

THE UNPRAGMATIC FAMILY LAW OF MARGINALIZED FAMILIES

*Mariela Olivares**

INTRODUCTION

In her excellent article *Pragmatic Family Law*,¹ Professor Clare Huntington argues that divisive issues roiling U.S. politics, law, and society — such as abortion rights, gender-affirming health care for children, and parental involvement in and control over public school curricula regarding race and identity — have put a spotlight on family law. She notes, though, that these debates need not focus on visceral disagreements but instead should coalesce around a foundational ideal in family law — that is, evidence-based decisionmaking that centers family and child well-being. Huntington offers that this “common methodological foundation . . . has implications for scholars, legal actors, and advocates”² to “advance the interests of children and families”³ and “provide direction for institutional reform.”⁴

At root, family law doctrine and the real-world experience of family court litigation do indeed strive for the best outcome — one in which parents, caregivers, and family members are heard and children are protected. In this sense, the premise of *Pragmatic Family Law* is exact. What pragmatism misses, though, is the deeply entrenched, inherent, and inextricable racism, classism, and xenophobia in the American legal system, which show up in family law courtrooms and family law systems around the country every day. To be sure, Huntington notes that pragmatism has “significant limitations, especially in addressing the root causes of racial inequity.”⁵ She notes that despite these limitations, pragmatism can “recalibrate” family law to rely on empirical evidence and families’ lived experiences.⁶

In this Response, I posit that precisely because empirical evidence and the lived experiences of marginalized families demonstrate the unique injustices that they experience in the family law system, family

* Associate Dean of Academic Affairs and Professor of Law, Howard University School of Law; LL.M., Georgetown University Law Center; J.D., University of Michigan Law School; B.A., University of Texas at Austin. I sincerely thank those who have contributed greatly to this project. I am grateful for the contributions of my research assistants, Howard University School of Law second-year students Hafzat Akanni and Fedel Estefanos. I thank Howard University and Dean Danielle R. Holley of the Howard University School of Law for the continued support of my work and scholarship.

¹ Clare Huntington, *Pragmatic Family Law*, 136 HARV. L. REV. 1501 (2023).

² *Id.* at 1502.

³ *Id.* at 1509 n.37.

⁴ *Id.* at 1502.

⁵ *Id.*

⁶ *Id.*; *see id.* at 1559.

law is anything but pragmatic for them. In this sense, then, a pragmatic approach would serve those who do not experience targeted mistreatment based on race, class, immigration status, or other identity markers. Importantly, I do not question the philosophical underpinnings and relevance of pragmatism that Huntington carefully outlines. She expertly explains the doctrine and how seemingly contentious issues can be better clarified through the pragmatic approach than through polarizing debates. This is a solid, effective, and excellent argument. I assert, however, that faith in the power of pragmatism as a leveling tool in family law is misplaced because it does not incorporate the inequitable ways in which the law treats marginalized people. Therefore, the methodology is not incorrect or misapplied, but it falls short as it does not include all families. For the families it excludes, the approach is imprecise exactly because it does not value their lived experiences of racism and other forms of marginalization.

In this Response, I discuss how the law surrounding families of color, immigrant families, poor families, and families of other marginalized identities is not practically the same law that governs families who do not share those identity markers. Part I considers how the “common methodological foundation”⁷ of family law that Huntington describes — while appropriately characterizing the Family Law (capitalization intended) doctrine — does not appropriately capture the radically different experiences of marginalized families. Through discussing my past experiences as a family law litigator for families of color, immigrant families, and poor families, and, more generally, the ways in which these families experience the family court system, we see the limitations of a normative approach in reaching common ground and depoliticization. Part II continues this exploration and focuses on the ways in which deep racialized and class divisions occur in the American child welfare system. Section II.B examines the fallacy of the primacy of child well-being and the best interests of the child standard, using as a case study the U.S. government practice of forcibly removing migrant children from their fit adult caregivers. This Family Separation Policy provides a stark example of pragmatism’s limits: although it may seem that putting families and children first would be a universal paradigm, experience shows differently. Interestingly, however, the formal end of the Family Separation Policy was due in large part to bipartisan calls for its termination from seemingly divergent political and societal camps. In this limited sense, then, empathy for all children’s well-being prevailed. Finally, I comment on the intrinsic limitations in any proposed methodology that does not contend with the inherent racism that forms the foundation of our country. To this point, and in conclusion, the lessons of pragmatism may be illustrative and meaningful, even if not within practical reach.

⁷ *Id.* at 1502.

I. THE PRAGMATIC METHODOLOGY DOES NOT PORTRAY THE EXPERIENCES OF ALL FAMILIES

Soon after graduating from law school, I landed my dream job. I was a legal services lawyer at Ayuda, an immigrants' rights organization in Washington, D.C.⁸ I worked in the Family Law and Domestic Violence Division of the organization, where I was one of three lawyers. Each of us had a large client base that was exclusively from the richly diverse immigrant communities of the area — most notably immigrants from Central America and Ethiopia, but including people from all over the world.⁹ There, I represented immigrants in their family law cases — domestic violence protection order petitions, renewals, and modifications; and child custody, child support, and divorce cases. As a legal services organization, Ayuda had client eligibility requirements that included living at a certain rate below the federal poverty guidelines — which meant that our clients were among the poorest in the city. Although I was an associate at a large Washington, D.C., law firm for a short time prior to this new job, I (like most such new attorneys) had never argued a case in court.¹⁰ At the extremely busy legal services office, though, I was in D.C. Superior Court with a new client within my first three weeks.

A few years and countless court appearances later, I found my next dream job: as a teaching fellow in the Domestic Violence Clinic at Georgetown University Law Center. There, I helped law students represent domestic violence survivors in their protection order cases.¹¹ Here, too, to qualify for our free legal assistance, clients must have been living at a certain rate below the federal poverty guidelines. At the clinic, our client population was overwhelmingly Black, a disproportionate share considering the Black population of Washington, D.C., is 45.8%.¹² Thus, in my combined years in legal services prior to joining academia, my entire courtroom experience was in D.C. Superior Court, representing low-income Black, Latina/o/x, and other immigrant clients. And my clients were not anomalies in the D.C. domestic violence and

⁸ *Legal Services*, AYUDA, <https://ayuda.com/legal-services-4> [<https://perma.cc/9WVW-G8MC>].

⁹ See AM. IMMIGR. COUNCIL, IMMIGRANTS IN DISTRICT OF COLUMBIA 1 (Aug. 6, 2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants_in_the_district_of_columbia.pdf [<https://perma.cc/QEJ7-XSKX>].

¹⁰ I represented many clients in court as a law student in the Child Advocacy Law Clinic at the University of Michigan Law School, under the supervision of our expert and excellent professors, who were practicing lawyers. That transformative experience, plus my own journey as a Spanish-speaking, Mexican American woman from South Texas, inspired me to pursue public interest law in service of vulnerable communities, especially Spanish-speaking indigent people.

¹¹ *Domestic Violence Clinic*, GEO. L., <https://www.law.georgetown.edu/experiential-learning/clinics/our-clinics/domestic-violence-clinic> [<https://perma.cc/XAA3-HGRY>].

