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FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS. By *Clare Huntington*. Oxford and New York: Oxford University Press. 2014. Pp. xix, 320. $45.

INTRODUCTION

There is something audacious at the heart of Clare Huntington's *Failure to Flourish*.[1] She insists that the state exists to ensure that families flourish. Not just that they survive, or not starve, or be able, somehow, to make ends meet—but that they flourish. She demands this not just for some families but, importantly, for all families. This simple, bold, and profoundly countercultural demand allows Huntington to make a tremendously convincing case that the state can begin to do precisely that. *Failure to Flourish* is a brave, rigorously produced, carefully researched, and politically astute book. Huntington seeks to persuade a wide swath of the American political landscape, and at every turn she chooses her words carefully to accomplish that end. This is an ambitious effort, and we would all be much better off if it succeeds.

In one of the most ambitious features of the book, Huntington attempts to transcend class, race, and gender boundaries. Although she is tremendously nuanced in dealing with the complexities of this endeavor, Huntington ultimately seeks universality. As a scholar dedicated to issues of poverty, I have no doubt that any restructuring of the relationship between poor families and the state will fare better if it is tightly anchored to universal solutions. The history of U.S. social-welfare policy teaches all too well that, when legal structures are targeted at the poor, structural racism, classism, and intersectional manifestations of gender bias raise their ugly heads. So we need something that is hard to get—we need universal solutions that take into account the differences in how legal institutions function across race, class, and gender. Ultimately, I applaud this book as a major contribution to the discussion of how the law must treat and support families and children, but I differ with Huntington in a few instances where she does not adequately account for the ways that legal institutions function in poor communities in general and poor communities of color in particular.

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This Review proceeds as follows. Part I provides an overview of the book, outlining its main arguments. Part II turns to the question of poverty and describes central features of the current relationship between poor communities and the state as *hyperregulatory*, which means that the mechanisms of social support "are targeted by race, class, gender, and place to exert punitive social control over poor, African-American women, their families, and their communities."[2] Part III then suggests that, rather than reject rights in child-welfare proceedings and beyond, Huntington's project might be more beneficial for those in poverty if we embrace a robust conception of rights. This Part acknowledges that, for those in poverty, our current constitutional jurisprudence confers neither any significant protection against rights violations nor a right to support. Nevertheless, Part III argues that a framework emphasizing rights allows us to see, in the interstitial cracks of our statutory schema and in daily fights on the ground for help and dignity, some glimmers of this more robust conceptualization of rights. Finally, this Part highlights the many ways in which Huntington's project challenges race, gender, and class privilege. In light of these challenges, this Review argues that, in addition to asserting vigorously rights that exist, we need to push forward in the project of theorizing a more robust conception of rights. Building on the work of Dorothy Roberts and Martha Fineman, Part III concludes by describing such a rights theory.

I. FAILURE TO FLOURISH

Failure to Flourish offers a searing indictment of the relationship between legal institutions and families in America. Huntington's central thesis is that the "broad system of family law—both in resolving familial disputes and in setting the structural framework for family life—fails to nurture the strong, stable, positive relationships that are the key to individual and societal flourishing" (p. xii). This critique applies to two separate categories of law. The first category is *dispute-resolution family law*—the legal processes by which individuals become families and restructure their relationships (p. xii). The second category, which Huntington labels *structural family law*, includes some topics that are likely to appear on a family-law course's syllabus and other topics that are not (p. xii). In the first category are laws about who comprises a family (with gay marriage being the central contested category) and rules about "what family members owe one another" (p. xii). Structural family law also reaches more broadly, extending into areas of the law that profoundly affect the ability of families to function well. Legal rules and institutions relating to zoning, employment discrimination, taxation, and social-welfare and criminal-justice policy all fall within structural family law (p. xii).

2. Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty and Support*, 25 YALE J.L. & FEMINISM 319, 322 (2014); *see also* KAARYN S. GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY 1 (2011).

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This book starts not in law but in science, offering extensive evidence that strong family relationships are crucial to "child development, adult well-being, health, healing, and the acquisition of social capital" (p. 7). Drawing on positive psychology, Huntington shows that the ability of families to nurture children, from their earliest moments, will have a long-term effect on brain development. When positive nurturing and secure attachment are absent, children's development can be negatively affected, often for the long term (pp. 7–8). Toxic stress, in the form of "abuse, neglect, extreme poverty, and maternal clinical depression," negatively impacts brain development (p. 8). And negative attachments often mean that kids and future adults will lag behind in important ways. Crucially for Huntington's later endorsement of programs that intervene early in family life, all of this happens very, very early—during the first months and years of children's lives (p. 8).

Having laid this groundwork, Huntington ventures boldly into the politically dangerous topic of how family structure affects children. She begins by cataloguing changes in the structure of American families and then turns to the question of impact (pp. 27–31). Her data-rich conclusions raise challenges for actors across the political spectrum. On gay marriage she is definitive. There is no credible evidence to suggest that children parented by two people of the same sex do any worse than children with opposite-sex parents. In fact, these children thrive (p. 34). Moreover, "[t]here is overwhelming evidence that children raised by single or cohabitating parents have worse outcomes than children raised by married, biological parents" (p. 31). So do children exposed to high-conflict divorces and children whose fathers fade out of the picture after divorce (pp. 33–34).

After demonstrating the correlation between family structure and child development, Huntington turns to the complicated issue of causation. She acknowledges that single parents are also more likely to be young, poor, and less educated (p. 35). Her question for social policy then becomes whether "the problem [is] having a *single* parent or having a *low-income, young, less educated* parent" (p. 35). Huntington presents data that strongly suggest that the problem is twofold. Age, poverty, and education matter, but relationships matter as well. Even in the face of stress, children do better when their parents can successfully raise them together (pp. 42–44). The question for social policy, though, is whether to focus on the families, the circumstances, or both. Huntington's answer is that we must do both—we must address the structural issues that exacerbate these risks and restructure legal institutions to support families (pp. 54, 115).

