

2017

Family Policy After the Fragile Families and Relationship Dynamics Studies

Leslie J. Harris

Follow this and additional works at: <http://scholarship.law.umn.edu/lawineq>

Recommended Citation

Leslie J. Harris, *Family Policy After the Fragile Families and Relationship Dynamics Studies*, 35 LAW & INEQ. 223 (2017).
Available at: <http://scholarship.law.umn.edu/lawineq/vol35/iss2/5>

Law & Inequality: A Journal of Theory and Practice is published by the
University of Minnesota Libraries Publishing.

Family Policy After the Fragile Families and Relationship Dynamics Studies

Leslie Joan Harris[†]

If children are born to a married opposite-sex couple who remain married, they have a legal parent-child relationship with both of their biological parents.¹ However, less than half of all American children live in such families throughout their childhoods.² At some time, most American children will live in a different kind of family—with parents who are not married;³ with one parent after the dissolution of the parents' relationship;⁴ or with a parent who has a new partner, who may or may not be married to the parent.⁵ In these families, the children's legal

[†] Dorothy Kliks Fones Professor, University of Oregon School of Law. Thanks to June Carbone and Naomi Cahn for organizing the conference on Jennifer Barber's work and for commenting on an earlier draft, to the staff of *Law & Inequality: A Journal of Theory and Practice* for hosting the conference and working so hard on this issue, and to Professor Barber for her fascinating and important research.

1. In all states, the husband of a married woman is presumed to be the father of children born in the marriage. On application of the marital presumption to same-sex couples, see Leslie Joan Harris, Obergefell's *Ambiguous Impact on Legal Parentage*, CHI.-KENT L. REV. (forthcoming) (on file with author).

2. Today, less than half of American children younger than eighteen live in a home with both their parents who are married and in their first marriage. Gretchen Livingston, *Fewer than Half of U.S. Kids Today Live in a "Traditional" Family*, PEW RES. CTR. (Dec. 22, 2014), <http://www.pewresearch.org/fact-tank/2014/12/22/less-than-half-of-u-s-kids-today-live-in-a-traditional-family/>. In comparison, 61% lived with both legal parents married to each other in 1980, as did 73% in 1960. These figures include only opposite-sex couples. *Id.*

3. In 2014 about 40% of all births were to unmarried women, compared to 10% in 1970. Brady E. Hamilton et al., U.S. Dep't of Health and Human Servs., Ctr. for Disease Control and Prevention, *Births: Final Data for 2014*, 64(12) NAT'L VITAL STAT. REP. 2 (Dec. 23, 2015), https://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_12.pdf; Stephanie J. Ventura et al., U.S. Dep't of Health and Human Servs., Ctr. for Disease Control and Prevention, *Nonmarital Childbearing in the United States, 1940–99*, 48(16) NAT'L VITAL STAT. REP. 28, tbl.4 (Oct. 18, 2000), http://www.cdc.gov/nchs/data/nvsr/nvsr48/nvs48_16.pdf.

4. About half of the single parents heading family groups are divorced or separated from a spouse. Shawn Fremstad, *Partnered But Poor*, CTR. FOR AM. PROGRESS (Mar. 11, 2016), <https://cdn.americanprogress.org/wp-content/uploads/2016/03/10123038/PartneredButPoor.pdf>.

5. It is expected that at least half of all American children will live in a household headed by an unmarried couple at some point during their childhoods. Most of the time one of the adults will not be the child's biological parent. Sheela Kennedy & Larry Bumpass, *Cohabitation and Children's Living Arrangements:*

relationship to adults in the household—other than their birth mothers—who may function as their parents is often ambiguous or nonexistent.

The lack of legal structure for relationships between children and adults who care for them can generate questions about support duties, custody, and related rights.⁶ Further, children whose primary caregivers have unstable and changing relationships are likely to be disadvantaged in multiple ways compared to children whose parents' relationships are stable. These children are more likely to exhibit aggressive and anxious/depressive behavior,⁷ and to have lower cognitive scores and more health problems.⁸

In response to the changing patterns of American families and to concern about the wellbeing of children when parents' relationships are unstable, various federal and state laws and programs have been adopted and proposed. Most of the existing and proposed policies encourage children's biological parents to remain together to raise their children or at least to work closely together to raise the children after they break up.⁹ Two major longitudinal studies of families from before or at the time children were born provide support for such policies in some, but not all

New Estimates from the United States, 19 DEMOGRAPHIC RES. 1663, 1680–81, 1686 (2008), <http://www.demographic-research.org/volumes/vol19/47/19-47.pdf>. In most households headed by an unmarried couple, one of the adults, usually the man, is not the children's biological parent. *Id.* at 1685–86.

6. See LESLIE JOAN HARRIS & JUNE CARBONE, FAMILY LAW ch. 13 (5th ed. 2014).

7. Cynthia Osborne & Sara McLanahan, *Partnership Instability and Child Well-Being*, 69 J. MARRIAGE & FAM. 1065, 1076 (2007); see also Isabel V. Sawhill et al., *Pathways to the Middle Class: Balancing Personal and Public Responsibilities*, BROOKINGS INST. 13 (Sept. 20, 2012), <https://www.brookings.edu/wp-content/uploads/2016/06/0920-pathways-middle-class-sawhill-winship.pdf>.