¹² *QuickFacts: District of Columbia*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/DC> [<https://perma.cc/R264-FL4A>]. Minorities comprise 62.7% of D.C.'s population. See *id.* Among other reported races and ethnicities, D.C. is 11.5% Hispanic or Latina/o/x and 4.5% Asian. *Id.*

family court dockets to which we were assigned. The existence of separate courtrooms and dockets for those less complicated divorce and custody issues was one way that the system distinguished between parties with financial resources and parties like my clients, who had little to no resources. The overwhelming majority of the families in our courtrooms, courthouse hallways, and self-help centers were Black, Latina/o/x, immigrant, and/or poor.

The same demographic and class realities ring true today — more than a decade after I left.¹³ Further, as a family law lawyer, I did not represent clients in child welfare court, in which judges decide if parents accused of child abuse or neglect will be forced to proceed through the system and ultimately determine whether a parent loses their parental rights. Data shows that Black, Latina/o/x, Indigenous, and/or poor children are overwhelmingly represented in the child welfare system, which I explore more in Part II. Disparity in court access matters. Noting that in New York State, the supreme court system (which generally serves more well-off litigants) investigates custody cases differently than does the family court system (which generally serves less well-off litigants),¹⁴ Professor Leah Hill argues:

I endorse . . . a consistent process of handling private child custody matters across supreme and family courts. Without consistency, we are left with a two-tiered system in which the cases of moneyed litigants are investigated by experts while the less well-off black and brown litigants are investigated by a public agency whose limited objective is to protect children from abuse. The obvious disparity is self-evident.¹⁵

This view into the experiences of people of color, immigrants, people living in poverty, and their lawyers offers a contrast to the benefits of the pragmatic methodology described in *Pragmatic Family Law*. Huntington skillfully explains early pragmatic philosophical thought, contemporary American approaches to pragmatism, and, indeed, how critical race and legal scholars have employed pragmatism in

¹³ Interestingly, the demographics of those seeking assistance in the D.C. domestic violence court system are no longer publicly available. Data from a 2012 D.C. domestic violence court watch report shows that Black was the perceived race of 86.3% of the petitioners (that is, those seeking help with a domestic violence case). DC SAFE, 2012 REPORT: DC DOMESTIC VIOLENCE COURT WATCH PROJECT 24 (2012), <https://courtwatchdc.files.wordpress.com/2013/08/2012courtwatchreport.pdf> [https://perma.cc/XQ7V-YL9P]. The percentage of Black people in the D.C. population in 2012 was 50.1%. JOY PHILLIPS & CARYN S. THOMAS, D.C. STATE DATA CTR., FACT SHEET 4 tbl.4 (2012), https://planning.dc.gov/sites/default/files/dc/sites/op/publication/attachments/2012%20DC%20Population%20Estimate_1.pdf [https://perma.cc/5T4U-ADUW]. Thus, my conclusions are drawn from personal and professional experiences and through informal conversations with practitioners and advocates over approximately twenty years in the D.C. legal community.

¹⁴ Leah A. Hill, *Do You See What I See? Reflections on How Bias Infiltrates the New York City Family Court — The Case of the Court Ordered Investigation*, 40 COLUM. J.L. & SOC. PROBS. 527, 546 (2007).

¹⁵ *Id.* at 547.

their advocacy for equality.¹⁶ Huntington describes family law pragmatism as when “decisionmakers sidestep abstract ideals and political ideology and instead focus on whether a law or policy promotes family and child well-being in specific, grounded ways . . . [a]nd legal actors learn from the lives of affected families, consult empirical evidence, and make context-specific determinations.”¹⁷ In this vein, then, the pragmatic approach results in outcomes that are examples of convergence, depolarization, and nonpartisan pluralism¹⁸ — making family law’s focus not on “abstract ideals and political ideology” but rather “on whether a doctrine or policy promotes core aspects of family and child well-being, such as a child’s need for a consistent caregiver and a family’s needs for basic resources.”¹⁹

Huntington is correct that the law prescribes and seeks just outcomes without explicit deference to or discussion of political or abstract ideologies. Thus, for example, state laws on ideal parental custodial arrangements uniformly land on some type of presumption in favor of joint custody of children when parents divorce or no longer parent together.²⁰ These state laws rely upon research that shows that children are best served by both parents being present in the children’s lives absent concerns of child abuse or neglect.²¹ In practice, courts therefore generally favor joint custody in a contested dispute between fit parents,²² but will veer toward sole or primary custody upon a review of the state-defined factors that support diverting away from joint custody.²³

To further explain the sustainability of a pragmatic methodology, *Pragmatic Family Law* discusses the depolarization of once-contentious family law issues, which eventually coalesced around legal and social consensus.²⁴ Two examples are married women’s property acts (from a

¹⁶ Huntington, *supra* note 1, at 1536–43.

¹⁷ *Id.* at 1536.

¹⁸ *Id.* at 1503–07.

¹⁹ *Id.* at 1507.

²⁰ Anna Burke et al., *Child Custody, Visitation & Termination of Parental Rights*, 21 GEO. J. GENDER & L. 201, 211 & n.52, 212 & nn.53–54 (2020) (noting that there is a general methodological presumption for joint custody in every state and citing examples).

²¹ See Kirsti Kurki-Suonio, *Joint Custody as an Interpretation of the Best Interests of the Child in Critical and Comparative Perspective*, 14 INT’L J.L. POL’Y & FAM. 183, 187–89 (2000).

²² See Milfred Dale, “Still the One”: *Defending the Individualized Best Interests of the Child Standard Against Equal Parenting Time Presumptions*, 34 J. AM. ACAD. MATRIM. LAWS. 307, 308 (2022) (“[C]onsideration of joint physical custody and shared parenting have become more common in discussions of social policy, in the private voluntary development of parenting plans by parents, and in instances where custody disputes require court adjudication.”).

²³ See, e.g., *id.* at 310–13 (describing the history of the best interests of the child standard and the benefits of its use over stark presumptions); *id.* at 311 (“The strengths of the *individualized best interests standard* lie in its ‘child-centered focus, its flexibility, its minimal a priori bias relative to the parties,’ and its ability to respond to changing social mores, values, and situations in a diverse society.” (footnote omitted) (quoting Melissa M. Wyer et al., *The Legal Context of Child Custody Evaluations*, in PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS 3, 18 (Lois A. Weithorn ed., 1987))).

²⁴ Huntington, *supra* note 1, at 1511–12, 1526.

place of women's complete nonagency to the legal ability to own property, among other rights)²⁵ and third-party parentage laws (from a place of recognizing only two biological or adoptive heterosexual parents to an expansion of the parent definition).²⁶ The article also mentions the ways in which the law has evolved around intimate partner violence, from a time when a husband had a legal right to physically abuse his wife to the current environment, where every state and Washington, D.C., have laws criminalizing domestic violence.²⁷ In 2022, Congress passed — and President Biden signed — the Bipartisan Safer Communities Act,²⁸ which contains a provision prohibiting dating partners who are convicted of domestic violence from owning guns.²⁹ The closing of the so-called “boyfriend loophole” regarding gun ownership marked a significant effort to protect victims of intimate partner violence from gun attacks even when the country was still engaged in political debate about, and remains divided over, the extent of gun rights and ownership.³⁰ In this sense, then, the new law provides an excellent example of policymakers recognizing the importance of strengthening protection measures for families based on evidence and common sense.