Having established the serious challenges facing American families, Huntington takes on a central myth of American law: that families are autonomous from the state (p. 58). She definitively debunks two related autonomy myths. First, she dispels the notion that any family operates apart from the state, and, second, she disputes the notion that only poor families depend on the state for support. In fact, Huntington maintains, all families are intertwined and interdependent.

To debunk the myth that families operate apart from the law, Huntington presents an extraordinary catalogue of the ways that law impacts

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families (pp. 59–68). Law determines what groupings are entitled to be a family (heterosexual couples, yes; lesbian and gay couples, well, it depends). Law determines how one enters and exits families. Law also structures families' ability to flourish (or not). Consider, for example, employment law. The ability to make a living wage (or not) profoundly impacts the ability of a family to provide strong parenting. So does the availability (or not) of paid parental leave, subsidized child care, and health insurance. The extraordinary policing, prosecution, and incarceration of poor black men and women all profoundly impact their ability to parent. Law and legal institutions make all of these rules. In the face of this pervasive state presence, it is easy to see that the idea of families as independent of the state is largely a myth.

On the issue of support, Huntington builds on the work of Suzanne Mettler to establish that a far greater range of families receives state support than popular discourse suggests or that families themselves actually realize (p. 72). Mettler surveyed families to find out if they believed they receive governmental assistance (p. 72). Fifty-seven percent responded that they had not received such assistance (p.72). When the same survey respondents were asked if they had ever received aid from twenty-one particular assistance programs, however, 92% indicated that they had (p. 72). One explanation for this striking disparity lies in differences in programmatic design (which are, of course, the product of law and regulation). For example, some programs are "submerged" (p. 72). Although people receive benefits from them, the programs are administered in a way that makes recipients less likely to perceive those benefits as support. Contrast, for example, the home-mortgage or child-care deduction with benefits under Temporary Assistance for Needy Families (colloquially welfare). To get the deductions, you mark a box and either write a smaller check or receive a bigger refund. To get welfare, you go down to an office and subject yourself to an experience that Kaaryn Gustafson terms *ritual degradation*.[3] Each is a governmental benefit, but the administrative structures and the social messages contained within those structures could not be more different.

Using her well-established case for pervasive state regulation and comprehensive state support, Huntington cogently counters voices from the Right and the Left. She dismisses both Charles Murray's brand of derogatory libertarianism and conservative rhetoric about the problem of welfare "dependence" for failing "to account for the inevitable role of the state in family life" (p. 77) and also for failing "to account for the substantial governmental support received by those at the top of the economic ladder" (p. 78). Then she speaks to the Left. "Whether liberals want to admit it or not, the relationship between adults affects children" (p. 80). The goal, then, is not to keep the law out of families but to discern "how best to redirect this

3. Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 U.C. IRVINE L. REV. 297 (2013).

pervasive state so that it encourages strong, stable, positive relationships within the family" (p. 80).

Family law, as Huntington broadly defines it, utterly fails to meet this challenge. As to the dispute-resolution system, adversarialism of the kind that works in corporate law or tort cases exacerbates conflict and undermines the ability to maintain strong relationships in the future. In both our child-welfare and social-welfare systems, we provide very little assistance to families in crisis, and we offer that assistance "only after the family has come to the attention of the authorities and is deemed to be at risk of abuse and neglect" (p. 94). In reality, "the child-welfare system is a late-in-the-day mechanism for dealing with the effects of poverty" (p. 94). By the time the state gets involved, the threat of losing custody looms large, and interventions are mostly ineffective. Treatment is primarily one size fits all and is vastly underfunded, which virtually guarantees its failure (p. 100).

Structural family law also fails by undermining low-income families. Take, for example, child-support laws (p. 102). Single parents receiving welfare are obligated to assign their right to child support to the state regardless of the absent parent's ability to pay (pp. 102–04). These rules undermine shared parenting by exacerbating conflict. In addition, in the case of incarcerated parents, child-support debt continues to accrue during imprisonment (p. 104). This makes it even harder for that parent to achieve stability after incarceration. In all these ways, structural family law undermines the family's ability to flourish.

Huntington's propositions flow directly from her critique. For private family-law disputes, she endorses high-quality mediation because "it has been shown to improve long-term psychological adjustment and post-divorce family relationships, particularly between noncustodial parents and their children" (p. 131).

Applying the same principles to child welfare, Huntington rejects a rights-based framework in favor of fostering "collaboration between the state and families" (p. 132). As she frames it, "a rights-based model leads to an adversarial process, whereas a problem-solving model leads to a collaborative process, which is better suited to serving the interests of both parents and children" (p. 132). Huntington offers two primary examples. The first is family group conferencing and the second is using problem-solving courts for child-welfare cases (pp. 132–37). There is much that is very good in family group conferencing, at least as it apparently operates in New Zealand. In that model, decisionmaking authority is largely transferred out of the hands of professionals and state actors and into the hands of extended family and community. In the same mode, Huntington endorses the model embodied in the Miami Child Well-Being Court, in which "[mental health] experts, the family, and the court then work together as a team to protect the child and respond to what led the family into court in the first place" (p. 139).

Huntington's normative vision for structural family law represents perhaps the book's greatest contribution. It begins with a discussion of liberalism, privacy, autonomy, and rights. Building on the work of scholars

like Jennifer Nedelsky[4] and Maxine Eichner,[5] as well as on her proof in Part I of the book, Huntington endorses a radically reconfigured notion of autonomy. In place of its traditional form—autonomy as existence apart from the state—Huntington compellingly proves both that families need the state and that the state needs families. Rather than accepting that the two can stand apart from each other, Huntington endorses Nedelsky's relational theory of autonomy. In applying this theory to her own arguments, Huntington writes that "[m]utual dependency still has a place for autonomy, but it is not the autonomy idealized as no need for others" (p. 152). Instead, mutual dependency understands autonomy as the capacity for self-governance (p. 152). "Relationships are not antithetical to self-governance but instead are essential to it" (p. 152).