8. Terry-Ann Craigie, et al., *Family Structure, Family Stability and Early Child Wellbeing* 4 (Nov. 2010) (unpublished paper), <http://crcw.princeton.edu/workingpapers/WP10-14-FF.pdf>. These effects occur regardless of the mother's relationship status when the child was born. Osborne & McLanahan, *supra* note 7, at 1065.

9. See, e.g., ALASKA STAT. ANN. §§ 25.20.060, 25.24.150(c) (West 2004) (listing “the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child” as a factor in determining custody); FLA. STAT. ANN. § 61.13(3)(a) (West 2016) (noting that the court will consider the “demonstrated capacity and disposition of each parent to facilitate and encourage a close and continuing parent-child relationship, to honor the time-sharing schedule, and to be reasonable when changes are required” when making custody decisions); LA. CHILD. CODE ANN. art. 134 (1994) (listing “[t]he willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party” as one of the factors used to determine custody over a child); MICH. COMP. LAWS ANN. § 722.23 (West 2016) (including a provision nearly identical to Louisiana's).

circumstances; instead of being one-size-fits-all, policies should allow for variation in relationships and be sensitive to the views of parents caring for children about what is best for their families.

Part I of this Article describes the major findings of these longitudinal studies. Part II examines some recent proposals that respond to the studies, arguing that the proposals may promote relationships that are unhealthy for the adults or children. Part III suggests policies that are more sensitive to the variability in families.

I. The Fragile Families and Relationship Dynamics Studies

The longitudinal studies of families at the center of this article are the Fragile Families and Child Wellbeing Study (Fragile Families) and the Relationship Dynamics and Social Life Study (Relationship Dynamics). Fragile Families is a group of studies based on data about the families of almost 5,000 children, three-quarters born to unmarried parents.¹⁰ Researchers interviewed the parents at birth, when the children were one, three, and five years old; researchers also conducted in-home assessments of the children when the children were three and five.¹¹ Relationship Dynamics gathered information every week for two-and-a-half years about the romantic relationships of a random sample of 880 eighteen- and nineteen-year-old women.¹² The two studies fit together well because the Fragile Families subjects entered the study at the birth of a child, while Relationship Dynamics began to study its subjects at an earlier stage, when they were just forming relationships, some of which led to pregnancies.

a. *The Fragile Families Findings*

Fragile Families data show that most young parents are committed to each other and to their child at birth and hope to

10. Sara McLanahan, *Fragile Families and the Reproduction of Poverty*, 621 AM. ACAD. POL. & SOC. SCI. 111, 113 (2009).

11. SARA McLANAHAN, ET AL., THE BENDHEIM-THOMAN CTR. FOR RES. ON CHILD WELLBEING, THE FRAGILE FAMILIES AND CHILD WELLBEING STUDY: BASELINE NATIONAL REPORT 2 (2013), <http://www.fragilefamilies.princeton.edu/sites/fragilefamilies/files/nationalreport.pdf>. The children in the study were born in seventy-five hospitals in twenty cities with populations of 200,000 or more in fifteen states; the results are generalizable to all U.S. cities of this size. McLanahan, *Fragile Families*, *supra* note 10, at 113–14.

12. Jennifer S. Barber et al., *The Relationship Context of Young Pregnancies*, 35 LAW & INEQ. 175 (2017).

create enduring families.¹³ However, these relationships are likely to fall apart within a few years, and the parents are likely to form new romantic relationships and have children with new partners.¹⁴ Although cooperative co-parenting after parents break up protects children from the adverse effects of this instability, parents vary significantly in their ability to work together to care for their children.

By one year after birth, 48% of the fathers in Fragile Families were living away from their children, as were 56% after three years and 63% after five years.¹⁵ Many parents who broke up quickly formed new partnerships and had children with new partners. Instability was greatest if the parents were not living together at a child's birth; of the parents who were not together at the five-year mark, all had at least one relationship transition, that is, ending or starting a new relationship; 16% experienced two transitions and 6% had three transitions.¹⁶ Between 25% and 30% of mothers who were not living with their children's fathers at birth had three or more transitions by the time their children were three years old.¹⁷ By the time the children were one, 14% of all the unmarried mothers in the study had another child. At the fifth year of the study, 20% of all unmarried mothers who were unmarried at birth had a child by a new partner.¹⁸ The study confirms prior findings about the effect that the stability of parents' relationships has on their children. Children whose custodial parents were in stable relationships had much better cognitive functioning, behavior, and overall health than those whose parents' relationships were unstable.¹⁹

13. McLanahan et al., *supra* note 11, at 3, 7–9.

14. Osborne & McLanahan, *supra* note 7, at 1074–75.

15. Marcia J. Carlson et al., *Coparenting and Nonresident Fathers' Involvement with Young Children After a Nonmarital Birth*, 45 DEMOGRAPHY 461 (2008). Of the 37% of the couples who were living together at five years, 30% were married and 7% had lived together continuously; 7% were continuously in touch. Lauren Rinelli McClain & Alfred DeMaris, *A Better Deal for Cohabiting Fathers? Union Status Differences in Father Involvement*, 11(2) FATHERING 199, 208 (2013). Cf. Kelly Musick & Katherine Micheltore, *Changes in the Stability of Marital and Cohabiting Unions Following the Birth of a Child*, 52 DEMOGRAPHY 1463, 1471–72 tbl.1 (2015) (analyzing data from the 2006–2010 National Survey of Family Growth and finding that half of all couples who were cohabiting at birth marry within the next five years and those who did not had great risk of breaking up).

