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Book Review: Casting Off the Canon: Family Law Reimagined

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BOOK REVIEW: CASTING OFF THE CANON: *FAMILY LAW REIMAGINED*,

JILL ELAINE HASDAY (Harvard University Press, 2014)

Laurie S. Kohn*

INTRODUCTION

The contours of marriage and family have shifted dramatically in the past several decades. Recent family law scholarship has analyzed how the law will accommodate the changing forms of marriage, parenthood, and family.¹ To consider how the family law canon will react to such societal changes affecting marriage and the family, one must have a distinct vision of the canon in the first place. Jill Hasday's² new book, entitled *Family Law Reimagined*, offers a clear-eyed vision of what family law is, what it is not, and where it might be headed. Hasday considers family law's canon—the set of principles by which we have come to characterize family law—and then debunks the canon by methodically setting forth each notion and illustrating its inaccuracies or limitations. In doing so, Hasday urges the reader to clear the noise of the canon and to see the law in all its messy inconsistencies and shortcomings.

The central mission of this book—debunking the traditional family law narrative—is an enormously valuable one. As Hasday explains,

* Associate Professor of Clinical Law, George Washington University Law School. I want to thank Jill Hasday for writing this important and thought-provoking book, as well as the organizers of the 2015 Law and Society Conference in Minneapolis, who gave me the opportunity to comment on the book. I am also grateful for the able research assistance of Krystal McKay and Olajumoke Obayanju.

¹ See, e.g., JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* (Oxford University Press 2014); CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* (Oxford University Press 2014); HERBIE DIFONZO & RUTH STERN, *INTIMATE ASSOCIATIONS: THE LAW AND CULTURE OF AMERICAN FAMILIES* (The University of Michigan Press 2013).

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reliance on the canon keeps us from clearly understanding the realities and shortcomings of the law as it stands. Adherence to the canons encourages lazy, superficial, and anti-progressive thinking—as she explains, it “misdirects attention away from the actual problems that family law confronts, and misshapes the policies that courts, legislatures, and advocates pursue.”³ She illustrates that the exceptions often swallow what are believed to be the family law accepted norms. Until we can sharply see and understand family law, we cannot effectively respond to the changes in today’s society, according to Hasday. Considering family law from a more authentic and nuanced place will allow us to implement more effective law and policy.

Hasday’s exhortation to debunk conventional wisdom is an irresistible invitation and a perfect place to start the book. She beautifully illustrates the allure of debunking the traditional notions of family law. Hasday does so by first surfacing the pervasiveness of legislatures’ and courts’ rhetorical adherence to this canon and then by elucidating the ubiquity of the exceptions to the canon.⁴ Who does not want to debunk conventional wisdom? Hasday does it so deftly that I found myself considering what else I could debunk. In fact, the fun she has seems to have debunking the canon inspired me to consider suggesting she draft subsequent volumes on other areas of the law. *Contract Law Reimagined; Property Law Rethought; International Law Revisited; Constitutional Law Recast* and so on. The intellectual allure of marshaling a coherent vision of a traditional canon and then debunking it comes through clearly and intriguingly in this book.

Accordingly, this Book Review celebrates Hasday’s deft deconstruction of the canon, and then builds on her notions of recasting the canon. This Review notes both where the book guides us in effective directions and where it suggests responses that might be excessively destabilizing and in need of further consideration as we move forward in the endeavor of adapting family law to the changed and changing realities of marriage and family. Hasday’s book is divided roughly into thirds, with the first two thirds setting forth and then debunking the canon. The last third addresses what is missing from the family law canon, and then concludes with proposals about how to recast it. This Review proceeds in two parts. Part I offers an overview of Hasday’s book. Part II considers Hasday’s prescriptions and offers additional notions of how to adapt family law to the realities of today’s families as we move forward.

³ Jill Hasday, *FAMILY LAW REIMAGINED* 3 (Harvard University Press 2014).

⁴ *Id.* at 15-158.

I. THE CANON AND ITS SHORTCOMINGS

First, Hasday presents and debunks what she identifies as a central principle of the family law canon—family law exceptionalism. It is conventional wisdom that family law is exceptional—different from other legal doctrines—in that it is locally derived, implemented, and enforced. She notes that this localism is sacrosanct and an enduring refrain in case law.⁵ Indeed, it is considered self-evident that family law is the province of the states and not the federal government.⁶

After convincingly illustrating the rhetorical adherence to this principle, Hasday tears it down—using methodology she uses throughout the first two thirds of the book—demonstrating by example after example that the exceptions to this principle are so ubiquitous as to negate the principle. For example, she lists and describes scores of federal decisions and statutes regulating families including a long line of Supreme Court cases delineating the right to marry and the parameters of divorce;⁷ the division of property in the creation of federal common law that preempts state law;⁸ and evidentiary privileges related to marriage.⁹ Hasday also sets forth pages of federal statutes that regulate issues integrally related to the family including immigration,¹⁰ citizenship¹¹ and tax and employment.¹² Hasday compellingly demonstrates the way diffuse federal law intimately affects the family.¹³ She also illustrates that by delinking our commitment to the narrative of family law as local, we can consider if federal family law occasionally would be preferable.¹⁴ In addition, she determines that, at times, it is.

Hasday also seeks to debunk the myth of family law exceptionalism that is situated in the perception of family law as separate from the market. She argues that the canonical narrative of family law as insulated from economic exchange principles is descriptively inaccurate, and that it instigates a misdirected debate amongst scholars and judges about whether courts should consider enforcing economic exchanges between family members.¹⁵ According to Hasday, the argument is off-base

⁵ *Id.* at 17.

⁶ *See, e.g.,* *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (describing “regulation of domestic relation [as] an area that has long been regarded as a virtually exclusive province of the States.”).

⁷ Hasday, *supra* note 3, at 40-41.

⁸ Hasday, *supra* note 3, at 44.

⁹ Hasday, *supra* note 3, at 44-45.

