets to the end of their rope, the legal system by and large sits idly by, waiting for crises to occur and only then taking an active—often too active—role in family life.

Instead of this cycle of passivity before crisis, and over-reaction after, this book argues that the entire structure of family law must be changed to an orientation that seeks to foster strong, stable, positive relationships from the beginning, and then approaches conflict with an eye to repairing relationships, knowing they will continue long after the legal battles are over. This would be a truly flourishing family law.

The argument, in a nutshell

Understanding how far wrong our family law system has gone and what we need to do heal it will take us from ancient Greece to cutting-edge psychological research, and from the dusty corridors of local family courts to a quiet revolution under way in how services are provided to families in need. Part I of this book begins by introducing a World War II nutritionist, ancient philosophers, and modern neuroscientists to demonstrate that strong, stable, positive relationships are essential to both individual and societal well-being. This understanding draws from a recent, profound shift in the field of psychology, from studying not

only human dysfunction but also human flourishing. The emerging field of positive psychology examines the elements of a well-lived, satisfying life. A repeated finding in positive psychology and related work is that close interpersonal relationships are significantly correlated with individual well-being as well as desirable outcomes on a societal level, from greater academic achievement to thriving communities.

The book then describes the extraordinary challenges facing families that often impede the development of the kinds of relationships—especially between caregivers and children—that are so critical to flourishing, including unemployment, teen parenting, domestic violence, and high rates of divorce and incarceration. Although these challenges may sound familiar, what is often unappreciated is the place of the law in both creating some of these problems and failing to respond effectively. The central problem is that the law largely ignores families until they fail and then intervenes in a manner that often makes things worse—an approach this book calls “negative family law.”

Part II sets forth a new vision for family law, arguing that it must be reoriented so that the central goal is nurturing strong, stable, positive relationships. The primary focus is on children because there is so much to be gained—on a personal and societal level—from strengthening families raising children. It is in the parent-child context that the argument for reforming family law is at its strongest, and thus the majority of this book concerns the relationship between caregivers and children.

This new vision recognizes that family conflicts are inevitable. Families break apart sometimes voluntarily, sometimes involuntarily, for good reasons and for bad reasons. Divorce has its place in family life. Adoptions ensure children are raised by adults who are able to care for them. And some children should be removed from their parents’ care because of abuse or

neglect. But we need to change the way that family law addresses these conflicts and alterations in legal status.

Relationships will almost certainly continue long after the judge and lawyers go home, so dispute-resolution family law should seek to restructure the family with an eye to the future. This means developing a dispute-resolution system that addresses conflicts in ways that preserve and repair relationships. Divorce, adoptions, and custody orders will continue, but when changing the legal status of family members, family law should try to repair the underlying relationships so that former family members can continue to relate to each other and work together when necessary, as with co-parenting following a divorce. This interest in preserving and repairing relationships, however, must be balanced against the need to ensure that family members are safe in their homes, as violence remains a regular part of too many lives.

This approach to dispute-resolution family law—restructuring families with an eye to the future, preserving and repairing relationships, and keeping family members safe—creates a framework for understanding what the state should be doing in structural family law: proactively nurturing strong, stable, positive relationships to avoid these conflicts in the first place. The first step is to acknowledge that families and the government are mutually dependent. *Families need the government* in myriad ways, from establishing clear rules about parentage to ensuring basic opportunities, such as education. But the point that is so often lost in heated political debates about “dependency” is that *the government needs families*. An excellent example of this interdependency is early childhood development. Children typically do not enter school until age five, so during the crucial formative years, it is parents and other caregivers who prepare children to learn and interact with society.