The discord occurs, though, when we look at people's day-to-day courtroom and courthouse experiences in seeking assistance to leave a domestic violence situation. Poor mothers of color and/or immigrant mothers who experience domestic violence and seek help run the risk of entanglement with the child welfare system. Within the domestic violence justice system itself, research shows the obstacles for women and women of color in their efforts to obtain protection. Professors Deborah Epstein and Lisa Goodman detail how women (in general) are perceived as less credible, and Black women and poor women experience even

²⁵ *Id.* at 1515.

²⁶ *Id.* at 1525–26.

²⁷ *Id.* at 1527–28.

²⁸ Pub. L. No. 117-159, 136 Stat. 1313 (codified in scattered sections of the U.S. Code).

²⁹ *Id.* § 12005, 136 Stat. at 1332–33 (codified at 18 U.S.C. § 921(a)); see Huntington, *supra* note 1, at 1528. Importantly, the new law specifies that the person can resume gun ownership after five years of a clean record unless the person has a certain type of relationship (partner, spouse, parent) with the victim. See Rachel Treisman, *The Senate Gun Bill Would Close the “Boyfriend Loophole.” Here’s What that Means*, NPR (June 23, 2022, 11:47 AM), <https://www.npr.org/2022/06/23/1106967037/boyfriend-loophole-senate-bipartisan-gun-safety-bill-domestic-abuse> [<https://perma.cc/4BXD-8ZP7>] (“The bill includes a related provision, allowing people who were convicted of misdemeanor domestic violence to have their gun rights restored if their record stays clean for five years. There are some exceptions for victims’ spouses, parents, guardians or cohabitants.”).

³⁰ See Treisman, *supra* note 29 (“It also would close the so-called ‘boyfriend loophole’ in a law that prevents people convicted of domestic abuse from owning a gun. That law currently only applies to people who are married to, living with or have a child with the victim.”). Importantly, however, the law applies only when the person has been convicted of an intimate partner crime. 18 U.S.C. § 921(a)(33). Some victims may not wish or be able to pursue criminal charges. Moreover, as with crimes generally, whether the abuser is prosecuted and convicted of a crime is in the hands of the prosecutor, judge, and jury, not the victim needing protection.

further critical challenges when they seek help.³¹ Their research reveals that Black witnesses have long been discredited in courtrooms.³² “Such discrediting can occur,” the authors explain, “based on stereotypes that African Americans are less intelligent than are whites, or that they are untrustworthy and dishonest. Based on all of the above [detailing the perceived deceitfulness of women witnesses], it stands to reason that black women risk being doubly disbelieved.”³³

Further, domestic violence victims who are poor are doubted because they are “vulnerable to stereotypes about their trustworthiness . . . [as people] who cheat the system to take what is not theirs.”³⁴ Reinforcing what I also experienced as an advocate for these women, the authors conclude that “[b]ecause so many survivors live at the intersection of all three of these identities — they are poor women of color — these stereotypes feed into each other to further undermine assumptions about their trustworthiness.”³⁵ For immigrant victims of domestic violence, their reality further encompasses anti-immigrant animus. As I wrote:

This anti-immigrant animus stems in part from racialized and gendered attitudes about immigrant communities. Immigrants of color and immigrant women particularly bear the brunt of the negative rhetoric surrounding immigration reform. Moreover, as the literal noncitizen, the immigrant outsider does not benefit from the positive attribution that derives from being a citizen.³⁶

Further, “[b]attered immigrants frequently face additional layers of isolation. Poverty, inability to secure legal representation for access to courts, language barriers, and culturally derived limitations may operate as barriers to immigrants seeking to leave abusive relationships.”³⁷ Therefore, even within the system created to protect women, poor women of color and poor immigrant women are more likely to have negative, demeaning experiences.

This results in a system that, though apparently focused on family protection, fails to properly protect all families. In fact, as is the practice

³¹ Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors’ Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV. 399, 435–37 (2019) (“[T]he available evidence indicates that, as a general rule, judges view women as less credible witnesses and advocates than they do men. And recent studies show that the police routinely discredit female survivors of intimate partner abuse.” *Id.* at 435 (footnote omitted)).

³² *Id.* at 436.

³³ *Id.* (footnote omitted).

³⁴ *Id.*

³⁵ *Id.* at 436–37.

³⁶ Mariela Olivares, *Battered by Law: The Political Subordination of Immigrant Women*, 64 AM. U. L. REV. 231, 263 (2014).

³⁷ *Id.* at 236. I further explained that “[l]ack of English-language skills remains a formidable barrier for immigrant domestic violence victims seeking legal assistance.” *Id.* at 237 n.16 (citing Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1031–32 (2000); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1249 (1991)).

in other imbalanced and unjust legal systems — the criminal justice system, for example — the law does not treat marginalized families in the normative ways that Huntington describes.³⁸ In this sense, then, the political depolarization that has expanded relief for domestic violence survivors over time has not resulted in comparable benefits for all. When the spotlight is not on the normative construct historically at the center of family law but rather on the families that have been pushed to the margins of legal protection, the injustice comes into focus. Therefore, the convergence of experiences is conceptual at most, not practical.

II. THE FUNDAMENTAL ERROR OF CONVERGENCE AS POLICY IDEAL

When I teach a seminar on domestic violence law and policy for upper-level law students at Howard University School of Law, one of the mandatory course assignments is to spend a few hours at the D.C. Superior Court in the courtrooms hearing civil or criminal cases involving domestic violence allegations. As a Historically Black College or University (HBCU), more than ninety percent of our students are Black — African American descendants of enslaved people in the United States, recent immigrants from throughout the global African diaspora or their descendants, and/or individuals identifying as multiracial. For the court visit assignment, I ask the students to reflect on a series of questions, including to comment on the racial and ethnic demographics of the people they see — litigants, judges, members of the public, courthouse staff, and lawyers. I ask them to reflect on any readily discernible class dynamics and to note what type of relief litigants are seeking. These are the same courtrooms and hallways that were my domain for the few years that I practiced family law, and I know that the answers to my questions have not changed since then. Unsurprisingly, then, my students unanimously comment that the litigants are mostly Black or Latina/o/x and sometimes require the help of an English-speaking court interpreter. They note that few people have lawyers in civil proceedings and most appear to not have significant financial resources. My students report that the petitioners seeking a protection order mostly ask for no-contact and stay-away provisions while some seek other forms of relief available to them — from return

³⁸ See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (rev. ed. 2012) (discussing how the “War on Drugs” and other so-called criminal justice campaigns led to the mass incarceration of Black people, decimating communities of color); PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* (2017) (explaining how the law enforcement and criminal justice systems function as designed — that is, to target and imprison Black men); CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON: AMERICA’S OBSESSION WITH LOCKING UP IMMIGRANTS* (2019) (describing how the criminal justice system, the immigration enforcement system, and the private-prison industry work together with the aim of imprisoning immigrants, mostly people of color, in the United States).

of property to the ordering of domestic violence prevention classes to financial redress, like child support. Some find witnessing the sometimes sad and dramatic outcomes jarring and unsettling. The court visit is a remarkable teaching tool as it puts the doctrine and policy that we read into practice. After reading and discussing illuminating and forceful works by Professors Kimberlé Crenshaw and bell hooks (among others) on how the legal system treats domestic violence victims of color differently because of their identities as women, Black, immigrant, and/or poor,³⁹ my students see firsthand what the authors mean.⁴⁰

Indeed, for lawyers, advocates, and people seeking help in family court, the reality is often far-removed from a conceptual methodology. This Part explores ways in which the paradigmatic normative construct does not apply to all marginalized families, using two examples. Section A discusses the ways in which the child welfare system unjustly targets families of color. Section B examines the ways in which family law does not protect migrant children and families. Finally, section C frames the analysis in both a critical theory and a critical race theory paradigm to argue that the idealization of children and family well-being works only for families of color, migrant families, and poor families when their interests happen to converge with the normative standard. Outside of this overlapping, these families experience an inherently racist and classist family court system that works just as intended in a society founded and reliant on the continuation of such principles.