¹⁰ Hasday, *supra* note 3, at 46-49.

¹¹ Hasday, *supra* note 3, at 49-50.

¹² Hasday, *supra* note 3, at 53-57.

¹³ Hasday, *supra* note 3, at 39-59.

¹⁴ Hasday, *supra* note 3, at 60-61.

¹⁵ Hasday, *supra* note 3, at 67.

because the often-invoked legal principle of family law as separate from the market is a principle with more exceptions than examples of application.¹⁶ Hasday highlights the surviving examples of the law's commitment to keeping the market and the family separate by reference to examples of the prohibition on inter-spousal contracts for domestic services and its refusal to consider human capital as property to be divided at divorce. She then deftly surfaces contradictions of this principle—the myriad examples of the legal system's enforcement of economic exchanges within the family.¹⁷ Enforcement of pre and postnuptial agreements of contracts for services between adult family members, and the imposition of child support and spousal support obligations all comprise Hasday's convincing illustrations of the reality of law's widespread approval of economic exchange within the family structure.¹⁸ Hasday argues that the myth of family law as separate from the market obscures the critical normative issue of how the legal system should regulate economic exchange within the family.¹⁹ As such, it allows the state to do so without extensive commentary, in a way that systematically disadvantages women and the poor.²⁰

In her methodical analysis of the family law canon, Hasday next turns to a skeptical eye toward the canon's progress narratives—supposed themes that portray family law as evolving toward justice and equality. She looks first at narratives relating to adults, and then to children. As with the prior narratives, Hasday begins by documenting the existence and salience of the canon's family law progress narrative, which touts the development of family law as one of rapid, dramatic changes, and of abdication of policies that perpetuate subordination. While she admits that the story of family law's evolution has been one with a fair amount of progress, she argues that the progress narrative overstates the case and obscures a reality that is less dramatic than the narrative suggests.²¹ Further, she asserts it is one that continues to perpetuate certain injustices.²² A narrative of progress, she asserts, can allow courts, advocates, and policy makers alike to rest on their laurels and to cease to seek further reform.²³

Hasday then provides rich examples that contradict the progress myth, focusing first on coverture. She sets forth a fulsome discussion of

¹⁶ Hasday, *supra* note 3, at 68-86.

¹⁷ Hasday, *supra* note 3, at 75-86.

¹⁸ Hasday, *supra* note 3, at 75-86.

¹⁹ Hasday, *supra* note 3, at 86.

²⁰ Hasday, *supra* note 3, at 86.

²¹ Hasday, *supra* note 3, at 97-98.

²² Hasday, *supra* note 3, at 98.

²³ Hasday, *supra* note 3, at 132.

the supposed demise of the coverture doctrine and a fascinating analysis of how reliance on its demise has justified the implementation of laws, policies, and judicial decisions that subordinate and disadvantage women. Further, she argues that coverture—through formally eradicated from the law—continues to shape the contours of family law.²⁴

This part of the book closes as Hasday debunks the progress narrative that parental prerogatives no longer trump children's interests. Although acknowledging the partial truth of this narrative, Hasday asserts that parental prerogatives, in fact, remain paramount when there is a conflict between a parent's interest and a child's interest.

While Hasday's point is well taken—that progress narratives can serve to distract us from the further work that the law needs to do to become truly progressive—this section overreaches in a way that the earlier sections did not. Though one cannot claim we have succeeded in eradicating all forms of subordination and injustice in family law, there has been progress since the mid-19th century, where Hasday herself begins her analysis. Whereas the prior sections forcefully develop the existence of inaccurate narratives, the progress narratives in this section seem more like red herrings. Hasday does not so much debunk them as note that they are an overstatement.

In the final third of the book, Hasday turns from what the family law canon misdescribes to what it altogether misses. She argues that the exclusive focus on family law narratives renders all the stakeholders—policy makers, judges, advocates, and commentators alike—blind to populations and situations that do not comport with the canon. By way of example, Hasday devotes a chapter to the law's failure to adequately address family ties that are exclusive of marriage or parenthood and their functional equivalents. Particularly, Hasday argues that the law largely ignores sibling and grandparent relationships. She argues that the law has not imposed obligations such as child support on those parties, nor has it developed in a way that recognizes the potential those relationships had to provide stability.²⁵ Somewhat surprisingly overlooking the recent development of grandparent visitation doctrine and statutes,²⁶ and of third party custody statutes that are largely used by grandparents and

²⁴ Hasday, *supra* note 3, at 107-08.

²⁵ Hasday, *supra* note 3, at 163-64.

²⁶ See, e.g., ARK. CODE § 9-13-103 (2009) (creating a cause of action for a grandparent seeking visitation); COLO. REV. STAT. § 19-1-117(1) (2014) (same); KAN. STAT. ANN. § 23-3301 (2012) (same); ME. REV. STAT. ANN. 19-A, § 1803(1) (2008) (same); MISS. CODE ANN § 93-16-3(1) (2009) (same).

often by older siblings,²⁷ Hasday may overstate the law's blindness to these relationships.

