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# The Color of Kinship

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# The Color of Kinship

R.A. Lenhardt\*

*ABSTRACT: This Article addresses the need for family law scholarship that better theorizes and grapples with how race informs American life in the 21st Century. Family law scholars have been instrumental in documenting and advocating for recognition of the “new kinship”—familial relationships and affective ties forged outside of marriage and amidst dramatic demographic shifts. In doing so, though, they have largely ignored race, focusing instead on matters such as gender or class. The assumption is that kinship is race-neutral. But, in fact, kinship has a color. Part II explores this reality by analyzing Cramblett v. Midwest Sperm Banks, LLC, a case involving a lesbian mother who filed a wrongful birth suit when the insemination process she underwent resulted not in the white baby desired, but a child who is partially black. Part III explains how the colorblind approach that informs much of family law scholarship undermines the ability of scholars in this area both to interrogate cases like Cramblett and to offer meaningful solutions to the problems that families confront. Part IV advocates for a new approach to issues of family and race, including whiteness. Mapping a research agenda and alternative vision for family law scholarship, this article urges greater attention to the ways in which race informs the functioning of all families and intersects with issues like sexual orientation and class. This article also makes the case that family law scholars can advance the national debate about race and inequality in the United States by offering insights into the ways in which family law systems and policies shape notions of race and structure inequality across a range of areas.*

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\* Professor of Law and Faculty Director, Center on Race, Law & Justice, Fordham Law School. I am grateful to the participants of the Fordham Law School Faculty Workshop, the Seton Hall Faculty Workshop, the 10th Annual Lutie Lytle Workshop, the AALS Mid-Year Family Law Workshop, the members of the eCRT Workshop at Wisconsin Law School, and the Law & Society Association’s John Hope Franklin Award Panel on Professor Osagie Obasogie’s book, *Blinded by Sight: Seeing Race Through the Eyes of the Blind*, and the SMU Law Faculty Workshop. I am very grateful for discussions with and feedback from the following people on matters relevant to this paper: Michelle Adams, Elise Boddie, Bill Crawley, Jessica Dixon, Nany Dowd, Clare Huntington, Trina Jones, Solangel Maldonado, Serina Mayeri, Melissa Murray, Angela Onwuachi-Willig, Kimani Paul-Emile, Camille Gear Rich, Aaron Saiger, Shaakirrah Sanders, Jed Sugarman, Ben Zipursky. Finally, I am grateful to Kajon Pompey and Lauren Sarkofsy for critical assistance with this Article, and to Clare Horan and others on the Iowa Law Review for their assistance, hard work, and patience during the publication process.

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### I. INTRODUCTION: THE COLOR OF KINSHIP

In October 2014, Jennifer Cramblett filed a wrongful birth and breach of warranty suit against the Chicago-based sperm bank that had been instrumental in helping her and her then partner, Amanda Zinkon, achieve their shared dream of becoming parents.<sup>1</sup> Cramblett and Zinkon had procured donor sperm from Midwest Sperm Bank, LLC and, with the assistance of their physician, eventually became pregnant after months of