16. See McClain & Demaris, *supra* note 15, at 208–10.

17. Osborne & McLanahan, *supra* note 7, at 1074–75.

18. Sara McLanahan & Audrey N. Beck, *Parental Relationships in Fragile Families*, 20 FUTURE OF CHILD. 17, 22 tbl.3 (2010).

19. See Osborne & McLanahan, *supra* note 7, at 1072–74, tbl.1, 1076, tbl.3; Craigie et al., *supra* note 8, at 4–5.

If the parents broke up, children benefited if the father and mother cooperated in raising them.²⁰ Fathers' nurturing co-parenting was associated with lower levels of children's behavioral problems and with higher levels of academic success.²¹ However, having a father come and go had a significantly harmful effect on the children's cognitive ability.²² In addition, the formation of stable relationships between men who are not biological fathers and children's mothers provided children some protection from cognitive and behavioral problems.²³

Patterns of co-parenting by parents who had broken up varied significantly, ranging from couples whose ability to work together was good to begin with and continued to be good, to those with poor relationships that did not improve. On average, the quality of co-parenting was moderate and declined over a six-year period.²⁴

Only a few factors were strongly related to the quality of co-parenting after parents broke up. Age, education, and employment were not good predictors. However, mothers' health was positively associated with the quality of co-parenting, and Black parents' co-parenting relationships were more likely to be high quality.²⁵ Parents entering new romantic relationships and having children with new partners predicted lower quality co-parenting.²⁶ Mothers beginning new relationships produced stress

20. See Jeong-Kyun Choi, *Nonresident Fathers' Parenting, Family Processes, and Children's Development in Urban, Poor, Single-Mother Families*, 84 SOC. SERV. REV. 655, 671 (2010); Craigie et al., *supra* note 8, at 6.

21. Choi, *supra* note 20, at 658.

22. Terry-Ann Craigie, *Effects of Paternal Presence and Family Instability on Child Cognitive Performance 2* (Ctr. for Res. on Child Wellbeing, Working Paper No. 2008-03-FF, 2008), ercw.princeton.edu/workingpapers/WP08-03-FF.pdf.

23. Sharon H. Bzostek, *Social Fathers and Child Well-Being*, 70 J. MARRIAGE & FAM. 950 (2008). *But see* Lawrence M. Berger & Sara S. McLanahan, *Child Wellbeing in Two-Parent Families: How Do Resources, Relationships, and Parenting Matter?* (Working Paper No. 11-13-FF, 2012), <http://ercw.princeton.edu/workingpapers/WP11-13-FF.pdf> (explaining that children raised in a home with both biological parents, who are married, tend to score higher in cognitive and behavioral screenings).

24. Julia S. Goldberg & Marcia J. Carlson, *Patterns and Predictors of Coparenting After Unmarried Parents Part*, 29 J. FAM. PSYCHOL. 416, 422 (2015). The length of time since the parents quit living together was strongly related to declines in father-child contact. Laura Tach, Ronald Mincy & Kathryn Edin, *Parenting as a "Package Deal": Relationships, Fertility, and Nonresident Father Involvement Among Unmarried Parents*, 47 DEMOGRAPHY 181, 181-82 (2010).

25. Goldberg & Carlson, *supra* note 24, at 423.

26. Marcia J. Carlson & Robin S. Högnäs, *Coparenting in Fragile Families: Understanding How Parents Work Together After a Nonmarital Birth 13-14* (Oct. 2010). (unpublished paper) http://www.ssc.wisc.edu/cde/unmarried-fathers/wp-content/uploads/2010/09/Carlson_Hognas_copar_Oct2010.pdf

and resulting poor parenting, which was associated with poorer co-parenting.²⁷ However, a mother having a child with a new partner was associated with higher quality co-parenting.²⁸ In contrast, fathers who had children with new partners were likely to have lower quality co-parenting relationships with the mothers of their prior children.²⁹ Researchers believe the reason for lower quality co-parenting relationships is that fathers may disengage from their nonresidential children to invest more in the new children with whom they live.³⁰ Finally, the quality of the parents' romantic relationship while they were together was a strong predictor of the quality of their later co-parenting.³¹

b. The Relationship Dynamics Findings

Relationship Dynamics followed a group of young women who were not pregnant at the beginning of the study, focusing on developments in their romantic relationships.³² The study allowed comparisons of the young women who did and did not become pregnant, their male partners, and the relationships that did and did not produce pregnancies.³³ The young women had few or no children at the beginning of study, which therefore captured information about first or very early pregnancies; these pregnancies have a disproportionate impact on the life courses of parents and all their children. The study found that while the relationships that led to pregnancy were usually long-lasting and serious, they were generally the most unstable and violent, raising serious doubts about the prospects of many of them for supporting children's healthy development.³⁴