To realize this vision, Huntington argues for significant reform. Her organizing principle is clear. If a legal rule, a legal structure, or a government-funded program will strengthen relationships and improve outcomes for kids, then it is part of flourishing family law. Huntington readily acknowledges that she raises difficult policy questions, and she does not purport to solve all of them (p. 155). But she argues persuasively that the question of the quality and importance of the relationship to the child should control, rather than a historically constrained notion of what a family ought to be (pp. 155–56).

To strengthen families, the state should also foster long-term commitment between parents. But in contrast to many proposals regularly issuing from the Right, Huntington makes clear that she is not endorsing marriage as a panacea for poverty. Instead, she relies on compelling data, from both the Fragile Families and Child Wellbeing Study and the widely cited work of Kathryn Edin and Maria Kefalas, to argue that low-income parents are in fact strongly invested in establishing and maintaining their families (pp. 194–95).

Relying on this data, Huntington supports interventions that are a far cry from mere marriage promotion. To support long-term commitment between low-income parents in particular, the state should address the structural impediments facing poor communities, including the "high incarceration rate, particularly of low income, African American men" (p. 175). In addition, "[p]olicies that focus on improving the employment prospects of low-income parents and increasing the value of work" all fall within her ambit (p. 175). So does significant restructuring of economic-support systems (p. 174). Huntington advocates eliminating "the kinds of support programs that benefit only middle- and upper-income families" and replacing them "with one overall subsidy to all families, regardless of

4. JENNIFER NEDELSKY, LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW 123–24 (2011).

5. *See generally* MAXINE EICHNER, THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS (2010).

income" (p. 176). These are proposals that the Left has long endorsed. As Huntington persuasively argues in her final chapter, however, emphasizing positive relationships provides a new and perhaps more politically appealing rationale for endorsing these reforms.

Finally, states must support parents in fostering child development. On the issue of teen pregnancy, Huntington rejects abstinence programs, which have repeatedly been shown to have little effect (pp. 185–86), in favor of programs like the Teen Outreach Program, which "does not focus on teen pregnancy per se but . . . focuses on the social and emotional growth of the students" (p. 186). For new parents, Huntington advocates strong, voluntary programs like the Nurse Family Partnership. "[T]he [program] is a resounding success, dramatically lowering rates of child abuse and neglect, increasing mothers' participation in the workforce, and improving educational outcomes for children . . ." (p. 166). It is, for Huntington, a perfect example of flourishing structural family law because "it helps forge a strong attachment between parents and children, rather than simply reacting after parents fail to do so" (p. 189).

Failure to Flourish concludes by turning squarely to the question of politics. Huntington argues, quite convincingly, that focusing on relationships rather than autonomy or state intervention will allow actors across the political spectrum to embrace flourishing family law.

II. POVERTY, RACE, AND HYPERREGULATION

Failure to Flourish presents an important reformulation of the relationship between families and the state. It insists both that we have a universal vision and that we remain conscious of the specifics of race, class, and gender as we test and implement that vision's central ideas. Huntington takes great care in this project and repeatedly makes clear that she remains conscious of some of the most difficult aspects of this endeavor. Although there are many points in this book that merit a careful response, here I want to respond directly to one of the most difficult facets of Huntington's universal project: its applicability to those in poverty. On this topic, I reframe and endorse much of what Huntington envisions but diverge from her on the role of rights. Centering rights, defined broadly, would better protect the autonomy of poor families and would ensure that these families receive autonomy-enhancing support. Using a rights framework would also provide grounds for an argument that we must not only implement good programs but also radically restructure those parts of the social-welfare state currently targeting poor communities.

Huntington is right about many things. She is right that families of all classes receive substantial support from the state. Invoking Mettler, she is absolutely right that the structure of support varies significantly by class. And she is right that the social-welfare state in general and child-welfare agencies in particular provide far too little support and are extraordinarily punitive. But even as Huntington is right about these matters, she fails to

highlight the critical link between support and punishment at the heart of American poverty policy.

Assistance in poor communities currently comes at great risk to those who seek it. And in a clear manifestation of structural racism and classism, those risks are heightened if the person seeking help is poor and African American. Elsewhere I argue that the relationship between social support and poor communities is best described as *hyperregulatory*, which means that "its mechanisms are targeted by race, class, gender, and place to exert punitive social control over poor, African-American women, their families, and their communities."[6] Some data about what happens when poor pregnant women seek health care provide a particularly clear example of hyperregulation.

When poor women in general and poor African American women in particular seek health care during their pregnancy, they expose themselves to a highly intrusive state. Take, for example, a program that Huntington also criticizes: the Prenatal Care Assistance Program ("PCAP") in New York City. Khiara Bridges performed an extensive ethnographic study of that program.[7] As she documents, a PCAP client must provide extensive personal information to a wide variety of professionals about subjects ranging from her diet, her income, her history with child-welfare agencies, her immigration status, her mental-health history, her relationship history, any history of violence, her use of contraception, and her parenting plans—all well before she has access to this support. Through these mechanisms, "poor women's private lives are made available for state surveillance . . . and they are exposed to the possibility of punitive state responses."[8]

Exposure to those regulatory systems creates a serious punitive risk, particularly and disproportionately for poor African American women.[9] This plays out quite clearly when women are suspected of using drugs while pregnant. To understand this disproportionate risk, it is important first to know that African American pregnant women are no more likely to use drugs during pregnancy than white women.[10] One study in fact revealed that a slightly higher percentage of white pregnant women (15.4%) than black

6. Bach, *supra* note 2, at 322. The term "hyperregulation" is derived from Loïc Wacquant's framing of the carceral state as characterized not by mass incarceration but by hyperincarceration. The prefix "hyper," in both formulations, is meant to suggest the means by which systems collectively target communities by race, class, and place. Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, DAEDALUS, Summer 2010, at 74, 78–79; *see also* GUSTAFSON, *supra* note 2, at 1.

7. Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 113 (2011).

8. *Id.* at 131.

9. For a far more extensive discussion of these phenomena, see Bach, *supra* note 2.

10. Bach, *supra* note 2, at 357 (citing Ira J. Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202, 1203–04 (1990)).

pregnant women (14.1%) test positive for drugs. Similarly, poor women are no more likely to use drugs than women who are not poor.[11] Despite the essentially equivalent rates of drug use, African American women are far more likely to be tested for drugs when seeking prenatal and birthing care. One revealing study focused on the rates of drug testing in a hospital that had detailed (race-blind) protocols to determine when infants should be drug tested. The researchers sought to determine whether "race was used as a criterion for screening infants for intrauterine cocaine exposure."[12] They examined the records of 2,121 mother–infant pairs and controlled for "standard screening criteria and income, insurance status, and maternal education."[13] The researchers concluded that "race remained independently associated . . . with drug screening."[14] "Infants born to black mothers were more likely than those born to white mothers to have screening performed whether they met screening criteria . . . or did not."[15] Of the women and infants who met the relevant screening criteria, 35% of infants born to black mothers were tested while only 13% of infants born to white mothers were tested.[16]

African American women are also far more likely to be referred to child-protection services, to suffer worse outcomes once that referral is made, and to face prosecution related to their drug use. As to rates of referral, despite equivalent rates of drug use, pregnant African American women are between four[17] and ten times[18] more likely to be referred to authorities. Once these women are referred, their children remain in the system longer, experience

11. *Id.* ("During a one-month period the researchers obtained a urine sample from 'every woman who enrolled for prenatal care . . . at each of the five Pinellas County Health Unit clinics and from every woman who entered prenatal care . . . at the offices of each of 12 private obstetrical practices in the county.' In total they obtained a sample from 715 women. Of the 715 women, 14.8% tested positive for alcohol, cannabinoids (marijuana), cocaine or opiates. A slightly higher percentage of white women (15.4%) than black women (14.1%) tested positive. As to socioeconomic status, which the researchers determined from the economic demographics of the zip code in which women lived, the researchers concluded that 'socioeconomic status . . . did not predict a positive result on toxicologic testing.' " (quoting Chasnoff et al., *supra* note 10, at 1203–04)).

12. Marc A. Ellsworth et al., *Infant Race Affects Application of Clinical Guidelines When Screening for Drugs of Abuse in Newborns*, 125 PEDIATRICS 1379, 1379, 1383 (2010) (finding that "criteria indicating that screening should be performed seemed to be selectively ignored . . . for infants born to white women").

13. *Id.* at 1379.

14. *Id.*

15. *Id.*

16. *Id.* at 1382 tbl.3.

17. Sarah C.M. Roberts & Amani Nuru-Jeter, *Universal Screening for Alcohol and Drug Use and Racial Disparities in Child Protective Services Reporting*, 39 J. BEHAV. HEALTH SERVICES & RES. 3, 12 (2011) (finding that African American newborns are 4.1 times more likely to be reported to child-protective services than white newborns).

18. Chasnoff et al., *supra* note 10, at 1204 (finding that African American newborns are 9.6 times more likely to be reported to health authorities than white newborns).

worse outcomes, and receive inferior services.[19] And these same women face heightened punitive consequences in the criminal-justice system. In one study that focused on the prosecution of pregnant women stemming from drug use during pregnancy, 59% of the women prosecuted were of color and 52% were African American.[20] Nearly all were poor.[21] Moreover, African American women were more likely to be charged with felonies than their similarly situated white counterparts.[22]

In a phenomenon I have elsewhere termed *regulatory intersectionality*, this disproportionate referral and punishment is enabled through the regulatory structures of the social-welfare, child-welfare, and criminal-justice systems.[23] Federal and state law and regulatory structures often mandate and facilitate reporting. Social workers and health-care personnel regularly report poor women to child-protection agencies, even when the law suggests that they should not. Prosecutors rely on information gathered in social-welfare and child-welfare settings to make their case against poor women.[24] In light of this disturbing data, as well as the extraordinarily punitive nature of much of the social- and child-welfare systems themselves,[25] it is no surprise that these systems are viewed with profound distrust in poor communities.

The question, though, is what this means for Huntington's project. If we start where we are—with a hyperregulatory state—and seek to build a state that both respects autonomy and offers significant positive support, how do we get there? I answer this question below in two parts. First, in Section III.A, I strongly differ with Huntington on the role of rights protection in child-welfare cases. Given the extraordinary power imbalances between poor families and the state and given the hyperregulatory nature of multiple institutions in the lives of poor families, vigorous rights protection offers a far better response than collaboration and problem-solving courts. When done well, vigorous advocacy leads to precisely what Huntington seeks: autonomy-enhancing support. Second, in Section III.B, I move away from rights enforcement in child welfare and toward more theoretical ground. Building on the work of Roberts and Fineman, I argue that conceptualizing and pressing an autonomy-enhancing right to support insists—as policy

19. DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 13–14 (2002) (documenting that African American children are more likely than white children to be separated from their parents, spend more time in foster care, and receive inferior services).

20. Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL. POL'Y & L. 299, 311 (2013).

21. *Id.*

22. *Id.* at 311, 322.

23. Bach, *supra* note 2.

24. *See id.*

25. *E.g.*, GUSTAFSON, *supra* note 2, at 1 (social welfare); ROBERTS, *supra* note 19, at 16 (child welfare).

arguments alone cannot—that family flourishing is unattainable for those subject to the hyperregulatory state unless we demand that key institutions are reformed. We must, in this sense, claim a right to flourish.

