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## Race, Dignity, and the Right to Marry

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# RACE, DIGNITY, AND THE RIGHT TO MARRY

R.A. Lenhardt\*

## INTRODUCTION

Justice Kennedy's majority opinion in *Obergefell v. Hodges*<sup>1</sup> asserts legal marriage's capacity to afford same-sex couples a measure of "equal dignity" and belonging too long denied.<sup>2</sup> In this Essay, I ask whether there is any reason to believe that marriage could do the same for African Americans. Could broader entrance into marriage, as some conservatives suggest, provide Blacks—gay and straight—a measure of belonging that has been frustratingly elusive,<sup>3</sup> even as the nation prepares to celebrate the one hundred and fiftieth anniversary of the Thirteenth Amendment's ratification?

The language of Justice Kennedy's opinion—which casts marriage as an "enduring bond, [through which] two persons together can find other freedoms, such as expression, intimacy, and spirituality," irrespective of sexual orientation, gender, or race—suggests that this question should be answered in the affirmative.<sup>4</sup> But I am deeply skeptical of this claim. While I do not dispute that exclusion from legal marriage imposes real citizenship harms<sup>5</sup> and celebrate the outcome in *Obergefell*, I am not convinced that access to marital rights, without more, magically cures the stigma, deprivation, disparate treatment, and harm that come with outsider status. Indeed, marriage regulation, in some instances, could very well exacerbate these wrongs.<sup>6</sup>

Even as it secures rights for LGBT Americans, *Obergefell* crafts a whitewashed version of marriage and dignity inconsistent with the actual experience of African Americans and other minorities with marriage. The relevant history demonstrates that legal marriage in this country has, in fact, too often not enhanced dignity for African Americans and other minority

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1. 135 S. Ct. 2584 (2015).

2. *Id.* at 2608.

3. See, e.g., Kay S. Hymowitz, Opinion, *How Single Motherhood Hurts Kids*, N.Y. TIMES (Feb. 8, 2014, 2:30 PM), [http://opinionator.blogs.nytimes.com/2014/02/08/how-single-motherhood-hurts-kids/?\\_r=0](http://opinionator.blogs.nytimes.com/2014/02/08/how-single-motherhood-hurts-kids/?_r=0) (discussing the correlation between single motherhood and poverty) [<http://perma.cc/4MFM-U9Z6>].

4. *Obergefell*, 135 S. Ct. at 2599.

5. See R.A. Lenhardt, *Beyond Analogy: Perez v. Sharp, Antimiscegenation Law, and the Fight for Same-Sex Marriage*, 96 CAL. L. REV. 839, 889–99 (2008).

6. See Katherine M. Franke, Opinion, *Marriage Is a Mixed Blessing*, N.Y. TIMES (June 23, 2011), <http://www.nytimes.com/2011/06/24/opinion/24franke.html> [<http://perma.cc/8ZGW-C2E7>].

groups.<sup>7</sup> Indeed, it has very often diminished black dignity and citizenship.<sup>8</sup>

Even more—as recent police shootings of black men and women,<sup>9</sup> new revelations about the extent of Blacks’ mistreatment in the judicial system,<sup>10</sup> and growing evidence of the cumulative disadvantage and despair that marks African American life<sup>11</sup> make plain—marriage, without more, is unlikely to secure black belonging anytime soon. Today, Blacks are the most unmarried group of any in the country.<sup>12</sup> Instead of looking for black dignity in marriage exclusively, I thus urge a greater focus on nonmarriage and greater attentiveness in law, policy, and even the advocacy efforts of groups such as “Black Lives Matter” to the ways in which family law structures, such as marriage, function to shape race—how it is defined, understood, and experienced—and inequality in ways that deny dignity and impede the flourishing of black families.<sup>13</sup>

#### I. COLOR-BLIND DIGNITY AND THE HISTORY OF RACE AND MARRIAGE *BERGEFELL* IGNORES

The question this Essay engages—whether marriage might be dignity enhancing for twenty-first century African America—is one that Justice Kennedy would likely find curious, if not offensive. Although arguably not as hostile to considering race as others on the Court,<sup>14</sup> he has expressed real skepticism about race in the past, especially where government decisions

7. See R.A. Lenhardt, *Marriage As Black Citizenship?*, 66 HASTINGS L.J. 1317, 1324–43 (2015).

8. See *id.*

9. See Lydia Polgreen, *From Ferguson to Charleston and Beyond, Anguish About Race Keeps Building*, N.Y. TIMES (Jun. 20, 2015), <http://www.nytimes.com/2015/06/21/us/from-ferguson-to-charleston-and-beyond-anguish-about-race-keeps-building.html> [<http://perma.cc/77CC-MT6H>].

10. See generally Shaila Dewan, *A Surreptitious Courtroom Video Prompts Changes in a Georgia Town*, N.Y. TIMES (Sept. 4, 2015), <http://www.nytimes.com/2015/09/05/us/surreptitious-courtroom-video-prompts-changes-in-a-georgia-town.html> (detailing harsh treatment and incarceration of poor individuals unable to pay municipal fines and penalties) [<http://perma.cc/9ZB3-4ZX7>].

11. See generally RICHARD ROTHSTEIN, ECON. POLICY INST., *THE MAKING OF FERGUSON: PUBLIC POLICIES AT THE ROOT OF ITS TROUBLES* (2014), <http://s3.epi.org/files/2014/making-of-ferguson-final.pdf> [<http://perma.cc/4GHF-D3DT>].

12. D’VERA COHN ET AL., PEW RESEARCH CTR., *NEW MARRIAGES DOWN 5% FROM 2009 TO 2010: BARELY HALF OF U.S. ADULTS ARE MARRIED—A RECORD LOW* 8 (2011), <http://www.pewsocialtrends.org/files/2011/12/Marriage-Decline.pdf> [<http://perma.cc/9FY7-SWA7>].