To foster strong, stable, positive relationships does not mean calling for a cradle-to-grave welfare state. Rather, it is to re-orient the ubiquitous role that the legal system *already* plays in relationships. To foster strong relationships, structural family law should grant legal recognition to broader range of families, rather than recognizing only traditional nuclear families. To foster stable relationships, structural family law should encourage a long-term commitment between parents—a commitment to each other and a commitment to the shared work of raising a child. To foster positive relationships, structural family law should make subtle but crucial changes to the context in which families live, by building communities where there are enough opportunities for children to play, families can interact easily, and parents and children can get to work and school relatively easily. This physical environment would increase family interaction and build social ties between families and the larger community. Finally, to put it all together and foster strong, stable, positive relationships, structural family law should help parents with their critical work by providing support during periods of stress and transition. The moment of family formation is particularly important, so helping teens avoid pregnancy and teaching basic parenting skills to young, at-risk, first-time parents during the first two years of a child's life are particularly crucial steps.

Cultivating strong, stable, positive relationships will not require imposing a traditional structure on every family, but the dramatic changes underway in American families makes it all the more critical to think about how the law can fortify a wide range of families. More than 40 percent of children are born to unmarried parents,³ more than a quarter of all children live with only one parent,⁴ a significant number of children live in households with adults in a same-sex relationship,⁵ and children increasingly are conceived through donated sperm and eggs.⁶ The model of a married mother and father living with their biological children is on the wane, and the

challenge for family law is to strengthen the many different kinds of families living in America today.

One thing this book does not do is focus on strong, stable, positive relationships outside the family. For many people, especially adults, relationships with friends, co-workers, and others are just as, if not more, important than relationships with family members. But for children, particularly very young children, relationships within the family (broadly defined) are the most influential, and these are the relationships that have a lasting impact on individual and societal well-being. For this reason, this book focuses primarily on the family relationships that affect and involve children.

Partial reforms

Highlighting the problems with negative family law does not mean that there has been no progress. Some legislatures, judges, attorneys, academics, and individuals have tried to move family law in a more positive direction, and many of these efforts have been successful. Rather than a winner-takes-all approach to child custody, for example, the law now allows joint custody between parents, recognizing the important role both parents play in a child's life. Procedurally, there have been developments such as the widespread use of mediation in the field of divorce. And some lawyers already adopt a more conciliatory, cooperative approach to family conflicts.

These efforts, however, are haphazard, unconnected, and sometimes actively challenged. There is no overarching theory of family law that would help unite these important developments and encourage more complete change. Additionally, reforms are largely to dispute-resolution family law. Structural family law continues to adopt a passive approach to family well-being, doing far too little to strengthen families early on. The vision articulated in this book—that

family law should nurture strong, stable, positive relationships, enabling families and society to flourish—is a way of uniting these disparate developments, bringing them under one theoretical umbrella and fostering more systematic and systemic reform.

Even in the areas where there has been significant reform, such as the field of divorce, there is still considerable room for improvement. Despite the availability of joint custody, for example, many committed fathers end up without meaningful relationships with their children. Much work remains to be done, and having a clear vision for what family law is trying to achieve is an essential first step.

Anticipating resistance

Of course there are limits to what the law can achieve, as well as political challenges in rethinking family law. A dominant theme in politics, today and throughout our history, is a deep-felt need to limit the government's reach, especially into the family. What this instinct for nonintervention fails to recognize, however, is that the law is already, and inevitably, in our lives, forming and shaping families. It is simply present in a largely unproductive way. Rather than pretend that legal regulation of families is minimal, it is far more useful to reflect on the role of the law and reconsider what the law can do to help build strong, stable, positive relationships. Strengthening families before a crisis and intervening afterwards in a manner that ends them more constructively will actually foster greater self-determination for families. Anyone who has been through a contested divorce can tell horror stories about the devastating loss of control that accompanies court involvement. And the child-welfare system, where children are removed from their homes and placed in foster care, can be bewildering, if not outright terrifying.

Particularly in a time of fiscal constraints, another concern may be that the reforms suggested in this book will entail considerable outlays of money. To be sure, some programs will require up-front investments. But special education, the child welfare system, and the criminal justice system are all expensive back-end programs that exist, at least in part, because families are not providing children with the strong, stable, positive relationships they need. The only question is whether we pay now or pay later, and overwhelming evidence demonstrates that investing in targeted prevention programs that work with children during their very early years are far more cost-effective than back-end programs that pick up the pieces much further down the road.