III. CLAIMING THE RIGHT TO FLOURISH

To speak of rights and poverty in the American context is in some ways almost absurd. As Julie Nice extensively documents, when it comes to those in poverty, courts apply "no scrutiny whatsoever."[26] "Poverty Law in the United States subsists within a constitutional framework that constructs a separate and unequal rule of law for poor people. Across constitutional doctrines, poor people suffer diminished protection, with their claims for liberty and equality formally receiving the least judicial consideration and functionally being routinely denied."[27] In effect, this jurisprudence endorses a regime where constitutional law makes significant class distinctions—according rights to those with privilege and denying rights to the poor. In 1971, Justice Douglas noted this class distinction in his dissenting opinion in *Wyman v. James*.[28] His words serve as a potent reminder that we have long differentiated the mechanisms of support by class. Those with class privilege receive extensive support, but they are not asked to trade their dignity, autonomy, or rights for that support. Those in poverty, however, regularly face this trade-off. While Justice Douglas dissented in *Wyman*, the majority found that conditioning welfare on consenting to a home inspection did not abrogate Barbara James's Fourth Amendment rights.[29] But Justice Douglas asked the following:

> If the welfare recipient was not Barbara James but a prominent, affluent cotton or wheat farmer receiving benefit payments for not growing crops, would not the approach be different? Welfare in aid of dependent children . . . has an aura of suspicion. There doubtless are frauds in every sector of public welfare whether the recipient be a Barbara James or someone who is prominent or influential. But constitutional rights—here the privacy of the *home*—are obviously not dependent on the poverty or on the affluence of the beneficiary. . . . [T]heir privacy is as important to the lowly as to the mighty.[30]

Justice Douglas's views, however, did not prevail, and *Wyman* is a prime example of how we force poor people to trade rights for support.[31] Of course,

26. Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, & Dialogic Default*, 35 FORDHAM URB. L.J. 629 (2008). The phrase "no scrutiny whatsoever" was originally penned by Justice Marshall in his dissent in *James v. Valtierra*, 402 U.S. 137, 145 (1971) (Marshall, J., dissenting).

27. Nice, *supra* note 26, at 629.

28. 400 U.S. 309, 330–33 (1971) (Douglas, J., dissenting).

29. *Wyman*, 400 U.S. at 326 (majority opinion).

30. *Id.* at 332–33 (Douglas, J., dissenting) (footnote omitted).

31. A notable recent divergence from this trend is found in an Eleventh Circuit decision holding that Florida's suspicionless welfare drug testing violated the Fourth Amendment.

this lack of rights is mirrored in the policies Huntington describes. While those with class privilege are supported by the submerged state, those in poverty are subject to a hyperregulatory state.

But to talk of rights is not to talk solely of constitutional rights. As those who litigate on behalf of people in poverty well know, rights can be embedded in statutory and regulatory schemes. Vigorously protecting those rights can, in some circumstances, lead to strong autonomy-enhancing outcomes. While Huntington rejects vigorous rights protection in favor of problem-solving courts, in Section III.A I suggest that, rather than abandoning rights, a strategy of vigorous rights protection in public family-law cases meets the hyperregulatory state where it is and helps families get the support they need.

By itself, however, this proves an insufficient answer to Huntington's project. Justice Douglas's dissent reminds us that there is a profound inequality in the way we think about rights and support and that it is precisely these disparities—between the submerged and the hyperregulatory states—that can lead to programs that undermine poor families. In the face of these significant inequities, it is essential to formulate and press rights claims. In Section III.B, I build on the work of Roberts and Fineman and suggest that formulating and pressing these rights claims guards against piecemeal, conservative implementation of Huntington's project and lays the groundwork to dismantle parts of the hyperregulatory state.

A. *Rights Enforcement in Child-Welfare Proceedings*

While Huntington argues strongly for child-welfare interventions that would offer real support and affirm the autonomy of poor families, she occasionally underestimates both the reach of punitive state mechanisms and the vast power disparities at the heart of interactions between poor families and the state. Take, for example, family group conferencing. Huntington describes in detail the benefits of the strongest model of such conferencing (pp. 132–43). The ideal model vests substantial power for decisionmaking in the hands of communities and families. This power shift undoubtedly enhances the autonomy of the participating families. Like the Nurse Family Partnership, family group conferencing is strength based and family focused (p. 139). The problem, however, is that in the United States "it is often implemented in a modified fashion, not giving families and communities control over the process" (p. 135). In this sense, the autonomy and dignity-enhancing focuses drop out. Given the hyperregulatory nature of these systems in general, this is hardly surprising. In the American context, then, families in these collaborations are left to negotiate on their

Lebron v. Sec'y, Fla. Dep't of Children & Families, 710 F.3d 1202, 1218 (11th Cir. 2013). This decision echoed the reasoning of the earlier decision in *Marchwinski v. Howard*, 113 F. Supp. 2d 1134 (E.D. Mich. 2000), *rev'd*, 309 F.3d 330 (6th Cir. 2002), *vacated en banc*, 319 F.3d 258 (6th Cir. 2003), *aff'd by an equally divided court*, 60 F. App'x 601 (6th Cir. 2003).

own behalf with system actors who have the power to remove their children. Families in this context are therefore engaged in "collaborations" with fewer rights to protect them. Given the extraordinarily punitive nature of the child-welfare system, trading rights for the benefits of a collaboration in which the family wields little power and lacks the structural support of extended family and community raises serious concerns.

Problem-solving courts pose even more dangers. As Jane Spinak argues, these reforms risk both net widening and perpetuating disproportionate racial impact.[32] If services are located in courts, there is even more incentive to draw families into the system.[33] Huntington certainly understands this danger and argues that this is precisely why we need good services outside of courts. But she ultimately comes down on the side of taking this risk (p. 140). As I detail above, though, when interventions are directed at poor communities, we hyperregulate: we link support to punishment, and we structure these systems in a way that is highly coercive and that disproportionately harms poor families led by African American women.[34] When it comes to poor families in general and poor families of color in particular, we have a penchant for control and degradation. At the end of the day, judges are judges and therefore have at their disposal a fundamentally coercive toolbox. They order, and they punish parties for failing to comply with their orders. Exposing more and more poor families to these coercive settings and making participation in such settings the price of support invites more hyperregulation. To make matters worse, not only do problem-solving courts involve these considerable risks but tying such courts to abandoning rights leaves families even more vulnerable.

