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Recommended Citation

Robin A. Lenhardt, *Marriage as Black Citizenship?*, 66 *Hastings L. J.* 1317 (2015)

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Marriage as Black Citizenship?

R.A. LENHARDT*

The narrative of black marriage as citizenship enhancing has been pervasive in American history. As we mark the fiftieth anniversary of the Moynihan Report and prepare to celebrate the 150th anniversary of Thirteenth Amendment, this Article argues that this narrative is one that we should resist. The complete story of marriage is one that involves racial subordination and caste. Even as the Supreme Court stands to extend marriage rights to LGBT couples, the Article maintains that we should embrace nonmarriage as a legitimate frame for black loving relationships—gay or straight. Nonmarriage might do just as much, if not more, to advance black civil rights.

Part I explores marriage's role in racial subordination by looking at the experiences of African Americans, as well as Native Americans, Puerto Ricans, and Asian Americans. Drawing on institutional structure analyses, it then considers how legal marriage has "married" Blacks to second-class citizenship. Part II explores the current place of marriage in African America. It argues that, while the regulation of black loving relationships today differs dramatically from what we saw in earlier times, family law often has a punitive effect on such American families. Part III contemplates the benefits of adopting a focus on nonmarriage. It contends that meeting black families where they are holds the most potential for progress in addressing the structural barriers to success faced by those families. The Article ends with a "call to action" for legal scholars and others concerned about black families and citizenship. It maps a broad agenda for exploring in earnest the potential that supporting and valuing the existing networks, arrangements, and norms regarding gender and caretaking in African America has for promoting black citizenship and equality in the twenty-first century.

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TABLE OF CONTENTS

INTRODUCTION: MARRIAGE AS BLACK CITIZENSHIP?	1318
I. MARRIAGE AS RACIAL SUBORDINATION.....	1324
A. MARRIAGE AS CASTE.....	1325
B. MARRYING BLACKS TO SECOND-CLASS CITIZENSHIP.....	1335
II. THE PLACE OF MARRIAGE IN TWENTY-FIRST-CENTURY AFRICAN AMERICA.....	1343
A. THE DECLINE OF BLACK MARRIAGE	1344
B. FRAGILE NONMARITAL BLACK FAMILIES AND THE STATE.....	1348
III. NONMARRIAGE AS CITIZENSHIP ENHANCING?.....	1353
CONCLUSION: NONMARITAL LOVING AND THE STRUGGLE FOR BLACK CIVIL RIGHTS	1362

INTRODUCTION: MARRIAGE AS BLACK CITIZENSHIP?

In 1866, a U.S. Colored Troops corporal delivered a public address heralding the state of Virginia's decision to legalize black unions in the wake of the Civil War.¹ Previously, black slaves in that state and others throughout the country were deemed to lack the legal capacity to formalize their affective relationships.² For this soldier and so many others in the fledgling community of emancipated persons, the extension of marriage rights signified the previously unimaginable potential for former slaves to secure full American citizenship rights. "[T]he [m]arriage [c]ovenant," he explained to those gathered, "is at the foundation of all our rights. In slavery we could not have *legalized* marriage: now we have it . . . and we shall be established as a people."³

As the nation prepares to mark the 150th anniversary of the ratification of the Thirteenth Amendment later this year, the narrative of black marriage as citizenship enhancing is one that retains tremendous amount of force. Inside and outside of African America, the widely held belief is, first, that marriage uniformly helped to elevate Blacks from a deeply degraded status and, second—insofar as the position of African Americans remains one still marked by disparities in areas ranging from employment to criminal justice to family life—that it can do so again. Indeed, marriage's popularity as a public policy response to black inequality has not ebbed since emancipation.

Significantly, this year also marks the fiftieth anniversary of the release of the so-called Moynihan Report, the exegesis on black family

1. LAURA F. EDWARDS, *GENDERED STRIFE & CONFUSION: THE POLITICAL CULTURE OF RECONSTRUCTION* 46 (1997).

2. Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221, 229 (1999).

3. EDWARDS, *supra* note 1, at 47.

disadvantage and citizenship penned by former Senator Daniel Patrick Moynihan when he was an assistant secretary at the Department of Labor.⁴ The language of black “pathology” and “matriarchal pattern” that the report deployed in diagnosing nonmarriage as a core challenge for 1960s African America still evokes strong criticism.⁵ But the legitimacy of the “national call” to focus on black “family structure” and marriage as the way of eradicating social and economic barriers to black belonging that it issued has not been seriously challenged.⁶ If anything, it has been amplified many times over, as the inclusion of marriage promotion provisions in national policy initiatives and federal statutes such as the 1996 Personal Responsibility and Work Reconciliation Act attests.⁷

This Article argues that the stock narrative that attends black marriage in this country is one that legal scholars and others concerned about African American citizenship and families should interrogate more deeply, if not resist. As an initial matter, this narrative obscures essential realities about African America’s actual experience with marriage over time. The real story of African American marriage is far more complex than it allows. Research in this area suggests that the Reconstruction period did not feature happy black brides and grooms so much as fragile black unions too often forged through trickery, government coercion, and punishment.⁸ Second, an expansive view of African America’s history with marriage makes it plain that legal marriage has not fulfilled the promise of full belonging and acceptance for Blacks. Indeed, if anything, marriage has very often been synonymous with racial caste in the United States—for African Americans and other minority groups.⁹ In ways that have largely gone unnoticed, marriage regulation—not unlike Jim Crow segregation in public schools or housing—has been instrumental in locking African America into a second-class citizenship from which it has not yet fully emerged.

Even more, the disproportionate focus on marriage has placed an unfortunate upper bound on our thinking and imagination with respect

4. See OFFICE OF POLICY PLANNING & RESEARCH, U.S. DEP’T OF LABOR, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965).

5. *Id.* at 31, 47–48.

6. *Id.* at 47–48.

7. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, 110 Stat. 2105 (1996) (codified as amended at 42 U.S.C. §§ 601–603); see also 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, 1649 (2005) (discussing statute).

8. Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251, 308 (1999).

9. See, e.g., NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 24–30, 32–34, 42–46 (2000) (discussing, inter alia, treatment of Native Americans and Blacks under eighteenth- and nineteenth-century marriage laws).

to matters of race and citizenship. In recent years, family law scholars and others have explored a number of alternative frames for structuring and supporting families.¹⁰ Yet, the potential such options hold for promoting black equality and citizenship has too often not been a topic of discussion. What we need is a change in focus, a reset, if you will. In the pages that follow, I issue a new call to action, but one that differs dramatically from the one that the Moynihan Report voiced fifty years ago. Instead of holding traditional marriage out as the presumptive lodestar in this domain, scholars, policy makers, and community leaders need seriously to consider a range of possible frames for affective black relationships, including nonmarriage. This does not mean abolishing marriage as an institution; it simply means reconsidering its supremacy as the presumptive vehicle for supporting black relationships.

The time to engage in such an inquiry could not be more opportune. The Supreme Court is poised to render a decision in *Obergefell v. Hodges*, a case raising the constitutionality of state bans on the extension of marriage rights to same-sex couples.¹¹ While the legal issues that it raises bear most directly on LGBT Americans, its outcome and effects will not be so limited. Questions about the relationship between marriage and citizenship have implications for all Americans, but especially for African Americans—whether gay or straight.

Today, multiple generations after Emancipation, African America is the most unmarried of any group in the country.¹² While the unmarried family configurations of Whites have become a matter of interest, even fascination, those of Blacks, which are disproportionately poor and headed by females, continue to be both stigmatized and marginalized within the broader community.¹³ Even now, the struggles that nonmarital black families face are cast primarily as the result of unwise individual choices rather than as a function of the same structural inequalities that limit black opportunity in areas such as public education, housing, employment, and criminal justice. What I argue in the pages that follow, however, is that matters of black marriage and family should also be seen as matters

10. See, e.g., Laura Rosenbury, *Friends with Benefits*, 106 MICH. L. REV. 189, 194–97, 208–12 (2007) (arguing for government recognition of friendship).

11. *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), cert. granted sub nom., *Obergefell v. Hodges*, 83 U.S.L.W. 3315 (U.S. Jan. 16, 2015) (No. 14-556).

12. See PEW RESEARCH CTR., THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES 10 (2010), <http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf> [hereinafter DECLINE OF MARRIAGE]; see also Rachel F. Moran, *Loving and the Legacy of Unintended Consequences*, 2007 WIS. L. REV. 239, 274–76 (discussing, inter alia, changes in marriage and social norms in this area). The percentage of married Americans fell from seventy-two percent in 1960 to fifty-two percent in 2008. DECLINE OF MARRIAGE, *supra*, at 1.

13. See, e.g., Abby Ellin, *Making a Child, Minus the Couple*, N.Y. TIMES, Feb. 10, 2013, at ST.1.

of civil rights. They are intimately intertwined with questions of black citizenship and belonging in the twenty-first century.

This Article maps a broad agenda for interrogating and better understanding the relationship between black citizenship and family. In doing so, it makes a number of important contributions. First, it identifies marriage as an institution that has functioned to structure race as well as family.¹⁴ I argue that marriage has often served to foster racial subordination and then engage in an exploration of its role limiting intimate choice and freedom for African Americans, but also other minority groups. Second, building on my prior work advocating the use of race audits to identify the sources of racial inequality and their effects, I demonstrate that deploying institutional structure analyses can help to reveal the ways in which marriage regulation—historically, as well as with respect to current policy—has contributed to cumulative racial disadvantage for African Americans in particular.¹⁵

Third, in light of historical and current statistics on black affective relationships, the Article observes that marriage, notwithstanding the dominant narrative, is unlikely to provide a vehicle for securing full belonging for African Americans. I argue that, instead of obsessing over the ever-expanding array of marriage promotion programs that have surfaced over time, what we need is to embrace and support black loving—in intimate, as well as in parental or other caregiving relationships—as it is currently experienced, without being preoccupied with how well it fares against the marriage yardstick.¹⁶ Accordingly, this Article briefly explores options for black relationships and families that might have greater capacity for fostering black belonging and could lead to benefit allocations for nonmarital families that approach those we now see in the marriage arena. The extension of such benefits could have a tremendous impact on black inequality overall.¹⁷ Although it is not this Article's project, it might even serve to promote black marriage, to the extent that unmarried African Americans frequently rank marriage high in importance but cite inadequate resources as a reason for not formalizing intimate relationships.

Finally, as indicated previously, I make the case that matters of marriage in the twenty-first century ultimately go to questions of black

14. See R.A. Lenhardt, *Structuring Families, Structuring Race*, BALKINIZATION (Oct. 30, 2014, 10:38 PM), <http://balkin.blogspot.com/2014/10/structuring-families-structuring-race.html> (arguing that family structures race as well as families).

15. R.A. Lenhardt, *Race Audits*, 62 HASTINGS L.J. 1527 (2011).

16. See Onwuachi-Willig, *supra* note 7, at 1653, 1673–82 (discussing marriage promotion targeting Blacks). See generally MELANIE HEATH, *ONE MARRIAGE UNDER GOD: THE CAMPAIGN TO PROMOTE MARRIAGE IN AMERICA* (2012) (exploring how marriage promotion in Oklahoma defined cultural repertoires of the middle-class, married, heterosexual family as the model of American citizenship).

17. For a discussion on black inequality, see generally Lenhardt, *supra* note 15.

civil rights. This framing of the issue is one that I urge law and policy makers to adopt. Just as importantly, I contend that African America itself must begin to see the place of marriage as a civil rights issue on par with housing discrimination or school segregation. While nonmarital black families have long been the subject of public discourse, civil rights organizations have frequently excluded matters of family formation and support from their core agenda, treating them as essentially private matters.¹⁸ This Article argues that this must also change to facilitate a more nuanced understanding of the relationships between race, family, and belonging in this country.

Part I begins the Article by examining marriage's underexplored role in effecting racial subordination. It argues that the true story of legal marriage in this country involves racial caste and subordination. Part I.A first complicates the typical narrative of early black marriage and then looks to provide insight into the racialized effects of marriage regulation on other groups. It considers the ways in which marriage promotion for groups such as Native Americans and Puerto Ricans has, as a historical matter, frequently been premised on the inherent inferiority of such groups and the need to civilize or acculturate them to dominant white approaches to intimacy and family, even if by force or coercion. It also considers the denial and "disestablishment" of citizenship by marriage-related immigration laws that marked Asian Americans as too "foreign" for inclusion in the polity.¹⁹

Part I.B shifts to focus more directly on the African American experience and argues that, rather than a vehicle for black liberation, marriage has been instrumental in effecting racial discrimination and disadvantage that has, over the years, married African America to second-class citizenship. To understand the multiple ways in which this has been true, the Article advocates the use of institutional structure analyses. Such analyses have been deployed very effectively to unpack how New Deal programs such as the G.I. Bill and Social Security, as well as welfare initiatives, retrenched black disadvantage and racial inequality. The Subpart makes the case that using an institutional or structural lens for research in this area could greatly enhance our understanding of marriage's true race effects where African America is concerned. Among other things, it would deepen our understanding of the structural implications of antimiscegenation law and other laws and policies concerning that institution.

18. Melinda Chateaufort, *Framing Sexual Citizenship: Reconsidering the Discourse on African American Families*, 93 J. AFR. AM. HIST. 198, 201 (2008).

19. See Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405 (2005).

Part II starts a conversation about how to think about black marriage and citizenship today, when entrance into marriage is increasingly on the wane in the United States, but experiencing its steepest decline in African America.²⁰ Part II.A begins by setting out the basic statistics on black marriage decline. Part II.B then considers the main focus of the Moynihan Report—the case of so-called “fragile” black families—poor, typically female-headed, unmarried caregiving units. It first offers demographic information and the results of sociological research by Katheryn Edin and others to provide a more comprehensive picture of such families and why the women and men who create them may not see marriage as a viable option for family formation.²¹ The Subpart then considers the barriers not just to marriage, but also to successful family outcomes that fragile black families face. It initially considers the challenges that structural obstacles such as unemployment, incarceration, and housing insecurity present for such caregiving units, but then turns to focus on family law-related structures and systems as well. Drawing on recent scholarship by Clare Huntington and others, the Subpart argues that the structures and systems of family law itself—that is, “structural family law”—must also be considered when evaluating the status of these families.²² Agreeing with legal scholars who lament that modern family law is more often punitive than supportive, the Subpart asserts that structural family law is often hardest on fragile, unmarried families of color who do not comply with traditional nuclear family norms. Indeed, it intervenes in their lives in ways that disrupts important familial relationships, compromises family autonomy, and exacerbates the effects of racial disadvantage and stigma in this context.²³ In other words, while the hyper regulation and abuses detailed in Part I are remnants of the past, family law policies today still work to disadvantage families of color.