A. *The Experience of Families of Color in the Child Welfare System*

In my time as an attorney for immigrant, Black, Latina/o/x, and poor victims of domestic violence, the threat of involvement with the child welfare system was omnipresent. Even if the mothers (most of my clients and indeed most victims of domestic violence are women⁴¹) were not individually accused of child neglect and abuse, child protection laws may be interpreted such that if a parent “exposes” the child to

³⁹ See BELL HOOKS, *Violence in Intimate Relationships: A Feminist Perspective*, in TALKING BACK: THINKING FEMINIST, THINKING BLACK, 84, 84–91 (1989); Crenshaw, *supra* note 37, at 1242–45.

⁴⁰ In our seminar, we talk about the intersection of multiple types of identities while experiencing domestic violence. This principle of intersectionality explores the ways in which people with multiple identities (for example, Black, queer, woman) experience systems differently due to the unique intersection of these identities. In her pioneering 1991 article, Crenshaw writes: “Contemporary feminist and antiracist discourses have failed to consider intersectional identities such as women of color. . . . Because of their intersectional identity as both women *and* of color within discourses that are shaped to respond to one *or* the other, women of color are marginalized within both.” Crenshaw, *supra* note 37, at 1242–44.

⁴¹ To be sure, people of all genders and gender identities experience domestic violence. Still, research demonstrates that women are more likely to experience it than are men. See *Fast Facts: Preventing Intimate Partner Violence*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/violenceprevention/intimatepartnerviolence/fastfact.html> [<https://perma.cc/JW4D-B2ZB>] (“About 1 in 3 women and [a]bout 1 in 4 men report having experienced severe physical violence from an intimate partner in their lifetime.”).

domestic abuse or does not adequately respond to another adult's abusive behavior, that parent may be found neglectful.⁴² One such Ayuda client, a Latina immigrant, found herself in child abuse and neglect proceedings in which, as a condition of reuniting with her child, she was ordered to receive a civil protection order against her abusive partner. The problem, however, is that no person can guarantee any court outcome. How could she ensure a judge would grant her an order of protection, and why was this deemed to be a condition of her reunification with her child? Professor Dorothy Roberts details a similar case:

In a family court hearing, [the New York City Administration for Children's Services (ACS)] insisted [that Angeline Montauban, a Black woman whose son was placed in the child welfare system when she sought social-service help to leave a violent partner,] file for an order of protection for her son against his father as well. Montauban disagreed, explaining to the judge that she wanted her son to maintain a relationship with his father, who had never hurt him.

A few days later, Montauban's partner took their son to family court for an appointment. ACS instructed him to leave the boy at a daycare center on the first floor of the court building. It was a setup: ACS had filed a petition to apprehend Montauban's son on the grounds that he was neglected because Montauban allegedly had allowed him to witness domestic violence and declined to file an order of protection against his father. That evening, the caseworker called Montauban to inform her that ACS had snatched her son from the family court daycare center. Her toddler was in foster care — in the custody of strangers in the Bronx.⁴³

⁴² *Nicholson v. Williams (Defending Parental Rights of Mothers Who Are Domestic Violence Victims)*, NYCLU, <https://www.nyclu.org/en/cases/nicholson-v-williams-defending-parental-rights-mothers-who-are-domestic-violence-victims> [<https://perma.cc/CC5G-EXQV>] (discussing a New York case holding on appeal that a child cannot be removed from their parent on the sole basis that the parent was unable to protect the child from witnessing domestic abuse). Other states and courts continue to consider failure to protect or failure to act as grounds for neglect and/or even criminal prosecution. See, e.g., Tim Talley, *Group Takes Aim at Oklahoma's Failure-to-Protect Law*, AP NEWS (Sept. 29, 2018), <https://apnews.com/article/45a6f24af72c4750ac141f3fe10b3bc9> [<https://perma.cc/CZ8Y-NZGH>] (discussing the Oklahoma failure-to-protect law that goes so far as to allow for prosecution of parent victims of domestic violence who do not respond to or report abuse by their abuser and noting such practices in other states); Sara Tiano, *Maryland Eyes Law to Protect Domestic Violence Survivors from "Failure to Protect" Charges*, THE IMPRINT (Feb. 14, 2023, 9:26 AM), <https://imprintnews.org/youth-services-insider/maryland-eyes-law-to-protect-domestic-violence-survivors-from-failure-to-protect-charges/238491> [<https://perma.cc/8GXG-T6XC>] (discussing what would be the first law of its kind in the nation protecting parent victims of domestic violence from claims of child neglect due to exposure to domestic violence and reporting that only fifteen state child welfare systems have policies that protect parent victims from charges of child abuse or neglect). Therefore, most states do not have codified protections for parent victims of domestic violence, leading to a broad array of policies. See, e.g., *id.* (“[Some] states have set a threshold of children being harmed or at risk of harm by their proximity to domestic violence. Under such policies, the parent experiencing the abuse can be charged with ‘failure to protect’ the children from the abusive partner.”).

⁴³ Dorothy Roberts, *How the Child Welfare System Is Silently Destroying Black Families*, IN THESE TIMES (May 24, 2022), <https://inthesetimes.com/article/systemic-inequalities-in-the-child->

For certain families, the very real threat of parents losing their children to the child welfare and foster care system hinders their ability to access needed social services while endangering their parental rights. In this context, then, even the most well-meaning and purposeful legislation and policies fail the very families that could perhaps be best served by resource and educational assistance.