But it does not have to be that way. It turns out that vigorously protecting rights can further Huntington's aims. Today, in the best form of rights protection in child-welfare proceedings, clients are demanding precisely what Huntington seeks: the right both to receive autonomy-conferring support and, at the same time, the right to be protected against inappropriate state action. Endorsing this form of rights protection and rights claiming meets the system where it is and balances the power differential between poor families and the state. It can also ensure that families receive actual support.

To make this more concrete, consider the work of the Center for Family Representation ("CFR"), an organization founded in 2002.[35] CFR's mission sounds a lot like Huntington's: to keep families together.[36] But while

32. Jane M. Spinak, *A Conversation About Problem-Solving Courts: Take 2*, 10 U. MD. L.J. RACE RELIGION GENDER & CLASS 113, 131–32 (2010).

33. *Id.*

34. *See supra* Part II.

35. For a detailed discussion of CFR's work and model, see generally Martin Guggenheim & Susan Jacobs, *A New National Movement in Parent Representation*, CLEARINGHOUSE REV., May–June 2013, at 44, 45–46.

36. CENTER FOR FAM. REPRESENTATION, http://www.cfrny.org (last visited Aug. 23, 2014).

Huntington puts her faith in collaboration and problem solving, CFR focuses on vigorous, multidimensional rights advocacy. CFR has two contracts with New York City to represent over 1,000 new parents each year in child-protective cases in Queens and Manhattan Family Courts.[37] The organization's open caseload includes over 2,100 parents with more than 5,000 children.[38] Ninety-two percent of its clients are people of color.[39] And CFR's outcome data is impressive. While in 2012 the average stay in foster care in New York City was 6.8 months,[40] the average stay for a child whose parents were represented by CFR was 2.5 months.[41] Moreover, more than 50% of children in families represented by CFR never enter foster care at all.[42] These outcomes are admirable.[43]

CFR accomplishes these impressive results in large part through use of a three-person team that exemplifies an autonomy-enhancing form of rights protection. Each CFR client gets a lawyer, a social worker, and, whenever needed, a parent advocate.[44] The attorney represents the parent in court. The social worker "helps the client access stabilizing services, such as housing, employment training, drug treatment, and domestic violence counseling. Together with the lawyer, the social worker helps shape the formal services plan that is endorsed by the agency and the court."[45] Finally, the parent advocate is "a trained professional who has experienced the child welfare system and can empathize with the struggles vulnerable families face."[46] The advocate "provides emotional support and helps the client engage in services, ensuring follow through."[47]

37. Email from Susan L. Jacobs, Exec. Dir. & President, Ctr. for Family Representation, to Wendy A. Bach, Assoc. Professor of Law, Univ. of Tenn. Coll. of Law (Mar. 12, 2014, 5:12 PM) (on file with author).

38. *Id.*

39. *Our Families*, CENTER FOR FAM. REPRESENTATION, http://www.cfrny.org/our-families (last visited Aug. 23, 2014).

40. CITY OF NEW YORK, MAYOR'S MANAGEMENT REPORT 103 (2013), *available at* http://www.nyc.gov/html/ops/downloads/pdf/mmr2013/acs.pdf.

41. Guggenheim & Jacobs, *supra* note 35, at 46.

42. *Id.*

43. CFR argues, quite convincingly, that these reforms also save money in the long term. Take, for example, the savings from shortening the length of stay. In New York State, foster care costs on average $29,000 per year. N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVS., TEN FOR 2010, at 14 (2011), *available at* http://www.ocfs.state.ny.us/main/reports/vera_tenfor2010.pdf. By significantly shortening stays in foster care and keeping other kids out of care, CFR saves substantial public dollars. CFR has also calculated that since 2007 it has saved $223 million in combined city, state, and federal foster-care costs. Email from Susan L. Jacobs, *supra* note 37.

44. *Our Team Model*, CENTER FOR FAM. REPRESENTATION, http://www.cfrny.org/our-work/team-model (last visited Aug. 23, 2014); Email from Susan L. Jacobs, *supra* note 37.

45. Guggenheim & Jacobs, *supra* note 35, at 45.

46. *Our Team Model*, *supra* note 44.

47. *Id.*

Various forms of rights protection are inherent in this model. CFR's clients clearly have fundamental rights to family autonomy. In the face of claims of abuse or neglect that fail to meet constitutional and statutory standards, it is appropriate to move to dismiss, and CFR's lawyers strongly protect these rights. As Huntington notes, children exposed to foster care suffer from high rates of posttraumatic stress disorder, depression, social phobia, panic syndrome, and anxiety disorders (p. 94). Moreover, as Roberts extensively documents, virtually every foster-care effect is worse for African American children.[48] Given these extraordinary failures and dangers, this traditional form of rights protection is essential.

But what about the cases where the agency's intervention meets the constitutional and statutory standards for such an intervention? CFR's version of rights protection plays a crucial role here, insisting that the state actually provide the support the families need. Huntington is absolutely right that many of these families, like all families, need support. But in the vast majority of cases, the help offered "consists of little more than boilerplate plans" and is "largely ineffective" (p. 95). Vigorous on-the-ground statutory- and procedural-rights protection can address this fundamental problem. The federal Adoption and Safe Families Act provides that, in order to receive assistance, states must enact a plan that comports with federal requirements. In these plans, states must guarantee that they will, in all but the most egregious cases (for example, those involving murder), make "reasonable efforts . . . to preserve and reunify families."[49] Under this duty, "prior to the placement of a child in foster care, [the state must make reasonable efforts to] prevent or eliminate the need for removing the child from the child's home."[50] The Act also requires the state to make reasonable efforts to "make it possible for a child to safely return to the child's home."[51] In the vast majority of cases, parents are represented by overburdened, underpaid counsel who lack assistance from social workers and parent advocates. Huntington is right that a lawyer in that position has little chance of forcing the agency to move beyond boilerplate plans to do something that might actually help. With the involvement of a well-resourced defense team, however, the agency's duties to make reasonable efforts to prevent removal and ensure return can look different. Working as a team, parents, lawyers, social workers, and parent advocates can more effectively force the agency to craft a plan that responds to families' actual needs. In place of boilerplate plans, a multidisciplinary team's vigorous advocacy can help families actually get the assistance they need to care for their children. With the support of social workers and parent advocates, families can better identify the type of assistance that would actually help them. And the presence of lawyers in court who can point out the agency's failure to make reasonable

48. ROBERTS, *supra* note 19, at 13–14.

49. 42 U.S.C. § 671(a)(15)(B) (2012).

