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Nestor M. Davidson

Clare Huntington

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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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* Albert A. Walsh Professor of Real Estate, Land Use and Property Law, Fordham Law School.
† Joseph M. McLaughlin Professor of Law and Associate Dean for Research, Fordham Law School.


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

These discourses rarely overlap. 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. 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 capacious 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


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).

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. This has a disproportionate impact on families of color, especially African Americans, 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. 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


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).

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,\textsuperscript{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.\textsuperscript{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.\textsuperscript{14} Schoenbaum argues that the sharing economy often involves intimate


\textsuperscript{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.

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, 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.

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.