Hasday also focuses on sibling relationships as an example of the law's failure to adequately acknowledge nonmarital and nonparental relationships. She notes that with a few exceptions, the law ignores sibling relationships when they are most vulnerable and in need of protection.²⁸ For example, she notes that children have no standing in adoption proceedings affecting themselves or their siblings.²⁹ No matter how strong their family ties, a sibling's preference to retain a formal or informal relationship with his or her sibling is legally irrelevant.³⁰ While adoption law may express a preference for keeping siblings together, and while some states mention visitation or communication between siblings separated by adoption, Hasday laments that most of these protections are discretionary, at the whim of the court or of the adoptive parents.³¹ She chronicles only a few states that confer on siblings the right to seek post adoption contact with each other.³² Similarly, she notes, siblings enjoy very few protections in divorce and custody proceedings, their interests deferring to parental preferences.³³ Hasday ends the chapter with several prescriptive pages setting forth how the law *could* address and acknowledge the importance of sibling relationships. Generally, she urges that family law should shed its narrow frame and think more broadly about family relationships and rights.³⁴

Hasday then shines a light on the omission from the canon of family law for the poor. She asserts that policy makers and judges fail to consider the poor in decision and policy making and leave the story of the poor family entirely out of the canon.³⁵ "Canonical accounts of family law that focus narrowly on the legal regulation of families considered financially self-reliant and omit reference to welfare law have helped legislators and judges to avoid discussing, much less defending,

²⁷ See, e.g., ARIZ. REV. STAT. § 25-409(A)(1) (2013) (granting standing for a nonparent who stands in loco parentis to a child to petition for custody); COLO. REV. STAT. § 14-10-123(1)(b) (2012) (creating a cause of action for nonparents to petition for custody); 750 ILL. COMP. STAT. 5/601(B)(2) (2013) (allowing a nonparent or grandparent under certain circumstances to seek custody of a minor); TEX. FAM. CODE ANN. § 153.432 (2009) (allowing a grandparent to seek custody of a minor).

²⁸ See Hasday, *supra* note 3, at 167-68.

²⁹ Hasday, *supra* note 3, at 168-76.

³⁰ Hasday, *supra* note 3, at 168-76.

³¹ Hasday, *supra* note 3, at 172-73.

³² Hasday, *supra* note 3, at 173-74.

³³ Hasday, *supra* note 3, at 176-83.

³⁴ Hasday, *supra* note 3, at 183-94.

³⁵ Hasday, *supra* note 3, at 195-96.

this divide between family law for the poor and family law for everyone else.”³⁶

Here Hasday draws a connection between the narrative of the family privacy and the omission of the poor from the family law canon by explaining the Supreme Court’s dogged commitment to distinguishing welfare law from family law.³⁷ In fact, Hasday argues that welfare law, in the myriad ways it affects the interactions, obligations, and structure of poor families is itself family law.³⁸ While noting that poor families are much more highly regulated than other families, Hasday does not critique this regulation, but asserts that the Supreme Court is being disingenuous in its doctrinal distinction between family and welfare law jurisprudence. She argues that the Court uses that distinction to justify its reliance on principles of privacy and autonomy in considering family law (for the well-off family) and intervention and redistribution in considering welfare law (for the poor family). In this section, Hasday does not offer any prescriptive responses, but rather firmly argues that this unacknowledged differential treatment of the family requires “explanation and justification, or elimination.”³⁹

After Hasday’s convincing surfacing and subsequent debunking and critique of the canon, the reader finds herself thirsting for Hasday to offer her ideas for recasting the family law canon, as promised in the title of the conclusion. On the front, Hasday leaves the reader somewhat unsated. This concluding chapter – which is only five pages when the reader would far prefer to learn much from Hasday – summarizes the shortcomings of the canon and reasserts the need for recasting it. She implores lawmakers, judges, scholars, and academics to engage in this process of recasting family, acknowledging that is a significant and challenging project.

II. WHAT FOLLOWS THE CANON?

Hasday’s book makes a compelling case for the desperate need for the reimagination of family law. In this part, this Book Review first considers the proposals Hasday herself puts forth to address the canon’s shortcomings and then it considers alternate ways to address the problems that *Family Law Reimagined* surfaces.

³⁶ Hasday, *supra* note 3, at 196-97.

³⁷ Hasday, *supra* note 3, at 197-208.

³⁸ Hasday, *supra* note 3, at 220.

³⁹ Hasday, *supra* note 3, at 220.

The Limitations of Hasday's Reconstructive Proposals

Hasday's critique and debunking of the family law canon is salient and effective. Her prescriptions—which are a far less significant aspect of this book's mission—raise questions and concerns to be resolved. While her critique of the canon frequently assails the status quo from the perspective of women and the disenfranchised, her own proposals may pose some risk for those very groups. The proposals sometimes advocate for expanding the role of the law in families, by inviting additional government intrusion into families, which can be problematic—especially poor families.

In several sections of *Family Law Reimagined*, Hasday makes concrete proposals to either fill gaps ignored by the canon or to address the deceptiveness of the canon. For example, Hasday asserts the law's supposed commitment to the separation of market and family masks the reality that it does regulate exchange within the family. She suggests that in considering *how* it should do so, courts should allow broader inter-spousal litigation for the enforcement of domestic service contracts.⁴⁰ In her discussion of the persistence of coverture principles in our law, Hasday critiques the law's inhospitality to inter-spousal tort suits brought for domestic violence, asserting this type of litigation “remains infrequent and marginalized by the law.”⁴¹ As such, she suggests that the law should entertain more federal and state level tort suits for domestic violence.⁴² In debunking the progress myth that touts our evolution away from the parental prerogative and toward deference for children's interests, Hasday advocates a more exacting application of the best interest standard in custody cases, including ways to “modify or adjust the tremendous control that parents exercise over their children's custody, education, employment, punishment and safety that would allow the legal system to better uncover, comprehend, respect, and protect children's individual needs. . . .”⁴³ Finally, Hasday proposes the introduction of new causes of action for siblings seeking visitation rights with their former or current siblings against their parent's objections.⁴⁴

Each of these proposals involves expanding the role of the courts in the lives of families. Some of the proposals expand the scope of suits that can be brought before the court; others expand the depth of the analysis required by the court; and still others enlarge the amount of time parties would need to be involved in the action prior to resolution. First, new

⁴⁰ Hasday, *supra* note 3, at 86-88.

⁴¹ Hasday, *supra* note 3, at 115.

⁴² Hasday, *supra* note 3, at 115.

⁴³ Hasday, *supra* note 3, at 158.