Of the 880 women in the study, 183 became pregnant at least once, 14% reported two pregnancies, and 2% reported at least

27. Goldberg & Carlson, *supra* note 24, at 423–24. Mothers' transitions into new romantic partnerships and new parenting roles were associated with larger declines in fathers' involvement than were fathers' transitions, and the declines were largest when the children are young. *Id.* at 424; *see also* Kathryn Edin et al., *Claiming Fatherhood: Race and the Dynamics of Paternal Involvement Among Unmarried Men*, 621 ANNALS 149, 161 (2009) (showing that among Black parents, fathers' subsequent partnerships and parental roles were less associated with a decline in their involvement than were the mothers' new relationships).

28. Goldberg & Carlson, *supra* note 24, at 424.

29. *Id.*

30. *Id.*

31. *Id.* at 423; *see also* Carlson & Högnäs, *supra* note 26, at 8.

32. Jennifer Barber et al., *Participation in an Intensive Longitudinal Study with Weekly Web Surveys Over 2.5 Years*, 18 J. MED. INTERNET RES., no. 6 (2016).

33. Barber et al., *Relationship Context*, *supra* note 12, at 178.

34. *Id.* at 195.

three.³⁵ At the beginning of the study, the women who became pregnant—like almost all the women in the study—strongly desired to avoid pregnancy.³⁶ The study confirmed prior findings that young women who become pregnant were more disadvantaged than those who did not.³⁷ Women who became pregnant were more likely to have been raised in families without both parents present, more likely to have had a mother who became pregnant as a teenager and who had not finished high school, and more likely to have received public assistance.³⁸ Their own academic achievements and employment histories were not as good as those of the young women who did not become pregnant.³⁹

Among the unique contributions of the study is information about the men who impregnated their partners, compared to men who did not, and about the relationships that resulted in pregnancy, compared to those that did not. During the study period, the women reported having some kind of relationship, ranging from spending time together to being married, with 2,499 men.⁴⁰ Of these, 194 men impregnated a woman during the study at least once.⁴¹ The men who fathered a pregnancy were typically the women's oldest and least educated male partners and were more likely to have children from prior relationships.⁴² In other words, the men who impregnated women were generally more disadvantaged and had less promising life prospects than all the other men, including the other partners of the women who became pregnant and the partners of the women who did not become pregnant.⁴³

The relationships that resulted in pregnancy were relatively long-lasting, enduring on average almost two years,⁴⁴ and they

35. *Id.* at 186, tbl.1.

36. *Id.* at 195; see also Carl Kendall et al., *Understanding Pregnancy in a Population of Inner-City Women in New Orleans—Results of Qualitative Research*, 60 SOC. SCI. & MED. 297, 298 (2005) (stating that data suggests that poor and young women “are at higher risk of unintended pregnancy, in comparison to general U.S. population” and almost 70% of births to women receiving Medicaid to pay for pregnancy expenses were unintended, compared to 31% of births to women who paid by other means).

37. Barber et al., *Relationship Context*, *supra* note 12, at 186.

38. *Id.* at 175.

39. *Id.* at 186, tbl.1.

40. *Id.* at 185–86, tbl.3.

41. *Id.* at 177, 189.

42. *Id.* at 187.

43. *Id.* at tbl.2.

44. *Id.* at 189, tbl.3. This description conflicts with the finding of Edin and Nelson's ethnographic study that pregnancy often occurs in relationships that have not existed for very long, began casually, and became more serious only as a

were more serious, i.e. they were intended to be monogamous and were more likely to include cohabitation,⁴⁵ but they were typically not high quality. The relationships resulting in pregnancy were more stable than relationships in general, but they were quite unstable in absolute terms. In 60% of pregnancy relationships, the couple broke up at least once, and only 21% got back together.⁴⁶ In comparison, 83% of relationships that did not result in pregnancy relationships broke up, and 4% got back together.⁴⁷ The pregnancy relationships also involved more infidelity than other relationships: in 27%, one of the partners had sex with someone else, compared to 20% of the non-pregnancy relationships.⁴⁸ The pregnancy relationships were the most violent of all: three-fourths involved fighting, which was more than twice the proportion in all relationships.⁴⁹ The pregnancy relationships involved more than twice as much disrespect, more than three times as many threats, and four times as many physical assaults as non-pregnancy relationships.⁵⁰ Young women were more likely to become pregnant at the time when the relationship was most violent.⁵¹ The Relationship Dynamics researchers conclude that the reasons include more frequent sexual intercourse during violent periods (rape or “make-up sex”), poor communication resulting in inability to cooperate in using contraception, and women’s compliance with their partners’ demands in the hope of mitigating the violence.⁵² In sum, the relationships that resulted in pregnancy were, on average, the

response to pregnancy. KATHRYN EDIN & TIMOTHY J. NELSON, *DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY* 203 (2013). Barber proposes that the difference between her findings and those of Edin and Nelson may result from differences in how information was gathered. The relationships in her studies are described at the time pregnancy occurs, based on interviews with the young women. The Edin and Nelson description came from interviews with fathers after the fact, often years later, and were filtered through subsequent experiences of the relationships and influenced by the men’s need to explain why the relationships did not survive.