Part III considers what African America’s response should be to this reality in a world where, even if marriage does not secure full belonging

20. See *DECLINE OF MARRIAGE*, *supra* note 12, at 1; RALPH RICHARD BANKS, *IS MARRIAGE FOR WHITE PEOPLE: HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE* 7 (2011); PEW RESEARCH CTR., *WOMEN, MEN AND THE NEW ECONOMICS OF MARRIAGE*, 22 (2010), <http://pewsocialtrends.org/files/2010/10/new-economics-of-marriage.pdf>. For more on black marriage decline and its effects, see *THE DECLINE IN MARRIAGE AMONG AFRICAN AMERICANS: CAUSES, CONSEQUENCES, AND POLICY IMPLICATIONS* (M. Belinda Tucker & Claudia Mitchell-Kernan eds., 1995).

21. See KATHRYN EDIN & MARIA KEFALAS, *PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE* 216 (2005). See generally KATHRYN EDIN & TIMOTHY J. NELSON, *DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY* (2013) (examining “a culture-wide shift in the meaning of fatherhood that has accompanied changes in the meaning of marriage”).

22. See CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* xii (2014).

23. See *id.*; see also MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA’S POLITICAL IDEALS* (2010).

for all, it still functions as the metric against which all intimate relationships—married or unmarried—are assessed and valued.²⁴ Given past history and current statistics on “fragile” black loving relationships, it confronts a reality that few people—inside African America and out—have been willing to internalize: traditional marriage is unlikely to secure black belonging any time soon. The Part thus argues that legal scholars and others should begin to think more about nonmarriage and the possibilities that exist for supporting nonmarital relationships in African America. Nonmarriage and nonmarital parenting are on the rise in the United States.²⁵ In some communities, these options for configuring intimate relationships and family have become increasingly accepted as legitimate, viable alternatives;²⁶ but for African America, they remain a mark of pathology and familial dysfunction. This needs to change. Instead of asking why African Americans are not doing better with marriage, we should consider not just why marriage is not working for African Americans, but also how destigmatizing and honoring existing black loving and familial relationships can promote black citizenship and belonging. The Part argues that one way to move the needle is to begin to devise better mechanisms for supporting nonmarital black relationships as they currently exist. Existing family law systems offer such support to predominantly white marital families in a variety of ways.²⁷ The time has come to do the same for black nonmarital families as well.

Part IV ends the Article by elaborating further on the content of the call to action that it issues. It notes that while supporting nonmarital families where they are is a critical first step, legal scholars and others concerned about black citizenship must ultimately begin to engage seriously with a much broader set of issues relating to race, black families, and belonging.

I. MARRIAGE AS RACIAL SUBORDINATION

Marriage has long functioned as a primary mechanism for racial formation in the United States, an essential pillar in the construction of racial norms and hierarchies. Yet, scholars of race and family law have been slow fully to engage it as such. So often, attention focuses on the myriad ways in which marriage structures families, delineating, among other things,

24. 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, 1654 (2003) (noting, in the context of a discussion about women, the extent to which “lawmakers still look to marriage as a public policy tool,” even though rights for those in nonmarital relationships formally exist).

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

26. See, e.g., Ellin, *supra* note 13.

27. See HUNTINGTON, *supra* note 22, at 58.

spousal roles and obligations, especially with respect to children.²⁸ Laws and policies pertaining to marriage, however, also work to structure race—racial categories and meaning, as well as the experience of race—in ways that we overlook to our detriment.²⁹ This Part thus turns to consider the relationship between race, marriage, and citizenship in this country and its implications, especially where African America is concerned. It makes the claim that for African Americans, but also other groups, this celebrated institution has sadly very often been citizenship diminishing. The true story of marriage in the United States is one of racial caste and subordination that sits alongside efforts to secure family and freedom.

Part II.A looks broadly at the racialized effects of marriage regulation efforts over time. It begins by correcting certain misconceptions about the history of black marriage, emphasizing the institution's regulatory effects where the policing of racial categories and black families are concerned. The Subpart then turns to consider the experiences of Native Americans, Puerto Ricans, and Asian Americans in particular. It demonstrates that while the history of black marriage is, of course, distinct from that of other groups, it is not exactly unique. Marriage has been dispatched to control, stigmatize, and subordinate other racial groups in ways that parallel African Americans' experience with that institution. Part II.B looks at the particular story of African America with a lens trained on the long-term effects of freedpersons' entrance into marriage, consequences obscured by the narrative of marriage as citizenship. Incorporating institutional analyses that have been utilized to identify the sources of cumulative racial inequalities in other contexts, this Subpart demonstrates that, for African America, marriage's role in racial subordination has adapted over time.³⁰ It has played a primary role in carving out a separate and unequal tier of citizenship in which, in many respects, it still resides.

A. MARRIAGE AS CASTE

The narrative of black marriage as primarily citizenship enhancing derives much of its purchase from perceptions of Emancipation and historical research suggesting that “after the [Civil] [W]ar multitudes [of

28. For insight into this function of marriage and other family law structures, see, for example, HUNTINGTON, *supra* note 22.

29. See Lenhardt, *supra* note 14.

30. Elise C. Bodie, Adaptive Discrimination (Mar. 26, 2015) (unpublished manuscript) (on file with author) (discussing adaptive nature of discrimination generally).

Brief of Amicus Curiae Marriage Equality USA in Support of Respondents at 15–16, *Hollingsworth v. Perry*, 558 U.S. 183 (2010) (No. 12–144). For other examples, see *id.* at 32.

former slaves] rushed to marry, often in mass ceremonies.”³¹ While the picture it paints is undeniably compelling, the black marriage as citizenship narrative rests on a flawed account of history. In addition to relying on a historical snapshot that ignores much of African America’s actual experience with marriage, the narrative gets the story of freedpersons’ entrance into legal marriage from which it derives most of its force wrong. At bottom, the narrative regards states and Reconstruction government officials as fundamentally benevolent in their extension of marital rights; it conceives of former slaves ravaged by the “peculiar institution” as effectively made whole by their entrance into matrimony. Yet, important research concerning the postbellum era tells a different story.

The work of historians and legal scholars confirms the intimate relationship between marriage and citizenship in post-Civil War America.³² But it does not support the proposition, implicit in the narrative, that marriage was the only frame for black loving during this period or the notion that its extension to freedpersons eased their transition into citizenship. Indeed, too often just the opposite was true. For many freedpersons, marriage was desirable because it held the promise of “reclaim[ing] families torn asunder by slavery and war”³³; establishing private lives free from “white interference”³⁴; and securing

31. AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* 44 (1998). Some looked to formalize marriages that had existed during slavery, but others sought to marry for the first time. See NORALEE FRANKEL, *FREEDOM’S WOMEN: BLACK WOMEN AND FAMILIES IN CIVIL WAR ERA MISSISSIPPI* 81 (1999) (accusing “[h]istorians [of] exaggerat[ing] the number of slave couples who remarried each other after the war”). Not insignificantly, narratives emphasizing marriage’s citizenship enhancing capacity have frequently been deployed in the movement to secure equal marriage rights for LGBT couples. For example, an amicus brief compiling citizenship testimonials from LGBT couples submitted in support of the respondents in *Hollingsworth v. Perry* helps to make the point. It included the following passage on the experience that one gay couple had after securing marriage rights in New York State:

Before New York ended the exclusion of same-sex couples from marriage, John Mace and his spouse, Richard Dorr, very much felt the stigma of not being able to marry. As John put it, “It’s terrible to be looked down upon and be considered a second-class citizen.” “We have friends who say, ‘I’ve always considered you guys married,’ but the reality is, we don’t have official status here,” he said. “When I fill out a form, I have to identify myself as single, when in reality, it’s spouse and spouse.” But after John and Richard were able to marry in New York in 2012, John exclaimed, “We are no longer second-class citizens.”

Brief of Amicus Curiae Marriage Equality USA in Support of Respondents at 15–16, *Hollingsworth v. Perry*, 558 U.S. 183 (2010) (No. 12-144). For other examples, see *id.* at 32.

32. See EDWARDS, *supra* note 1, at 46; Franke, *supra* note 8, at 307; MARY FARMER-KAISER, *FREEDWOMEN AND THE FREEDMEN’S BUREAU: RACE, GENDER, & PUBLIC POLICY IN THE AGE OF EMANCIPATION* 155 (2010); FRANKEL, *supra* note 31, at 80–84.

33. FARMER-KAISER, *supra* note 32, at 97.

34. *Id.*

protection from the sexual exploitation of black women.³⁵ Many others, however, were quite ambivalent about formalizing their intimate relationships.³⁶ As Noralee Frankel explains in her book exploring the lives of freedwomen, there were “African Americans [who] did not see the need for legalized marriage” at all.³⁷

Postbellum marriage initiatives functioned less to honor black loving relationships than to reestablish control over former slaves and their “domestic relations.”³⁸ Indeed, with slavery eliminated, marriage became a critical path to erecting something approximating the master-servant relationship that had previously existed—its power configuration as well as its color distinctions.³⁹ Under nineteenth-century norms, marriage and the male governance of households it facilitated was necessary to combat a potentially lethal threat “to civil order [and effective government] more generally.”⁴⁰ Whites thus viewed legal marriage as essential to the economic, social, and moral reconstruction of the South, as well as the Union as a whole.⁴¹ Nonmarriage, in their estimation, posed a threat to the project of creating black households, as a way both to internalize the tremendous dependency of former slaves within black families, and to ensure adherence to prevailing gender norms and rules for sexual behavior.⁴²

Reconstruction-era officials at all levels devoted substantial resources to the project of creating black husbands and wives, and policed the boundaries of marriage with vigor.⁴³ Southern states moved quickly to enact laws establishing black marriage.⁴⁴ Mississippi, for example, in 1865, passed a law providing that “[a]ll freedmen, free negroes and mulattoes, who do now and have heretofore lived and

35. SHIRLEY A. HILL, *BLACK INTIMACIES: A GENDER PERSPECTIVE ON FAMILIES AND RELATIONSHIPS* 77 (2005).

36. See STANLEY, *supra* note 31, at 44–45 (explaining, inter alia, that many former slaves did not want to assume the obligations of marriage).

37. See FRANKEL, *supra* note 31, at 91. To this group, the diverse array of intimate arrangements developed during slavery had more appeal. Alternatives such as “sweethearting,” “taking up,” and “living together” established a differentiated spectrum of commitment not possible with legal marriage and posed fewer obstacles to exit. *Id.*

38. EDWARDS, *supra* note 1, at 45.

39. FRANKEL, *supra* note 31, at 26; EDWARDS, *supra* note 1, at 93; see Franke, *supra* note 8, at 294 (explaining that during this period “marriage was positioned as an institution that would ‘save the race from moral ruin’”).

40. CATHERINE J. DENIAL, *MAKING MARRIAGE: HUSBANDS, WIVES AND THE AMERICAN STATE IN DAKOTA AND OJIBWE COUNTRY* 12 (2013).

41. FRANKEL, *supra* note 31, at 26; EDWARDS, *supra* note 1, at 93; see Franke, *supra* note 8, at 294 (explaining that during this period “marriage was positioned as an institution that would ‘save the race from moral ruin’”).

42. Franke, *supra* note 8, at 302.

43. See *id.* at 296.

44. *Id.* at 297.

cohabited together as husband and wife shall be taken and held in law as legally married,”⁴⁵ automatically, ensuring that there would be freedpersons who would be completely unaware of their newly imposed marital status. Similarly, officials on the ground deployed a range of techniques to buttress the foundation that nineteenth century marriage was understood to provide.⁴⁶ Some Freedman’s Bureau officials even went so far as to deploy physical force, boasting of their willingness to have “a Bayonet at . . . former slaves’ backs all the time” and, if necessary, to adopt even more drastic measures to ensure compliance with marriage laws.⁴⁷ Even courts found themselves drawn into the project of stamping out non-traditional black loving relationships.⁴⁸ In effect, the goal during this period was not to establish unfettered black citizenship as the stock black marriage narrative implies. Instead, the objective was to create, through often brutal and unforgiving state regulation, the “right” kind of black citizens, productive, sexually compliant, gender conforming, and, of course, married.⁴⁹

Time and circumstance separate the experience of newly emancipated persons with marriage from those of other groups. Still, as suggested earlier, meaningful parallels exist. For example, just as in the Reconstruction era, Whites in the Native American context and that of colonial Puerto Rico reacted with some concern upon encountering family structures, sexual practices, and gender roles that did not comport with traditional white norms. To English colonists and, later, early American missionaries, traders, and government agents, the communal kinship systems, fluid gender norms, and polygamous and other intimate practices of Native peoples “flew in the face of colonial morality.”⁵⁰ These differences, especially those that permitted women to exercise control over agricultural endeavors, instead of limiting their affairs to the home front as experienced by white women,⁵¹ marked the already racially divergent Native American peoples as “barbarous and savage.”⁵²

Likewise, in Puerto Rico, the American colonial government found “the high incidence of consensual unions, serial sexual relationships, and female-headed households among the popular classes” exceedingly

45. Civil Rights Act of 1865, ch. 4, § 3, 1865 Miss. Laws. 82.

46. See Franke, *supra* note 8, at 293.

47. See STANLEY, *supra* note 31, at 45–46 (describing incident of Freedmen’s Bureau agent who trapped freedman reluctant to marry in a dark hole at gunpoint until he agreed to do so).

48. See Franke, *supra* note 8, at 296.

49. See Amy L. Brandzel, *Queering Citizenship?: Same-Sex Marriage and the State*, 11 GLQ: J. GAY & LESBIAN STUD. 171, 196 (2005).

50. HEATH, *supra* note 16, at 152.

51. COTT, *supra* note 9, at 25.

52. *Id.* at 154.

concerning.⁵³ These behaviors—combined with high rates of interracial intimacy that served to blur racial boundaries in ways that sounded alarms for “North Americans steeped in the United States’ rigidly bipolar racial system”—became a primary focus.⁵⁴ Officials worried openly about what nonconformity along lines of race and sexuality meant for Puerto Rico, an island that figured prominently in plans for American expansionism.⁵⁵ As one scholar noted, the U.S. Attorney General himself voiced fears in a speech about possible contagion, asking whether, without adequate interventions, “we [Americans] *are to be infected and contaminated by the immoralities of Porto Rico* [sic].”⁵⁶

Civilizing the respective groups of indigenous peoples and rooting out difference became a high priority for eighteenth- and nineteenth-century government officials in the western plains of the continental United States and in the tropics. In the case of Native Americans, the focus was on the introduction of property ownership, animal domestication, and other similar measures, but especially legal marriage.⁵⁷ Intermarriage emerged as a key strategy for missionaries, traders eager to advance commerce, and government officials keen on westward expansion.⁵⁸ This “whitening” strategy produced a new racial hierarchy within Native communities that white settlers and officials later exploited, but not the cultural changes sought.⁵⁹ Accordingly, as time progressed and the national goals shifted from assimilating to dominating Native tribes, other marriage-related mechanisms for corralling errant behaviors and gender practices took on more prominence.⁶⁰ For example, in the late 1800s in particular, special Indian courts became a place where allegations of sexual promiscuity or polygamy could be punished,⁶¹ either “with fines, deprivation of rations, or hard labor.”⁶²

53. EILEEN J. SUAREZ FINDLAY, *IMPOSING DECENCY: THE POLITICS OF SEXUALITY AND RACE IN PUERTO RICO, 1870–1920*, at 120; see 33 CONG. REC. app. 175, 177 (1900) (remarks of Sen. Ebenezer J. Hill) (“They sin, but they sin only as animals, without shame, because there is no sense of doing wrong. They eat the forbidden fruit, but it brings with it no knowledge of the difference between good and evil . . . They are innocently happy in the unconsciousness of the obligations of morality.”).