⁴⁴ Hasday, *supra* note 3, at 188.

causes of action for inter-spousal enforcement of contracts and for sibling visitation would give the legal system more influence over the operation of the family,⁴⁵ expanding the matters into which the court can intervene and impose its prerogative.⁴⁶

Second, her proposals would invite a far greater judicial skepticism about parental decision-making than currently required by the law. Specifically, a cause of action for siblings to seek visitation with each other after divorce or adoption would force the legal system to greatly expand its role in second-guessing parenting decisions. Presently, courts consider parenting decisions in the context of abuse and neglect cases and custody suits.⁴⁷ But aside from those contexts, the legal system does not permit suits that challenge parenting decisions within the family and does not grant children standing to seek to overcome parental prerogatives.⁴⁸

Moreover, Hasday's suggestion that courts more closely scrutinize parental behavior and prerogatives in the context of family law cases would invite an increased level of court intervention into the family.⁴⁹ Hasday critiques the best interest standard as one that disingenuously

⁴⁵ Further, the creation of new remedies for siblings who seek contact with siblings after divorce or adoption seeks to institutionalize the recognition of family relationships outside the marital or parental context. While Hasday makes a strong argument to justify the value of this move, sibling relationships could be given greater recognition without the creation of a new cause of action. Consideration of sibling preferences for contact could be an element of adoption of custody statute for analysis by the court and statutes could encourage judges to implement visitation orders to support those relationships.

⁴⁶ See Hasday, *supra* note 3, at 183-94 (Hasday's discussion of such causes of action).

⁴⁷ See, e.g., OKLA. STAT. 43, § 107.3(D) (2014) (directing the court to consider false accusations of child abuse by one parent in determining custody as between parents); 23 PA. CONS. STAT. ANN. § 5328 (2014) (directing the court to consider parenting decisions and past practices); TENN. CODE. ANN. § 36-6-106 (2013) (directing the court to consider past parenting in determining future custodial arrangements). See also Carolyn Wilkes Kaas, *Breaking Up a Family or Putting It Back Together Again: Refining the Preference in Favor of the Parent in Third-Party Custody Cases*, 37 WM. & MARY L. REV. 1045, 1067 (1996) ("Cases involving claims of parental unfitness are most likely to arise in juvenile court as abuse and neglect proceedings.").

⁴⁸ See generally Caroline E. Johnson, *A Cry for Help: An Argument for Abrogation of the Parent-Child Tort Immunity Doctrine in Child Abuse and Incest Cases*, 21 FLA. ST. U.L. REV. 617 (1993) (providing an overview of the history of the tort immunity doctrine providing that children cannot sue their parents for activities inherently a part of the child-parent relationship); Carol Sanger & Eleanor Willemssen, *Minor Changes: Emancipating Children in Modern Times*, 25 U. MICH. J.L. REFORM 239, 258-59 (1992) (discussing that emancipation statutes permit children the right they are otherwise not afforded, to sue their parents).

⁴⁹ Hasday, *supra* note 3, at 155-58.

purports to prioritize children's interests over parental discretion.⁵⁰ In arguing the legal system should be attentive to reifying the progress narrative of the law's attentiveness to children's interests, Hasday asserts that the law must confront the question of when it's appropriate to overcome parental prerogatives and to question the "tremendous control"⁵¹ that parents exert over children. Without commenting on the substantive merit of Hasday's prescription, it is impossible to ignore that the approach recommended requires a much greater level of court-involvement and a significantly broader scope of evidentiary inquiry. If a judge engages in the type of inquiry Hasday advocates, the court would demand far more information and the case would be much more complex than the ordinary best interest of the child inquiry.⁵²

Finally, Hasday's recommendations for expanded use of tort actions for domestic violence and for a more exacting and involved application of the best interests standard also envision a court system that would require more time-consuming intervention into family matters. In critiquing the paucity of state level assault and/or battery suits for domestic violence, Hasday cites a study—one from the early 1990's⁵³—that found that out of "2600 reported state cases for battery, assault, or both . . . only fifty-three involved adult parties in a domestic relationship."⁵⁴ In using tort cases for assault and battery to measure the law's willingness to provide relief for domestic violence, Hasday does not fully capture reality.⁵⁵ Since the 1970's, the most prevalent, efficient,

⁵⁰ Hasday, *supra* note 3, at 157-58.

⁵¹ Hasday, *supra* note 3, at 157-58.

⁵² Further, it's far from clear that courts are in a position to effectively undertake this more exacting role as fact finders. Family courts are notoriously overburdened and understaffed. The adversarial system, with its procedural and substantive rules, may not be an effective method for surfacing "truth." And it's not well-situated to implement resolutions that are highly contextual. *See generally* Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making about Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. OF WOMEN & L. 145, 162 (2003) (discussing the criticisms of the adversarial model in problem-solving in emotionally fraught cases).

⁵³ I'll pause here for a moment to offer one critique of Hasday's research. While her arguments are exhaustively researched and extraordinarily well supported by case law, at times her social science assertions are supported by somewhat dated research. For example, as noted above, she cites study about assault and battery suits that focuses on cases brought from 1981-1990. Hasday, *supra* note 3, at 115 (citing Donald D. Scherer, *Tort Remedies for Victims of Domestic Abuse*, 43 S.C. L. REV. 543, 565 (1992)). Further, she suggests a recent trend of scholarship supports the 1980's work of Lenore Weitzman on divorce. Hasday, *supra* note 3, at 116-17. However, the sources she cites were published in 1990, 1991, 1993, and 2000. Hasday *supra* note 3, at 117, n.145.

⁵⁴ Hasday, *supra* note 3, at 115.

⁵⁵ Hasday, *supra* note 3, at 115.

and accessible form of recourse for domestic violence has been the civil protection order (“CPO”).⁵⁶ Statistics about the numbers of civil protection orders being sought and granted nationwide tell a very different story about the legal system’s willingness to intervene in intimate relationships with meaningful relief.⁵⁷ At the same time, if Hasday truly does mean to suggest that the legal system should entertain more tort suits for assault and battery between intimate partners, then her suggestion invites far more judicial intervention than is generally the norm in the current civil legal response to domestic violence.