45. Barber et al., *Relationship Context*, *supra* note 12, at 189, tbl.3.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* The women who became pregnant were not generally in more violent relationships; their relationships that did not result in pregnancy were less violent than pregnancy relationships.

51. Jennifer S. Barber et al., U. of Mich., Population Stud. Ctr., *The Dynamics of Intimate Partner Violence and the Risk of Pregnancy During the Transition to Adulthood* 26 (2016) (unpublished paper) (on file with author).

52. *Id.* at 26–27.

worst of all the relationships in terms of stability, fidelity, and violence.

Relationship Dynamics confirmed the Fragile Families finding that couples who become parents tend not to stay together.⁵³ Almost half of the couples in the study broke up after the pregnancy, with only twenty-eight percent getting back together.⁵⁴ Violence and men's infidelity generally increased after the pregnancy.⁵⁵

Commenting on why the poorest relationships tended to result in pregnancies, Professor Barber observed that the young women who became pregnant might have been at greater risk of having low-quality relationships and partners, regardless of whether they became pregnant because of their own disadvantage, which makes them relatively less attractive as partners.⁵⁶ During a workshop centered on her work, Professor Barber added that the women who became pregnant valued motherhood highly and recognized the limitations of their partners, but nevertheless hoped that the relationships would work out and wanted to hold on to their partners.⁵⁷ Often the couple's communication was poor, and women had unprotected sex because they thought their partners were more committed than they turned out to be or because they were coerced into doing so.⁵⁸

II. Policy Responses Emphasizing Parental Cooperation

Until fairly recently, law and policy did not focus much on the kind of families that are the subject of the Fragile Families and Relationship Dynamics studies other than to try to collect child support from absent fathers when mothers receive public assistance.⁵⁹ However, federal policy and recent academic

53. Barber et al., *Relationship Context*, *supra* note 12, at 189, tbl.3.

54. *Id.*

55. *Id.*

56. *Id.* at 195.

57. Jennifer S. Barber, U. of Mich., Presentation of Study Results, Methodology at the *Law & Inequality: A Journal of Theory and Practice* & the Washington Center for Equitable Growth Workshop: The Family-Inequality Debate: A Workshop on Coercion, Class, and Paternal Participation (Nov 17, 2016).

58. *Id.*

59. Since the mid-1970s, the federal-state child support enforcement program has increasingly ramped up efforts to identify children's legal fathers and then to establish and collect child support orders from absent fathers. Leslie Joan Harris, *Questioning Child Support Enforcement Policy for Poor Families*, 45 *FAM. L. Q.* 157, 161 (2011). Aspects of the child support system denigrate the value of fathers and undermine whatever positive relationships might exist between custody mothers and absent fathers. See *id.*; Solangel Maldonado, *Deadbeat or Deadbroke*:

proposals have recognized that children raised in many of these families are relatively disadvantaged and have sought to make changes that will improve children's prospects.⁶⁰ The programs are based on the assumption that it is best for children if their parents cooperate to raise them, preferably by staying together.⁶¹ This assumption is consistent with two prominent themes from *Fragile Families* and earlier studies: that children born to married couples generally do better cognitively and behaviorally than children born to unmarried couples,⁶² and that if parents break up after a child's birth, children do better if their fathers remain in contact with them and actively participate in raising them.⁶³ However, these programs and proposals fail to account for a critical qualifier to these findings: that the ability of parents to cooperate, together or after they have broken up, depends greatly on the quality of their relationship prior to the pregnancy.

During the early 2000s, the federal government launched a major policy initiative—the Healthy Marriage Initiative—to promote marriage to solve poverty and childhood disadvantage.⁶⁴ This program has been judged to be ineffective at best, because people did not respond to the incentives to marry, and the evidence did not show that marriage in itself was the key to improving children's chances.⁶⁵ Instead, differences in parents'

Redefining Child Support for Poor Fathers, 39 U.C. DAVIS L. REV. 991 (2006); Daniel L. Hatcher, *Forgotten Fathers*, 93 B.U. L. REV. 897 (2013). Ironically, this problem has abated over the last twenty years because the 1990s welfare reforms have resulted in a decline in the number of families receiving Temporary Assistance for Needy Families by almost 75%. Usually poor custodial parents who do not receive assistance do not voluntarily sign up for it; as a result, the number of child support cases coming into the system has dropped by 13% since 1994. Daniel Schroeder, *The Limited Reach of the Child Support Enforcement System*, AM. ENTERPRISE INST. 7–8 (2016), <https://www.aei.org/wp-content/uploads/2016/12/The-Limited-Reach-of-the-Child-Support-Enforcement-System.pdf>. The percentage of custodial parents who voluntarily contacted the child support enforcement program for any kind of child support assistance declined from 42% in 1994 to 22% in 2014. The belief that the noncustodial parent cannot afford to pay accounted for at least two-thirds of the reductions. *Id.* at 12. Generally, policies fail to recognize these informal families. See Fremstad, *supra* note 4.