54. FINDLAY, *supra* note 53, at 119.

55. *Id.* at 113–15.

56. Eileen Findlay, *Love in the Tropics*, in *CLOSE ENCOUNTERS OF EMPIRE: WRITING THE CULTURAL HISTORY OF U.S.-LATIN AMERICAN RELATIONS* 139, 150 (Gilbert M. Joseph et al. eds., 1998).

57. See DENIAL, *supra* note 40, at 15.

58. See THEDA PERDUE, “MIXED BLOOD” INDIANS: RACIAL CONSTRUCTION IN THE EARLY SOUTH 52 (2005). For a discussion of “custom marriages” between white traders and Native women and their importance to trade, see DENIAL, *supra* note 40, at 35; NANCY GOODMAN & ROBERT GOODMAN, JOSEPH R. BROWN: ADVENTURER (1996).

59. PERDUE, *supra* note 58, at 52–53, 74.

60. *Id.* at 76.

61. HEATH, *supra* note 16, at 15.

62. COTT, *supra* note 9, at 123. Significantly, so-called Indian courts had been in existence since the 1600s. See ANN MARIE PLANE, *COLONIAL INTIMACIES: INDIAN MARRIAGE IN EARLY NEW ENGLAND* (2000).

Similarly, over time legal measures designed to advance Indian removal efforts, whether forcible or by agreement, began to increasingly incorporate provisions consonant with white paternalism and monogamous marriage.⁶³ Such incorporation served to make express “the link between ‘civilization’” and conformity with prevailing norms pertaining to gender and marriage.⁶⁴ An 1817 treaty with the Cherokee that invoked common law coverture helps to illustrate the point. The treaty, which gave 640 acres of land to “each and every head of any Indian family” wishing to “become citizens of the United States,” included a provision for dower, a testamentary override that required a husband upon death, even against his wishes, to provide financial support to his widow.⁶⁵ In effect, “[d]ower, like [the] coverture [system as a whole], sought to ensure a woman’s economic reliance on a particular man.”⁶⁶ It functioned primarily to avoid the possibility that poor women might become reliant on the public fisc after the death of their husbands.⁶⁷ As Catherine Denial notes in a recent book on legal marriage in former Dakota and Ojibwe country, the inclusion of the dower provision, which rested on ideas about women’s inherent dependency and incapacity, reflected prevailing white norms, not Native “value[s].”⁶⁸ It exemplified the “U.S. government’s commitment to reorganizing American Indian gender roles, marital responsibilities, and concepts of property ownership” through and in support of its management of Indian affairs and removal.⁶⁹

But they rarely dealt with matters of intimacy at that time. See Daniel K. Richter, *Love Colonial Style*, 29 AM. HIST. 491, 493 (2001) (reviewing PLANE, *supra*).

63. DENIAL, *supra* note 40, at 27.

64. *Id.* at 15. Coverture, a common law doctrine governing spousal relations, essentially “‘covered’ a married woman’s legal identity with her husband’s identity” Dubler, *supra* note 24, at 1645. It literally stripped married women of any legal identity independent from that of their husbands’. See Mary L. Heen, *From Coverture to Contract: Engendering Insurance on Lives*, 23 YALE J.L. & FEMINISM 335, 348 (2011) (discussing coverture system); see also FARMER-KAISER, *supra* note 32, at 31; Franke, *supra* note 8, at 258. For a discussion of that doctrine and impact of women’s citizenship, see generally CANDICE LEWIS BREDBENNER, A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP (1998); COTT, *supra* note 9; LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP (1998); Nancy F. Cott, *Marriage and Women’s Citizenship in the United States, 1830–1934*, 103 AM. HIST. REV. 1440 (1998).

65. DENIAL, *supra* note 40, at 15; see Dubler, *supra* note 24, at 1652–53. The 1887 Dawes Severalty Act, which divided Indian territory into plots to be accorded to tribal “household” heads desirous of citizenship, provides another noteworthy example. See COTT, *supra* note 9, at 123. This provision did not reference gender or even marriage per se. See *id.* But, in establishing a system of property ownership incommensurate with communal living, it “further subverted women’s roles as agriculturalists by presuming the Indian male should be the landowner and farmer.” *Id.*

66. Dubler, *supra* note 24, at 1652–53.

67. *Id.*

68. DENIAL, *supra* note 40, at 16.

69. *Id.*

For the colonial government in Puerto Rico, the objective was not the creation of legal marriage, but rather its “massification.”⁷⁰ American officials, who regarded much of the island’s populace as “without ambition” or lacking in “incentive to labor beyond the least that will provide the barest sustenance,”⁷¹ believed that “[a] productive, properly disciplined workforce and stable political order could only be built on a base of marriage and ‘legitimate’ families.”⁷² They thus sought to expand access to marriage by initiating civil code reforms designed to enhance its appeal to locals.⁷³ An 1899 decree legalized civil marriage and prohibited municipal court fees for wedding ceremonies.⁷⁴ Later enactments further extended civil reforms, such as one granting solemnization rights to “all ministers, rabbis, and judges on the island.”⁷⁵ Finally, when these measures affected no substantial increase in marriage rates, the government paradoxically instituted divorce reforms, reasoning that enhanced ability to exit unhappy marital unions and to enforce the obligations of marriage would make the institution more attractive.⁷⁶

These two examples, like the example of African America’s entrance into legal marriage, underscore the extent to which “‘race, sexuality, [and] gender . . . have been mutually conditioning in the production of American whiteness’” and structural systems.⁷⁷ In each, government officials’ assessment of the need for legal marriage was premised on the assumed racial and moral inferiority of the relevant groups. Indeed, their certainty on this score made it possible to justify military action and the destruction of cultural practices, kinship systems, and gender norms with deep roots in both societies.⁷⁸ Insofar as marriage in both the Native American and Puerto Rican contexts required the creation of new or supplemental legal systems focused on disciplining or homogenizing racial, gender, and sexual difference, we can understand that institution as not just a reflection of civil order, as early Americans maintained, but also as a key instrument in reinforcing an expansive, racialized project of Americanization.⁷⁹

Perhaps no example highlights this particular point as starkly as that of Asian Americans, whose treatment over time has so often involved

70. Findlay, *supra* note 56, at 150.

71. 33 CONG. REC. app. 175, 177 (1900) (remarks of Sen. Ebenezer J. Hill).

72. FINDLAY, *supra* note 53, at 120.

73. *Id.*

74. *Id.* at 113.

75. *Id.* at 121.

76. *Id.*

77. R.A. Lenhardt, *Beyond Analogy: Perez v. Sharp, Antimiscegenation Law, and the Fight for Same-Sex Marriage*, 96 CALIF. L. REV. 839, 854–66 (2008).

78. See DENIAL, *supra* note 40, at 16.

79. FINDLAY, *supra* note 53, at 1–17.

questions of immigration and national citizenship. From the late nineteenth century to well into the twentieth, Congress implemented a program under immigration law designed not just to exclude Asians from U.S. borders, but also to indelibly mark them as racially and morally undesirable for citizenship.⁸⁰ Legal scholarship has documented the extent to which “identity” in the immigration context has worked to “shape access to citizenship in its fullest meaning.”⁸¹ Scholars of race, in particular, have worked to identify the ways in which exclusionary legislative and administrative measures, as well as Supreme Court cases⁸² targeting Asians, have served to structure race.⁸³ The particular role of marriage as a vehicle for carving out a subordinate space for migrants of Asian descent has been, however, insufficiently explored.

Domestically, antimiscegenation laws banning marriage between Whites and individuals of Asian descent have received some attention. Work in this area confirms that like African Americans and Native Americans, individuals of Asian descent found their intimate choices constrained by state antimiscegenation laws designed to preserve whiteness and, to that end, prohibit unions whose offspring might destabilize existing racial categories.⁸⁴ A number of western states, in response to growing concerns about the “yellow peril,” adopted interracial bans reaching the Chinese, but also migrants from other Asian countries.⁸⁵ For example, section 60 of California’s antimiscegenation law, which the California Supreme Court ultimately struck down as unconstitutional in its 1948 *Perez v. Sharp* decision,⁸⁶ banned unions involving individuals hailing from China, Japan, and the Philippines.⁸⁷ Section 60 provided that “[a]ll marriages of white persons with negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void.”⁸⁸

80. See *id.* at 13–14.

81. Volpp, *supra* note 19, at 482.

82. See, e.g., *Ozawa v. United States*, 260 U.S. 178 (1922); *United States v. Thind*, 261 U.S. 204 (1923).

83. See, e.g., Devon W. Carbado, *Yellow by Law: The Story of Ozawa v. United States*, in *RACE LAW STORIES* 175, 175 (Rachel F. Moran & Devon W. Carbado eds., 2008); Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 *UCLA L. REV.* 1, 27 (1998).

84. For a detailed exploration of antimiscegenation law and those it affected, see generally PEGGY PASCOE, *WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA* (2009) (examining the lifespan of miscegenation laws in the United States that banned interracial marriage).

85. *Id.* at 80–85 (discussing antimiscegenation law reaching, inter alia, native Chinese, Japanese, Filipinos, and Hawaiians in Arizona, California, Idaho, Nevada, Oregon, and Wyoming).

86. 198 P.2d 17 (Cal. 1948). Due to changes in the Los Angeles County Clerk’s office during the 1940s, *Perez* is sometimes referred to as *Perez v. Moroney* or *Perez v. Lippold*. *Perez v. Lippold* is the title utilized in the Pacific Reporter. See Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of “Race” in Twentieth-Century America*, 83 *J. AM. HIST.* 44, 61 n.42 (1996).

87. CAL. CIV. CODE § 60 (West 1941), *invalidated by Sharp*, 198 P.2d 17.

88. *Id.* Similarly, section 69 of the same statute decreed that “no license may be issued authorizing the marriage of a white person with a Negro, mulatto, Mongolian or member of the Malay race.” CAL. CIV. CODE § 69 (West 1941), *invalidated by Sharp*, 198 P.2d 17.

In the area of immigration, relatively few legal scholars have undertaken an inquiry into marriage's deployment in advancing an Asian exclusion agenda. The research that does exist, however, begins to lay bare the troubling ways in which marriage-related provisions have specifically helped to deny individuals of Asian descent opportunities for full citizenship and belonging. For example, Rose Cuison Villazor's work examining federal provisions that regulate interracial intimacy identifies the War Brides Act of 1945 as a significant bar to citizenship for Japanese women.⁸⁹ That Act, which offered noncitizen spouses of American G.I.s serving abroad a fast track to citizenship, did not prevent, in explicit terms, women from Japan and other countries from marrying American citizens or even from immigrating to the United States.⁹⁰ Instead, it worked to enhance exclusionary efforts by omission, leaving the longstanding ban on Asian naturalization in place, but lifting quotas and restrictions on disability and easing administrative requirements on noncitizen spouses in ways that essentially guaranteed citizenship to spouses from Europe and other regions of the world.⁹¹ The dramatic increase in immigration that the Act helped effect makes it plain that any history of Asian immigration would be incomplete without some reference to this provision. Between 1946 and 1950, approximately 114,000 non-Asian women entered the United States and gained citizenship, but only 7049 Asians received such treatment.⁹² This information supports the conclusion that the War Brides Act, insofar as it changed the scope and face of American immigration, did more than adversely affect a subset of families consisting of American G.I.s and Japanese noncitizen spouses. By definition, it also played a critical role in shaping normative notions of what constitutes good citizenship and ideal race in ways that served to further degrade, marginalize, and stigmatize Asian Americans within the polity.

Similarly, Leti Volpp's research on marital expatriation sheds light on the citizenship-stripping purposes to which the institution of marriage has been applied in the immigration context.⁹³ The 1922 Cable Act adopted a policy of marital expatriation for women that persisted in some form until 1931.⁹⁴ In effect, it paired racial exclusionary rules with coverture-inspired norms concerning female dependency to exclude women from

89. See Rose Cuison Villazor, *The Other Loving: Uncovering the Federal Government's Racial Regulation of Marriage*, 86 N.Y.U. L. REV. 1361, 1406 (2011).

90. *Id.* at 1404–06.

91. *Id.* at 1405–06, 1416.

92. *Id.* at 1416.

93. Volpp, *supra* note 19, at 405–06.

94. *Id.* at 407, 409. Volpp criticizes others for erroneously stating that the policy of marriage expatriation ended in 1922 with the Cable Act. *Id.* at 408. That provision largely only ended the policy's application to white women. *Id.*

citizenship by treating the act of marrying a noncitizen man as a renunciation of their legal identity as Americans.⁹⁵ Feminist legal scholars have fruitfully explored the gender effects of such rules on the thousands of white women affected by such laws.⁹⁶ But Volpp emphasizes that expatriation policies also regulated race, falling most heavily on Asian American women and on women married to Asian men, groups whose marital expatriation, because of immigration law's continued reliance on Asian exclusion policies, was not addressed until years after it had been resolved for other groups.⁹⁷

The story of Ng Fung Sing highlighted by Volpp's research powerfully illustrates the scope of the marriage-related impairment on Asian American citizenship effected by the Cable Act of 1922.⁹⁸ Sing was born in Washington but later traveled to China with her Chinese-born parents.⁹⁹ While there, she met and then married a Chinese native, a decision that immediately divested her of her American citizenship.¹⁰⁰ When Sing's husband unexpectedly died only two years later, she sought to return to the United States, but was not permitted to do so.¹⁰¹ Although the Cable Act generally allowed women expatriated through marriage to reclaim their citizenship status through naturalization, Sing was prohibited from pursuing that avenue of recourse because she was a member of the "yellow race;" thus, she could never naturalize.¹⁰² In other words, race- and gender-based regulations intersected to lock her in a legal double bind from which she could not escape.