Civil protection orders cases are expedited proceedings that do not involve procedural hurdles that are typical of civil cases such as filing fees, excessively detailed pleading requirements, answers, and discovery.⁵⁸ Protection order cases, pursuant to most state statutes, move through the court system anywhere from one to three weeks.⁵⁹ Pursuant to the Violence Against Women Act, courts are not permitted to charge filing fees in protection order cases.⁶⁰ By contrast, the typical civil case involves all civil pretrial procedures, filing fees, and is far from quick to resolve.⁶¹ Further, if Hasday seeks to limit the legal system’s differential

⁵⁶ See Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship*, 29 CARDOZO L. REV. 1487, 1503-04 (2008) (discussing the prevalence and history of protection order statutes); Carolyn N. Ko, *Civil Restraining Orders for Domestic Violence: The Unresolved Questions of “Efficacy,”* 11 S. CAL INTERDISC. L.J., 361, 362-63 (2002) (providing an overview of the CPO remedy); Jane K. Stoeber, *Enjoining Abuse: The Case for Indefinite Domestic Violence Protection Orders*, 67 VAND. L. REV. 1015, 1018-19 (2014) (providing an overview of the CPO remedy).

⁵⁷ See CIVIL PROTECTION ORDERS: A GUIDE FOR IMPROVED PRACTICE 3, NATIONAL CENTER FOR JUVENILE & FAMILY COURT JUDGES (2010) (citing that 1.2 million victims each year receive protection orders in the U.S.); Jane K. Stoeber, *Freedom From Violence: Using the Stages of Change Model to Realize the Promise of Civil Protection Orders*, 72 OHIO ST. L.J. 303, 318 (2011) (explaining that civil protection orders are now the single most frequently used legal remedy to address intimate partner violence).

⁵⁸ See Ko, *supra* note 56, at 363 (“Civil restraining orders...work to provide immediate relief.”).

⁵⁹ See D.C. CODE ANN. § 16-1004(b)(2) (2009) (temporary protection order is issued for 14 days after which time the hearing on the long-term order is held); ME. REV. STAT. ANN. 19-A, § 4006(1),(2),(3) (2013) (temporary protection order is issued for 21 days after which time the hearing on the long-term order is held); NEB. REV. STAT. § 42-925(2) (2012) (temporary protection order is issued for 14 days after which time the hearing on the long-term order is held); N.J. STAT. ANN. § 2C:25-29(a) (2012) (temporary protection order is issued for 10 days after which time the hearing on the long-term order is held).

⁶⁰ 42 U.S.C.S. § 3796gg-5 (2014) (conditioning the receipt of state funds on a jurisdiction refraining from imposing filing fees in protection order cases).

⁶¹ Elizabeth J. Cabraser, *Apportioning Due Process: Preserving the Right to Affordable Justice*, 87 DENV. U. L. REV. 437, 471 (2010) (“It should be a matter

impact on women and the disenfranchised, advocating the expansion of a legal tool that imposes filing fees and is so involved that it promotes parties with lawyers over pro se representation that it directly counteracts her goal.

As discussed, some of Hasday's concrete prescriptions in this book expand the role of the courts in the lives of families. In the past few decades, scholarship has chronicled the over-involvement of the courts in the lives of families, especially in the lives of poor families.⁶² The adversarial system for resolving family disputes is time-consuming, often expensive, and intrusive.⁶³ Already the standard actions such as abuse and neglect, custody, child support, and domestic violence demand high levels of personal disclosure.⁶⁴ Generally, courts are also assailed for

of equal concern to deliver the due process these litigants deserve by refusing to consign them to an endless wait for a trial which can never come because their opponent insists on a complete, costly, time consuming trial..."); Frank G. Evans, *The ADR Management Agreement: New Conflict Resolution Roles for Texas Lawyers and Mediators*, HOUS. LAW. 10, 11 (2007) (explaining that civil trial preparation has become more complicated and has escalated the amount time cases linger in the court system); Daniel B. Winslow, *Alexandra Bedell-Healy, Economical Litigation Agreements: The "Civil Litigation Prenup" Need, Basis, and Enforceability*, 11 PEPP. DISP. RESOL. L.J. 125 (2010) (discussing how time consuming discovery procedures can be).

⁶² See, e.g., Annette Ruth Appell, *Accommodating Childhood*, 19 CARDOZO J.L. & GENDER 715, n.154 (2013) ("Poor example, poor families and their members are overrepresented in the child welfare, juvenile justice, and prison systems."); Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL'Y 63, 79 (1995) ("[I]ntervention and intrusion in low-income families (is accepted), and we have discounted the cultural backgrounds and solid parenting skills of low-income parents.") (internal quotation marks omitted).

⁶³ See Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495, 504 (2001) ("Legal scholars and critics of the adversary system contend that the divorce process is time-consuming and expensive."); Steve Swartz, *Family Business Litigation: The Remedy Can Be Worse Than the Malady*, BENCH & B. MINN. 40, April 2004 ("While in most such cases the dispute has been "resolved" in a legal sense, the process ultimately has been inordinately costly."); Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 133 (1997) (discussing that an adversarial procedure depletes and expends the resources of the parties involved).

⁶⁴ See Robert H. Aronson, *What about the Children? Are Family Lawyers the Same (Ethically) As Criminal Lawyers? A Morality Play*, 1 J. INST. FOR STUDY LEGAL ETHICS 141, 151 (1996) (noting the wide scope of disclosures required in child abuse cases); Julian Grant, *Victims, Offenders, and Other Children: A Right to Privacy?*, 19 AM. J. CRIM. L. 485, 487-89 (1992) (discussing the dangers of public disclosure in child abuse cases).

their inability to make nuanced decisions about particular families and to generate even more conflict than necessary.⁶⁵

Even outside the court, poor families are particularly subject to government-involvement. The receipt of public benefits is usually conditioned on the disclosure of personal information and of continuing oversight.⁶⁶ Indigent families are also disproportionately subject to the post-conviction oversight by the criminal justice system.⁶⁷ The conditions of parole and probation permit the government to impose requirements, require disclosures, and exert control over family life.⁶⁸ Similarly, the abuse and neglect system, also more often a part of the lives of families living below the poverty line, permits and requires significant levels of court-involvement and government oversight.⁶⁹ Hasday's suggestions that would increase or pave the way for new court-involvement in matters previously left to autonomous family decision-making must be considered with a critical eye.