Thus, although evidence-based decisionmaking in family law has resulted in gains such as the recognition of nontraditional family formation,⁴⁴ its focus on what is best for the family or child has not applied to all families. In discussing nontraditional family formation and the functional parenthood doctrine, Huntington describes how family court judges hear from the affected families, reflect on the testimony and evidence and thus “center the lived experience of children and their caregivers and eschew ideology about the primacy of nuclear families, instead ratifying the family forms they observe.”⁴⁵ Huntington concludes that, through this courtroom observance, judges provide families with individualized solutions.⁴⁶

For many families of color and poor families, however, this context-based approach may not reflect their lived experiences. So, though the law prescribes a judgment based on a child’s best interests, families from politically and socially marginalized communities may experience this aspect of family court decisionmaking differently than a white family with financial resources. Indeed, it may seem that for these families, their lives and family choices are disrespected and discounted as not fitting within the traditional normative understanding of families. Hill describes witnessing this phenomenon as a family lawyer for indigent clients in New York City, where the local family court relied on caseworkers from the city’s ACS, a child welfare agency, to conduct investigations in child custody proceedings between private parties who did not have resources to hire a private custody evaluator.⁴⁷ The result, she notes, is that ACS improperly intervened in families’ custodial decisionmaking by taking an adversarial lens to the cases in part to avoid the possibility (no matter how small or completely unsubstantiated) that a child could suffer harm.⁴⁸ New York City dispatched ACS caseworkers, even though the agency was already understaffed and

welfare-system-target-black-families [https://perma.cc/966E-DCQ7]; see also Susan Edelman, *Mom Calls Years-Long War with City Foster System “Kidnapping,”* N.Y. POST (Aug. 21, 2016, 6:00 AM), <https://nypost.com/2016/08/21/mom-calls-years-long-war-with-city-foster-system-kidnapping> [https://perma.cc/VU2F-W948] (describing the story and the class action lawsuit of which the mother was a part and providing pictures of the mother and son).

⁴⁴ See Huntington, *supra* note 1, at 1507.

⁴⁵ *Id.* at 1555.

⁴⁶ *Id.*

⁴⁷ Hill, *supra* note 14, at 532. Hill refers to a New York Family Court rule that provides for this service of the ACS. *Id.* at 539 (citing N.Y. COMP. CODES R. & REGS. tit. 22, § 205.56(a)(1) (2023)).

⁴⁸ See *id.* at 541.

overworked,⁴⁹ for purported judicial and administrative reasons.⁵⁰ But, as Hill writes:

If we couple the image of the courthouse filled with mostly poor, black and brown litigants with what we know about racial disproportionality and ACS, we see another possible explanation: in the minds of some decisionmakers, the poor families of color whose lives are impacted by these [child custody] decisions do not warrant the kind of principled risk-taking [as in a private, detailed, and neutral inquiry] necessary to defeat the officials' fear of bad publicity.⁵¹

In other words, for marginalized families, evidence-based family law does not operate in their favor.

Indeed, Huntington states that “race, racism, and deep divides about whether the United States should do more to address racial inequity are fundamental cleavages in the United States,” thus challenging the efficacy of the pragmatic method.⁵² Huntington cites the stark disparities in the child welfare system, in which “Black children are 14% of the child population but 23% of the foster care population,” as stated in a 2021 Department of Health and Human Services report.⁵³ A scholar on the ways in which families of color and low-income families experience the family law system, Huntington writes in another recent article: “Families of color and low-income families tend to be subject to far more state intervention today than other families, and state actors are more likely to override these parents’ child-rearing decisions, often based on views of child wellbeing infused with middle-class biases.”⁵⁴ Revisiting this phenomenon in *Pragmatic Family Law*, Huntington notes that pragmatism could help families of color in the child welfare system because “[i]f the government centered the experience of families, this could transform the government’s response to child abuse and neglect by focusing on the support that families themselves so often identify as welcome and

⁴⁹ See *id.* at 542.

⁵⁰ See *id.* at 541, 547.

⁵¹ *Id.* at 544; see also Dale Margolin Cecka, *Inequity in Private Child Custody Litigation*, 20 CUNY L. REV. 203, 228 (2016). Professor Cecka draws on her own experience to make the following “striking” observation:

New York City Family Court judges are often highly dissatisfied with the investigations and services that ACS provides. For Family Court judges to turn around and use ACS as a reliable and trustworthy gatherer of “facts” in a private case is ironic and further reinforces the message that Family Court litigants are not worthy of respect.

Id. (footnote omitted).

⁵² Huntington, *supra* note 1, at 1569.

⁵³ *Id.* at 1566 n.386 (citing CHILD.’S BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., CHILD WELFARE PRACTICE TO PREVENT RACIAL DISPROPORTIONALITY AND DISPARITY 2–3 (2021), https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf [<https://perma.cc/FR5X-2TM9>]).

⁵⁴ Clare Huntington & Elizabeth Scott, *The Enduring Importance of Parental Rights*, 90 FORDHAM L. REV. 2529, 2533 (2022) (footnote omitted).

needed.”⁵⁵ Huntington decries the lack of political will to attack the roots of racism.⁵⁶

Indeed, ideally a pragmatic approach would eradicate the effects of the bedrock racism and classism that undercut a fair legal system. But this ideal presupposes a “race-neutral” vacuum in which policymakers and judges would not castigate families of color, migrants, and poor families no matter the methodology employed. Certainly, the stated purpose of child welfare policies is to protect all children regardless of race or identity. The implementation, however, is inextricable from fundamentally flawed systemic injustices. In other words, even if a pragmatic approach were used for all families, the result would still be outcomes that penalize marginalized families because their lived experiences are not valued in the same way as the white, middle-class normative family experience.

The experiences of families of color and poor families in the child welfare system present perhaps the most extreme example. In a recent comprehensive empirical study jointly produced by the American Civil Liberties Union (ACLU) and Human Rights Watch, the authors conclude: “The child welfare system in the United States disproportionately investigates and removes children from over-policed, underserved communities, especially Black and Indigenous children and those living in poverty.”⁵⁷ An October 2022 article by members of the American Bar Association’s Children’s Rights Litigation Committee reports that “[i]n 2020 over 70 percent of all children, and 63 percent of Black children, removed into the U.S. foster system were taken from their families for reasons related to ‘neglect.’”⁵⁸ “Neglect,” however, is an ambiguous term that may be weaponized against poor parents, deeming poverty as equal to inability to sufficiently parent. Roberts writes: “Based on vague child neglect laws, [child welfare] investigators can interpret being poor — lack of food, insecure housing, inadequate medical care — as evidence of parental unfitness. Caseworkers search homes, subject family members to humiliating interrogation and inspect children’s bodies for evidence, sometimes strip-searching them.”⁵⁹ In the lived experiences of poor families of color pulled into the child welfare system — even absent substantiated abuse or true neglect — the

⁵⁵ Huntington, *supra* note 1, at 1571; *see also* Huntington & Scott, *supra* note 54, at 2540 (“Increasing state authority to supervise parenting can lead to a more intrusive state presence in communities of color to the detriment of the children affected.”).

⁵⁶ Huntington, *supra* note 1, at 1569–71.

⁵⁷ HUM. RTS. WATCH & ACLU, “IF I WASN’T POOR, I WOULDN’T BE UNFIT”: THE FAMILY SEPARATION CRISIS IN THE US CHILD WELFARE SYSTEM 32 (2022), https://www.hrw.org/sites/default/files/media_2022/11/us_cr1122web_3.pdf [<https://perma.cc/3TPH-HQSR>].

⁵⁸ Shereen A. White & Stephanie Persson, *Racial Discrimination in Child Welfare Is a Human Rights Violation — Let’s Talk About It that Way*, AM. BAR ASS’N (Oct. 13, 2022), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2022/fall2022-racial-discrimination-in-child-welfare-is-a-human-rights-violation> [<https://perma.cc/K9GC-7N6K>].

⁵⁹ Roberts, *supra* note 43.

pragmatic approach seems to perpetuate systemic harm. Thus, although a call for political change of racist systems is valid and important, the everyday reality as shown by researchers, attorneys, advocates, and families belies reliance on a normative-based methodological approach.