50. *Id.* § 671(a)(15)(B)(i).

51. *Id.* § 671(a)(15)(B)(ii).

efforts helps families by forcing the agency to provide more robust support. This kind of on-the-ground rights protection offers some glimmer of flourishing rights—both vigorous protection of the right to family integrity and a mechanism to demand the help that families need.

If we were fully to implement the best model of family group conferencing, the role of the team might at times shift to supporting family- and community-conceived solutions. But even in that context, parents would still benefit from the significant resources that the CFR model offers, resources that could help parents repair and build the strong positive families that Huntington seeks. CFR's model certainly protects rights in the traditional sense, but the model also demands appropriate support. In a world where poor children and families rarely see their rights protected or receive the support they need, CFR's expansive view of rights protection meets the system where it is and supports families.

B. *Family Flourishing and Theorizing Rights*

Although she does not explicitly acknowledge this, Huntington's project contains within it proposals that go to the heart of class, race, and gender privilege in America. Take, for example, the following sentence: "If the single mother had a job with decent wages that provided benefits such as sick leave, and if she also had access to guaranteed child support and a child allowance, then it would be somewhat easier to provide her children with strong, stable, positive relationships" (p. 98). In the course of this one sentence, Huntington attacks the wage structure and the lack of affordable child care and, in effect, argues for a universal child allowance. These are no small changes, and each one represents, to say the least, a substantial political challenge to the systems that maintain class, race, and gender privilege. Similarly, Huntington argues that we cannot achieve flourishing family law without reforming child-support policies that punish poor fathers (p. 104) and without addressing mass incarceration (p. 47). She also contends that funding schools through the local tax system fails to allow a family to flourish (pp. 38–39), an argument that challenges a key feature of the way in which the education system perpetuates class privilege. While Huntington distinguishes herself from both the Left and the Right, her proposals in fact represent a substantial and quite radical set of systemic challenges.

Similarly, by endorsing autonomy-enhancing support for poor families, Huntington challenges a long and devastating history of social-control mechanisms within poverty programs. The division between poverty programs and other forms of support stems at least from the New Deal,[52] and it was repeatedly reinforced and racialized in particular ways during and

52. *See* MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 238–39 (10th ed. 1996).

after the War on Poverty.[53] This history has produced a fundamental split in the mechanisms of social support. As I argue above, for those with privilege, we provide support in a form that enhances autonomy, but for the poor we link support to degradation and punishment. This bifurcation reinforces privilege both by providing largely invisible support to the economically privileged and by subordinating those in poverty. Challenging this bifurcation challenges privilege.

It would be easy, in light of these challenges, to pick and choose, to implement only those parts of Huntington's project that are less challenging. Consider just a few disturbing possibilities: Will we embrace problem-solving courts, with the attendant dangers of net widening and disproportionate racial impact? Or will we be open to investing in the vigorous rights protection that addresses the power imbalance between poor families and the state? Similarly, will we embrace family group conferencing in its less community-centered form while leaving in place the power disparities between poor families and the state? Will we actually dismantle the class privilege inherent in our bifurcated system of social support? Will we continue to offer a submerged form of substantial, autonomy-enhancing, rights-protecting assistance to privileged families while linking meager support for poor families to structures of subordination? Finally, and perhaps most crucially, will we move beyond focusing only on "fixing" poor families of color and tinkering around the edges of social-support and child-welfare systems? Or will we instead grapple with the tremendously difficult issues of unequal education, mass incarceration, and structural economic inequality that lie at the heart of many of the family struggles that Huntington details?

With the exception of advocating family group conferencing and problem-solving courts—issues on which we appear to differ—Huntington clearly does not seek these outcomes. Nevertheless, given the extraordinary challenge to those with privilege at the heart of her most aggressive proposals, all of these outcomes seem quite possible. A variety of theorists, among them Roberts and Fineman, have been framing the need for autonomy-enhancing support in rights terms. This framing acknowledges the great difficulty of achieving positive change in the face of structural subordination and begins to develop new language around which to organize rights claims. In striving to achieve some of her more ambitious goals, Huntington marshals policy arguments and data that certainly provide strong support. But they are not enough. When one challenges privilege, attacks subordination, and advocates for changes that would provide substantial assistance to those who lack significant political power, rights claims are essential.

53. *See* JILL QUADAGNO, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY (1994).