⁶⁵ See Katharine Bartlett, *Prioritizing Past Caretaking in Child-Custody Decisionmaking*, 77 LAW & CONTEMP. PROB. 29, 46 (2014) (referring to the use of excessive judicial discretion custody cases as "intuition-based"); Daniel L. Hatcher, *Forgotten Fathers*, 93 B.U. L. REV. 897, 911 (2013) ("High caseloads lead to an increased likelihood that noncustodial parents will be viewed as "all the same," as making excuses, and not credible."); Laura Sack, *Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases*, 4 YALE J.L. & FEMINISM 291, 298 (1992) (discussing the shortcomings of judicial discretion). Ver Steegh, *supra* note 52, at 163 (citing a study in which 71% of parents reported that the court process escalated the level of conflict).

⁶⁶ See generally Michele Estrin Gilman, *The Class Differential in Privacy Law*, 77 BROOK. L. REV. 1389, 1397-98 (2012) (discussing the process by which an applicant for Temporary Assistance for Needy Families (TANF) must undergo involving extensive disclosures).

⁶⁷ See generally J.M. Zitter, *Validity of Requirement That, as Condition of Probation, Defendant Submit to Warrantless Searches*, 99 A.L.R.5th 557 (providing an overview of the low expectation of privacy by probationers and parolees).

⁶⁸ *Id.*

⁶⁹ Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 773 (2001) (noting the prevalence of poor families in the child welfare system); Naomi Cahn, *Symposium: The Implications of Welfare Reform for Children: Welfare Reform and the Juvenile Courts: Children's Interests in the Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L.J. 1189, 1199 (1999) (citing the correlation between the abuse and neglect system and poor families); Michael Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 1021 (1975) (stating the majority of neglect cases involve poor families).

Post-Canon Family Law

In the end, Hasday's debunking initiative is extremely convincing. However, if our current canon is inaccurate, distracting, and incomplete, then what? After reading Hasday's first two thirds, I wanted to explore a constructive response—a theoretical and practical one; one that would allow us to reconstruct a more accurate, coherent, and workable narrative; one that would implement a system that responds to the realities of the changing families, diverse families, and their needs. Yet, Hasday's practical responses, by her own acknowledgement, just begin to address the ways our family law system could more fully respond to the shortcomings and omissions in the family law canon. This section turns to concrete ways that the family law legal system could evolve to address the shortcomings and omissions of the family law canon that are so elegantly revealed in *Family Law Reimagined*.

1. Improving the Current System by Allowing for the Consideration of Context.

At the root, the vast majority of Hasday's critiques of the family law canon come down to the legal system's reliance on narratives and principles that distract judges from the reality of each case. For example, reliance on the narrative that family law is separate from the market permits a judge to blindly find contracts for domestic work unenforceable without considering the propriety of enforcing the contract or the effects of failing to enforce it in the context presented by the case.⁷⁰ A commitment to the inaccurate principle that our family law rests at the core on the best interest of the child leads fact finders to fail to truly scrutinize the many instances in which the law privileges parental prerogatives and to determine, based on the children and parents at issue in a particular case, when a better balancing of the two would be advisable.⁷¹ The law's failure to recognize the power of the parental prerogative can also render judges to blind to the context of the family and the interests of siblings in adoption and custody proceedings. Finally, Hasday's critique that the canon neglects to contemplate those living in poverty can also be seen as a failure of the law to consider the social and economic context of the family when applying and considering the impact of the law.⁷²

Reforming the family law system to allow for more consideration of context involves judicial education and for legal and procedural

⁷⁰ Hasday, *supra* note 3, at 94.

⁷¹ Hasday, *supra* note 3, at 155-58.

⁷² Hasday, *supra* note 3, at 195-96.

initiatives. First, in order to move toward an adjudicatory system in which judges consider the broader context of the family and the legal matter before them, judges would first need to understand the importance and the relevance of context. Hasday's debunking and insightful analysis of the family law canon would be a powerful way to illustrate this point. Hasday's conclusion exhorts scholars to reconsider their reliance on the canon and academics to teach students family law in a way that challenges the family law canon and lays bare the reality. The effects of these efforts may reach judges through academic journals and through lawyering by future lawyers in years to come. But more immediately, judicial education about the fallacy of the canon and the way it distracts from the realities of the law may well influence the application of the law and liberate judges to consider the context of cases more carefully. In seeking to increase the relevance of context in the adjudication of cases, direct judicial education could prove effective and more efficient than efforts aimed at scholarship or legal education.

A second approach to increasing the mandate for and likelihood that judges will more fulsomely consider context would be to reduce the reliance on presumptions in family law. Family law relies on a significant number of presumptions⁷³ that allow judges to short-circuit their consideration of the facts in favor of a predictable outcome.⁷⁴ Some presumptions have been created to safeguard against judge rulings based on stereotypes or historically failing to consider relevant evidence. For this reason, and because they maximize efficiency, reliance on presumptions should not be abolished, but quite possibly reduced.⁷⁵ In current family law doctrine, courts regularly employ the parental presumption in favor of granting custody to a biological parent over the request of a third party,⁷⁶ the presumption of certain proportions of

⁷³ See Katherine T. Bartlett, *Preference, Presumption, Predisposition, and Common Sense: From Traditional Custody Doctrines to the American Law Institute's Family Dissolution Project*, 36 FAM. L.Q. 11, 16 (2002) (noting the "number" of presumptions that exist in family law and discussing some at length).