B. Family Law Does Not Shield Migrant Families and Children

Huntington writes that “although policymakers and advocates will not argue against *child* well-being, when policy questions turn to adults, consensus can be harder.”⁶⁰ She explains this paradigm through excellent examples — corporal punishment laws, prekindergarten prioritization, Medicaid expansion, same-sex marriage, and others.⁶¹ In discussing the reach of the Earned Income Tax Credit (EITC) and Medicaid expansion under the 2010 Patient Protection and Affordable Care Act⁶² (ACA), Huntington explores how focus on children and healthy families won bipartisan support: “The EITC is the backbone of antipoverty relief for families, providing \$64 billion to 31 million low-income workers annually.”⁶³ Additionally, she writes that:

Medicaid expansion has improved parental access to substance abuse treatment and mental health services, two conditions linked to child abuse and neglect as well as poor family functioning more generally. Further, Medicaid expansion has improved the finances of low-income families, increased employment rates, and promoted housing stability, all of which benefit children.⁶⁴

This data is certainly instructive, and the argument is exact.

In a 2012 article, I similarly discussed the bipartisan push to reenact the State Children’s Health Insurance Program (SCHIP),⁶⁵ the precursor to the current Children’s Health Insurance Program.⁶⁶ The program as currently administered provides health insurance to eligible children who are deemed to be above the eligibility guidelines for Medicaid but still unable to procure private insurance.⁶⁷ As I explained in the earlier article and as is still relevant in the children’s health insurance program,

⁶⁰ Huntington, *supra* note 1, at 1561 (footnote omitted).

⁶¹ *Id.* at 1544–53.

⁶² Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

⁶³ Huntington, *supra* note 1, at 1532.

⁶⁴ *Id.* at 1523 (footnotes omitted).

⁶⁵ See generally Mariela Olivares, *The Impact of Recessionary Politics on Latino-American and Immigrant Families: SCHIP Success and DREAM Act Failure*, 55 HOW. L.J. 359 (2012) [hereinafter Olivares, *SCHIP Success*].

⁶⁶ Children’s Health Insurance Program Reauthorization Act of 2009, Pub. L. No. 111-3, 123 Stat. 8 (codified as amended at scattered sections of the U.S. Code); see *Children’s Health Insurance Program (CHIP)*, MEDICAID.GOV, <https://www.medicaid.gov/chip/index.html> [https://perma.cc/ZKY6-NJPG].

⁶⁷ *CHIP Eligibility*, MEDICAID.GOV, <https://www.medicaid.gov/chip/eligibility/index.html> [https://perma.cc/VHV2-DTPT].

only some lawful immigrants are covered under the federal guidelines.⁶⁸ The inclusion of immigrants as any sort of beneficiaries was controversial in the early SCHIP political and legislative negotiations.⁶⁹ Similar to Huntington in *Pragmatic Family Law*, I wrote:

[A]n important component of the success of the 2009 reauthorization of SCHIP is how the legislation was labeled and lobbied. The focus by Democratic and Republican supporters alike was on the need to provide poor and modest-income children with health care coverage. Although [the reauthorization legislation] contained a strong and important provision expanding coverage to certain immigrants, supporters deflected the issue, purposefully keeping the immigrant in the shadows of the debate so as to ensure the legislation's eventual passage. This strategy that was, of course, ultimately successful was summarized perfectly by Senator Richard J. Durbin (D-Illinois) during the 2009 debate on the legislation: "The bottom line is: This is a debate about children's health coverage This is not a debate about immigration."⁷⁰

As I argued then in 2012 and have continued to argue since, though, the narrative focus on child welfare and the best interests of children does not typically embrace immigrant children and families and certainly does not protect undocumented migrants.⁷¹ Even in the SCHIP program, Medicaid, and the EITC, only lawful immigrant parents and children are eligible for participation and tax relief.⁷² This targeted exclusion of certain migrants from benefits and protection — including those living within the country as undocumented immigrants and those seeking asylum relief when arriving at a port of entry pursuant to the proper immigration processes — is perhaps most starkly demonstrated in the ongoing family separation crisis, which began in 2017.⁷³ Within

⁶⁸ See Olivares, *SCHIP Success*, *supra* note 65, at 371–77 (discussing the negotiations to include certain lawful immigrant classifications in the eligibility guidelines); *Coverage of Lawfully Present Immigrants*, HEALTHCARE.GOV, <https://www.healthcare.gov/immigrants/lawfully-present-immigrants> [<https://perma.cc/CW7B-HPDC>] (detailing which lawfully present immigrant children are eligible for CHIP coverage).

⁶⁹ See Olivares, *SCHIP Success*, *supra* note 65, at 374–77.

⁷⁰ *Id.* at 377 (footnotes omitted) (quoting Ceci Connolly, *Senate Passes Health Insurance Bill for Children; Immigrant Clause Opens Rift*, WASH. POST, Jan. 30, 2009, at A1).

⁷¹ Olivares, *SCHIP Success*, *supra* note 65, at 384–90; Mariela Olivares, *Resistance Strategies in the Immigrant Justice Movement*, 39 N. ILL. U. L. REV. 1, 20–22 (2018); see Olivares, *supra* note 36, at 282–83; Mariela Olivares, *Intersectionality at the Intersection of Profiteering & Immigration Detention*, 94 NEB. L. REV. 963, 964 (2016); Mariela Olivares, *Narrative Reform Dilemmas*, 82 MO. L. REV. 1089, 1090 (2017).

⁷² See *Health Coverage and Care of Immigrants*, KAISER FAM. FOUND. (Dec. 20, 2022), <https://www.kff.org/racial-equity-and-health-policy/fact-sheet/health-coverage-and-care-of-immigrants> [<https://perma.cc/QL75-468U>] (“Undocumented immigrants are not eligible to enroll in Medicaid or CHIP or to purchase coverage through the [Affordable Care Act] Marketplaces.”). To claim the Earned Income Tax Credit, taxpayers must have a valid Social Security Number, which undocumented immigrants do not have. For eligibility guidelines, see *Who Qualifies for the Earned Income Tax Credit (EITC)*, IRS (Jan. 25, 2023), <https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit/who-qualifies-for-the-earned-income-tax-credit-eitc> [<https://perma.cc/BJC5-F23H>].

⁷³ Mariela Olivares, *The Rise of Zero Tolerance and the Demise of Family*, 36 GA. ST. U. L. REV. 287, 296 (2020).

this example, we see blatant disregard for family unity and children's safety, which are ostensibly bedrock family law principles.