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1. See Complaint for Wrongful Birth and Breach of Warranty, *Cramblett v. Midwest Sperm Bank, LLC*, No. 2014-L-010159 (Ill. Cir. Ct. Sept. 29, 2014), 2014 WL 4853400 [hereinafter *Cramblett Complaint*]. For articles on the case, see, e.g., Mark Gillispie, *White Couple Outraged That Sperm Bank Donor Turned Out to Be Black*, TALKING POINTS MEMO (Oct. 2, 2014, 7:07 AM), <http://talkingpointsmemo.com/news/ohio-women-sue-wrong-sperm>; Meredith Rodriguez, *Lawsuit: Wrong Sperm Delivered to Lesbian Couple*, CHI. TRIB. (Oct. 1, 2014, 7:22 AM), <http://www.chicagotribune.com/news/local/breaking/ct-sperm-donor-lawsuit-met-20140930-story.html>; Patricia J. Williams, *The Value of Whiteness: A Lawsuit is Being Waged Against the “Wrongful Birth” of a Black Child*, NATION (Nov. 12, 2014), <https://www.thenation.com/article/value-whiteness>. Subsequent complaints filed in this litigation convey a significantly more truncated version of Cramblett’s story and allege injuries other than the one initially crafted on her behalf. After a transfer of venue from the Circuit Court of Cook County, Illinois, to the Circuit of DuPage County, Illinois, the DuPage district court dismissed the wrongful birth and breach of warranty claims that she initially advanced with prejudice. Order, *Cramblett v. Midwest Sperm Bank, LLC*, No. 2015 L 000282 (Ill. Cir. Ct. Sept. 3, 2015). Cramblett, by her lawyer, thus filed an amended complaint advancing 9 claims sounding in contract, negligence, common law breach of warranty, and various statutory violations. See Amended Complaint, *Cramblett v. Midwest Sperm Bank, LLC*, No. 2015 L 000282 (Ill. Cir. Ct. Sept. 23, 2015). The DuPage court dismissed the statutory claims with prejudice, but dismissed the remaining claims without prejudice and granted Cramblett permission to file a second amended complaint. Order, *Cramblett v. Midwest Sperm Bank, LLC*, No. 2015 L 000282 (Ill. Cir. Ct. Mar. 11, 2016). Cramblett did not further amend her state court complaint, however. Instead, in April 2016, she filed a federal diversity suit under 28 U.S.C. § 1332 in the U.S. District Court of Illinois, Eastern Division. Plaintiff’s Complaint for Consumer Fraud, Common Law Fraud, Willful and Wanton Misconduct, Common Law Negligence, Breach of Contract and Breach of Warranty, *Cramblett v. Midwest Sperm Bank, LLC*, No. 1:16-cv-04553 (N.D. Ill. Apr. 22, 2016). That complaint sets forth a total of 7 claims against Midwest Sperm Bank, alleging consumer and common law fraud, misconduct, negligence, and breach of both contract and warranty. See generally *id.* Because later complaints provide a less fulsome account of Cramblett’s experience with Midwest Sperm Bank as well as the nature of her concerns regarding Payton and the constraints that she anticipates they will both face, this Article will draw on the information contained in the first complaint filed in this litigation in offering its analysis.

trying.<sup>2</sup> In August 2012, their daughter, Payton, was born.<sup>3</sup> Payton, by all accounts, is a “beautiful” child.<sup>4</sup> The complaint includes no mention that she suffers from physical deformities, intellectual disabilities, or serious medical conditions.<sup>5</sup> Indeed, according to the complaint her mother filed, Payton has only one notable flaw: she is the wrong race.<sup>6</sup>

Cramblett and Zinkon, both white, had carefully selected a white sperm donor with the desire and expectation that their child would also be white.<sup>7</sup> A few months into Cramblett’s pregnancy, however, they learned that those expectations would not be met.<sup>8</sup> Cramblett, it turns out, had mistakenly been inseminated with the sperm of an African American donor.<sup>9</sup> Thus, instead of a child “with genetic traits similar to both of them,”<sup>10</sup> she gave birth to an “obviously mixed race[] baby girl,”<sup>11</sup> one whose hair and other features mark her as racially different in the all-white suburb in which she resides.<sup>12</sup> Cramblett emphasizes that, notwithstanding the depression and devastation she felt upon learning of the sperm bank’s mistake,<sup>13</sup> “[she] bonded with Payton easily, and [that] she and [Zinkon] love her very much.”<sup>14</sup> But her actions tell a more complex story. The complaint, filed in what proved to be only the first phase of her quest to obtain pecuniary damages from the sperm bank, plainly sought compensation for violation of unwittingly bearing a non-white child.<sup>15</sup> Specifically, the complaint requests damages for the “personal injuries, medical expense, pain, suffering, emotional distress, and other economic and non-economic losses” that Cramblett believes she has sustained and will incur in the future because she is the mother of a mixed-race child.<sup>16</sup>

2. Cramblett Complaint, *supra* note 1, at 3.

3. *Id.* at 6.