The examples provided by the War Brides Act and the marital expatriation provisions of the Cable Act begin to offer a more complete account of Asian America's history with marriage. The consequences of these provisions help to complete the continuum of how marriage has been deployed in advancing an overall agenda of racial subordination against other groups. At one end of the continuum rests the outright denial of marriage rights, such as that in effect during slavery. At the opposing end are initiatives that have promoted or imposed marriage, supposedly in order to "redeem" minorities morally, sexually, and racially. The measures affecting Native Americans and Puerto Ricans in the colonization context are illustrative examples. Finally, in between

95. *Id.* at 431, 433–34; *see also* COTT, *supra* note 9, at 1445–64 (discussing marriage expatriation laws). Ethel Mackenzie unsuccessfully launched a constitutional challenge to the application of marriage expatriation laws in her case in the Supreme Court. *See generally* *Mackenzie v. Hare*, 239 U.S. 299 (1915).

96. *See* Volpp, *supra* note 19, at 408.

97. *See id.*

98. *Id.* at 407–08.

99. *Id.* at 407.

100. *Id.*

101. *Id.*

102. *Id.* at 407–08.

these poles exist provisions that divested or otherwise denied existing citizenship rights.

In sum, the short group histories set out in this Subpart shed important light on how deeply constitutive of race and American citizenship that institution has been.¹⁰³ They demonstrate that marriage regulation, even as it afforded groups certain rights, helped to shape ideas and stereotypes about race and gender, and to situate families and individuals of color as racially and morally inferior to their white counterparts. For better or for worse, they make it clear that marriage has functioned also to deprive African Americans and other groups of formal and informal citizenship along a number of vectors.

B. MARRYING BLACKS TO SECOND-CLASS CITIZENSHIP

To the extent that adherents of the marriage as citizenship narrative acknowledge any of the deficits that marriage regulation has imposed on African Americans, they have regarded them as confined in their impact. The below analysis demonstrates that this view badly misapprehends the scope and impact of marriage as it pertains to African America. Marriage, over the years, by facilitating the hyper regulation of black families and the stigmatization of blackness more generally, has helped to perpetuate racial inequality in concrete ways. In effect, marriage-related laws and policies have married African America to second-class citizenship.

Structural accounts of persistent racial inequality typically omit marriage or, more specifically, its regulation, from the list of contributory factors. Attention most often focuses on other durable inequality sources. Housing discrimination, school segregation, and discriminatory lending practices, such as redlining, figure prominently in almost any account of cumulative inequality and disadvantage—and for good reason.¹⁰⁴ The deleterious impact of such practices on black opportunity, wealth, and standing within the broader community cannot be overstated. At the same time, the role of other troubling institutional practices and forms of racial regulation in creating black inequality cannot be ignored. Marriage regulation's systemic, racialized effects on African America over time must be better delineated and understood. Achieving this requires a structure and institution-sensitive analysis that, perhaps because of the positive feelings that marriage's dual status as a frame for loving relationships evokes, has yet to be undertaken in full. Elsewhere, I have advocated the use of race audits and similar evaluative measures as a way

103. See HEATH, *supra* note 16, at 31.

104. See, e.g., Lenhardt, *supra* note 15, at 1534; see also John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1068–73 (1998); John A. Powell, *Structural Racism: Building upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 801–02 (2008).

of identifying and beginning to interrupt the systems and practices that produce racial inequality.¹⁰⁵ Tools of this sort could also be deployed in tracing the cumulative disadvantage and deleterious effects that marriage regulation has had on black citizenship, family autonomy, and opportunity.

Institutional structures scholarship on race and inequality provides a useful starting point in thinking about what such an inquiry might entail. This research constructs a history of the present insofar as it concerns itself with the sources of racial disadvantage and inequality in the twentieth and twenty-first centuries.¹⁰⁶ This scholarship rejects the common inclination to regard such inequality as inevitable or natural, or, more importantly, the sole result of individualized prejudices, actions, or culture. Rather, this scholarship concerns itself with law, public institutions, benefit structures, and policy. It sees law, organizational and administrative structures as key drivers in the distribution of benefits and, to the extent that race, and other invidious factors influence social policy, in the production of racial inequality.¹⁰⁷

Ira Katznelson's book, *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America*,¹⁰⁸ as I have noted elsewhere,¹⁰⁹ provides a powerful example of the institutional structure analysis. Examining New Deal initiatives that excluded black workers from labor protections or that incorporated discriminatory housing policies, Katznelson documents the ways in which some of the most celebrated social policies in this nation's history—such as the G.I. Bill and the Fair Labor Standards Act—rested on racial norms and structures that, even as they produced tremendous wealth for Whites, ensured that Blacks would face nearly insurmountable economic and social obstacles long into the future.¹¹⁰ For example, Katznelson argues that the exclusion from New Deal era labor protections of farm workers and domestics—occupations in which black workers were overrepresented during the 1940s and 1950s—made it nearly impossible for them to improve their economic and social standing well into the future.¹¹¹

Similarly, Robert Lieberman's book, *Shifting the Color Line: Race and the American Welfare State*, elaborates on the ways in which institutional structures in the welfare context have worked to disadvantage

105. Lenhardt, *supra* note 15, at 1527.

106. See ROBERT C. LIEBERMAN, *SHIFTING THE COLOR LINE: RACE AND THE AMERICAN WELFARE STATE* 12 (1998) (discussing scholarship on institutional structures and racial inequality).

107. *Id.*

108. IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* 35–52 (2005).

109. See Lenhardt, *supra* note 15, at 1545–46.

110. KATZNELSON, *supra* note 108, at 53–61.

111. *Id.* at 112–29.

generations of African Americans.¹¹² Conducting a comparative analysis of three New Deal era programs created by the Social Security Act, Lieberman persuasively argues that the differing structures and racial policy exclusions or inclusions effected by these initiatives can be explained by their institutional infrastructure and objectives.¹¹³ For example, he attributes both the initial widespread exclusion of Blacks from benefits under the Aid to Families program—a precursor of the now defunct Aid to Families with Dependent Children (“ADC”)—and their later overrepresentation in these welfare programs to an intentionally decentralized ADC structure.¹¹⁴ Lieberman explains that, unlike its sister initiative, the Old Age Insurance program, which still operates today, ADC relied on state and local officials to distribute benefits.¹¹⁵ This meant that early in the program’s existence, white officials in the South, where the vast majority of African Americans lived at the time, discriminated freely and openly against families of color, denying them benefits to which they were entitled.¹¹⁶ As Blacks migrated North, Lieberman argues, even though migrants faced a localized structure less intent on denying benefits outright, they faced exclusionary labor practices and a system of political patronage that essentially tied them to those benefits in ways that also left them vulnerable.¹¹⁷ Significantly, Lieberman attributes the racialized tropes—such as the black welfare queen—now associated with welfare and the so-called “black American underclass” to this localized institutional structure, arguing that the political isolation, as well as the economic and social disenfranchisement of Blacks it enabled, allows such tropes to persist unchecked even today.¹¹⁸

That research powerfully displays the potential that an institutional structure-informed analysis has for better understanding legal marriage and its impact on African America over time. In the end, the structure of modern marriage and the differences between it and, say, the legislative enactments and administrative entities linked to the implementation of certain Social Security Act provisions mean that the kind of institutional analyses that Katznelson and Lieberman conduct may not be perfect analogues for the inquiry into marriage’s racial effects imagined here.

112. See LIEBERMAN, *supra* note 106.

113. *Id.* at 7.

114. *Id.* at 174–75.

115. See *id.* at 7–8, 173–74.

116. *Id.* at 7–9.

117. *Id.* at 175.

118. *Id.* at 174–76. On the stereotype of the black welfare queen that has influenced welfare reform debates, see ANGE-MARIE HANCOCK, *THE POLITICS OF DISGUST: THE PUBLIC IDENTITY OF THE WELFARE QUEEN* 1–2, 23–27, 57–64 (2004); DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 1718, 207 (1977).

Obviously, some significant similarities exist. States, as recent equal marriage cases involving mayors and county clerks who have spurred litigation by denying or granting marriage rights to LGBT couples underscore, have long delegated authority for implementing matrimonial law to local officials in ways that parallel delegations made under ADC, for example, and thus could productively be examined for racialized effects.¹¹⁹ But, the sheer number of states and varied state systems regulating access to marriage, as well as the difference between state and federal provisions delineating the many benefits of marriage, would make exact application of even the multivariant analyses applied by Katznelson and Lieberman challenging. Ultimately, state-level inquiries may initially provide the deepest insight into the full range of racialized effects that marriage regulation has imposed. For our purposes here, however, simply conceiving of marriage as an institution that performs regulatory functions and then understanding the decisions and policy choices concerning marriage as institutionalized outcomes capable of generating racial disadvantage provides a useful starting point. Even this relatively modest reframing opens the door to new insights about African America's relationship to marriage.

First, a more institutional lens could help amplify the structural consequences of marriage regulation whose race effects scholars have already considerably mined. Take, for example, antimiscegenation law, which first surfaced in this country in 1664.¹²⁰ Race and family scholars have extensively explored the development and role of interracial sex and marriage bans in both establishing racial categories and in reinforcing gender and race norms.¹²¹ While legal prohibitions on interracial marriage flourished during slavery, in many ways antimiscegenation regimes reached their full force after slavery's demise.¹²² Even as jurisdictions formally

119. See Sylvia A. Law, *Who Gets to Interpret the Constitution?: The Case of Mayors and Marriage Equality*, 3 STAN J. C.R. & C.L. 1, 2–3 (2007).

120. See Jonathan L. Alpert, *The Origin of Slavery in the United States—The Maryland Precedent*, 14 AM. J. LEGAL HIST. 189, 195 (1970) (referencing interracial sex bans in colonial jurisdictions as early as 1664); see also RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* 19 (2001) (discussing 1661 Maryland and 1662 Virginia bans).

121. See, e.g., MORAN, *supra* note 120; RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* (2003) (exploring the history of race in interracial sex in relation to legal institutions and politics); Kevin R. Johnson & Kristina L. Burrows, *Struck by Lightning?: Interracial Intimacy and Racial Justice*, 25 HUM. RTS. Q. 528 (2003) (reviewing MORAN, *supra* note 120); Leti Volpp, *American Mestizo: Filipinos and Antimiscegenation Laws in California*, 33 U.C. DAVIS L. REV. 795 (2000) (examining the prohibition and legal history of marriages between Filipinos and Whites in California).

122. Prior to slavery's end, twenty-five states, including fifteen in the South, where the vast number of Blacks were located, had or once had antimiscegenation laws. See PETER WALLENSTEIN, *TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE, AND LAW—AN AMERICAN HISTORY* 51–65, fig.7 (2002). By 1913, the year in which the last antimiscegenation law was enacted, thirty of forty-eight states had bans on interracial marriage. *Id.* fig.8.

conferred marriage rights on newly emancipated persons in the late 1800s, white officials eager to control emancipated Blacks moved to minimize the citizenship effects of such provisions by sometimes simultaneously enacting or reenacting interracial marriage bans.¹²³

As scholarship in this area explains, antiscegenation statutes functioned to establish whiteness as the ideal and to inscribe a norm of family monoraciality that retains force even today, influencing marriage and even dating choices.¹²⁴ Because of this research, we have valuable insight into the extent to which antiscegenation laws signaled the inferiority of black individuals in cross-racial unions and had an adverse impact on the standing of black families as a whole.¹²⁵ For the most part, however, what we know about the consequences of antiscegenation provisions—setting aside racialized violence and the criminal penalties that they carried—centers on family law matters such as the dissolution or annulment of relationships and intestacy contests.¹²⁶ Evidence of statutory provisions defining eligibility for public school enrollment¹²⁷ and even residency within a city neighborhood by reference to antiscegenation law,¹²⁸ however, suggests that the racialized effects of

123. For example, Georgia legislatures provided for black marriage rights in a statute enacted during the 1865–66 legislative session, but then followed that proviso with language penalizing the licensure or solemnization of interracial marriages and making clear their illegality:

Any officer issuing a marriage license to parties, either of whom is of African descent and the other a white person, shall be guilty of a misdemeanor and fined not less than \$200 nor more than \$500, or confined in the common jail three months, or both.

Any officer, or minister of the Gospel marrying such persons together, shall be guilty of a misdemeanor, and fined not less than \$500 nor more than \$1,000, or confined in the common jail for six months, or both.

FRANKLIN JOHNSON, *THE DEVELOPMENT OF STATE LEGISLATION CONCERNING THE FREE NEGRO* 91 (1919) (quoting Georgia statutory provisions).

124. See JEFFREY S. PASSEL ET AL., PEW RESEARCH CENTER, *MARRYING OUT: ONE-IN-SEVEN NEW U.S. MARRIAGES IS INTERRACIAL OR INTERETHNIC* 11–13 (2010), <http://www.pewsocialtrends.org/files/2010/10/755-marrying-out.pdf>.

125. See R.A. Lenhardt, *Forgotten Lessons on Race, Law, and Marriage: The Story of Perez v. Sharp*, in *RACE LAW STORIES* 343, 350–54 (Rachel F. Moran & Devon W. Carbado eds., 2008); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 856–57 (2004). For additional resources on antiscegenation law, see generally *LOVING v. VIRGINIA* IN A POST-RACIAL WORLD: RETHINKING RACE, SEX, AND MARRIAGE (Kevin Noble Maillard & Rose Cuison Villazor eds., 2012); KENNEDY, *supra* note 121; MORAN, *supra* note 120.

126. See R.A. Lenhardt, *According to Our Hearts and Location: Toward a Structuralist Approach to the Study of Interracial Families*, 16 J. GENDER RACE & JUST. 741 (2013) (discussing annulment and other consequences of antiscegenation laws' enforcement or impact).

127. See JOHNSON, *supra* note 123, at 158–59 (citing North Carolina law providing that “[i]n determining the right of any child to attend schools of either race, the rule laid down . . . regulating [interracial marriages] shall be followed”).

128. See *City of Richmond v. Deans*, 37 F.2d 712, 713 (4th Cir. 1930) (invalidating Richmond, Virginia municipal ordinance that “prohibit[ed] any person from using as a residence any building on any street between intersecting streets where the majority of residences on such street are occupied by those whom said person is forbidden to intermarry” as unconstitutional).

such provisions may extend well beyond this context. Attention to the institutional and structural consequences of antimiscegenation law would require further interrogation of these and possibly other aspects of intimate regulation affecting black opportunity and wealth across generations.

Second, institutional structure analyses could direct new attention to aspects of marriage regulation whose adverse impact on African Americans has, for the most part, been ignored. Within African America especially, the denial of meaningful reparations to freedmen and women—that is, the proverbial forty acres and a mule—for the ravages of slavery that they endured remains an oft cited explanation for the relative economic disadvantage that still affects Blacks today, even those considered middle or upper-middle class.¹²⁹ Calls for reparations for past wrongs more recently have expanded beyond slavery to reach tragic events such as the Tulsa race riots or to focus on discriminatory housing and lending practices.¹³⁰ For example, Ta-Nehsi Coates's recent article calling for black reparations supports the claim that “no statistic better illustrates the enduring legacy of our country's shameful history of treating black people as sub-citizens, sub-Americans, and sub-humans than the wealth gap.”¹³¹ Coates's article provides a sweeping overview of individual discriminatory practices, private institutional initiatives, and local, state, and federal governmental policies that have racially exploited, abused, and discriminated against African Americans.¹³² While Coates briefly addresses the devastation of black families during slavery, his very persuasive case for reparations, not unlike other arguments made in this area, makes no mention whatsoever of marriage. From a perspective trained on the structural consequences of institutional decisionmaking, however, it very much warrants inclusion on this list of contributors to black social and economic disadvantage.