13. See CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* (2014) (arguing that the legal regulation of the family undermines the family).

14. In *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), a case concerning the voluntary consideration of race as a factor in school assignment decisions, Chief Justice Roberts infamously asserted in his plurality opinion that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” *Id.* at 748. In contrast, Justice Kennedy argued in his concurrence that certain race-conscious measures designed to combat racial isolation are permissible. See *id.* at 787–88 (Kennedy, J., concurring); see also R.A. Lenhardt, *Race Audits*, 62 HASTINGS L.J. 1527, 1566–67 (2010) (discussing Justice Kennedy’s concurrence in *Parents Involved*).

might be understood to classify or regard an individual on the basis of their racial identity.<sup>15</sup> Indeed, in his plurality opinion in *Schuette v. Coalition to Defend Affirmative Action*,<sup>16</sup> Justice Kennedy went so far as to suggest that, given the extent to which racial “lines are becoming more blurred,” race may simply not be as salient today, notwithstanding evidence of racial inequality across American society.<sup>17</sup> Further, from a doctrinal perspective, he has increasingly moved away from equal protection analyses typically associated with race and embraced notions of liberty and dignity in addressing LGBT rights in cases such as *Lawrence v. Texas*<sup>18</sup> and *United States v. Windsor*.<sup>19</sup>

In *Obergefell*, all this translates into a color-blind conception of dignity that, even with Justice Kennedy’s observations about stigma, privileges an atomistic conception of liberty only tangentially associated with group-based concerns.<sup>20</sup> For example, although many of the amicus briefs submitted to the *Obergefell* Court deal with matters of race at length,<sup>21</sup> the majority opinion only references it a handful of times.<sup>22</sup> Indeed, so intent is Justice Kennedy on telling an affirmative story about dignity and marriage that he fails even to mention the denial of marriage rights to Blacks during slavery in his discussion of the negative “developments in law and society” affected by marriage.<sup>23</sup> This omission is glaring, particularly given the ways in which exclusion from legal marriage helped to reaffirm Blacks’ slave status and to stigmatize blackness itself in ways that remain consequential.<sup>24</sup>

The majority opinion does engage *Loving v. Virginia*<sup>25</sup> at various points.<sup>26</sup> That decision, of course, supports the “double helix”<sup>27</sup> approach

15. See, e.g., *Parents Involved*, 501 U.S. at 787–96 (Kennedy, J., concurring).

16. 134 S. Ct. 1623 (2014).

17. *Id.* at 1634.

18. 539 U.S. 558 (2003).

19. 133 S. Ct. 2675 (2013). Kenji Yoshino attributes this move to “pluralism anxiety.” See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748 (2011). Some have argued that this shift effects a “constitutional displacement” rather than a reduction in protections. See, e.g., *id.* (quoting Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1417 (1974)). But Russell Robinson argues that the doctrinal treatment afforded minorities in the equal protection context has not been as favorable as that for LGBT couples, who have not been required, inter alia, to satisfy requirements pertaining to animus applicable in race cases. See Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. (forthcoming 2015) (on file with author).

20. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2630 (2015).

21. See, e.g., Brief for Legal Scholars Stephen Clark, Andrew Koppelman, Sanford Levinson, Irina Manta, Erin Sheley, and Ilya Somin as Amici Curiae, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, and 14-574); Brief of NAACP Legal Defense and Education Fund, Inc. and NAACP as Amici Curiae Supporting Petitioners, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, and 14-574).

22. *Obergefell*, 135 S. Ct. at 2599, 2615, 2619.

23. See *id.* at 2595.

24. See R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 855–56 (2004).

25. 388 U.S. 1 (1967).

26. See *Obergefell*, 135 S. Ct. at 2598–99, 2602–03.

27. See Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004) (discussing the “double helix”

resurrected in *Obergefell* to the extent that it relies on both equality and due process-based principles in invalidating Virginia's interracial marriage ban.<sup>28</sup> Yet, the analysis ultimately renders portions of *Loving* somewhat mute. Even *Loving*'s arguably most celebrated passage—which dismisses the Virginia interracial marriage prohibitions then in effect as “measures designed to maintain White Supremacy”<sup>29</sup> and concludes that “restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause”<sup>30</sup>—gets deployed to repackage the case's focus and meaning. Notwithstanding the fact that so many regard *Loving* as the decision that leveled the final blow to the third rail of the Jim Crow system,<sup>31</sup> Justice Kennedy insists that it is not a case about “interracial marriage” but rather one about the “abiding connection between marriage and liberty” under the Due Process Clause more generally.<sup>32</sup> The point here, to be clear, is not that *Loving*'s due process-based holding has no meaning. Indeed, I have elsewhere urged a greater focus on it.<sup>33</sup> But, in *Obergefell*, the weight of that passage gets redistributed in a way that, rather than simply complementing the *Loving* Court's equal protection-based holding, eclipses it.

This sidelining of race means that the history of marriage on which *Obergefell* relies is necessarily incomplete. In truth, inclusion within marriage, as I argued earlier, has not always been dignity enhancing, as Justice Kennedy's opinion implies. In a recent article, I explore the instrumental role that marriage has played over time in racial formation and in the subordination of African Americans, but also of groups such as Native Americans, Puerto Ricans, and Asian Americans.<sup>34</sup> This and other research suggests that mere entrance into marriage did not dramatically change the status and prospects of Blacks in the postbellum period.<sup>35</sup> For formerly enslaved Blacks, any dignity that rights to legal marriage conferred was often short lived.<sup>36</sup> Those who chose to marry as a way of

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approach of intertwining conceptions of due process and equal protection in *Lawrence v. Texas*). For more on the treatment of equality and liberty concerns in recent marriage cases, see Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817 (2014); Kenji Yoshino, *The Anti-Humiliation Principle and Same-Sex Marriage*, 123 YALE L.J. 3076 (2014).