⁷⁴ See *id.* at 12 (discussing the rationale behind presumptions and preferences).

⁷⁵ *Id.* at 23. The presumption against awarding joint custody when one parent has committed parental kidnapping, child abuse, or domestic violence is a central example of a presumption implemented for this reason. This Review does not advocate abolishing such a presumption.

⁷⁶ See, e.g. D.C. CODE ANN. § 16-831.05 (2014) (creating a presumption in the third party custody statute that custody with the biological parent is in the child's best interest unless rebutted); CONN. GEN. STAT. § 46b-56b (West 1995); TEXAS FAM. CODE § 14.01(b)(1) (West 1995).

parenting time with each parent,⁷⁷ the marital presumption in determining parentage of a child,⁷⁸ the presumption in favor of joint custody,⁷⁹ and the community property presumption.⁸⁰ Presumptions, even when rebuttable, allow the judge to rule based on few facts and render many facts irrelevant if the presumption cannot be rebutted. For example, in a jurisdiction in which a biological parent enjoys a presumption in favor of custody with him or her over a third party, a judge need only hear facts going to best interest of the child if the presumption is overcome.⁸¹

Presumptions and less contextual analyses of best interest of the child allow judges to more efficiently manage their dockets.⁸² Therefore, reducing the reliance on presumptions and requiring a more contextual analysis could wreak havoc on family law dockets, forcing judges to consider each case based not on a baseline presumption, but only on the facts presented. To actually consider a case in the contextual way Hasday's critique suggests, judges would need to approach contextual

⁷⁷ See, e.g., MINN. STAT. ANN. § 518.175(1)(g) (West 2015) (creating a rebuttable presumption that a parent is entitled to at least 25% of parenting time for a child); TEXAS FAM. CODE ANN. § 153.252 (West 2013) (creating a presumption of "standard possession orders" to determine how to allocate parenting time).

⁷⁸ See, e.g., ARIZ. REV. STAT. ANN. § 25-814 (West 2014) (establishing presumption of paternity); COLO. REV. STAT. ANN. § 19-4-105 (West 2014); MONT. CODE ANN. § 40-6-105 (West 2013); TEX. FAM. CODE ANN. § 160.204 (West 2014).

⁷⁹ See, e.g., D.C. CODE ANN. § 16-914(a)(2) (West 2014) (creating a presumption in favor of joint custody except in circumstances of child abuse, parental kidnapping, and domestic violence); FLA. STAT. ANN. § 61.13 (c) (West 2013) (noting that the court "shall order that the parental responsibility for a minor child be shared by both parents"); IDAHO CODE ANN. § 32-717 (West 2013) (implementing a presumption that joint custody is in the best interests of the child); LA CIV. CODE ANN. art. 132 (West 2013) ("the court shall award custody to the parents jointly"); N.M. STAT. ANN. § 40-4-9.1 (West 2006) (creating a rebuttable presumption joint custody is in the best interests of the child.).

⁸⁰ See *In re Marriage of Baragry*, 73 Cal. App. 3d 444, 448-49 (Cal. Ct. App. 1977) (explaining that the community property presumption dictates that "property acquired during the marriage become community property").

⁸¹ See, e.g., D.C. CODE § 16-831.05 (2014) (establishing a presumption in favor of the biological parent over a third party).

⁸² See generally Michael J. Kaufman, *Summary Pre-Judgment: The Supreme Court's Profound, Pervasive, and Problematic Presumption about Human Behavior*, 43 LOY. U. CHI. L.J. 593, 612, note 104 (2012) ("Most presumptions come into existence because of probability - the proof of one fact renders the existence of another so probable that judges save time by assuming the truth of the second fact."); 3-4A TREATISE ON ENVIRONMENTAL LAW § 4A.03 ("Presumptions normally rest on demonstrated probabilities, and they save time and effort in the evidentiary process.").

analyses, such as best interests of the child, with even a heightened contextualism. Such an approach would require far more judicial time and attention.

That is where procedural restructuring or support comes in. To achieve the level of contextual judicial decision-making that would be necessary to begin to achieve Hasday's vision of post-canon judicial decision-making, judges would need support to alleviate the burden of their dockets. To do so, courts could implement or increase court-based services to utilize non-judicial personnel to work with parties and their families to holistically consider the needs of a family, and if possible, settle the case prior to an adversary hearing. These services could serve to provide more contextual resolutions for parties who can agree to terms with assistance and could serve to clear the judicial docket to allow for more contextual inquiry into contested family law matters.

Programs that achieve these two goals could involve volunteer support by attorneys who act as negotiators, meeting with parties prior to initial hearings and seeking to settle cases by talking to both parties and their witnesses. Volunteer attorney-mediators could meet with parties separately or together if appropriate and determine if a settlement could be reached with little court intervention. Such a program in the District of Columbia supports the court several mornings each week and substantially lightens the judicial family law docket.⁸³ In Alaska, another program involving a magistrate judge and volunteer attorneys and mediators has reduced the burden on the family law docket, and resulted in settlements that require in very little post-settlement court intervention.⁸⁴

Formal court-based mediation programs are also critical to providing more contextual case resolution and to alleviating judicial dockets to permit judge to consider cases in a more thoughtful way. Mediation programs are not novel;⁸⁵ however, mediation services

⁸³ See *Report of the Family Law Task Force*, DC Bar, 5 (2013), <http://legaltimes.typepad.com/files/family-law-task-force-report.pdf> (providing a brief description of the program); NEW YORK STATE UNIFIED COURT SYSTEM, https://www.nycourts.gov/attorneys/volunteer/vap/program_descriptions.shtml (showing an example of a New Jersey program).

⁸⁴ Stacey Marz, *Early Resolution for Family Law Cases in Alaska's Courts*, Alaska Justice Forum, http://justice.uaa.alaska.edu/forum/31/12springsummer2014/d_erp.html (last updated Nov. 06, 2014).