The often-brutal regulation of black intimate choice and family obscured by the liberation narrative outlined in Part I.A rested on policy objectives that bolstered the economic abandonment of former slaves post-emancipation.¹³³ The goal of containing black economic dependency and need drove the actions of Freedmen's Bureau agents on the ground in southern communities. Whites feared that freedpeople would become a “‘huge white elephant,’ dependent upon the state or their former

129. For a discussion of the gap between white and black wealth generally, THOMAS M. SHAPIRO, *THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY* x-xii (2004); Henry Louis Gates, Jr., *Forty Acres and a Gap in Wealth*, N.Y. TIMES, Nov. 18, 2007, at 4.14.

130. Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC, June 1, 2014, at 54 (discussing, inter alia, lawsuit seeking reparation for victims of the Tulsa race riots).

131. *Id.* at 69.

132. *Id.*

133. See *supra* Part I.A.

masters for support.”¹³⁴ They saw marriage as the best way to ensure that black households, not the state, internalized the tremendous need of freedpersons.¹³⁵ Dependency was a vice that all families—white or black—were exhorted to avoid. Yet, the fallout of the “war on dependency” in terms of the enforcement of marital obligations and norms had, as Part I notes, a disparate and often devastating impact on Blacks.¹³⁶

Marriage alone does not explain the federal government’s refusal to pay adequate compensation to former slaves for the horrors that they suffered during slavery, or to provide meaningful support for Blacks as they emerged from bondage. A strong argument exists, however, that marriage norms touting independence and the internalization of need may have helped to set the tone and perhaps even the predicate for the denial of reparations. As with the exclusion of black domestics and farm workers from labor protections during the New Deal, that institutional judgment has had ongoing wealth effects for African Americans. So too have other aspects of the postbellum “war on dependency.”¹³⁷

Under state laws, impoverished freedmen already faced imprisonment for noncompliance with bastardy, illegitimacy, and vagrancy laws designed to ensure performance of marriage and gender-based obligations.¹³⁸ Agents sometimes merely “reminded freedmen of their marital and familial responsibilities,”¹³⁹ exhorting them to provide for their families by “industry and economy. . . .”¹⁴⁰ But more often, they sought to compel black men into labor, even relocating them to distant places where employment was more plentiful, if necessary.¹⁴¹ In certain circumstances, they resorted to still more “draconian method[s],” including taking children from needy families, frequently without parental consent, and sending them to labor in state-created apprenticeship programs that

134. Franke, *supra* note 8, at 302.

135. Mary Farmer-Kaiser, “*With a Weight of Circumstances Like Millstones About Their Necks*”: *Freedwomen, Federal Relief, and the Benevolent Guardianship of the Freedmen’s Bureau*, 115 VA. MAG. HIST. & BIOGRAPHY, 412, 420, 429 (2007); Drew D. Hansen, Note, *The American Invention of Child Support: Dependency and Punishment in Early American Child Support Law*, 108 YALE L. J. 1123, 1143 (1999).

136. See *supra* Part I.

137. Farmer-Kaiser, *supra* note 135, at 429.

138. See FRANKEL, *supra* note 31, at 80–87 (discussing use of vagrancy laws to penalize black men for noncompliance with marital obligations); see also STANLEY, *supra* note 31, at 113 (discussing postbellum vagrancy laws and dependency); Hansen, *supra* note 135, at 1144 (discussing freedmen’s prosecutions under bastardy and illegitimacy laws). For an excellent discussion of marriage, bastardy, and apprenticeship laws, see Kaaryn Gustafson, *The Legal Manufacture of Hardworking Bastards: Marriage, Bastardy, Apprenticeship, and the Policing of Race and Labor in North Carolina* (Mar. 21, 2014) (unpublished manuscript) (on file with author).

139. Farmer-Kaiser *supra* note 135, at 416.

140. *Id.* at 420.

141. *Id.* at 416.

replicated labor conditions in force during slavery.¹⁴² The removal of able-bodied workers from black families only worked to compound the economic disenfranchisement that marriage facilitated. It also criminalized Blacks, destroyed the integrity of black families, and promoted a narrative of black indolence and sloth that still animates public policy across a number of domains.¹⁴³

Finally, analyses sensitive to institutional structure can help trace how marriage regulation has intersected with other forms of regulation in ways that racially stigmatize and disadvantage African Americans. Unlike the government programs studied in the research described at the beginning of this Subpart, marriage regulation has been transsubstantive, traversing areas as diverse as criminal law, education, public benefits, housing, employment, child welfare, and even voting.¹⁴⁴ For example, marriage plays a role in the federal welfare programs that Liebermann so effectively dissects in his work. In ways already discussed, it helped shape deeply entrenched narratives about black dependency that, as Liebermann notes, still drive popular responses to welfare and black Americans.¹⁴⁵ Marriage, however, has also figured much more directly into welfare policy. The 1996 Personal Responsibility and Work Reconciliation Act, which replaced a later version of the ADC program explored by Liebermann, explicitly incorporated marriage promotion provisions as a way to minimize welfare reliance and move unmarried women, including those with children, into the workforce, notwithstanding the absence of meaningful child-care options.¹⁴⁶ Its enactment prompted race and family law scholars like Angela Onwuachi-Willig to call for more and deeper “analy[sis] [of] the legal connection between marriage and welfare as a reversion to an earlier phase of colonialism in the United States.”¹⁴⁷

A complete institutional analysis of marriage regulation would be much more capacious than the limited analytical platform that this Article provides, delving even deeper into the past and launching

142. *Id.* at 428–29. Not surprisingly, many states, with the support of planters, moved to create such apprenticeship programs in the wake of the Civil War. See Richard Paul Fuke, *Planters, Apprenticeship, and Forced Labor: The Black Family Under Pressure in Post-Emancipation Maryland*, 62 AGRIC. HIST. 57, 59 (1988). In Maryland, planters apprenticed as many as 3000 children under the state’s relevant Black Code provision. *Id.* at 58.

143. Lenhardt, *supra* note 125, at 851–64.

144. For example, in her work on sexual citizenship, Melinda Chateaufort points to cases of people “losing jobs and voting rights on the grounds of ‘moral turpitude,’” such as the 1960 matter involving an African American man named Joe Kirk, who was prohibited from voting in a Louisiana county because he was accused of “[f]ath[er]ing a child out of wedlock.” Chateaufort, *supra* note 18, at 198.

145. See *supra* text accompanying note 118. For more on the race effects of welfare policy, see Shani King, *The Family Law Canon in a (Post?) Racial Era*, 72 OHIO ST. L.J. 575, 616–19 (2011).

146. Onwuachi-Willig, *supra* note 7, at 1653.

147. *Id.*

additional critical examinations of existing marriage norms and regulatory frames. As initially indicated, this Part had fairly modest aims. It sought primarily to signal the potential benefits of applying institutional structure analyses in the marriage context, and to identify key respects in which marriage regulation has situated African Americans as “failed citizens” rather than strengthen black belonging.¹⁴⁸

Thus far, the analysis has focused a great deal on the institutional effects regulation in this area had on married African Americans primarily. But in actuality, the structural and stigmatic effects of marriage have not been so limited. Unmarried Blacks also fall within marriage’s “regulatory shadow.”¹⁴⁹ To the extent that marriage, even with recent declines, still constitutes the primary normative frame for affective relationships, it shapes not just the lives of those who formally enter into it, but also the lives of those who do not.¹⁵⁰ Understanding the full impact of traditional marriage in the area of race, then, requires looking at how the various institutions and structures that help regulate marriage affect the unmarried, a category into which most African Americans now fall. The next Part turns to that issue, exploring factual and more normative questions about marriage’s place in African America today, and the role of marriage regulation in perpetuating the economic and social inequality of black families.

II. THE PLACE OF MARRIAGE IN TWENTY-FIRST-CENTURY AFRICAN AMERICA

The sobering evidence of the role of legal marriage in racial subordination and caste set out in Parts I and II strongly suggests that marriage equality advocates might want to adjust their expectations as the nation awaits the Supreme Court’s decision in *Obergefell v. Hodges*.¹⁵¹ No one doubts that an outcome extending marriage rights to LGBT couples will be a victory of monumental proportions. And yet, if African America’s experience teaches us anything, it is that entrance into marriage, without more, is unlikely to secure immediate belonging for LGBT America. Chances are that, at best, marriage within the LGBT

148. BRENDA COSSMAN, *SEXUAL CITIZENS: THE LEGAL AND CULTURAL REGULATION OF SEX AND BELONGING* 122–23 (2007).

149. Dubler, *supra* note 24, at 1653.

150. *Id.* at 1656.

151. See *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *cert. granted sub nom.*, *Obergefell v. Hodges*, 83 U.S.L.W. 3315 (U.S. Jan. 16, 2015) (No. 14-556); Adam Liptak, *A Steady Path to the Justices*, N.Y. TIMES, Feb. 15, 2014, at A1.

community, as Katherine Franke has suggested, will be a “mixed blessing.”¹⁵²

The critical question is what the current debate about marriage rights for LGBT couples mean for African American—for those who are straight, as well as those who are gay—150 years after Emancipation. Obviously, marriage did not secure, as so many freedpersons had hoped,¹⁵³ full black citizenship after the Civil War. Its acquisition did not magically ease the destitution of the emancipated; establish the integrity and inviolability of black families; or guard against the coercion and exploitation so many endured in multiple contexts.¹⁵⁴ But the failure of marriage to secure full belonging then or even years later begs the question whether, after decades of experience with its norms and requirements, we can reasonably expect it to do so now. Instead of trying to answer that question in a vacuum, this Part turns to the matter of where marriage currently sits in African America. Part II.A provides information documenting black marriage decline. Part II.B explores the legal treatment of so-called “fragile” black families—the poor, unmarried caregiving units that account for a significant portion of the decrease in marriage identified. After providing information about the characteristics and structure of such families, it examines the structural barriers to economic stability that fragile black families face. Citing recent research by family law scholars such as Clare Huntington and Maxine Eichner, this Subpart also argues that while the modern regulation of marriage—and, by extension, nonmarriage—differs in kind and effect from the discriminatory and often oppressive regulation discussed in the previous Part, it often has adverse effects on this population, raising serious concerns about the wisdom and racial impact of existing institutional policies and practices in this area.

A. THE DECLINE OF BLACK MARRIAGE

Marriage is not what it used to be—in African America or out.¹⁵⁵ In recent decades, we have seen tremendous flux in the institution once regarded as so critical to civic governance and the proper functioning of households.¹⁵⁶ In the United States, fewer Americans are married today

152. See Katherine M. Franke, *Marriage Is a Mixed Blessing*, N.Y. TIMES, June 24, 2011, at A25 (arguing that securing equal marriage rights carries costs, as well as benefits, for LGBT America).

153. EDWARDS, *supra* note 1, at 46–47.

154. See Franke, *supra* note 8, at 278, 284–85, 293.

155. See generally 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 (2011), <http://www.pewsocialtrends.org/files/2011/12/Marriage-Decline.pdf>. Indeed, marriage is not what it used to be anywhere in the industrialized world. See *id.* at 3. Entrance into marriage has declined around the globe. See *id.*

156. See *supra* note 12.

than at any other time in recent memory. The Pew Center on Research reports that the percentage of married Americans dropped to fifty-two percent in 2010, down from seventy-two percent in 1960.¹⁵⁷ These statistics reflect higher rates of people never marrying, now at twenty-seven percent,¹⁵⁸ and the decision among younger adults to delay marriage much longer than their parents or grandparents did.¹⁵⁹ They also indicate divorce rates that, while lower than they have been in recent decades, dwarf those of the past.¹⁶⁰ Studies suggest “that between 40% and 50% of first marriages, and about 60% of second marriages, end in divorce in the United States.”¹⁶¹

Declines of this sort know no color; they can be seen across racial groups, but they are most dramatic in African America. In 1960, black marriage rates were as high as sixty-one percent.¹⁶² As of 2008, the rate sat at a shockingly low thirty-two percent.¹⁶³ On the numbers, black love and the varying ways it is expressed—whether between adults, in parenting, or in other caregiving situations—does not currently have a strong link to legal marriage.¹⁶⁴ Indeed, Blacks constitute the most unmarried racial group of any in the country.¹⁶⁵

Consistent with rates nationally,¹⁶⁶ marriage levels among African Americans trend highest among the most highly educated.¹⁶⁷ A division exists between wealthier, college-educated Blacks and those who are poor and did not have the opportunity to pursue higher education. Even so, statistics indicate that “blacks in all educational groupings were less likely to be in intact marriage than were their white peers.”¹⁶⁸ Black

157. DECLINE OF MARRIAGE, *supra* note 12, at 1.

158. *See id.* at 12.

159. *Id.* at 3. Research indicates that, in 2010, only nine percent of individuals between eighteen and twenty-four years of age and forty-four percent of individuals twenty-five and thirty-four years old were married. *Id.* In 1960, forty-five percent and eighty-two percent of individuals in these respective groups had married. *Id.*

160. *See id.* at 16.

161. Alan J. Hawkins, *Will Legislation to Encourage Premarital Education Strengthen Marriage and Reduce Divorce?*, 9 J.L. & FAM. STUD. 79, 80 (2007).

162. DECLINE OF MARRIAGE, *supra* note 12, at 9.

163. *Id.* Reflecting these social changes, rates of white marriage fell from seventy-four percent in 1960 to fifty-five percent in 2010. COHN ET AL., *supra* note 155, at 8. Hispanic marriage rates declined during this period as well, moving from seventy-two percent down to forty-eight percent. *Id.*

164. *See* DECLINE OF MARRIAGE, *supra* note 12, at 9–11 (discussing, *inter alia*, black marriage decline and increase in black cohabitation and unmarried parenting); *see also* INST. FOR AM. VALUES & NAT’L MARRIAGE PROJECT, THE STATE OF OUR UNIONS: WHEN MARRIAGE DISAPPEARS: THE NEW MIDDLE AMERICA 54 (2010), <http://stateofourunions.org/2010/SOOU2010.pdf> [hereinafter WHEN MARRIAGE DISAPPEARS] (discussing African American divorce rates).

165. COHN ET AL., *supra* note 155, at 8.

166. *Id.*

167. *See generally* JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY (2014); *see also* WHEN MARRIAGE DISAPPEARS, *supra* note 164, at 54–55.