In 2020, I discussed a news story about a Honduran mother and child who were apprehended at the U.S.-Mexico border during the Trump Administration's Zero Tolerance Prosecution Policy and Family Separation Policy, which wreaked havoc on migrant families:

After declaring to U.S. Customs and Border Protection (CBP) officials her intent to seek asylum based on being the target of violence in her home country, the mother and her eighteen-month-old son were transferred to a holding facility where they spent the night together. The mother, Mirian, recounts what happened next: "When we woke up the next morning, immigration officers brought us outside where there were two government cars waiting. They said that I would be going to one place, and my son would go to another. I asked why repeatedly, but they didn't give me a reason. The officers forced me to strap my son into a car seat. As I looked for the buckles, my hands shook, and my son started to cry. Without giving me even a moment to comfort him, the officer shut the door. I could see my son through the window, looking back at me — waiting for me to get in the car with him — but I wasn't allowed to. He was screaming as the car drove away."⁷⁴

Mirian's story is like that of thousands of migrant families in which the U.S. government forcibly separated children from their fit adult parents or caregivers, absent any showing that such separation was in the children's best interest. The Zero Tolerance Prosecution Policy and Family Separation Policy worked collaboratively to arrest arriving migrants (without regard to the viability of their pleas for lawful asylum relief), place them in detention (that is, jail), and take their children away from them.⁷⁵ The policies destroyed thousands of families until the public and political pressure was so loud that President Trump declared its formal end in 2018.⁷⁶ Indeed, the bipartisan, convergent outcry against the government ripping children away from their parents was one clear example where concerns about general child well-being superseded the political and societal attacks against migrants arriving from Central America.⁷⁷ A poll of voting Americans conducted in June 2018 — during the height of the media coverage of crying, inconsolable children who were taken from their parents — showed that two in three

⁷⁴ *Id.* at 288–89 (footnote omitted) (quoting Mirian G., *At the Border, My Son Was Taken from Me*, CNN (July 11, 2018, 1:43 PM), <https://us.cnn.com/2018/05/29/opinions/immigration-separation-mother-son-mirian/index.html> [<https://perma.cc/6APC-72XH>]).

⁷⁵ See Olivares, *supra* note 73, at 294.

⁷⁶ See Miles Parks et al., *Trump Signs Order to End Family Separations*, NPR (June 20, 2018, 11:51 AM), <https://www.npr.org/2018/06/20/621798823/speaker-ryan-plans-immigration-votes-amid-doubts-that-bills-can-pass> [<https://perma.cc/PVD9-6HFY>].

⁷⁷ See *id.*

respondents disagreed with the policy.⁷⁸ Facing opposition to his actions from even within his own party, President Trump was forced to concede.

In my 2022 update about the family separation crisis, I discussed President Biden's newly created Task Force on the Reunification of Families, which was formed to reunify the families targeted by the Family Separation Policy, report to President Biden on the progress, and recommend policies and practices to ensure that the government does not separate families again.⁷⁹ Recent Task Force reports state that the U.S. government took at least 3855 migrant children away from their parents in the name of immigration deterrence.⁸⁰ Some families remain separated.⁸¹ Others who have been reunited are living through the ongoing trauma that they experienced.⁸² What unifies their experiences is that harmful actions were done to them without any regard for the well-established and seemingly unassailable standard that law should act in children's best interest. Indeed, the class action lawsuit brought by affected families against the U.S. government persuasively argued constitutional violations and challenged various defenses, including that the defendant agencies were properly operating under their executive

⁷⁸ David Smith & Tom Phillips, *Child Separations: Trump Faces Extreme Backlash from Public and His Own Party*, THE GUARDIAN (June 19, 2018, 2:23 PM), <https://www.theguardian.com/us-news/2018/jun/19/child-separation-camps-trump-border-policy-backlash-republicans> [https://perma.cc/J89D-UQRE] (summarizing the findings of a Quinnipiac University national poll).

⁷⁹ See Mariela Olivares, *Family Detention and Family Separation: History, Struggle, and Status*, 9 BELMONT L. REV. 512, 519 (2022). I continue my research into the aftereffects of the policies in a recently published piece on child migration. See Mariela Olivares, *Perspective, The Trauma of the Family Separation Policy on Migrant Children (2017–2022)*, 12 LAWS, no. 1, 2023, at 1 [hereinafter Olivares, *The Trauma of the Family Separation Policy*]. The Task Force outlines seven broad goals of its work: (1) “[l]ocating [f]amilies and [e]xplaining [o]ptions”; (2) “[e]stablishing a [m]echanism for [f]amilies to [c]ome [f]orward”; (3) “[p]roviding [h]ome [c]ountry [s]upport”; (4) “[o]ffering [f]amilies [r]eunification [s]ervices”; (5) [s]ustaining and [i]mproving the [a]vailability of [b]ehavioral [h]ealth [s]ervices”; (6) “[i]dentifying a [l]ong-[t]erm [s]tatus [o]ption for [f]amilies”; and (7) “[i]dentifying [d]urable [f]unding [s]ources.” U.S. DEP’T OF HOMELAND SEC., INTERAGENCY TASK FORCE ON THE REUNIFICATION OF FAMILIES, INTERIM PROGRESS REPORT 1 (2021), https://www.dhs.gov/sites/default/files/publications/21_0826_s1_interim-progress-report-family-reunification-task-force.pdf [https://perma.cc/5E4H-YBWL] [hereinafter 2021 INTERIM REPORT].

⁸⁰ When the U.S. government undertook the family separation process, it did so haphazardly, carelessly, and without basic documentation. As a result, the total number of separated children may never truly be known. In the first Task Force 120-day progress report, the Task Force “identified 3,914 [separated] children . . . between July 1, 2017 and January 20, 2021 Additionally, the Task Force continue[d] to review . . . 1,723 separations involving parents who were previously determined to be out of scope.” 2021 INTERIM REPORT, *supra* note 79, at 3. The most recent Task Force report, from September 2022, states that the Task Force “has identified 3,855 children” impacted by the policy. U.S. DEP’T OF HOMELAND SEC., INTERAGENCY TASK FORCE ON THE REUNIFICATION OF FAMILIES, INTERIM PROGRESS REPORT 6 (2022), https://www.dhs.gov/sites/default/files/2022-10/22_1026_sec-frtf-interim-progress-report-september-2022-cleared.pdf [https://perma.cc/BTN2-WVSF] [hereinafter 2022 INTERIM REPORT].

⁸¹ 2022 INTERIM REPORT, *supra* note 80, at 8.

⁸² Olivares, *The Trauma of the Family Separation Policy*, *supra* note 79, at 4–6.

authority for immigration decisions.⁸³ Thus, when family law intersects with immigration enforcement, the law does not protect all children. Although the policies are driven through the federal government by executive powers and not driven by state family law, the paramount best interests of the child standard that should govern all law concerning families and children is ignored. Here, too, the pragmatic method falls short.

C. *Race Is Not an Obstacle; Race Is the Foundation*

In her discussion of race in the article, Huntington notes the difficulties facing families of color: “[W]hen a problem is understood to affect primarily families of color, race has trumped pragmatism.”⁸⁴ In *Social Justice and Family Court Reform*, Professors Susan Brooks and Dorothy Roberts state:

The fundamental problem with family courts is that they treat family problems according to a family’s race and class status. White middle-class and affluent families almost always come to family court voluntarily to handle private matters, even though they may be seeking a coercive resolution to a dispute. Poor and minority families, on the other hand, are disproportionately compelled to appear before family court judges against their will.⁸⁵

Through the two brief examples of the child welfare system and the targeting of migrant families and children, we see but two ways in which family law fails to treat families equally or fails to uniformly prioritize child and family well-being. In this final section, I briefly echo an important point made in critical legal scholarship, and specifically by the theorists focusing on race and ethnicity, class, and immigration status. By using the lens in which the experiences of Black, Latina/o/x, poor, and immigrant families are the center, rather than the exception, we see that family law is just another area of law in which these families’ lives and lived experiences are not valued or believed. Moreover, this is not because entrenched racism is an obstacle. This is not due to a failure of the systems. As systems founded on racism, classism, and xenophobia, the family law and justice systems operate exactly as intended. Therefore, for these families, the solution cannot only be about incorporating an evidence-based methodology — but must also include a deep investigation into and dismantling of these degraded foundations of American law.