28. See Lenhardt, *supra* note 5, at 861–66 (discussing equal protection and due process components of the Court's decision in *Loving*).

29. *Loving*, 388 U.S. at 11.

30. *Id.* at 12.

31. See, e.g., Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 17 (1994) (“The key sentence in *Loving* says that ‘the racial classifications [at issue] must stand on their own justification, as measures designed to maintain White Supremacy.’” (alteration in original)).

32. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015).

33. See generally Lenhardt, *supra* note 5.

34. See Lenhardt, *supra* note 7, at 1324–43.

35. See, e.g., Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251, 274–92 (1999).

36. For historical research on emancipated persons' early experience with marriage regulation, see, e.g., LAURA F. EDWARDS, *GENDERED STRIFE & CONFUSION: THE POLITICAL CULTURE OF RECONSTRUCTION* (1997); MARY FARMER-KAISER, *FREEDWOMEN AND THE FREEDMEN'S BUREAU: RACE, GENDER & PUBLIC POLICY IN THE AGE OF EMANCIPATION*

affirming loving relationships and attaining a measure of family integrity denied them during bondage quickly found that marriage offered them little protection from government intervention in their newly constituted families.<sup>37</sup> And those more enamored of nonmarital frames for organizing their lives discovered that their status as freedperson gave them no freedom at all when it came to affairs of the heart.<sup>38</sup> In the postbellum era, marriage was less an option than a command, as many formerly enslaved persons were coerced, forced, and even tricked into formalizing intimate relationships.<sup>39</sup> Marriage laws regulated those who willingly entered into legal marriage, but also those unmarried persons who existed in that institution's "shadow."<sup>40</sup>

Reconstruction era marriage laws often functioned more to reassert control over former slaves than to affirm their intimate choices and new status as citizens.<sup>41</sup> Whites saw marriage as a way to reconstruct the South, as well as the nation overall.<sup>42</sup> Officials at all levels of government thus devoted themselves to the goal of "creating black [households], husbands and wives," using whatever means deemed necessary to ensure compliance with its norms.<sup>43</sup> The goal was not to establish Blacks as a people, but to create the kind of citizens that served the objectives of Whites—those who were sexually and gender compliant and, who could, perhaps most importantly, internalize the tremendous dependency that many freedpersons had upon emerging from slavery.<sup>44</sup> Those who could not meet these expectations often faced harsh punishments.<sup>45</sup> For example, destitute fathers unable to satisfy nineteenth century expectations for supportive husbands quickly found themselves imprisoned and their children involuntarily placed in "apprenticeships" that, not surprisingly, replicated the labor arrangements of slavery.<sup>46</sup>

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(2010); NORALEE FRANKEL, *FREEDOM'S WOMEN: BLACK WOMEN AND FAMILIES IN CIVIL WAR ERA MISSISSIPPI* (1999); AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* (1998); Franke, *supra* note 35, at 308.

37. Lenhardt, *supra* note 7, at 1337.

38. See FRANKEL, *supra* note 36, at 91.

39. See STANLEY, *supra* note 36, at 45–46; Franke, *supra* note 35, at 296; see also Lenhardt, *supra* note 7, at 1327–28. Some states moved so quickly to institute black marriage as a form of social control that some former slaves had no idea that they had been married. See Franke, *supra* note 35, at 277 (discussing, inter alia, Mississippi law that deemed Blacks "who do now and have heretofore lived and cohabited together as husband and wife" to be deemed married as a matter of law); see also Civil Rights Act of 1865, ch. 4, § 3, 1865 Miss. Laws 82.

40. See Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 *YALE L.J.* 1641, 1656 (2003).

41. Lenhardt, *supra* note 7, at 1327.

42. *Id.* at 1326–28.

43. *Id.*; Franke, *supra* note 35, at 302.

44. Lenhardt, *supra* note 7, at 1327.

45. See, e.g., FRANKEL, *supra* note 36, at 80–87 (discussing use of vagrancy laws to penalize noncompliance with marital obligations); Franke, *supra* note 35, at 296–97 (discussing role of courts in imposing punishment for noncompliance with marriage norms).

46. See Mary Farmer-Kaiser, "With a Weight of Circumstances Like Millstones About Their Necks": *Freedwomen, Federal Relief, and the Benevolent Guardianship of the*

Over time, marriage as an institution worked in ways that primarily served to marry African Americans—those who are married, as well as those who are not—to second-class citizenship.<sup>47</sup> A full exploration of all the ways in which this has been true is not feasible in this Essay. But I have argued that an institutional structure analysis would reveal the long reach of marriage regulation in structuring black disadvantage and segregation.<sup>48</sup> Just take the single example of Jim Crow era statutes that incorporated antimiscegenation laws as a way of determining where a student might attend school or, even more, where an individual might live.<sup>49</sup> To the extent that such segregation templates still undergird zoning decisions and policy, we can understand them to provide concrete support for the notion that marriage has not only functioned as a mechanism for racial subordination, but that it has done so in ways that have disproportionately affected the wealth and opportunity structures of countless Blacks.<sup>50</sup> Research shows not only that the housing options open to Blacks are different than those for other groups, but that this difference has implications for access to education, transportation, and a host of other benefits.<sup>51</sup> In other words, marriage regulation, through its broad and often troubling reach into areas as diverse as education, housing, child welfare, public benefits, and even voting, has been instrumental in structuring race and disadvantage in this country.<sup>52</sup>

## II. MARRIAGE AS DIGNITY ENHANCING TODAY?: WHY BOTH MARRIAGE DECLINE AND “BLACK LIVES MATTER”

Marriage simply has not had a lot to do with the recognition or affirmation of black dignity historically.<sup>53</sup> Nevertheless, could it be dignity

*Freedmen's Bureau*, 115 VA. MAG. HIST. & BIOGRAPHY 412, 428–29 (2007); Franke, *supra* note 35, at 285 n.167.