In short, it is easy to argue that the government should stay out of family life and that there is no money to strengthen families, but the reality is that the government is already present in our lives, and we are already paying for the costs associated with dysfunctional families. The question is whether we want the government's presence to be positive and cost-effective, not whether we want the government involved at all.

Judging families, and the dangers of state-sponsored change

To talk of families is inevitably to talk of race, class, and sexual orientation. This book treads cautiously when drawing conclusions about families that function well and families that do not. At several points, for example, this book argues that it is particularly challenging for low-income families to provide children with the strong, stable, positive relationships they need. This is not because low-income parents love their children any less than financially stable parents. Rather, it is simply to acknowledge the many challenges facing families with limited

financial resources that make it exceedingly difficult for these families to provide children with the relationships they need.

I am well aware that it is sensitive for an outsider to draw conclusions and make judgments about non-dominant families. In 1965, Daniel Patrick Moynihan, then the Assistant Secretary of Labor, completed a government report entitled *The Negro Family: The Case for National Action*, which came to be known as the Moynihan Report.⁷ The Moynihan Report argued that efforts such as the Civil Rights Act of 1964 were insufficient to ensure African Americans full participation in society.⁸ Instead, the Moynihan Report identified the heart of the problem as “the deterioration of the Negro family,” which centered around a “tangle of pathology . . . capable of perpetuating itself without assistance from the white world.”⁹ Unsurprisingly, this reductionism and paternalism drew a strong negative reaction from civil rights leaders, the press, academics, and the African American community.¹⁰

One legacy of the report has been a reluctance to talk about problems in families, particularly low-income families of color. This book takes its cue from the work of the sociologist William Julius Wilson, who distinguishes structural challenges from cultural challenges facing non-dominant families. As Wilson argues, there are structural challenges—such as institutionalized discrimination, dangerous neighborhoods, low-quality schools, and a lack of economic opportunities—that make it harder for some families to raise their children.¹¹ But there are also cultural challenges, such as a devaluation of men making a long-term commitment to the mothers of their children, resulting in single-parent homes and paternal disengagement.¹² Addressing the cultural issues is far more sensitive, but any meaningful discussion must tackle both kinds of challenges.

An additional reason to tread cautiously is that although this book argues for state support of families, the history of state involvement in family life is too often a history of discrimination against non-dominant families— families in poverty, single parents, people of color, LGBT couples, immigrant families, the disabled, and others marginalized by a legal system predicated on a two-parent, married, opposite-sex, white, suburban, middle class paradigm of the family. State-sponsored “improvement” programs often have a paternalistic stance and make negative judgments about families that do not fall into this supposed heartland.

Although this book does have a view about relationships, it does not seek to reinforce the primacy of the traditional family. There is a lot of debate these days about family form, from the fast-moving battle over marriage equality to the ongoing concern about families headed by single mothers, to name just two points of contention. Focusing on whether the law should give legal legitimacy to one kind of relationship and not another misses the point that children (and many, if not most, adults) need strong, stable, positive relationships to flourish.

Family form is relevant only to the extent it nurtures or hinders these kinds of relationships. Marching an unstable couple down to city hall and issuing a marriage license is not going to ensure the couple stays together and become good parents. It is true that there is very strong evidence that children raised by two married parents have better outcomes as measured by a variety of metrics than children raised in other family structures. It is also true, however, that poverty and other factors go a long way to explaining the differential outcomes, a reality that is too often lost in debates about family form. The state must address the entire range of factors—including family structure *and* poverty—that influence child outcomes. This book does argue that the law should encourage a long-term commitment between parents, but, as

Chapters 7 and 8 explore in detail, this is far more complicated than simply saying the government should promote marriage.