4. *Id.*

5. *See generally id.*

6. *See id.* at 7 (including a claim for wrongful birth because the defendant “caus[ed] [plaintiff] to be artificially inseminated with the sperm from the wrong donor,” i.e., a donor of African American descent). As others writing in this area have observed, words such as “wrongful,” “mistake,” or “tragedy” have frequently been deployed in cases involving cases of unintentional multi-racial births. *See* Seline Szkupinski Quiroga, *Blood Is Thicker than Water: Policing Donor Insemination and the Reproduction of Whiteness*, 22 *HYPATIA* 143, 143 (2007) (discussing media framing of cases involving incidents of unintended multi-racial birth); *see also generally* DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997) (discussing cases similar to *Cramblett*).

7. Cramblett Complaint, *supra* note 1, at 2–4.

8. *See id.* at 4.

9. *See id.* at 4–5.

10. *Id.* at 3.

11. *Id.* at 6.

12. *See id.*

13. *See id.* at 5.

14. *Id.* at 6.

15. *See id.* at 8 (seeking damages in an “amount exceed[ing] \$50,000”).

16. *Id.* at 7.

That document, like the subsequent submissions made in connection with her effort to secure pecuniary relief, regards blackness as a kind of injury,<sup>17</sup> and conceives of whiteness as a legitimate, legally enforceable property right.<sup>18</sup>

The *Cramblett* case, with the complex issues of identity, kinship and community it involves, points to the need to think more deeply about how race informs and structures family life in the 21st Century. The tragic police shooting deaths of men and women of color in places such as Ferguson, Missouri, Baton Rouge, Louisiana, and North Charleston, South Carolina, have, of course, already opened a serious dialogue about race in the United States.<sup>19</sup> Furthermore, important scholarly research provides critical insights into how systems and practices in areas such as criminal justice,<sup>20</sup> housing,<sup>21</sup> and education<sup>22</sup> produce and sustain racial stratification.<sup>23</sup> But we do not have a comparable picture of how family systems and structures contribute to and

17. See *id.* (alleging personal injuries due to daughter's partial blackness); see also Williams, *supra* note 1.

18. For an influential article on the ways in which whiteness functions as a source of privilege and property rights, see generally Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993) (discussing whiteness as a form of property).

19. See generally, e.g., RICHARD ROTHSTEIN, ECON. POLICY INST., THE MAKING OF FERGUSON: PUBLIC POLICIES AT THE ROOT OF ITS TROUBLES (2014), <http://www.epi.org/files/2014/making-of-ferguson-final.pdf>; Henry Louis Gates, Jr., *Black America and the Class Divide*, N.Y. TIMES (Feb. 1, 2016), <https://www.nytimes.com/2016/02/07/education/edlife/black-america-and-the-class-divide.html>. For Department of Justice investigative reports that have influenced how such incidents have been analyzed and understood, see, for example, U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT (2016), <https://www.justice.gov/opa/file/883366/download> [hereinafter DOJ, INVESTIGATION OF BALTIMORE]; and U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [hereinafter DOJ, INVESTIGATION OF FERGUSON].

20. See generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012) (identifying mass incarceration as a problem of structural and systemic racial injustice); see also generally DOJ, INVESTIGATION OF BALTIMORE, *supra* note 19; DOJ, INVESTIGATION OF FERGUSON, *supra* note 19.

21. See David Leonhardt, *Middle-Class Black Families, in Low-Income Neighborhoods*, N.Y. TIMES: UPSHOT (June 24, 2015), <http://www.nytimes.com/2015/06/25/upshot/middle-class-black-families-in-low-income-neighborhoods.html> (discussing a recent report on race and housing); see also generally DARIA ROITHMAYR, REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE (2014).