47. Lenhardt, *supra* note 7, at 1327, 1335.

48. *Id.* at 1335–43.

49. *See, e.g.*, FRANKLIN JOHNSON, THE DEVELOPMENT OF STATE LEGISLATION CONCERNING THE FREE NEGRO 158–59 (1918) (citing North Carolina law that based the right to attend a particular school on antimiscegenation law); *City of Richmond v. Deans*, 37 F.2d 712, 713 (4th Cir. 1930) (invalidating Richmond law that based eligibility to live in a neighborhood on antimiscegenation law).

50. *See* Lenhardt, *supra* note 7, at 1338–40.

51. *See* David Leonhardt, *Middle-Class Black Families*, in *Low-Income Neighborhoods*, N.Y. TIMES (June 24, 2015), [http://www.nytimes.com/2015/06/25/upshot/middle-class-black-families-in-low-income-neighborhoods.html?\\_r=0](http://www.nytimes.com/2015/06/25/upshot/middle-class-black-families-in-low-income-neighborhoods.html?_r=0) (discussing a recent report on race and housing) [<http://perma.cc/34EH-6H3Y>]; *see also* DARIA ROITHMAYR, REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE (2014).

52. *See* Lenhardt, *supra* note 7, at 1338–43. For examples concerning public benefits and voting, *see* Melinda Chateauvert, *Framing Sexual Citizenship: Reconsidering the Discourse on African American Families*, 93 J. AFR. AM. HIST. 198, 198 (2008) (discussing voting rights denial based on belief that black man fathered child out of wedlock); Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure As the Revival of Post-Bellum Control*, 93 CALIF. L. REV. 1647, 1653 (2005) (discussing marriage promotion designed to reduce welfare reliance).

53. Some might argue that *Loving v. Virginia*, 388 U.S. 1, 11 (1967), provides a notable exception. *But see* Yoshino, *supra* note 27, at 3078–80 (discussing Bruce Ackermann's view

enhancing today? Notably, public disclosure on race typically occurs in the register of equality, not dignity. The Supreme Court, for its part, has yet to develop a robust doctrinal language for talking about dignity in the context of race. Current race jurisprudence privileges a paper-thin, hyper-formalistic notion of equality, one preoccupied with the treatment of “innocent” Whites and essentially disinterested in the dehumanizing effects of racial discrimination and disadvantage on African Americans and other minorities.<sup>54</sup>

It has taken the demands of activists associated with the “Black Lives Matter” movement and other groups to clear meaningful space to talk about issues of dignity and race today.<sup>55</sup> Outrage over the senseless, inhumane shooting deaths of African Americans such as Michael Brown and Rekia Boyd has not just focused important attention on our broken criminal justice system, it has also raised new consciousness about the “devaluation of the black body”<sup>56</sup> and isolating, stigmatizing, and degrading effects of the racial disadvantage and segregation that the Supreme Court has long dismissively described as mere “societal discrimination.”<sup>57</sup> It seems that, for now at least, how African Americans actually live their lives now matters to a growing segment of the population.

Investigations by the U.S. Department of Justice, non-profit institutions, and scholars into events in places like Ferguson, Missouri have begun to connect the dots between black inequality and the black deaths that have increasingly been at the forefront of public discourse in recent months.<sup>58</sup> We have the beginning of a national narrative about race and cumulative disadvantage that increasingly makes sense of inequality markers such as high black incarceration rates, segregated housing, and huge gaps in black and white wealth.<sup>59</sup> Yet, none of this changes the fact that, in the near term, marriage just is not likely to advance black dignity or citizenship more broadly.

On the numbers, as I have already discussed, marriage increasingly has less and less to do with the lives of most Blacks. African Americans are likely to hold the title of the least married group in the country for some

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that *Loving* constitutes a misstep insofar as the Court failed to address the adverse effects of the “institutionalized humiliation” achieved through antimiscegenation law).

54. See generally Elise C. Boddie, *The Sins of Innocence in Standing Doctrine*, 68 VAND. L. REV. 297 (2015).

55. See Claudia Rankine, *The Condition of Black Life Is One of Mourning*, N.Y. TIMES MAGAZINE (June 22, 2015), [http://www.nytimes.com/2015/06/22/magazine/the-condition-of-black-life-is-one-of-mourning.html?\\_r=0](http://www.nytimes.com/2015/06/22/magazine/the-condition-of-black-life-is-one-of-mourning.html?_r=0) [<http://perma.cc/XQV3-GD88>].

56. *Id.*

57. See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986).

58. CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 42–62 (2015), [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<http://perma.cc/CV46-MJR8>].