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. The book focuses on the pressing need to find a more positive approach to other types of families as well, particularly those with strong emotional ties but often without legal recognition, such as donor families, other-mothers, same-sex partners, multiple adults with ties to the same child, and so on. As this book elaborates, flourishing comes in many stripes and family law can support flourishing across all family forms, not just in traditional, nuclear families. A core lesson from the book, then, is that the law can be more ecumenical about family form while still nurturing the strong, stable, positive relationships that foster individual and societal well-being.

Despite the essential role families play in society, too often families are not up to the task. The broad system of family law is a significant part of the problem when families fail, but it can also be part of the solution. Engaging on both a practical and theoretical level, this book offers concrete reforms to family law that would encourage flourishing families while simultaneously seeking to change the way we think about families and family law. The approaches outlined in this book would transform not only family law, but society itself.

¹ Nearly half of all divorces involve children, so even after a divorce is finalized, the former couple must continue to co-parent. See Paul R. Amato, *The Consequences of Divorce for Adults and Children*, 62 J. MARRIAGE & FAM. 1269, 1269 (2000) (stating that approximately half of all divorces involve children). Similarly, the dominant image of adoption is of infants placed in the homes of non-relatives, but the majority of domestic adoptions are by relatives and step-parents. See Joan H. Hollinger, *Introduction to Adoption Law and Practice*, in 1 ADOPTION LAW AND

PRACTICE § 1.05[2]. Only 20 to 30 percent of adoptions are of infants by unrelated individuals. *See id.* These percentages refer only to children born in the United States and do not include international adoptions. For statistics about children who are placed in foster care and return home to their biological families, *see* [insert statistic about how many children are reunited with their bio families after removal. Get an HHS statistic, the Admin for Children and Families has periodic reports that should contain this statistic].

² In the child welfare system, teenagers often return to live with their biological parents after they “age out” of foster care, even though the court would not allow such a reunion while the child was still in the system. [cite from chapter xx?]

³ In 2009, 41 percent of births in the United States were to unmarried women. JOYCE A. MARTIN ET AL., U.S. DEPARTMENT OF HEALTH & HUMAN SERVS., BIRTHS: FINAL DATA FOR 2009 8 (2011), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr60/nvsr60_01.pdf.

⁴ ROSE M. KREIDER, U.S. CENSUS BUREAU, LIVING ARRANGEMENTS OF CHILDREN: 2004 3-4 (2008).

⁵ According to U.S. census data, in the year 2000, of the approximately 71.6 million children living in the United States, nearly 416,000 lived in a household with same-sex partners. *See* U.S. CENSUS BUREAU, CENSUS 2000, CHARACTERISTICS OF CHILDREN UNDER 18 YEARS BY AGE, FOR THE UNITED STATES, REGIONS, STATES, AND PUERTO RICO: 2000, PHC-T-30 (2000). There are reasons to believe, however, that the census significantly undercounts same-sex families. *See* David M. Smith & Gary J. Gates, *Gay and Lesbian Families in the United States: Same-Sex Unmarried Partner Households* 1-2 (Urb. Inst. 2001) (estimating that “gay and lesbian families could be undercounted as much as 62 percent”) available at

http://www.urban.org/UploadedPDF/1000491_gl_partner_households.pdf.

⁶ [get a cite for this from Naomi Cahn’s G’town article on donor families]

⁷ *See* LEE RAINWATER & WILLIAM L. YANCEY, THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY 3-4 (1967).

⁸ Cite to actual Moynihan Report.

⁹ Cite to actual Moynihan Report.

¹⁰ *See* DAVID C. CARTER, THE MUSIC HAS GONE OUT OF THE MOVEMENT: CIVIL RIGHTS AND THE JOHNSON ADMINISTRATION, 1965-1968, at 67-73 (2009).

¹¹ WILLIAM JULIUS WILSON, MORE THAN JUST RACE: BEING BLACK & POOR IN THE INNER CITY 95-108 (2009).

¹² WILLIAM JULIUS WILSON, MORE THAN JUST RACE: BEING BLACK & POOR IN THE INNER CITY 115-28 (2009).