Professor Derrick Bell explains that the eradication of racism in America is not a mere political question or endeavor because “all of our

⁸³ Olivares, *supra* note 73, at 342–43; see *Ms. L. v. U.S. Immigr. & Customs Enf’t*, 310 F. Supp. 3d 1133, 1146, 1148 (S.D. Cal. 2018).

⁸⁴ Huntington, *supra* note 1, at 1510.

⁸⁵ Susan L. Brooks & Dorothy E. Roberts, *Social Justice and Family Court Reform*, 40 FAM. CT. REV. 453, 453 (2002) (footnotes omitted) (citing Judith Areen, *Intervention Between Parent and Child: A Reappraisal of the State’s Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 899 (1975)).

institutions of education and information — political and civic, religious and creative — either knowingly or unknowingly ‘provide the public rationale to justify, explain, legitimize, or tolerate racism.’”⁸⁶ Crenshaw writes that we must be wary of efforts to minimize the rootedness of racism in what she deems a “post-racial pragmatism,” in which under the banner of purported colorblindness, the “pragmatist may be agnostic about the conservative erasure of race as a contemporary phenomenon but may still march under the same premise that significant progress can be made without race consciousness.”⁸⁷ Thus, if the aim is to assist all families, attempting to advocate around or over the racist foundations of our institutions is a fruitless endeavor.

But a deep exploration of Critical Race Studies, Latina/o/x Critical Studies, and/or Critical Legal Studies is left to the distinguished scholars of those fields. The rich body of critical race and theory scholarship challenges lawyers, advocates, and teachers to reimagine the way in which we use, teach, and confront the law by acknowledging that the American legal system depends on the marginalization of certain populations to uphold the principles of white supremacy. It is in this context that I assert that a seemingly practical, evidence-based approach does not encompass marginalized families.

When marginalized families benefit from a political or legal methodology, it is often because their interests happen to align with the interests of the majority.⁸⁸ Further, even though families of color may benefit from the programs and policies described in *Pragmatic Family Law*, like the Earned Income Tax Credit, they are overrepresented because systems operate to keep such families impoverished and in the lower strata of income earners. In the recent report researched and authored by Human Rights Watch and the ACLU, the authors provide data showing that “Black children were more than three times as likely to be living in poverty as white children. The wealth gap between Black and white

⁸⁶ DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 156 (1989) (quoting Manning Marable, *Beyond the Race-Class Dilemma*, THE NATION, Apr. 11, 1981, at 428, 431); see also Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L.J. 85, 90 & n.26 (1994). In her excellent historical work on Critical Race Theory, Crenshaw describes Bell’s pioneering work to discount “post-racial” legal scholarship:

Bell’s work revealed how liberal, rights-oriented scholarship had been preoccupied with the task of reconciling racial equality with competing values such as federalism, free market economics, institutional stability, and vested expectations created in the belly of white supremacy, such as seniority. Bell sought to critique the liberal constitutional frame within which race scholarship was disciplined, uncovering the ways that these investments were not separate values to be balanced against the quest for racial equity but were themselves repositories of racial power.

Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1282 (2011) (footnote omitted).

⁸⁷ Crenshaw, *supra* note 86, at 1314.

⁸⁸ See DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 7 (1992).

families in the U.S. was the same in 2016 as it was in 1968, and . . . it has increased since the start of the Covid-19 pandemic.”⁸⁹ The authors discuss the deep research regarding how the legacy of enslavement is perpetuated by generations of “policies and practices” that “have subjected Black families to residential segregation, housing discrimination, discriminatory exclusion from employment opportunities, and limitations to social benefits and safety nets.”⁹⁰ Therefore, although such assistance programs ultimately include families of color and poor families, the deeper issues of why these families are disproportionately represented are never unearthed, exposed, or resolved.

Finally, when critically examining proposed methodologies, we must recognize that superimposing a normative ideal onto communities of color or otherwise ostracized people succeeds only when the majority allows it and/or benefits from it. As Bell explains, interest convergence theory dictates: “When whites perceive that it will be profitable or at least cost-free to serve, hire, admit, or otherwise deal with blacks on a nondiscriminatory basis, they do so. When they fear — accurately or not — that there may be a loss, inconvenience, or upset to themselves or other whites, discriminatory conduct usually follows.”⁹¹ As he observes, progress toward racial equality remains elusive precisely because of the entrenched American foundation of white supremacy.⁹²

CONCLUSION

Pragmatic Family Law adds substantially to the family law literature, discussing the reach and limits of the pragmatic approach. Huntington notes, for example, that even when such evidence-based policymaking results in important changes to the law (like health care expansion, marriage equality, and nontraditional parenthood), there are still seemingly unmovable obstacles that remain to achieving broader protections — like universal health care, acceptance of polyamorous families, or robust and expansive support for LGBTQ people.⁹³ She persuasively demonstrates how family law’s strong foundations in family and child well-being have helped and can help advocates and policymakers to further embrace a pragmatic approach that already operates in some family law spheres and helps to depolarize divisive political issues.

To be sure, the shortcoming in embracing the approach is not just that it cannot fully account for the racism inherent in family law, which

⁸⁹ HUM. RTS. WATCH & ACLU, *supra* note 57, at 38.

⁹⁰ *Id.* at 38–39.

⁹¹ BELL, *supra* note 88, at 7.

⁹² DERRICK A. BELL, JR., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (“However, the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites.”).

⁹³ Huntington, *supra* note 1, at 1561–62.

Huntington recognizes.⁹⁴ Instead, by centering the normative family experience, we miss the cornerstone question: what about families of color, immigrant families, and poor families? Their lived experiences, rooted in a heritage of marginalization and oppression designed to preserve the American status quo, are outside of the prescriptive family experiences. As Roberts states about the child welfare system's assault on families of color and poor families: "Family destruction has historically functioned as a chief instrument of group oppression in the United States."⁹⁵ As I state about the heinous practice of stripping children away from their fit parents at the U.S. border: "Policies shifting away from family unity and towards an inhumane treatment of immigrant families are anchored in the political rhetoric that normalizes the oppression of immigrants."⁹⁶ And, as I and myriad family law practitioners experience every day in family courts around the country, the family court system continues to treat families from marginalized communities differently than the traditional normative family. Therefore, while evidence-based, individual decisionmaking is best for family and child well-being and should be operationalized, it is critical that we understand its deep limitations for many American families.

⁹⁴ In discussing certain disparate effects of law and policy on families of color, she writes: [P]ragmatism in family law should work for all families, but race, racism, and deep divides about whether the United States should do more to address racial inequity are fundamental cleavages in the United States. This makes it significantly harder to use the pragmatic method to address the root causes of racial inequity in family law.

Id. at 1569.

⁹⁵ DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES — AND HOW ABOLITION CAN BUILD A SAFER WORLD* 87 (2022).

⁹⁶ Olivares, *supra* note 73, at 287.