59. See, e.g., *id.* See generally ROITHMAYR, *supra* note 51; ROTHSTEIN, *supra* note 11; Elise C. Boddie, *Adaptive Discrimination*, 94 N.C. L. REV. (forthcoming 2016); Lenhardt, *supra* note 14.



time to come.<sup>60</sup> Marriage decline affects all groups, as the fact that the percentage of married Americans fell from 72 to 52 percent between 1960 and 2010 suggests.<sup>61</sup> But declines have been steepest in African America: in 2008, Black marriage rates stood at merely 32 percent, down from 61 percent in 1960.<sup>62</sup> Although, as with other groups, marriage rates are lowest among the poor and those with low levels of educational attainment,<sup>63</sup> “[B]lacks in all educational groups [are] less likely to be in intact marriages.”<sup>64</sup>

Even more, however, research in this area suggests that structural inequality, as well as the norms associated with marriage itself, prevent or at least discourage many African Americans from marrying. African Americans consistently rate marriage as important and are very likely to express a desire to marry in the future.<sup>65</sup> But research by Kathryn Edin and Maria Kefalas suggests that many poor Blacks may “avoid marriage not because they think too little of it, but because they revere it.”<sup>66</sup> “Uncertainty” and fears about not fulfilling traditional marriage roles seem to prevent low-income, black heterosexual couples from actually marrying.<sup>67</sup> The belief that “to . . . do [marriage] ‘right,’” they must be on a “solid economic footing,”<sup>68</sup> may lead some Blacks to decouple childbirth and marriage. In other words, structural inequality in areas such as housing, employment, education, and mass incarceration works in ways that keep marriage out of reach for many poor Blacks. “For poor [b]lack women, [in particular,] socioeconomic circumstances translate into very high levels of ‘uncertainty’ in their intimate . . . lives”<sup>69</sup> and may even be a barrier to finding an appropriate partner.<sup>70</sup>

Marriage today reflects black inequality. What is arguably most devastating where that institution’s ability to affirm the dignity of black loving relationships is concerned, however, is that marriage and other

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60. See *supra* note 12 and accompanying text.

61. PEW RESEARCH CTR., THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES (2010) [hereinafter DECLINE OF MARRIAGE], <http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf> [<http://perma.cc/B7LK-2HZA>].

62. *Id.* at 9 (comparing the “Current Marital Status” of Whites, Blacks, and Hispanics).

63. See generally JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY (2014); see also INST. FOR AM. VALUES & NAT’L MARRIAGE PROJECT, THE STATE OF OUR UNIONS: WHEN MARRIAGE DISAPPEARS: THE NEW MIDDLE AMERICA 54–55 (2010) [hereinafter WHEN MARRIAGE DISAPPEARS].

64. WHEN MARRIAGE DISAPPEARS, *supra* note 63, at 54.

65. *Id.* at 134.

66. See KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE 207 (2005).

67. LINDA C. MCLAIN, THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY 138–41 (2006).

68. *Id.* at 140–41.

69. Lenhardt, *supra* note 7, at 1351 (citing Linda M. Burton & M. Belinda Tucker, *Romantic Unions in an Era of Uncertainty: A Post-Moynihan Perspective on African American Women and Marriage*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 132, 136–39 (2009) (describing the problem of “uncertainty” and its impact on the marriage choices of Blacks)).

70. Kristen Harknett & Sara S. McLanahan, *Racial and Ethnic Differences in Marriage After the Birth of a Child*, 69 AM. SOC. REV. 790, 804, 808 (2004).

family law structures also shape such inequality, not to mention race itself. Elsewhere, I have offered personal examples from my work as a legal scholar who writes and teaches about race and family to support this assertion.<sup>71</sup> For more objective proof, however, we need only look at one of the tragic incidents at the heart of the “Black Lives Matter” movement: the shooting death of Walter Scott in North Charleston, South Carolina.

Scott was shot in the back after running away from a police officer after a seemingly routine traffic stop for a broken tail light.<sup>72</sup> The world focused on a death that might otherwise have gone unnoticed because a bystander used his cell phone to secretly record Scott’s shooting by Officer Michael T. Schlager with a cell phone.<sup>73</sup> For the purposes of this Essay, however, the reason that Scott apparently ran is far more important. News reports suggest that an outstanding warrant to pay eighteen thousand dollars in back child support led to his ultimately fatal efforts to evade possible arrest.<sup>74</sup> Having already been incarcerated and consequently lost a job for a similar inability to pay support, Scott was desperate to avoid having to bear the dual indignity of going to jail for unpaid child support and then losing another job because of it.<sup>75</sup> Our mechanisms for securing child support payments nationwide have a disparate impact on African American men, who are more likely to be unemployed and to be incarcerated than their non-minority peers.<sup>76</sup> States seek child support from married and unmarried parents alike.<sup>77</sup> Nevertheless, we can understand such obligations at least to be informed by marital norms privileging patriarchy, support, and the internalization of dependency.<sup>78</sup> Existing law—to include *Obergefell*’s implicit assumption that unmarried families are, as a normative matter, somehow both less deserving of respect and central to the

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71. R.A. Lenhardt, *Structuring Families, Structuring Race*, BALKINIZATION BLOG (Oct. 30, 2014, 10:38 PM), <http://balkin.blogspot.com/2014/10/structuring-families-structuring-race.html> [<http://perma.cc/YY3T-V9XD>].

72. Michael S. Schmidt & Matt Appuzo, *South Carolina Officer Is Charged with Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), <http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html> [<http://perma.cc/9DTA-AKJ6>].

73. *Id.*

74. Frances Robles & Sheila Dewan, *Skip Child Support. Go to Jail. Lose Job. Repeat.*, N.Y. TIMES (Apr. 19, 2015), <http://www.nytimes.com/2015/04/20/us/skip-child-support-go-to-jail-lose-job-repeat.html> [<http://perma.cc/V2Z8-2CJN>].

75. *Id.*

76. See Tonya Brito et al., “*I Do for My Kids*”: *Negotiating Race and Inequality in Family Court*, 83 FORDHAM L. REV. 3027, 3037 (2015); Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN ST. L. REV. 349, 364–70 (2013).