Roberts has written extensively about the devastation wrought upon poor African American families by the child-welfare system[54] as well as at the intersections of child-welfare, social-welfare, and criminal-justice systems.[55] In the face of this devastation, Roberts argues that poor women need a right to privacy that not only offers protection from incursion but also affirmative support.[56] While this call for dignity, autonomy, and support echoes the policy arguments in *Failure to Flourish*, Roberts explicitly invokes rights. As she frames the matter, "merely ensuring the individual's 'right to be let alone' . . . may be inadequate to protect the dignity and autonomy of the poor and oppressed."[57] Indeed, a better notion of privacy "includes not only the negative proscription against government coercion, but also the affirmative duty of government to protect the individual's personhood from degradation and to facilitate the processes of choice and self-determination."[58]

Although Roberts and Fineman differ in many respects, their work comes together on the issue of autonomy-enhancing support.[59] In a sweeping intervention in classic liberal theory, Fineman argues that, rather than imagining the traditional autonomous subject, we should think of the human subject as inherently vulnerable, inherently in need.[60] Although we may be more or less vulnerable at different moments in life, each of us has needs that we cannot meet alone. In Fineman's analysis, vulnerability theory is certainly—but not merely—descriptive. Instead, it forms the basis of a claim that state institutions must provide support:

> [C]onsideration of vulnerability brings societal institutions, in addition to the state and individual, into the discussion and under scrutiny . . . . The nature of human vulnerability forms the basis for a claim that the state must be more responsive to that vulnerability. It fulfills that responsibility primarily through the establishment and support of societal institutions.[61]

54. *See* ROBERTS, *supra* note 19.

55. *See* Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474 (2012).

56. *Id.* at 1495–96.

57. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1478 (1991).

58. *Id.* at 1479.

59. For a more detailed treatment of these issues that includes not only an extensive discussion of Fineman's theory but also of the important work of Maxine Eichner, see Bach, *supra* note 2.

60. *See* MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY (2004); Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 257 (2010) [hereinafter Fineman, *Responsive State*]; Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008).

61. Fineman, *Responsive State*, *supra* note 60, at 255–56.

For Fineman, this theory does substantial work. If the "primary objective [were] ensuring and enhancing a meaningful equality of opportunity and access, we may see a need for a more active and responsive state."[62] This envisioned state would not "simply protect citizens' individual rights from violation by others."[63] Instead, it would "actively support the expanded list of liberal goods by creating institutions that facilitate caretaking and human development."[64] Such a state would also move past constrained notions of formal equality toward a much more robust and substantive demand on state institutions to create the possibility for real equality. The "primary objective [would be] ensuring and enhancing a meaningful equality of opportunity."[65]

This talk of rights is admittedly ambitious, but it is also essential. It provides a basis for insisting not only that good programs receive funding and support but that we dismantle the hyperregulatory nature of much of today's social-welfare state. It demands rejecting the inequality at the heart of our bifurcated system of support. To understand this point, it is important to revisit Huntington's observation that a wide range of families receives support from the state. Families with class, race, and gender privilege receive extensive support from programs like child-care deductions, high-quality public schools, farm subsidies, and social security. As Justice Douglas noted in his dissent in *Wyman*, recipients of this support would balk at any notion that they could be forced to trade their constitutional rights for such assistance. But what is important here is that programs like tax deductions and high-quality public schools not only fail to interfere with traditional negative rights. Crucially, they begin to do for privileged families precisely what both Roberts and Fineman argue we must do for all families: they promote the exercise of autonomy by conferring support. Such programs also embody the exact form of relational autonomy that Huntington endorses. As she frames it, dependency understands "autonomy [as] the capacity for self-governance" (p. 152). In these programs for the privileged, support is not separate from autonomy. It facilitates the exercise of autonomy.

Of course, this could not be further from the truth for poverty programs. Poor women of color find themselves losing their children and their freedom at the intersections of the child-welfare and criminal-justice systems. As I detail above, health services come at enormous punitive risk, particularly for poor African American women. Schools in poor communities are far too often pipelines to prison. It is true that some programs resist these characterizations. Programs like the Nurse Family Partnership and the Teen Outreach Program, for example, are voluntary and nonpunitive. They offer support while respecting autonomy, and their support in fact enables

62. *Id.* at 260.

63. EICHNER, *supra* note 5, at 70.

64. *Id.*

65. Fineman, *Responsive State*, *supra* note 60, at 260.

families to exercise autonomy. But the size of these programs pales in comparison to the reach of the hyperregulatory state. As I argue elsewhere, the whole gamut of poverty-focused support (welfare, food stamps, public housing, public school, health care, and so forth) must be restructured to confer dignity and enhance autonomy.[66] Although it sounds far too glib to put it this way, we need only to transfer the rights-protective, autonomy-enhancing mechanisms of the submerged state into the programmatic designs of poverty-focused support. Rights claims of the sort that Roberts and Fineman envision, when combined with Huntington's strong policy arguments, might actually get us there.

CONCLUSION

Although this Review has focused primarily on the viability of Huntington's project for those in poverty, I want to return here to the idea of universal solutions. I have argued above that vigorous rights protection, combined with theorizing a right to autonomy-enhancing support, is more likely to result in family flourishing for poor families in general and poor African American families in particular. I have repeatedly referred to class and race divisions, and I have referred to the beneficiaries of the submerged state as privileged. But in conclusion I want to suggest that these divisions are not quite so stark. While families receiving benefits like social security and home-mortgage deductions are certainly privileged when compared to those in poverty, it is also true (as Huntington proves) that many of these families struggle. Although these families receive substantial support and receive it in a way that facilitates their dignity and exercise of autonomy, Huntington is certainly right that legal institutions could do a much better job at helping virtually all families flourish. For those families, too, rights confer dignity and facilitate the exercise of autonomy. And Huntington's own work, in fact, makes this clear.

Take, for example, her discussion of gay marriage. In Huntington's view, gay marriage should be embraced because it strengthens relationships, which in turn strengthen children. That is absolutely true. Entering the institution of marriage confers a plethora of structural and economic supports. But as Huntington so beautifully describes, it also provides more. It accords protection for the integrity of and decisions within that family, and it brings an intangible dignitary value. What we must remember, though, is that what is true for gay marriage is true for poverty as well. One of Huntington's most important contributions is revealing the many ways in which legal institutions accord support, protect against incursion, and confer dignity on some families. As should be clear from the discussion above, when we look carefully at the legal systems targeted at poor communities, these values could hardly be more absent. As we move forward to implement this very

66. *See* Bach, *supra* note 2.

important project, insisting that legal institutions accord these rights to families across lines of race, class, and gender opens the door to that audacious idea that all families have the right to flourish.