60. See *supra* note 59 and accompanying text.

61. See *id.*

62. See Osborne & McLanahan, *supra* note 7, at 1072–74, tbl.1, 1076, tbl.3.

63. See *supra* notes 20–23 and accompanying text.

64. Archives, ADMIN. FOR CHILDREN & FAMILIES ARCHIVES, U.S. DEP'T OF HEALTH & HUM. SERVS., <https://www.acf.hhs.gov/ofa/resource/healthy-marriage-initiative-archive> (last visited Apr. 20, 2017) (providing archives of program documents, including modifications by the Obama administration).

65. See John R. Schuerman & Barbara Needell, *The Child and Family Services Review Composite Scores: A Critique Method*, CHAPIN HALL U. OF CHI. (Dec. 2009), https://www.chapinhall.org/sites/default/files/Final%20Issue_Brief_12_15_09.pdf.

personal characteristics and economic situations and in their relationships were far more important.⁶⁶

More recently academics have proposed that the law should extend the norm of shared custody from divorcing couples⁶⁷ to unmarried couples who break up. A leading proponent of this view is Professor Clare Huntington, whose work is based on the foundational principle that children need strong, positive relationships with both parents to thrive, and that the law should attempt to change circumstances when parents cannot provide these relationships.⁶⁸

While Professor Huntington proposes many steps to achieve this goal, for the purposes of this Article, the important proposals are changes in the law of parental rights and responsibilities. These proposals respond to the perceived bad consequences for children if fathers do not remain involved in their children's lives

66. See generally ISABEL V. SAWHILL, *GENERATION UNBOUND: DRIFTING INTO SEX AND PARENTHOOD WITHOUT MARRIAGE* (2014) (discussing the difficulty in crafting social policy that addresses the issues facing fragmented families); ANDREW J. CHERLIN, *LABOR'S LOVE LOST: THE RISE AND FALL OF THE WORKING CLASS FAMILY IN AMERICA* 177–95 (2014) (detailing the unique problems low-income families face in terms of economics growth, institutional challenges, and labor market intervention). For an international perspective, see Claire Crawford et al., *Cohabitation, Marriage and Child Outcomes: An Empirical Analysis of the Relationship Between Marital Status and Child Outcomes in the UK Using the Millennium Cohort Study*, 24 *CHILD & FAM. L. Q.* 176, 195–96 (2012) (detailing a study conducted in England and Wales that found little evidence that differences in the cognitive and socio-emotional wellbeing of children born to married and cohabiting couples were caused by the parents' marital status, ethnicity, education, socio-economic status, couples' relationship stability, and quality of relationships accounted for differences).

67. See June Carbone & Naomi Cahn, *Nonmarriage*, 76 *MD. L. REV.* 55, 89 (2016).

68. See Clare Huntington, *FAILURE TO FLOURISH* ch. 2 (2015) (hereinafter *FAILURE TO FLOURISH*); Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 *STAN. L. REV.* 167 (2015) (hereinafter Huntington, *Postmarital Family Law*); Clare Huntington, *Family Law and Nonmarital Families*, 53 *FAM. CT. REV.* 233 (2015) (hereinafter Huntington, *Family Law and Nonmarital Families*). Huntington identifies many problems, including family instability, domestic violence, poverty, and unemployment. The most complete statement of her program includes governmental programs to promote development of physical environments that make it easier for families to do their daily activities, leaving them more time together, *FAILURE TO FLOURISH*, at 149–51; providing access to effective birth control, economic opportunities, and sex education to decrease unintended pregnancy, *id.* at 160; preparing people for parenthood, *id.* at 161; providing good quality early childhood education, *id.*; and rebuilding the middle class and eliminating poverty, *id.* at 162. She also advocated legal protection for a broader range of families. *Id.* at 167–72. Note, however, that the book was published before *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015) held that same-sex marriage is constitutionally protected.

after they break up with the mothers.⁶⁹ While acknowledging that fathers' connections to children often break down because of the fathers' violence and substance abuse, she depicts most fathers as basically good guys and lays most of the problem on mothers shutting out fathers because the fathers weren't contributing enough, or to avoid complications when the mothers found new partners.⁷⁰ To solve the problem, Professor Huntington recommends that the law designate unmarried, former parents as "co-parents," a status that could not be ended until the child turned eighteen.⁷¹ The purposes would be to recognize the importance of the relationship of both parents to the child's wellbeing and their obligation to work together to raise children and to eliminate mothers' ability to act as gatekeepers.⁷² Huntington proposes that unmarried parents have joint custody from birth (unless the mother establishes domestic violence), including a background rule that the child spends equal time with both parents, although she recognizes that this would not be the actual arrangement for many unmarried couples.⁷³