77. See Susan Frelich Appleton, *Illegitimacy and Sex, Old and New*, 20 AM U. J. GENDER SOC. POL’Y & L. 347, 362–63 (2012) (noting irrelevancy of marital status to determinations of child support involving heterosexual couples). Some even impose support obligations without regard to whether the parent is incarcerated, an approach to child support enforcement that disproportionately affects Blacks to the extent that they are overrepresented in the prison system. See Lenhardt, *supra* note 71 (reviewing HUNTINGTON, *supra* note 13).

78. See *supra* pp. 57–58.

fabric of society<sup>79</sup>—privileges marriage in ways that render it both overly punitive and insufficiently attuned to the needs of the poor and unmarried.<sup>80</sup> This is probably nowhere more true than in the case of black, nonmarital, female-headed households, which are disproportionately affected by such laws.<sup>81</sup>

With the Princeton and Columbia University-affiliated Fragile Families and Child Wellbeing Study—which follows 5000 children born in U.S. cities between 1998 and 2000 and their families—we now have more information about nonmarital or “fragile” families of all backgrounds.<sup>82</sup> Such families, unsurprisingly, are overwhelmingly likely to be disadvantaged.<sup>83</sup> As a group, the women who primarily head such families—whether single, cohabiting, or living without a partner—tend to live in poverty and to have far fewer socioeconomic resources than their married peers.<sup>84</sup> But, nonmarital black families tend to be the most fragile of the fragile.<sup>85</sup>

Black women in fragile families face tremendous degrees of “uncertainty” in areas such as employment and housing.<sup>86</sup> For example, they are more likely to live below or near the poverty line than their white counterparts.<sup>87</sup> They are also more likely to be recent recipients of public assistance and to describe their neighborhood as unsafe.<sup>88</sup> Finally, although they are more likely to live apart from romantic partners even if a relationship survives post-birth, black women are more likely to have additional children.<sup>89</sup> The chances that black women will marry after the birth of a child are only about 9 percent.<sup>90</sup>

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79. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2589 (2015) (“[T]he right to marry . . . supports a two-person union unlike any other in its importance.”).

80. See generally Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167 (2015).

81. See *Lenhardt*, *supra* note 7, at 1348–53.

82. *About the Fragile Families and Child Wellbeing Study*, FRAGILE FAM. & CHILD WELLBEING STUDY, <http://www.fragilefamilies.princeton.edu/about.asp> (last visited Sept. 27, 2015) [<http://perma.cc/YQ6C-CWAN>]. Fifty years ago, the Moynihan Report, of course, addressed the issue of black nonmarital families and what it derisively described as the growing “matriarchal pattern” within them. See OFFICE OF POLICY PLANNING & RESEARCH, U.S. DEP’T OF LABOR, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* 31 (1965) [hereinafter *MOYNIHAN REPORT*], <http://web.stanford.edu/~mrosenfe/Moynihan's%20The%20Negro%20Family.pdf> [<http://perma.cc/4MAZ-UXDB>]. At the time, the black nonmarital birth rate was 20 percent. See GREGORY ACS ET AL., *THE URBAN INST., THE MOYNIHAN REPORT REVISITED* 4 (2013) [hereinafter *MOYNIHAN REVISITED*], <http://www.urban.org/UploadedPDF/412839-The-Moynihan-Report-Revisited.pdf> [<http://perma.cc/ZV6B-ATZT>].

Significantly, the percentage of black nonmarital births has nearly tripled since then. *Id.* The rate of nonmarital births for Whites now stands at 20 percent, up from only 2 or 3 percent in 1965. *Id.*; see also Robert A. Hummer & Erin R. Hamilton, *Race and Ethnicity in Fragile Families*, 20 FUTURE CHILD. 113, 113 (2010).

83. Hummer & Hamilton, *supra* note 82, at 121.

84. *Id.* at 120.

85. See *id.*

86. *Id.*

87. *Id.*

88. *Id.* at 127.

89. *Id.* at 120.

90. *Id.* at 118.

The tremendous inequality that fragile black families confront compounds the disparate effects that family law structures—i.e., those regulating matters ranging from marriage to child custody to welfare to tax benefits—have on nonmarital family units. Indeed, the primacy of marriage as a regulatory device today means that family-related laws persist in marrying Blacks to second-class status. Tax policy that incentivizes marriage by extending benefits only to married couples rather than nonmarital individuals provides a noteworthy example of this problem.<sup>91</sup> State-imposed caps on welfare benefits under the Temporary Assistance for Needy Families (TANF) program provides another.<sup>92</sup> Welfare cap programs limit the economic support that families bearing additional children while on public assistance can receive.<sup>93</sup> As Jill Hasday explains, this “impose[s] an extreme financial hardship” on poor families, especially those that qualify as fragile families in which multipartner fertility often results and tends to result in family dissolution.<sup>94</sup>

TANF-based durational limits on welfare support stand as another window into this problem. Under those provisions, poor women are mandated to enter the workforce within a certain period<sup>95</sup> to end the dependency many wrongly believe that public assistance creates.<sup>96</sup> In the absence of meaningful support for childcare, however, these changes disproportionately affect women of color, who are overrepresented among recipients of welfare.<sup>97</sup> As suggested by the tragic story of a black mother recently prosecuted because she was so desperate for employment that, when her childcare fell through, she briefly left her young children in the car while she interviewed for a job,<sup>98</sup> durational limits and other similar policies significantly limit the capacity of single mothers to care for and support their families.<sup>99</sup> Their disparate racial impact raises serious

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91. See, e.g., MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS* 113 (2010) (arguing that “the state’s seeking to further two-parent families by awarding them economic resources not awarded to single-parent families is a peculiarly bad tool to harmonize” family-related interests). State-imposed caps on economic support for families bearing additional children while on public assistance provide another important example. See JILL ELAINE HASDAY, *FAMILY LAW REIMAGINED* 215 (2014); see also DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 209–17 (1997) (discussing issues of race and family cap programs).