22. See, e.g., RICHARD ROTHSTEIN, ECON. POLICY INST., FOR PUBLIC SCHOOLS, SEGREGATION THEN, SEGREGATION SINCE: EDUCATION AND THE UNFINISHED MARCH (2013), <http://www.epi.org/files/2013/Unfinished-March-School-Segregation.pdf> (discussing the permanent racial isolation of African American children in neighborhoods and schools); see also Nikole Hannah-Jones, *The Continuing Reality of Segregated Schools*, N.Y. TIMES: MAG. (July 31, 2015), <https://www.nytimes.com/2015/07/31/magazine/the-continuing-reality-of-segregated-schools.html>.

23. Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 AM. SOC. REV. 465, 472 (1997) (discussing, *inter alia*, structural inequality and racial formation); see also ROITHMAYR, *supra* note 21, at 4–5 (discussing structural inequality and “lock-in” segregation).

interact with racial inequality.<sup>24</sup> Family law scholars have been instrumental in exploring questions of kinship and relatedness in the United States. Most recently, they have been especially prominent in efforts to document and advocate for recognition of what has often been called the “new kinship”—intimate associations, parental relationships, and affective ties increasingly forged outside of traditional marriage and amidst dramatic demographic shifts in the family, LGBT rights efforts, and the rise in assisted reproductive technologies.<sup>25</sup> However, in both instances they have largely done so without engaging in questions of race in any meaningful way. Instead, kinships, whether old or new, have been framed as essentially race-neutral relationships and affective ties that implicate matters of gender, sexuality, and even class, but exist before or somehow outside of race.<sup>26</sup> As *Cramblett* makes plain, though, nothing could be farther from the truth. Kinship has a color.

This Article seeks to open a dialogue about the need for family law scholarship that better theorizes and grapples with the ways in which race informs and shapes the experience of family life in 21st Century America.<sup>27</sup> Too often, we presume a kind of post-raciality in the family law context that has, in fact, never been achieved.<sup>28</sup> Progress has, of course, been made. This year, for example, marks the 50th anniversary of the U.S. Supreme Court’s landmark decision in *Loving v. Virginia*, which invalidated antimiscegenation law provisions prohibiting people of different races from marrying.<sup>29</sup> But race, notwithstanding increases in interracial intimacy,<sup>30</sup> continues to be salient in the lives of families—whether one talks about disparities in the child welfare

24. 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> (reviewing Clare Huntington’s book, *Failure to Flourish: How Law Undermines Family Relationships*, which explores how family-related institutions, laws, and policies operate in ways that produce and exacerbate racial inequality).

25. See, e.g., NAOMI CAHN, *THE NEW KINSHIP: CONSTRUCTING DONOR-CONCEIVED FAMILIES* (2013) (exploring donor-conceived families); NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE* (2008) (discussing, *inter alia*, LGBT families and marriage rights); Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 194–97, 208–12 (2007) (urging recognition of friendship and other alternative networks for caregiving as a way of combating gender inequality).

26. See *infra* Part IV.

27. See generally Maxine Baca Zinn, *Family, Feminism, and Race in America*, 4 GENDER & SOC’Y 68 (1990) (making a similar argument for the inclusion of race in feminist theory).

28. See generally Shani King, *The Family Law Canon in a (Post?) Racial Era*, 72 OHIO ST. L.J. 575 (2011) (explaining, *inter alia*, why declarations of post-racialism in family law remain premature); see also generally Mario L. Barnes et al., *A Post-Race Equal Protection?*, 98 GEO. L.J. 967 (2010) (explaining, *inter alia*, that claims of post-raciality are generally premature in our society).

29. *Loving v. Virginia*, 388 U.S. 1, 2–3 (1967). For another oft-mentioned decision rejecting race-conscious decision making in the family area, see *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). See also King, *supra* note 28, at 584–88 (discussing *Palmore* and *Loving* as oft-cited exemplars of post-racialism in family context).