The clear problem with this proposal is that it presupposes most relationships between unmarried couples are healthy enough to expect parents to cooperate, an assumption inconsistent with the results of the Relationship Dynamics Study, which found most of the relationships that resulted in pregnancies were violent.⁷⁴ Although Professor Huntington recognizes the risk of domestic violence and says that expectations of cooperation would not apply if domestic violence were proven, the difficulties that women have in establishing domestic violence exceptions in other situations⁷⁵

69. This proposal responds to the Fragile Families studies and the ethnographic studies of poor mothers and fathers by Kathryn Edin and her collaborators. Huntington, *Postmarital Family Law*, *supra* note 68, at 186–202. The Edin work is PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE (2005).

70. FAILURE TO FLOURISH, *supra* note 68, at 41, 190–92; Huntington, *Postmarital Family Law*, *supra* note 68.

71. Huntington, *Postmarital Family Law*, *supra* note 68, at 226.

72. *Id.*; see also Huntington, *Family Law and Nonmarital Families*, *supra* note 68, at 239. Another proposal along these lines, but that goes much further is MERLE H. WEINER, A PARENT-PARTNER STATUS FOR AMERICAN LAW 201–04 (2015).

73. Huntington, *Postmarital Family Law*, *supra* note 68, 227–29; Huntington, *Family Law and Nonmarital Families*, *supra* note 68, at 239.

74. For criticism of position generally, see Carbone & Cahn, *supra* note 67, at 74–79.

75. *E.g.*, Zoe Garvin, *The Unintended Consequences of Rebuttable Presumptions to Determine Child Custody in Domestic Violence Cases*, 50 FAM. L. Q. 173, 174 (2016); Margaret F. Brinig et al., *Perspectives on Joint Custody Presumptions as Applied to Domestic Violence Cases*, 52 FAM. CT. REV. 271, 271 (2014); OFFICE OF

raise real concerns about whether the exception would be successfully implemented. In addition, establishing the exception would apparently require proof in a formal setting, such as a court—a major procedural barrier for the young, poor women described in the studies.⁷⁶ Further, most of the relationships in the Relationships Dynamics Study that resulted in pregnancies were characterized by instability and cheating, offering little hope that the parents would be able to cooperate in their children's interests after they broke up.

The usual rule that only the mother of a nonmarital child has custody, placing the burden on fathers to go to court to establish access,⁷⁷ does, as a practical matter, allow many mothers to decide whether the fathers of their children will have a relationship with them or not. While on its face, this arrangement can be criticized as unfairly sexist, that criticism focuses on adult interests. The principal concern in choosing custody rules should not be adult interests, but advancing the interests of as many children as possible. As Relationship Dynamics shows, most of the relationships that produced children but ended with the parents' break-up were not ones where the adults were likely to cooperate, and many were bad enough that requiring the parents to have contact would only expose children to more conflict and instability. Both contraindicate a presumption favoring joint legal or physical custody and support a primary caregiver preference.

III. Some Modest (and Really Ambitious) Proposals

While the law should not start with the assumption that all unmarried parents who break up are suited for cooperative co-parenting, some of these parents are able to work together, and their efforts should be supported and encouraged, a proposition that is now widely accepted. Beyond that, what can be done? I suggest, first, measures to make it more likely that unmarried parents will have the kind of relationship that fosters cooperative parenting, and second, steps to improve the lives of children whose parents do not stay together and do not cooperate well to raise them.

INSPECTOR GEN., U.S. DEPT OF HEALTH & HUMAN SERVS., OEI-06-98-00043, CLIENT COOPERATION WITH CHILD SUPPORT ENFORCEMENT: USE OF GOOD CAUSE EXCEPTIONS 2 (Mar. 2000), <http://oig.hhs.gov/oei/reports/oei-06-98-00043.pdf> (“States report receiving very few requests for exceptions and granting even fewer.”).

76. See Huntington, *Postmarital Family Law*, *supra* note 68, at 209.

77. See *id.* at 203–05.

a. Increasing Chances that Parents Will Have Stable Living Situations

The best way to improve the likelihood that parents will develop stable, supportive relationships is probably to improve the parents' own life circumstances by attacking poverty, unemployment, over-incarceration, and other social ills.⁷⁸ Until these problems are solved, though, what else can be done?

As many commentators have recognized, a significant reason that so many young, unmarried parents break up despite their hopeful beginnings is that they have children while they are still immature, and with partners with whom they have not developed enduring commitments.⁷⁹ The virtually universal recommendation is to encourage young women to wait to have children until they are older and find partners to whom they can commit.⁸⁰ A specific recommendation is to make safe and effective contraceptives that do not require daily use and that are not subject to sabotage.