168. WHEN MARRIAGE DISAPPEARS, *supra* note 164, at 54.

women, for example, “are only half as likely as white women to be married, and more than three times as likely as white women never to marry.”¹⁶⁹ Likewise, black men are “substantially less likely than white men to be married.”¹⁷⁰ More than forty percent of African America as a whole has never married, whereas only about twenty-five percent of non-Hispanic Whites fall into that category.¹⁷¹

One sees concomitantly high rates for Blacks along each of the indicators that might begin to explain a marriage gap of this proportion. Again, elevated percentages along vectors such as cohabitation and single parenting are not unique to Blacks.¹⁷² Studies show that Americans as a whole are far more likely to be single, never marrying, or to reside with intimate partners outside of marriage than they ever were in the past.¹⁷³ Still, Blacks post higher numbers relative to other groups. Divorce rates, for example, are higher among Blacks than they are for Whites.¹⁷⁴ Research indicates that fifty percent of black couples will divorce within the first ten years of marriage, while less than one-third of white couples will do so.¹⁷⁵

Decreases in black marriage rates, significantly, have not reduced rates of black family formation. Black loving relationships continue, just not within the traditional structure provided by legal marriage. For example, even though not necessarily more approving of cohabitation,¹⁷⁶ African Americans increasingly reside with intimate partners without marrying. They are not only more likely than Whites to cohabit with intimate partners,¹⁷⁷ but also are more likely to have and parent children within nonmarital unions.¹⁷⁸

When the Moynihan Report was released fifty years ago, the rate of nonmarital births stood at what then was an eye-popping twenty percent.¹⁷⁹ In recent decades, we have seen an exponential increase from the levels that gave him and others concern. White nonmarital birth rates, roughly only two percent to three percent in the 1960s, have

169. BANKS, *supra* note 20, at 7.

170. *Id.* at 246 n.11.

171. DECLINE OF MARRIAGE, *supra* note 12, at 29.

172. *Id.* at 10.

173. CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 112 (2010).

174. WHEN MARRIAGE DISAPPEARS, *supra* note 164, at 72.

175. See BANKS, *supra* note 20, at 8.

176. Julie A. Phillips & Megan M. Sweeney, *Premarital Cohabitation and Marital Disruption Among White, Black, and Mexican American Women*, 67 J. MARRIAGE & FAM. 296, 298 (2005).

177. BOWMAN, *supra* note 173, at 112. Significantly, however, Hispanics have experienced the greatest increase in cohabitating relationships. See DECLINE OF MARRIAGE, *supra* note 12, at 67.

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

179. See GREGORY ACS ET AL., THE MOYNIHAN REPORT REVISITED 4 (2013), <http://www.urban.org/UploadedPDF/412839-The-Moynihan-Report-Revisited.pdf> [hereinafter MOYNIHAN REVISITED].

increased so much that they now approximate the rate for Blacks that Moynihan lamented.¹⁸⁰ Meanwhile, nonmarital births for Blacks have nearly tripled.¹⁸¹ Nonmarital births now account for more than seventy percent of overall black births in the United States.¹⁸² As with marriage, studies show that, while no group has been immune from these increases, an economic divide has emerged even within African America itself. In 1982, African Americans with only a high school diploma had a nonmarital birth rate of forty-eight percent.¹⁸³ Today, that rate is seventy-five percent.¹⁸⁴ For black women who lack even a high school diploma, nonmarital birth rates are even higher, at ninety-six percent.¹⁸⁵

Increases such as these have led, not surprisingly, to equally significant changes in the structure of black families. Today, “African American children spend substantially more time in single-parent households than white or Hispanic children.”¹⁸⁶ In fact, they are “much more likely than [their] white or Hispanic [counterparts both] to live in a home with only one parent and to have a parent who has never been married.”¹⁸⁷ Further, the parent with whom African American children live is most often their mother, not their father.¹⁸⁸ In 2010, this was the case for roughly fifty-three percent of black children, up from twenty percent in 1960.¹⁸⁹ In contrast, only twenty percent of white children lived in such households in 2010, an increase of fourteen percent in the since 1960.¹⁹⁰

Debates about what accounts for the picture of African American families painted by the statistics just outlined—whether it be structural

180. *Id.* at 5; see also Robert A. Hummer & Erin R. Hamilton, *Race and Ethnicity in Fragile Families*, FUTURE CHILD., Fall 2010, at 113, 121. Incidentally, nonmarital birth rates also increased for Hispanics during this period. See MOYNIHAN REVISITED, *supra* note 179, at 3.

181. MOYNIHAN REVISITED, *supra* note 179, at 4.

182. *Id.*

183. June Carbone & Naomi Cahn, *The Triple System of Family Law*, 2013 MICH. ST. L. REV. 1185, 1199.

184. *Id.*

185. *Id.* at 1198 (citing WHEN MARRIAGE DISAPPEARS, *supra* note 164, at 23 fig.5).

186. Harknett & McLanahan, *supra* note 178, at 790.

187. See DECLINE OF MARRIAGE, *supra* note 12, at 10. The report explains:

In 2008, roughly half of all black children under the age of 18 (52%) were living in a household with one parent. A third (32%) were in a household with two married parents. The rest were living in households with cohabiting partners (6%) or no parent at all (10%). By comparison, 74% of white children younger than age 18 lived in households with two married parents in 2008. Fewer than one in five (18%) lived in one-parent households, and the remainder lived with cohabiting partners (5%) or no parent (3%). Hispanic children fall in the middle: In 2008, 59% lived with two married parents, 27% lived with one parent, 9% lived with a cohabiting couple and 5% lived without a parent.

Id.

188. See MOYNIHAN REVISITED, *supra* note 179, at 4.

189. *Id.*

190. *Id.*

forces, culture, or some combination of the two—abound within African America and beyond.¹⁹¹ No one, however, disputes this simple truth: more black families today live outside of marriage than in it.¹⁹² Marriage just does not provide the primary frame for black loving relationships. Loving outside of marriage, for better or worse, has become the norm. The question addressed in the following Subpart is what this means in practical terms, especially for so-called “fragile” black families, those that have children and are unmarried.¹⁹³

B. FRAGILE NONMARITAL BLACK FAMILIES AND THE STATE

In recent years, Sara McLanahan and others associated with the Princeton and Columbia University-run Fragile Families and Child Wellbeing Study (“FFCWS”), which examines 5000 children born in U.S. cities between 1998 and 2000 and their families,¹⁹⁴ have generated important research on the structure, functioning, and challenges faced by all nonmarital families. While this research combines to paint a broad, composite picture of nonmarital families and the factors that render them so fragile in this country, it also provides critical insights into fragile black families, in particular, that bear on this Article’s project.¹⁹⁵ Nonmarital African American families, this work shows, are among the most of the fragile.

Unsurprisingly, fragile families of all backgrounds are overwhelmingly likely to be disadvantaged.¹⁹⁶ The women who typically head such families, whether single, living with a partner, or in a non-cohabiting relationship, have fewer socioeconomic resources and support than their married peers.¹⁹⁷ As one set of researchers explained, they are, among other things, “much more likely to have less than a high school education, have a partner with less than a high school education, and to live in or near poverty than married new mothers in the same group.”¹⁹⁸ Even within this group, however, fragile black families stand out for the

191. See, e.g., WILLIAM JULIUS WILSON, *MORE THAN JUST RACE: BEING BLACK AND POOR IN THE INNER CITY* (2009).

192. COHN ET AL., *supra* note 155, at 2.

193. See Hummer & Hamilton, *supra* note 180, at 114.

194. *About the Fragile Families and Child Wellbeing Study*, FRAGILE FAM. & CHILD WELLBEING STUD., <http://www.fragilefamilies.princeton.edu/about.asp> (last visited June 9, 2015).

195. See HUNTINGTON, *supra* note 22, at 97–98.

196. Hummer & Hamilton, *supra* note 180, at 121.

197. *Id.* (noting that 37.4 percent of single, white women within fragile families lacked a high school degree at the birth of their child, compared to only 8.1 percent of married white women, contrasted with 52.6 percent of single, black women in poverty at the birth of their child, compared with 14.2 percent of married black women).

198. *Id.*

particular socioeconomic difficulties that they face.¹⁹⁹ Compared to their single white peers, as well those in cohabiting relationships, black women within FFCWS are much more likely to live below or near the federal poverty line; to have more children; to indicate that they reside in an unsafe or violent neighborhood; and to lack resources such as cars.²⁰⁰ They are also substantially more likely than white cohabiting mothers to report having recently received public assistance²⁰¹ and, to have a “higher prevalence of [nonmarital] births.”²⁰² Finally, they are considerably less likely than their peers to be cohabiting with their romantic partners, even though they may remain involved with them after the birth of a child, a rate significantly lower than for their white peers.²⁰³ Significantly, black women in fragile families have comparatively low rates of post-birth marriage:²⁰⁴ Five years after a nonmarital birth, only nine percent of African American women will have married.²⁰⁵ These disparities create consequences that are not limited to the women and men in the cohabiting relationships. They also create consequences for their children, whose rates of educational disruption and nonmarital births increase with prolonged exposure to poverty,²⁰⁶ and arguably for the communities in which they live.

Socioeconomically, fragile black families sit on a perilous perch that, even with the overall increase in nonmarital births nationally, increasingly places them on the margins of American society. Stereotypes about such families, nurtured in the years since the Moynihan Report’s publication by conservative pundits and social policies hostile to poor blacks in particular, suggest that their views about marriage and family also place them outside the norm. They are presumed, among other things, to place little or no value on marriage as an institution. Such assumptions, research shows, has little basis in reality. Kathryn Edin and Maria Kefalas’s study of poor, nonmarital families, which included interviews with mothers and

199. Notably, so do Mexican American and immigrant Mexican single and cohabiting women, who surpass the disadvantage registered by African American women on some measures. *See id.* at 120, 121 tbl.1. For example, more Mexican American and Mexican immigrant single and cohabiting women lack a high school education than do their white and even African American peers. *Id.* at 121.

200. *Id.*

201. *Id.*

202. *Id.* at 122.

203. *See id.* at 122 (indicating that African American women are most likely to maintain a non-cohabitation relationship with the father of their children).

204. Harknett & McLanahan, *supra* note 178, at 806.

205. Hummer & Hamilton, *supra* note 180, at 118. Some researchers attribute low post-birth marriage rates for black women to an undersupply of African American men. *Id.* at 125; Harknett & McLanahan, *supra* note 178, at 791; *see* EDIN & KEFALAS, *supra* note 21, at 130.

206. *See* MOYNIHAN REVISITED, *supra* note 179, at 6–7. In 2010, a study indicated that approximately forty percent of black children resided in poverty. For whites, the percentage of children in poverty that year, at thirteen percent, was substantially less. *Id.*

fathers about their relationships and parenting, revealed that, if anything, “[t]he poor avoid marriage not because they think too little of it, but because they revere it.”²⁰⁷ Marriage consistently ranks high in importance among African Americans.²⁰⁸ Indeed, they are more likely than some to express a desire to marry at some point in the future.²⁰⁹ At the same time, “uncertainty”²¹⁰ and concern about the expectations associated with marriage seem to be significant obstacles to marriage.²¹¹ Much of the research in this area correlates with the inequality metrics just described. It seems clear that low-income black heterosexual couples, in particular, may opt to decouple childrearing from marriage because they believe that “to do [marriage] . . . right” they must be on a “solid economic footing,”²¹² a goal that the structural barriers they face keeps out of reach.²¹³

Persistent race-based inequalities obviously “have roots that go beyond differences in the family structures of black and other families.”²¹⁴ The problems discussed in Part III.B, like segregated and low-quality housing options;²¹⁵ high unemployment rates;²¹⁶ disparities in educational

207. EDIN & KEFALAS, *supra* note 21, at 207; see EDIN & NELSON, *supra* note 21, at 219.

208. EDIN & KEFALAS, *supra* note 21, at 134.

209. See DECLINE OF MARRIAGE, *supra* note 12, at 9.

210. See 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 temporal “uncertainty” and the ways in which such uncertainty works to discourage marriage as an option for black women).

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

212. *Id.* at 140–41.

213. Interestingly, specific concerns about the fulfillment of gender-specific norms and roles also underlie this general concern about the financial feasibility of the household. For black men, the burden of having to become the primary economic provider, the position into which postbellum officials sometimes forcibly inserted them, has been thought to discourage marriage. See EDIN & KEFALAS, *supra* note 21, at 138. For women, in contrast, fear of “financial interdependence” with a partner less economically established presents a major obstacle. Melissa Murray, *What’s So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL’Y & L. 387, 413–17, 429–30 (2012). One of the young black women Edin interviewed in her study of poor unmarried women, when asked about the characteristics necessary for a potential spouse, explained, “He would have to have a job . . . You have to have a job! You don’t have to take *care* of me . . . but you have to have means for *something*!” EDIN & KEFALAS, *supra* note 21, at 114. In other words, what unfolds is an almost Sisyphean performance of—once imposed, but now thoroughly internalized—race and gender roles that lie at the center of traditional marriage. Such roles, given the impact of existing racial disparities, prevent many poor black men and women, from seeing marriage as a viable frame for their own lives. See DECLINE OF MARRIAGE, *supra* note 12, at 23 (indicating that eighty-eight percent of black respondents answered the question whether a man must be able to support a family before getting marriage in the affirmative, while only sixty-two percent of whites and seventy-seven percent of Hispanics did so); see also *id.* (indicating that fifty percent of black respondents answered the question whether a woman must be able to support a family before getting married in the affirmative, while only twenty-eight percent of white and forty-seven percent of Hispanic respondents did so).

214. MOYNIHAN REVISITED, *supra* note 179, at 8.

215. *Id.* at 14–15.

opportunities and completion rates;²¹⁷ and mass incarceration,²¹⁸ as previously noted, affect wide swaths of African America. But these problems affect fragile black families uniquely, in ways that lock them into ongoing cycles of poverty and marginalization.²¹⁹ For poor black women, socioeconomic circumstances translate into very high levels of “uncertainty” in their intimate relationships and lives more broadly.²²⁰ Limited resources mean that problems such as housing and food insecurity, neighborhood violence, unemployment, or even heavy work demands, put a heavy strain on poor, nonmarital parents and children alike.²²¹ Research suggests that limited resources may also “block” opportunities for black women to find a potential spouse or financial “breadwinner.”²²²

This type of inequality merely compounds the adverse effects of the family law structures and policies that directly and indirectly regulate nonmarital families. The standard account of families in the United States is, of course, that families are autonomous units that, for the most part, operate freely, without any intervention from the state.²²³ In truth, though, “state regulation of family life is deep and broad,”²²⁴ reaching areas ranging from marriage and child custody matters to welfare and tax benefits that shape family life.²²⁵ The problem for fragile black families is that such regulation is too often punitive and insufficiently attuned and responsive to the challenges that poverty presents for families.²²⁶ Indeed, as Clare Huntington argues, existing family law, in focusing so much on marriage and the rights and obligations that flow from it, often ignores nonmarital families.²²⁷

The priority given to marriage means that, even today, it still works to marry black families to second-class citizenship. For example, existing tax policy incentivizing marriage socioeconomically disadvantages fragile families by extending benefits to married individuals that are not

216. *Id.* at 9–10.