30. See generally PAUL TAYLOR ET AL., PEW RESEARCH CTR., *MARRYING OUT: ONE-IN-SEVEN NEW U.S. MARRIAGES IS INTERRACIAL OR INTERETHNIC* (2010), <http://www.pewsocialtrends.org/files/2010/10/755-marrying-out.pdf>.

context<sup>31</sup> or inequalities pertaining to educational access and opportunity.<sup>32</sup> The Article thus advocates for an approach to modern families that places race at the very center of scholarly inquiry. While individual scholars—especially those writing from a critical race perspective—have demonstrated the possibilities inherent in such an approach,<sup>33</sup> family law scholars as a whole have not yet come close to mining the insights to be gleaned from a more intentional focus on race, emphasizing issues of gender or class instead.<sup>34</sup> Existing research sometimes touches on issues of race, but does not treat them as matters of central concern for the family.<sup>35</sup> They are instead viewed as tangential, merely additive.<sup>36</sup> This sidelining of race has consequences for the ability of family law scholars to effectively analyze and interpret family law decision making by judges, legislators, policymakers, and other actors. It also greatly diminishes the capacity of scholars—who have otherwise proved influential in charting shifts in family form and legitimation—to track how

31. See generally DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002) (detailing racial disparities in the child welfare system).

32. See generally ROTHSTEIN, *supra* note 22; Hannah-Jones, *supra* note 22.

33. See generally, e.g., ANGELA ONWUACHI-WILLIG, ACCORDING TO OUR HEARTS: RHINELANDER V. RHINELANDER AND THE LAW OF THE MULTIRACIAL FAMILY (2013) [hereinafter ONWUACHI-WILLIG, ACCORDING TO OUR HEARTS] (discussing race and multi-racial families); ROBERTS, *supra* note 6 (exploring issues of race, reproduction, and liberty); Khiara M. Bridges, Windsor, Surrogacy, and Race, 89 WASH. L. REV. 1125 (2014) (discussing surrogacy and race); Tonya L. Brito et al., “I Do For My Kids”: Negotiating Race and Racial Inequality in Family Court, 83 FORDHAM L. REV. 3027 (2015) (discussing child support enforcement and race); Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN ST. L. REV. 349 (2012) (discussing *inter alia*, child support enforcement and race); Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345 (2011) (discussing stigma affecting nonmarital children and, *inter alia*, issues of race); Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385 (2008) (discussing caregiving and issues of race and gender); 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 (2005) (discussing race and welfare); Twila L. Perry, *Alimony: Race, Privilege, and Dependency in the Search for Theory*, 82 GEO. L.J. 2481 (1994) [hereinafter Perry, *Alimony: Race, Privilege, and Dependency*] (exploring race in the context of alimony decision making and policy); Twila L. Perry, *Family Law, Feminist Legal Theory, and the Problem of Racial Hierarchy*, in TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY 243 (Martha Albertson Fineman ed.) (2011) [hereinafter Perry, *Family Law, Feminist Legal Theory*] (discussing the capacity of family law scholarship to expose racial hierarchy); Camille Gear Rich, *Making the Modern Family: Interracial Intimacy and the Social Production of Whiteness*, 127 HARV. L. REV. 1341 (2014) (reviewing ANGELA ONWUACHI-WILLIG, ACCORDING TO OUR HEARTS: RHINELANDER V. RHINELANDER AND THE LAW OF THE MULTIRACIAL FAMILY (2013)) (discussing racial formation and interraciality); Jessica Dixon Weaver, *Grandma in the White House: Legal Support for Intergenerational Caregiving*, 43 SETON HALL L. REV. 1 (2013) (discussing intergenerational caregiving).

34. See generally R.A. Lenhardt, *Marriage as Black Citizenship?*, 66 HASTINGS L.J. 1317 (2015) (lamenting inattentiveness to issues of race and family in current scholarship).

35. See *infra* Part III; see also generally JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY (2014) (discussing the decline of marriage as an economic issue that merely implicates race).