⁸⁵ Some states require that parties attempt to resolve custody conflict through mediation prior to litigation. See, e.g., ALA. CODE § 6-6-20 (1996); CAL. FAM. CODE § 3170 (West 2010); N.M. STAT. ANN. § 40-4-8 (West 1977); N.C. GEN. STAT. ANN. § 50-13.1 (West 2011); S.D. CODIFIED LAWS § 25-4-56 (2008); TENN. CODE ANN. § 36-4-131 (West 2008); UTAH CODE ANN. § 30-3-39 (West 2008); VA. CODE ANN. § 20-124.4 (West 1994); W. VA. CODE ANN. § 48-9-202

generally have been aimed at divorce cases rather than custody cases, which include never-married parents litigating custody and child support.⁸⁶ Through the mediation, neutral mediators seek to resolve disputes without resorting to an adversarial adjudication.⁸⁷ Prior to trial, parties meet privately with a mediator who attempts to craft a settlement that satisfies both parties to the extent that they are willing to surrender their right to trial.⁸⁸ The court then enters the settlement reached by the parties. Mediation is often successful at reaching resolutions.⁸⁹ Greatly expanding mediation services where appropriate could help achieve Hasday's suggestion of a legal system that addresses the needs of families without relying on misplaced assumptions and inaccurate doctrines.

Finally, problem-solving courts could allow the court to employ a more contextual response to families.⁹⁰ Problem-solving courts seek to

(West 2001); WIS. STAT. ANN. § 767.405 (West 2012). *See also* Nancy Ver Steegh et al., *Symposium: The Future of Court ADR: Mediation and Beyond: Look Before You Leap: Court System Triage of Family Law Cases Involving Intimate Partner Violence*, 95 MARQUETTE L. REV. 955, 959 (2012) (discussing the prevalence of mandatory mediation as well as mediation at judicial discretion). Other states encourage mediation. *See, e.g.*, IDAHO CODE ANN. § 32-1402 (West 2009); KAN. STAT. ANN. § 60-1626 (West 2000); ME. REV. STAT. TIT. 19-A, § 1653 (2012); MO. ANN. STAT. § 452.600 (West 1998). *See also* *Child Access and Visitation Programs: Participant Outcomes*, DEP'T. OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, OFFICE OF CHILD SUPPORT ENFORCEMENT 5 (2007) [hereinafter *Child Access*] (stating that as of 2001, 46 states offered mediation in family law cases).

⁸⁶ *Child Access*, *supra* note 85, at 15.

⁸⁷ *See id.* at 17-18 (summarizing the success rate of sample mediation programs (from 60 – 80% success rate for resolving the dispute)); *see also* DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF INSPECTOR GEN., *OEI-05-02-00300: Effectiveness of Access and Visitation Grant Programs* 1, 7 (2002) (asserting that in the four state survey, “[i]n 76% of cases, mediation facilitated noncustodial parents’ access rights through the creation of mutually agreed upon visitation plans.”).

⁸⁸ *See generally* Paula Young, *A Connecticut Mediator in a Kangaroo Court?: Successfully Communicating the “Authorized Practice of Mediation” Paradigm to “Unauthorized Practice of Law” Disciplinary Bodies*, 49 S. TEX. L. REV. 1047, 1161 (2008) (noting that the mediator’s role is to assist the parties in reaching a voluntary agreement).

⁸⁹ *See Child Access*, *supra* note 58, at 17-18 (summarizing the success rate of sample mediation programs (from 60 – 80% success rate for resolving the dispute)); DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF INSPECTOR GEN., *OEI-05-02-00300: Effectiveness of Access and Visitation Grant Programs* 1, 7 (2002) (asserting that in the four state survey, “[i]n 76% of cases, mediation facilitated noncustodial parents’ access rights through the creation of mutually agreed upon visitation plans.”).

⁹⁰ *See* Laurie S. Kohn, *Engaging Men as Fathers: The Courts, the Law, and Father-Absence in Low-Income Families*, 35 CARDOZO L. REV. 511, 553-56 (2013) (extensively discussing problem-solving courts).

apply a collaborative and holistic approach to traditionally adversarial cases.⁹¹ These courts are distinguishable from traditional courts in that they involve team approaches with social services and direct interactions between litigants and judges, with judges taking a proactive role in solving underlying problems to resolve legal problems.⁹² Although they can require additional resources, problem-solving courts harness the expertise and support of professionals to allow the court to more contextually address the problem at issue. As such, judges would be able to more thoughtfully approach cases on their merits and not rely on shortcuts and mistaken assumptions about what family law doctrine demands.

In the end of *Family Law Reimagined*, the reader is left with a clear understanding of the family law canon's omissions, its mischaracterizations, and its implications for marginalized populations. But, the reader is also left with hope that the system still can function in a way that allows families to resolve disputes, secure rights, and to thrive. This book, which forces the reader to constantly question and reassess, sets a fertile stage for family law reimagined.

⁹¹ See John Feinblatt et al., *Institutionalizing Innovation: The New York Drug Court Story*, 28 FORDHAM URB. L.J. 277, 282 (2000) (describing the collaborative approach utilized by judges, lawyers, and service providers in New York's problem-solving drug courts); Problem-Solving Justice, CENTER FOR COURT INNOVATION, <http://www.courtinnovation.org/research/problem-solving-principles?url=research%2F11%20Article&mode=11&type=article> (examining various shared principles of problem-solving courts, including collaborative responses by members of the legal community).

⁹² See generally Donald J. Farole, Jr. et al., *Applying Problem-Solving Principles in Mainstream Courts: Lessons for State Courts*, 26 JUST. SYS. J. 57 (2005) (providing an overview of the principles behind problem-solving courts.); Hon. Milton Lee, *Fathering Court: A New Model for Child Support Enforcement*, 51 JUDGES J. 24, 25 (discussing the philosophy of problem-solving courts).