The Relationship Dynamics Study supports these recommendations, especially regarding contraceptive access. In the Study, most of the relationships that resulted in pregnancies were unstable, and prior research shows that in such relationships, use of less effective contraceptive methods is more likely, as is men's desire for pregnancy to demonstrate masculinity.⁸¹ Most of these relationships were also violent, and prior research shows that pregnancy may be more common in violent relationships because of more frequent sex resulting from rape, male assertion of control, women using sex as a tool to placate partners, or poor communication between the partners around contraception.⁸²

However, as Professor Barber says, Relationship Dynamics also raises the question of whether the women who became

78. For example, research has shown that wealth plays an important role in shaping couples' stability, whether they are married or not; owning assets of any kind is associated with increased relationship stability, unsecured debts are associated with instability, and secured debts, such as mortgages, are associated with increased stability. See Alicia Eads & Laura Tach, *Wealth and Inequality in the Stability of Romantic Relationships*, 2(6) RSF: THE RUSSELL SAGE FOUND. J. SOC. SCI. 197, 211 (2016).

79. E.g. McLanahan, *supra* note 10, at 128; SAWHILL, *supra* note 66. Others who take this view are too numerous to cite.

80. See McLanahan, *supra* note 10, at 128.

81. Barber et al., *Relationship Context*, *supra* note 12, at 182; see also Alan Dolan & Christopher Coe, *Men, Masculine Identities and Childbirth*, 33(7) SOC. OF HEALTH & ILLNESS 1019, 1023 (2011).

82. Barber et al., *Relationship Context*, *supra* note 12, at 191.

pregnant in the Study will ever have the stable relationships that ideally precede childbearing.⁸³ There is some evidence that their romantic relationships will generally always be of lower quality than those of their peers, whether or not they become pregnant.⁸⁴ Nevertheless, even though many of these young women may never find stable, supportive life partners, it makes sense to help and encourage them to delay childbearing until they are more mature and more prepared to make choices that will protect their children.

b. Supporting Disadvantaged Children and Families

Even if the efforts discussed above are eventually successful, in the near to medium term, thousands of children will still be born to unmarried mothers who have unstable and complex relationships that put their children at risk of cognitive and behavioral problems.⁸⁵ Therefore, social supports for these children and their parents that help offset this disadvantage are essential. Besides financial and medical assistance, these supports should include good quality preschools.

Studies consistently show that high-quality early childhood education programs can improve the social, cognitive, and academic development of socially disadvantaged children.⁸⁶ The effects of early childhood programs persist; children who were in good programs have better outcomes in high school, higher rates of employment, and less criminal involvement.⁸⁷ Despite the uncontested value of high-quality preschools, in 2013 only 42% of children eligible for Headstart and 4% of infants and very young children eligible for Early Headstart were served.⁸⁸ In 2015, the Federal Department of Education reported that 60% of four-year-

83. *Id.* at 195–96.

84. *Id.* at 195.

85. *Id.* at 180.

86. Deborah Lowe Vandell et al., *Do Effects of Early Child Care Extend to Age 15 Years? Results from the NICHD Study of Early Child Care and Youth Development*, 81(3) CHILD DEV. 737, 738 (2010) (citing studies); American Academy of Pediatrics, Comm. on Early Childhood, Adoption, and Dependent Care, *Policy Statement: Quality Early Education and Child Care from Birth to Kindergarten*, 115(1) PEDIATRICS 187, 187–88 (2005), <http://pediatrics.aappublications.org/content/115/1/187>.

87. Vandell et al., *supra* note 86, at 81.

88. STEPHANIE SCHMIT ET. AL., CTR. ON LAW & SOC. POLICY & NAT'L CTR. FOR CHILD. IN POVERTY, INVESTING IN YOUNG CHILDREN: A FACT SHEET ON EARLY CARE AND EDUCATION PARTICIPATION, ACCESS AND QUALITY 6 (Nov. 2013), <http://www.clasp.org/resources-and-publications/publication-1/Investing-in-Young-Children.pdf>.

olds were not enrolled in a Headstart or a preschool funded by a state or other public program, with the percentage of children *not* in publicly-funded preschool ranging from 88% in New Hampshire, 87% in Hawaii and Idaho, to 11% in Florida, and none in the District of Columbia.⁸⁹ Although the states and Congress have increased funding for preschools in this century,⁹⁰ much more remains to be done.

Conclusion: Taking the Results of the Fragile Families and Relationship Dynamics Studies Seriously

Fragile Families has provided important and sometimes surprising information about families, especially those formed by young, poor, less educated, and unmarried parents. The findings of Relationship Dynamics caution us to look clearly at the relationships of many of these young parents. We should not expect all or even most of them to function like middle-class parents who not only have more personal and economic resources, but also well-developed relationships that give them a solid base for co-parenting (remembering too that many of these parents do not work well together despite their advantages). Together, these studies call for law and policies that respond to the actual circumstances of the parents, build on their strengths, and shore up their weaknesses, for the sake of the parents themselves as well as for their children and society.

89. U.S. DEPT. OF EDUC., A MATTER OF EQUITY: PRESCHOOL IN AMERICA 2–3 (Apr. 2015), <http://www2.ed.gov/documents/early-learning/matter-equity-preschool-america.pdf>.

90. *Id.* at 5–6.