217. *Id.* at 11–13.

218. *See id.* at 17–18; *see also* McClain, *supra* note 211, at 138 (discussing research of William Julius Wilson attributing “low marriage rates and the rise in female-headed families to a reduced number of ‘marriageable’ black men owing to increased joblessness”).

219. *See* MOYNIHAN REVISITED, *supra* note 179, at 6–7.

220. *See* Burton & Tucker, *supra* note 210, at 135–36 (emphasizing uncertainty as an under-explored factor in post-Moynihan life for black women and identifying its sources).

221. *See* Hummer & Hamilton, *supra* note 180, at 124.

222. *See* Harknett & McLanahan, *supra* note 178, at 804, 808.

223. *See* EICHNER, *supra* note 23, at 26.

224. HUNTINGTON, *supra* note 22, at 58.

225. *Id.* at 58–59; *see also* JILL ELAINE HASDAY, FAMILY LAW REIMAGINED 2, 5–6, 8 (2014).

226. HUNTINGTON, *supra* note 22, at 195–96, 208–20.

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

available to such families.²²⁸ Further, current welfare policy, in addition to exposing fragile families to government scrutiny and further stigmatizing those who are black, also disadvantages them relative to other families.²²⁹ Take the example of state-imposed family caps on welfare benefits under the Temporary Assistance for Needy Families (“TANF”) program. As Jill Hasday explains, such caps drastically limit economic support to families that bear children while receiving benefits. Such caps, present in almost twenty states, have “‘imposed an extreme financial hardship’” on poor families,²³⁰ especially fragile ones where multi-partner fertility often occurs, and often results in family dissolution. Parents must elect either to care for their newly expanded families “without [the] adequate food, shelter and other necessities” available to families in states without family caps,²³¹ or to dissolve those families in whole or in part.²³² Evasion of the economic consequences of the family caps is only possible if a parent removes the child from their home, and places them with extended family or even the foster care system.²³³

Likewise, under changes made by the Personal Responsibility and Work Reconciliation Act,²³⁴ TANF limits the duration of welfare support and mandates the entrance of poor women into the workforce in ways that disproportionately affect fragile black families, which are overrepresented among welfare recipients.²³⁵ Child-care costs consume a large proportion of income for such families.²³⁶ While government support exists to cover some of these expenses, many eligible parents have difficulty securing the funds to procure reliable child care.²³⁷ This compromises the capacity of single mothers, in particular, to earn support for their families and to care for their children.

These and other similar policies under existing family law conspire to compromise the already fragile standing of nonmarital black families within the state. While the policies just referenced do not affect such families alone, their disparate racial impact and real effects on black family integrity are cause for serious concern. Just as it was nearly 150 years ago, when freedmen and women first “stood [for] a brief moment

228. EICHNER, *supra* note 23, at 113.

229. HASDAY, *supra* note 225, at 197.

230. *Id.* at 214.

231. *Id.*

232. *See id.* at 215.

233. *Id.*

234. *See supra* note 7 and accompanying text.

235. Ariel Kalil & Rebecca M. Ryan, *Mothers' Economic Conditions and Sources of Support in Fragile Families*, FUTURE CHILD., Fall 2010, at 39, 52–53.

236. *Id.* at 52.

237. *Id.* at 53.

in the sun,” how we treat black families today is critical to ensuring that black citizenship and belonging can be realized.²³⁸

III. NONMARRIAGE AS CITIZENSHIP ENHANCING?

The basic assumption that black marriage “is at the foundation of all our rights”²³⁹ has never seriously been challenged in African America.²⁴⁰ Even in the face of Whites’ aggressive regulation of black marriage, “[e]arly scholars writing about African American families,” as Melinda Chateauvert observes in her work, “rarely questioned the European-derived nuclear family ideal, holding it as a standard by which to judge racial ‘progress toward civilization’”²⁴¹ W.E.B. Du Bois’s foundational sociological work chronicling the passage of freedpersons from slavery to freedom, for example, is frequently disapproving of emancipated persons’ failure to live up to the nineteenth-century marital ideal, lamenting “easy marriage and easy separation” among Blacks.²⁴²

In *The Negro American Family*, published in 1909, Du Bois offered an empirical assessment of affective relationship patterns among black families throughout the United States. Noting slavery’s devastating impact on families, he addressed the topic of black immorality, what he termed “the plague spot of Negro relations”:²⁴³

Without doubt the point where the Negro American is furthest behind modern civilization is in his sexual *mores*. This does not mean that he is more criminal in this respect than his neighbors. . . . It does mean that he is more primitive, less civilized, in this respect than his surrounding demand, and that thus his family life is less efficient for its onerous social duties, his womanhood less protected, his children more poorly trained. All this, however, is to be expected. This is what slavery meant, and no amount of kindness in individual owners could save the system from its deadly work of disintegrating the ancient Negro home and putting but a poor substitute in its place.²⁴⁴

For Du Bois, data indicating that “at least one-half [of Blacks] are observing the monogamic sex *mores*” were to be celebrated alongside growing evidence of educational attainment, “economic independence,”

238. W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* 30 (1983).

239. EDWARDS, *supra* note 1, at 47.

240. See Chateauvert, *supra* note 18, at 201.

241. *Id.*

242. See Du Bois, *supra* note 238, at 130. Chateauvert points to texts betraying similar attitudes in her exploration of black marriage and, inter alia, the failure of African America to see it as civil rights issue in the 1950s and 1960s. See Chateauvert, *supra* note 18, at 201. Her intervention helped to give shape to my independent examination of Du Bois’s foundational work.

243. See, W.E.B. DU BOIS, *THE NEGRO AMERICAN FAMILY* 130 (1909).

244. *Id.* at 37.

and progress toward civilization.²⁴⁵ He acknowledged that Whites could occasionally learn from Blacks on matters such as “Negro mother-love and family instinct.”²⁴⁶ Yet, this pathbreaking scholar and fierce advocate for civil rights, like others of that time, did not quarrel at all with the priority placed on marriage or the urgency of black compliance with its dictates to secure full citizenship.

As a product of the nineteenth century, Du Bois can perhaps be forgiven for an assessment of freedpersons less charitable than one might expect, given his stance on other issues. But, of course, the failure of black leaders and scholars of race to interrogate deeply the assumptions about race, gender, sex, and citizenship in marriage debates and policy was not corrected by passage into the twentieth or twenty-first centuries.²⁴⁷ African America as a whole, given its history and current decline in marriage rates, has been surprisingly uncritical of marriage regulation. At no time has marriage been subjected to the critical, normative examination that residential segregation or the criminal justice system have received for their role in marginalizing black men and women.²⁴⁸ The intense religiosity of black communities might explain this omission,²⁴⁹ or perhaps an enduring sense that, even now, “we are on trial before the tribunal of the nation and of the world.”²⁵⁰ Whatever the cause, the need to adjust course could not be clearer. Questions of black marriage, insofar as they can be linked directly to persistent inequality that also limits black opportunity in domains such as education, housing, criminal justice, and employment, speak directly to issues of black belonging and civil rights.

Traditional marriage has placed an upper bound on our thinking and imagination with respect to matters of race and citizenship. Just as in the gender context, where courts and legislators only looked to set the legal rights of unmarried women by evaluating their position in proximity to that of married women, current policy measures nonmarital black

245. *Id.* at 152. Chateauvert notes that celebrating changes in black moral along with “the increase in the number of college graduates, practicing professionals, home owners, businesses, and charitable organizations among African Americans” was characteristic of other scholars and thinkers of this era. Chateauvert, *supra* note 18, at 201.

246. *See* Du Bois *supra* note 243, at 42.

247. *See, e.g.,* Gates, *supra* note 129 (inviting civil rights advocacy “around responsible sexuality” and “birth within marriage” among other things).

248. *See* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 13 (2010) (arguing that, like slavery and the Jim Crow system, “mass incarceration operates as a tightly networked system of laws, policies, customs, and institutions that operate collectively to ensure the subordinate status of a group defined largely by race”).

249. *See* Neha Sahgal & Greg Smith, *A Religious Portrait of African-Americans*, PEW FORUM (Jan. 30, 2009), www.pewforum.org/2009/01/30/a-religious-portrait-of-african-americans/.

250. EDWARDS, *supra* note 1, at 56.

affective relationships only against the yardstick of traditional marriage.²⁵¹ Even worse, it evaluates potential responses to current conditions in this light as well. Notably, black feminists offered useful reflections on similar imitative reforms in the aftermath of the release of the 1965 Moynihan Reports, inciting a firestorm of debate. They questioned the efficacy of policies designed to curb the “matriarchal pattern” in black households by bolstering the status of black men as household heads,²⁵² rather than by “pioneer[ing] egalitarian marriages which can serve as models for young people of both sexes and races.”²⁵³ Eleanor Holmes Norton put a fine point on the matter, arguing that “it will be impossible to reconstruct the black family if its central characters are to be crepe-paper copies acting out the old white family melodrama.”²⁵⁴ Real change, in other words, requires flipping old scripts and considering new paradigms.

What is required is a fundamental rethinking and restructuring of existing law and programs affecting nonmarital families. Unfortunately, new approaches have been in short supply in current debates about black families. Forces within and without African America remain deeply invested in promoting marriage as a key strategy for eliminating black disadvantage.

Conservatives, capitalizing on a growing national debate about inequality,²⁵⁵ increasingly tout marriage’s capacity to build wealth for the fragile black families described in the preceding Part.²⁵⁶ Essentially, proponents argue—ignoring real questions about the availability and suitability of partners²⁵⁷—that for poor nonmarital families in particular, more is always more, that even two meager paychecks will be better than one.²⁵⁸ Such arguments, however, vastly overstate the economic benefits of marriage to African Americans in particular.

Low-income black couples, to begin, might just as well face a marriage penalty as a benefit.²⁵⁹ For example, the presence of two earners might actually disqualify a family for the earned income tax benefit, which takes the income of both spouses into account when determining

251. See Dubler, *supra* note 24, at 1656.

252. MOYNIHAN REVISITED, *supra* note 179, at 29.

253. Serena Mayeri, *Historicizing the “End of Men”: The Politics of Reaction(s)*, 93 B.U. L. REV. 729, 736 (2013).

254. Eleanor Holmes Norton, *For Sadie and Maude*, in *SISTERHOOD IS POWERFUL: AN ANTHOLOGY OF WRITINGS FROM THE WOMEN’S LIBERATION MOVEMENT* 397 (Robin Morgan ed., 1970).

255. See Peter Baker, *Obama Taking up Economic Issues on His Authority*, N.Y. TIMES, Jan. 29, 2014, at A1.

256. See, e.g., Kay S. Hymowitz, *How Single Motherhood Hurts Kids*, N.Y. TIMES, Feb. 9, 2014, at SR5.

257. Huntington, *supra* note 227, at 170.

258. ROBERTS, *supra* note 118, at 222–23.

259. Huntington, *supra* note 227, at 221.

eligibility.²⁶⁰ Further, the marriage-related benefits for which they could be eligible, in theory, might not provide adequate assistance. Research by Dorothy Brown, for example, indicates that black couples benefit less from Social Security survivor benefits than white couples do.²⁶¹ The reality is that the wealth effects of getting married vary dramatically by race, as work by sociologist Thomas Shapiro affirms.²⁶² In a paper drawing on data from a twenty-five year study of families, Professor Shapiro found, that marriage “significantly increase[d] the wealth holdings for white families by \$75,635”;²⁶³ but getting married had “no statistically significant impact on African-Americans.”²⁶⁴ Because “marriage among African-Americans typically combines two comparatively low-level wealth portfolios,” it “does not significantly elevate the family’s wealth.”²⁶⁵

Even more fundamentally, arguments touting the economic benefits of marriage rest on an inherently faulty premise. Contrary to what marriage advocates imply, there is nothing natural or preordained about traditional marriage and the mechanisms that incentivize entrance into that institution. Collectively, marriage policy and incentives reflect a set of very calculated, particular choices and commitments, each with its own consequences for affected individuals and families. Those commitments, although long standing, are by no means set in stone; they can be changed.²⁶⁶

Demographic realities and the increasingly socioeconomic fragility of black loving relationships necessitate a greater focus on nonmarital families—their status, specific needs, and capacities. Rather than setting traditional marriage as the lodestar for all black affective relationships, this Article proposes a normative alternative: nonmarriage. Importantly, this shift in attention does not contemplate the eradication of legal marriage. For all the ways that it has diminished citizenship, the institution can work,

260. *Id.*

261. See, e.g., Dorothy A. Brown, *Social Security and Marriage in Black and White*, 65 OHIO ST. L. J. 111, 112, 122–43 (2004).

262. See THOMAS SHAPIRO ET AL., *The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide*, INST. ON ASSETS & SOC. POL’Y 6 (2013), <http://iasp.brandeis.edu/pdfs/Author/shapiro-thomas-m/racialwealthgapbrief.pdf>. For more on the racial wealth gap, see generally SHAPIRO, *supra* note 129; MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (1997).

263. SHAPIRO ET AL., *supra* note 262, at 6.

264. *Id.*

265. *Id.*

266. See, e.g., Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 405, 414 (2008) (critiquing, among other things, the “reluctance to recognize care networks and nonparental caregivers” and urging the “[l]egal recognition of networked care [as a way of making] clear that reliance on caregiving networks is not a sign of pathological dependence or deviance, but rather is an important aspect of providing care”).

however imperfectly, to enhance citizenship and belonging for some.²⁶⁷ Rather, this proposal looks to situate nonmarriage alongside marriage as a viable frame for organizing black intimate relationships and families. It acknowledges the extent to which, given current circumstances, nonmarriage constitutes a legitimate, rational choice for many.²⁶⁸ Thus, the proposal resists the impulse to strengthen black families by attempting to drag those who now sit primarily within marriage's "regulatory shadow" more squarely within that institution's borders.²⁶⁹ Instead, this Article contemplates finding unmarried black couples with children, in particular, where they are and then looks to build out from there. To the extent that current rates of nonmarital births and parenting in the United States generally are unlikely to change in the near term, this shift in focus could ensure critical support for fragile black families in particular. In the end, it could work to destigmatize and, in the process, greatly improve the overall standing of black families in the broader community.