92. The TANF program was established as part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§ 101–116, 110 Stat. 2105, 2110–2185; see also Onwuachi-Willig, *supra* note 52, at 1673–77.

93. See ROBERTS, *supra* note 91, at 219–20.

94. See HASDAY, *supra* note 91, at 214.

95. Ariel Kalil & Rebecca M. Ryan, *Mother’s Economic Conditions and Sources of Support in Fragile Families*, 20 *FUTURE CHILD*. 39, 52–53 (2010).

96. See ROBERTS, *supra* note 91, at 219–20.

97. Kalil & Ryan, *supra* note 95, at 52.

98. Shaila Dewan, *A Job Seeker’s Desperate Choice*, N.Y. TIMES (June 21, 2014), <http://www.nytimes.com/2014/06/22/business/a-job-seekers-desperate-choice.html> [<http://perma.cc/EL3X-LA5T>].

99. Kalil & Ryan, *supra* note 95, at 52.

concerns, just as the racially discriminatory practices discussed in Part I did.<sup>100</sup>

### III. NONMARRIAGE AS DIGNITY ENHANCING?

African America, as I have previously noted, has never fully interrogated the assumption—implicit in national law and policy, but also its own narratives about family life—that black marriage “is at the foundation of all our rights.”<sup>101</sup> And perhaps because this is true, we have never fully considered the ways in which family law structures such as marriage contribute to racial inequality. The time to consider such issues is long overdue and—insofar as anguish over recent police shootings and the massacre of black worshippers by white supremacist Dylan Roof earlier this summer now seems to flow across wide numbers of communities<sup>102</sup>—could not be more opportune.

In effect, traditional marriage has limited our thinking and imagination with respect to matters of race, dignity, and citizenship.<sup>103</sup> While family demographics have changed dramatically since 1965, proposals for grappling with the structural inequality that increasingly limits the choices and opportunities of nonmarital black families generally have not. Conservatives still emphasize marriage as the way to solve African America’s problems, despite documented doubts about its ability to single-handedly address black need—or, increasingly, the needs of many non-Blacks.<sup>104</sup> Others now urge birth control and a delay in childbearing until economic security can be achieved.<sup>105</sup> Yet, it seems clear that, without real attention to the inequality that destabilizes black communities, most black parents will never achieve the goal of economic security. What is needed is a fundamental rethinking and restructuring of existing law and policies concerning nonmarital families.

Demographics and the growing fragility of black loving relationships demand a greater focus on nonmarriage. Our entire policy focus should not be on eliminating such families, as urged by the popularly named Moynihan Report—former U.S. Senator Daniel Patrick Moynihan’s infamous and still hotly debated exegesis on race, nonmarital black families, and

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100. See *supra* Part I.

101. EDWARDS, *supra* note 36, at 47; see Lenhardt, *supra* note 7, at 1353.

102. See Lizette Alvarez et al., *In Charleston Funerals, Remembering Victims of Hate As Symbols of Love*, N.Y. TIMES (Jun. 25, 2015), <http://www.nytimes.com/2015/06/26/us/charleston-south-carolina-shooting-funerals.html> [<http://perma.cc/BY4A-A57A>].

103. See Lenhardt, *supra* note 7, at 1353–62.

104. See, e.g., THOMAS SHAPIRO ET AL., INST. ON ASSETS & SOC. POL’Y, THE ROOTS OF THE WIDENING RACIAL GAP: EXPLAINING THE BLACK-WHITE ECONOMIC DIVIDE 6 (2013), <http://iasp.brandeis.edu/pdfs/Author/shapiro-thomas-m/racialwealthgapbrief.pdf> [<http://perma.cc/7RMT-HWRB>].

105. See, e.g., ISABEL V. SAWHILL, GENERATION UNBOUND: DRIFTING INTO SEX AND PARENTHOOD WITHOUT MARRIAGE 22–28 (2014). Not insignificantly, such proposals ignore the reality that, as Dorothy Roberts has noted, nonmarital births tend not to make African Americans poor. Instead, Blacks, more than other groups, tend already to be poor when nonmarital births occur. See ROBERTS, *supra* note 91, at 219.

citizenship.<sup>106</sup> Rather, I recommend an inquiry into the potential for nonmarriage to secure black belonging. In suggesting that we explore supporting nonmarital black families where they stand, rather than trying to convert them into marital families, I do not advocate the abolition of marriage.<sup>107</sup> Instead, the proposal I advance imagines situating nonmarriage alongside marriage as a framework for loving black relationships. This shift in focus could generate critical support for nonmarital black families, improving their economic situation and overall standing in the broader community. The goal would be to ensure the “flourishing” of all black families, not to pathologize those who, either by choice or because of the structural inequality they confront, never enter traditional marriage.<sup>108</sup>

Elsewhere, I consider proposals generated by family law scholars that, if structured with an eye toward race, might provide a platform for real change.<sup>109</sup> Here, I will simply underscore that a critical piece in moving forward will be eliminating the marriage myopia of existing law and policy. Clare Huntington, for example, has advocated the development of a “postmarital family law” with new norms and rules that better aid nonmarital families navigating the challenges and poverty that they face.<sup>110</sup> Revisions to federal and state programs regulating families will also be imperative.