Family law scholars have advanced a range of alternatives to traditional marriage that together map some of the possibilities for the restructuring contemplated.²⁷⁰ Some of the proposals contemplate systems that would operate alongside marriage. Such systems provide adults in romantic or caregiving relationships access to government benefits. Cynthia Bowman's proposal to afford cohabiting relationships "quasi-marital" status²⁷¹ and Linda McClain's kinship registration system, which contemplates "governmental recognition and support to forms of intimate, committed relationships other than marriage," provide two noteworthy examples.²⁷² Other proposals more consciously seek to displace legal marriage as the frame for affective relationships. For example, Laura Rosenbury advocates legal recognition of adult friendship as a way of promoting gender equity and undermining the norms enshrined by marriage.²⁷³ Martha Fineman's influential work urges a focus on dependency within the structures established by family law.²⁷⁴ She argues that the dependent-care relationship, not marriage, should be the basis

267. Lenhardt, *supra* note 77, at 892–94.

268. *See id.* at 894.

269. Dubler, *supra* note 24, at 1656.

270. *See, e.g.,* BOWMAN, *supra* note 173, at 221.

271. *Id.* Under this proposal, couples would be free to opt out of this status after either two years of cohabitation or the birth of a child, as a way of "stabiliz[ing] cohabiting relationships and . . . improve[ing] the lives of people living in cohabitant households, especially children." *Id.*

272. *Id.* at 193.

273. Rosenbury, *supra* note 10, at 194–97, 208–11. Under her approach, the government, rather than providing benefits through domestic relationships, would permit individuals to dispense all the "benefits, default rules, and obligations attaching to marriage" to one or more of the people "perform[ing] different functions in their lives." *Id.* at 230.

274. *See generally* MARTHA FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004).

for government support and benefits.²⁷⁵ Marriage, under Fineman's proposal, would be reduced essentially to system of contract, where adults memorialize their affective or sexual affiliations through written agreement.²⁷⁶

This Article does not endeavor to select among these proposals or others concerning matters of family and law. In cataloguing a subset of the proposals advanced to date, its purpose is simply to signal that marriage need not be the only, or even the primary, frame for supporting black loving relationships. To attempt to do more than that here would be premature. Thinking about alternative frames for structuring families creates the conditions necessary to ensure that all families receive the respect and support that they deserve. But legal scholars of race and family must do much more to understand and address the unique history and needs of African American families, particularly those that live below the poverty line. The racial subordination effected by marriage regulation, for example, may well require strategies and solutions geared specifically to race. Without attending purposefully to race in this context, as in others, real progress may be elusive. As Part II makes plain, family structures, however widely utilized, are not necessarily race neutral.²⁷⁷ Questions of race have long informed the positioning and treatment of intimate choice and affective relationships in African America.

In generating effective proposals, we must eliminate the marriage myopia of existing law and policy, and its adverse and stigmatizing impacts on African Americans. Fortunately, scholars in this area are beginning to grapple with the fact that nonmarital families are here to stay. Clare Huntington argues that the law must develop norms and approaches more likely to support fragile, nonmarital families as they try to navigate the challenges that poverty can create for them and their children.²⁷⁸ She urges conscious development of "postmarital family law."²⁷⁹ For Huntington, this means adopting "[n]ew legal rules" capable of disrupting the dynamics and practices that compromise the functioning of nonmarital families.²⁸⁰ Such rules might "discourage maternal gatekeeping [in noncohabiting families], defuse conflict, and encourage co-parenting."²⁸¹ More positively, they could also seek to build upon the existing capacities

275. MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 230-33 (1995).

276. *Id.* at 228-30.

277. See Lenhardt, *supra* note 14.

278. Huntington, *supra* note 227, at 172.

279. *Id.* at 173.

280. *Id.* at 167.

281. *Id.*

and positive inclinations of nonmarital families and parents. This might entail supporting the strategies deployed by parents who have already developed effective co-parenting techniques or encouraging the development of “new social norms [that, for example] . . . embrace a broader notion of unmarried fatherhood.”²⁸²

The idea of capitalizing on the core strengths and capacities of nonmarital black families will seem, no doubt, counterintuitive to some. As Parts I and II indicate, public discourse over the years has too often emphasized the perceived indolence and chronic dependency of African Americans in general, but especially poor, nonmarital black mothers and fathers. The welfare queen trope imagines an unmarried black woman with bad parenting skills who has an irresponsible number of children and is simply unwilling to work.²⁸³ She has no skills and no ambition beyond securing government handouts.²⁸⁴ The twin stereotype of the unmarried deadbeat dad²⁸⁵—which seemed at least partially to animate even President Barack Obama’s well-intentioned “My Brother’s Keeper” fatherhood program—paints a similar picture of black impotence.²⁸⁶ This perpetually unemployed black father avoids paying child support at all costs and spends almost no time with his children, if he knows them at all.²⁸⁷ He is the farthest thing away from a “good” father.

Research, however, reveals that, in addition to greatly understating the effects of the structural inequality in this context, such narratives ignore how well nonmarital black couples actually manage to navigate the often difficult terrain of parenthood.²⁸⁸ In truth, not all nonmarital African American fathers are absent parents. Indeed, as a group, unmarried black fathers tend to do better than most when it comes to retaining relationships with children with whom they do not reside.²⁸⁹ “Black mothers are somewhat more likely to report that the fathers of their children visited the hospital [after their birth] and want[ed] to be involved in their children’s lives than are other racial and ethnic groups.”²⁹⁰ Likewise, studies show that black nonmarital fathers are more likely than white and Latino fathers actually to maintain a relationship

282. *Id.*

283. ROBERTS, *supra* note 118, at 17–19.

284. *Id.*

285. Brenda Cossman, *Contesting Conservatism, Family Feuds, and the Privatization of Dependency*, 13 AM. U. J. GENDER & SOC. POL’Y & L. 415, 440 (2005).

286. See Kenya Rankin Naasel, *It’s a Myth That Black Fathers are Absent*, N.Y. TIMES (Mar. 12, 2014), <http://www.nytimes.com/roomfordebate/2014/03/12/the-assumptions-behind-obamas-initiative/its-a-myth-that-black-fathers-are-absent>.

287. See Cossman, *supra* note 285, at 443.

288. See Huntington, *supra* note 227, at 226.

289. *Id.*

290. See Hummer & Hamilton, *supra* note 180, at 122.

with a nonresident child;²⁹¹ to see their children more often than other fathers;²⁹² and to maintain a functioning co-parenting relationship with birth mothers over time.²⁹³ That black men and women find ways to negotiate the difficulties of co-parenting amidst sometimes difficult interpersonal dynamics, such as those created when one parent enters into a new romantic relationship, suggests a capacity for parenting, communication, and conflict resolution that prevailing stories about nonmarital black parents do not capture.²⁹⁴ This is not to suggest that nonmarital black families face no challenges. Clearly, they do. But, it also seems plain that policy initiatives designed to capitalize on co-parenting strengths and to nurture other capacities could be very productive.

In addition to such initiatives, a focus on nonmarital families could lead to important reforms in federal and state programs affecting families, such as expanding the federal Family and Medical Leave Act and similar state programs to reach a broader scope of workers, broadening the range scope of child-care initiatives.²⁹⁵ The family-related proposals outlined in President Obama's 2015 State of the Union address—which contemplate extending child care and making access to Head Start and universal preschool available to the poor—would, for example, go a long way toward addressing the TANF-related constraints on black parents outlined in Part II.B.²⁹⁶ Similarly, removing family caps under TANF would help ensure the integrity of poor black families and protect them against having to make the choice between nurturing a child and receiving critical financial benefits. Such violations, as Part I.B and II.B outlined, harken back to brutal antebellum and postbellum measures that stigmatized and undermined black families.

Modifications to tax policy concerning the poor could also greatly improve the functioning and economic status of fragile black families. Consider the Earned Income Tax Credit ("EITC"), which effectively enlarges the income available to address family needs. An Urban Institute report on black families notes that the EITC could be restructured to better support nonmarital black families.²⁹⁷ For example, the EITC provides

291. Marcia J. Carlson et al., *Coparenting and Nonresident Fathers' Involvement with Young Children After a Nonmarital Birth*, 45 DEMOGRAPHY 461, 473 (2008); see Huntington, *supra* note 227, at 190.

292. Carlson et al., *supra* note 291, at 190.

293. Huntington, *supra* note 227, at 190.

294. EDIN & NELSON, *supra* note 21, at 215 (discussing post-break up co-parenting); Huntington, *supra* note 227, at 195 (same).

295. See EICHNER, *supra* note 23, at 35–47, 77–90.

296. Michelle Chen, *This Unnoticed Part of Obama's Childcare Initiative Is a Big Deal*, NATION (Feb. 4, 2015, 12:41 PM), <http://www.thenation.com/blog/197105/unnoticed-part-obamas-childcare-initiative-big-deal#>.

297. See MOYNIHAN REVISITED, *supra* note 179, at 21.

relatively little support to nonresident parents.²⁹⁸ Because this is the case, “unmarried men who have no children or are living apart from their children and can only secure low-wage work may find working in the mainstream not worth the effort.”²⁹⁹ “Increasing the EITC for nonmarital parents who reside separately from their children could have the effect of encouraging more work among single men” who can find it.³⁰⁰ Better work opportunities could help such men become “established in the mainstream economy and be better positioned to support their [current or] future families financially.”³⁰¹ For nonmarital African American fathers, such policy changes might even have the added benefit of improving affective relationships with children and even former partners.

These and other possibilities for more effectively supporting families—and ensuring that nonmarital households are not required to shoulder dependency in ways that, under current policy, marital household do not—could be transformative for all families, but especially fragile black caregiving units. Pairing such initiatives with structural interventions designed to resolve problems such as housing segregation, inequities in the criminal justice system, and antidiscrimination policies concerning the workplace and the classroom could dramatically reduce the economic insecurity of fragile black families and children.³⁰²

More broadly, developing nonmarital alternatives for family support would have the benefit of reframing notions of race-based, gender-based, and family-based citizenship overall. So long as marriage continues to be the metric against which all black loving relationships, married or unmarried, are evaluated, African Americans, at least given current statistics, will continue to fall short. For centuries, marriage has troubled the relationship of Blacks to the state, rendering them subordinate and stigmatized, outcasts within its borders. Introducing an alternative normative frame for loving relationships, of which all groups could take advantage, would begin to change that calculus. It reduces marriage’s “regulatory shadow.”³⁰³ In effect, it would change how African America is situated within the polity without coercing its members into changing how they form or experience their loving relationships—a courtesy that freedpersons were not afforded as they took their first steps toward freedom. In other words, a focus on nonmarriage might actually provide a measure of belonging to black couples and their families. It would

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. See *supra* note 106 (noting that greater economic stability might even serve to increase marriage rates among Blacks who cite financial instability as an important reason for foregoing marriage).

303. Dubler, *supra* note 24, at 1656.

make them “becoming,” rather than “unbecoming” citizens.³⁰⁴ A growing number of nonmarital relationships, no doubt at least in part because they are non-black and possess economic resources, now enjoy such acceptance without the taint of pathology.³⁰⁵ Nonmarriage could do the same for African America.

CONCLUSION: NONMARITAL LOVING AND THE STRUGGLE FOR BLACK CIVIL RIGHTS

This Article has advanced two basic claims: first, that marriage has very often been citizenship diminishing, not enhancing, for Blacks; and, second, that nonmarriage might do more than marriage ever did to secure black civil rights and belonging. In doing so, it has, in effect, sounded a national “call to action” concerning black families, albeit one very different than the one issued by former Senator Daniel Patrick Moynihan five decades ago. While acknowledging the structural barriers faced by African American families, Moynihan ultimately looked to neutralize the threat that persistent racial inequality poses for black citizenship by requiring that poor Blacks, once again, internalize their need within marital families. He voiced public call, but ultimately settled on a solution—given the norms underlying traditional marriage—still very private in nature.

This Article aims to inspire a new discourse about race and family. It looks to take black familial relationships “public” in a way that they have not yet been. Obviously, such relationships have often been a matter of public concern in the United States. But our public discourse and solutions have too often emphasized the individual, private choices of African Americans instead of the racialized systems and structures that both inform and constrain such choices. In essence, the obsession with traditional marriage as the key to African America’s salvation has masked the true effects of racial inequalities on black families, as well as obscured marriage’s role in creating such inequalities.

The more complete history of black marriage offered, and the focus on nonmarriage as a viable frame for black affective relationships urged in this Article, constitute important, but still preliminary steps in changing this dynamic. Earlier, I offered institutional structural analyses as one way to begin to detail the concrete effects of marriage’s role in advancing racial subordination and caste, identifying potential areas of concentration. There is still much more to learn about the ways in which law and policy have structured race and family in this country, however. Legal scholars and others concerned about black belonging can do more

304. See COSSMAN, *supra* note 148, at 122.

305. See, e.g., Ellin, *supra* note 13.

to excavate the history and effects of institutions and structures that bear on black families. As I argue in Part I, there is good reason to see family structures and systems relating to housing, public education, or employment as intimately intertwined.

We can also do more to explore how African America itself has understood and experienced family and kinship ties within such systems. The research on fragile families provides one useful starting point.³⁰⁶ Legal scholars are already examining how well family law, broadly defined, affects and supports such families. Analyses that deal much more explicitly with issues of race in this context could open even more fruitful avenues of inquiry. In Part II.B, this Article demonstrates that welfare-related policies have an especially punitive effect on fragile black families. Additional targeted research along these and similar lines could yield other important insights, including those relating to how we perceive and pathologize black dependency and poverty. Likewise, thinking very broadly about kinship structures and the norms that inform them, as I have done in other work, constitutes another potentially productive area of research.

Finally, as Part III suggests, work in this area must examine alternatives to traditional mechanisms for supporting families that directly engage matters of race. Such alternatives, along with other improvements in law and policy, could benefit a range of families. Nevertheless, ignoring the unique issues confronting families of color risks exacerbating some of the very problems scholars in this area look to address. Even more, failing to attend to race in this context might minimize the benefits of some of the alternative measures proposed. For example, the proposal that the law start to recognize and build upon the capacities of nonmarital black parents could eventually lead to important shifts in the gender norms that inform how such parents interact with one another and their children. Opening additional avenues for black fathers to serve as family caregivers could benefit black children, as well as black working mothers and other kinship-based caregivers.

In sum, the time to determine how laws regulating affective relationships actually bear on black civil rights and belonging is long overdue. The confluence of three events pertaining to family and citizenship—the 150th anniversary of the ratification of the Thirteenth Amendment, the fiftieth anniversary of the release of the controversial Moynihan Report, and the Supreme Court’s widely anticipated decision concerning the extension of marriage rights to LGBT couples—suggests

306. Melinda Chateaufort’s observation that black civil rights organizations studiously avoided matters of family and sexual relations in developing civil rights advocacy plans could provide another important window into issues in this area. See Chateaufort, *supra* note 18, at 200.

that the time is ideal to take this inquiry up in earnest. Legal scholars and others concerned about matters of race and family should capitalize on the opportunity to do just that.