For example, President Obama’s January 2015 State of the Union Address included proposals to expand child care and open access to Head Start and universal preschool.<sup>111</sup> These proposals hold concrete benefits for nonmarital black families, as do initiatives that would increase the number of workers benefitting from the protection of the Family and Medical Leave Act (and similar state laws), and modifying federal tax policy would as well.<sup>112</sup> Proposals to restructure the Earned Income Tax Credit for the poor could similarly improve the financial health and overall functioning of such families.<sup>113</sup>

Finally, recognizing the resiliency and strengths of nonmarital families will also be critical. Too often policy interventions begin with an assumption that nonmarital families possess only “weaknesses” and no

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106. See THE MOYNIHAN REPORT, *supra* note 82, at 47–48.

107. See Lenhardt, *supra* note 7, at 1320.

108. See HUNTINGTON, *supra* note 13, at xii.

109. Lenhardt, *supra* note 7, at 1357–58.

110. See Huntington, *supra* note 80, at 173.

111. See President Barack Obama, 2015 State of the Union Address (Jan. 20, 2015), <https://www.whitehouse.gov/photos-and-video/video/2015/01/20/president-obamas-2015-state-union-address> [<http://perma.cc/L46Q-E3MW>]; see also Michelle Chen, *This Unnoticed Part of Obama’s Childcare Initiative Is a Big Deal*, NATION (Feb. 4, 2015), <http://www.thenation.com/blog/197105/unnoticed-part-obamas-childcare-initiative-big-deal#> [<http://perma.cc/W2LU-ZC7Y>].

112. See Eichner, *supra* note 91, at 35–47, 77–90, 113 (discussing the Family and Medical Leave Act as well as state economic and policy support for caretaking relationships).

113. See MOYNIHAN REVISITED, *supra* note 82, at 21.

strengths.<sup>114</sup> But reinforcing some of the strategies that such families deploy in scaling uncertainty in areas such as housing, food security, employment, and often complex relational ties could be very beneficial. For example, research indicates that black nonmarital families navigate the challenges of co-parenting and multipartner fertility better than some other groups.<sup>115</sup> Black men, in particular, do better than their white counterparts at maintaining ties with nonresident children.<sup>116</sup> Developing programs that exploit these and other strengths, and focusing on generating new capacities in this realm, could be very beneficial.

These and other suggestions for better supporting nonmarital black families and ensuring that they are not left to shoulder the burden of dependency and cumulative disadvantage alone could be beneficial to all families, but especially those that are “fragile” and black. While many of the benefits are economic in nature, the ideas explored here could generate positive effects in other areas as well. Among other things, developing nonmarital alternatives for family support would, as I have argued in other work, reframe notions of race, gender, and family-based citizenship overall.<sup>117</sup> Incorporating nonmarriage into family law and policy could—insofar as African Americans are likely to be the most unmarried group in the country for some time to come—dramatically change the standing of Blacks in American society.<sup>118</sup> They might, in other words, begin to secure a measure of belonging that has not hitherto been forthcoming.

#### CONCLUSION: THE PLACE OF DIGNITY AND FAMILIES IN THE NEW CIVIL RIGHTS MOVEMENT

The Supreme Court’s recent decision in *Obergefell* should be celebrated for the triumph of love and law that it represents. But we should guard against becoming complacent in its wake. Merely having access to marriage rights is not likely to afford LGBT individuals of any race the legal protections and belonging to which they are entitled.

We are now one hundred and fifty years beyond the moment when the guarantee of freedom from bondage became manifest and the period in which many Blacks gained access to legal marriage. Yet, this country has still not resolved the issues of race and citizenship that animated debates at that time. Our discourse about race, in many ways, replicates the conversations conducted then and in subsequent years. Notably, the debates about race and marriage today are almost identical to those we had fifty years ago, when the Moynihan Report was released.<sup>119</sup>

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114. See MOYNIHAN REPORT, *supra* note 82, at 30.

115. Huntington, *supra* note 80, at 190.

116. Marcia J. Carlson et al., *Coparenting and Nonresident Fathers’ Involvement with Young Children After a Nonmarital Birth*, 45 DEMOGRAPHY 461, 473 (2008); Huntington, *supra* note 80, at 190.

117. Lenhardt, *supra* note 7, at 1361.

118. See Dubler, *supra* note 40, at 1656.

119. See *supra* note 82 and accompanying text.

Fortunately, the national conversation about race that has been sparked by recent events and the grassroots organizing of “Black Lives Matter” and other groups holds great promise, notwithstanding the recent complaints of conservatives.<sup>120</sup> It has brought a much needed focus on black dignity and its relationship to racial inequality. We must continue to address the criminal justice concerns highlighted by the deaths of Michael Brown and others, as well as inequality in areas such as housing, education, and employment. But we cannot stop there.

This Essay has urged an added focus on marriage and other family-related systems that help to structure race. Family law-related institutions, systems, and policies intersect with other forms of disadvantage in ways we often fail to appreciate. We need to begin to think of institutions such as marriage in the same way that we do segregated schools and housing. I fear that, if we resist understanding laws and policies concerning families as a key instrument in structuring race and inequality, the quest for black dignity and equal citizenship will always be elusive. The place of black families—whether marital or nonmarital, same- or opposite-sex—in our society is as important a civil rights issue as any facing African America today.<sup>121</sup>

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120. See Editorial, *The Truth of ‘Black Lives Matter’*, N.Y. TIMES (Sept. 4, 2015), <http://www.nytimes.com/2015/09/04/opinion/the-truth-of-black-lives-matter.html> (disputing conservative claims that the “Black Lives Matter Movement” incites racial hatred) [<http://perma.cc/83PQ-ZK7D>].

121. See Chateauvert, *supra* note 52, at 200 (discussing failure of early black leaders to identify family-related issues as civil rights matters).