36. See *infra* Part III.

race informs family formation and meaning for families of color, but also those that are white. Further, it precludes the intersectional analyses essential to understanding the ways in which issues of race, gender, and sexual orientation combine in “new kinship” cases like *Cramblett* to determine family standing, opportunity, and belonging.<sup>37</sup> Finally, it greatly undermines the ability of scholars in this area to advance an account of family law systems and structures that prove useful or influential in reform efforts in this area, not to mention the national debate about race and structural inequality that has already led to meaningful change in other areas.<sup>38</sup>

The pages that follow therefore begin to outline an approach to the study of *all* families, not just those of racial minorities, which feature race-attentive analyses as an indispensable tool for greater understanding, support, and positive change in the family law context.<sup>39</sup> Part II considers the *Cramblett* case—a dispute originating in the assisted reproductive technology (“ART”) context—in some detail, exploring the issues of racial and sexual identity, privilege, and inequality that it raises in a post-*Obergefell v. Hodges* world.<sup>40</sup> Part III explains why current family law research fails adequately to interpret such matters or to engage other questions pertaining to race and modern family units. Part IV then paints a picture of what it might mean as a practical matter to center race more fully in family law scholarship. In doing so, it briefly maps a research agenda for engaging more intentionally with race and kinship that family scholars and others might follow in considering the challenges faced by and supports needed by 21st Century families. Part V concludes the Article.

## II. RACE AND THE OLD “NEW” KINSHIP: *CRAMBLETT V. MIDWEST SPERM BANK, LLC*

The assertion that young Payton’s partial blackness rendered her birth “wrongful” has made the *Cramblett* case a source of debate and almost prurient fascination in the media and online discussion boards.<sup>41</sup> Its presumed novelty,

37. For a discussion of intersectionality, see generally Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, reprinted in FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER 57 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991) (discussing intersectionality in race and gender context). See also generally Bridges, *supra* note 33 (utilizing an intersectional analysis in evaluating race impact of surrogacy arrangements in formation of LGBT families).

38. See *supra* notes 19–25 and accompanying text. For other efforts to surface issues of race and structural inequality, see generally R.A. Lenhardt, *Localities as Equality Innovators*, 7 STAN. J. C.R. & C.L. 265 (2011); and John A. Powell, *Structural Racism: Building Upon the Insights of John Calmore*, 86 N.C. L. REV. 791 (2008).

39. See Zinn, *supra* note 27, at 69 (emphasizing that race focus can inform study of minority and non-minority families).

40. See generally *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

41. See, e.g., Gillispie, *supra* note 1; Jeff Jacoby, Opinion, *Wrong Sperm, Right Baby: So Why Sue? So Why Sue?*, BOS. GLOBE, (Oct. 9, 2014), <https://www.bostonglobe.com/opinion/2014/10/08/the-baby-was-wrong-color-but-that-reason-for-lawsuit/ZCxZswYITdMomSEz1TkSbP/story.html>; Maria Mercedes Lara,



however, is somewhat misplaced.<sup>42</sup> From a race perspective, the issues that it raises are more old than new. The case does not involve truly “novel conceptualizations of [race and] kinship” so much as “old ideas and symbols . . . being ‘pressed into new service.’”<sup>43</sup> The reproductive technologies at its center have enabled rather recent changes in family formation, but the race-making function that they serve and the meanings about race that they reinforce have deep historical roots.<sup>44</sup>

Family law scholars have celebrated ART as boundary-breaking, even revolutionary, because of the “recombinant,” donor-informed kinship ties that it facilitates.<sup>45</sup> When it comes to race, however, the fertility clinics and sperm banks that comprise the industry have been more “conforming” and retrograde than anything else.<sup>46</sup> Reports of non-race concordance resulting

*Judge Dismisses the Case of a White Woman Who Was Accidentally Impregnated with a Black Man’s Sperm*, PEOPLE MAG.: CRIME (Sept. 5, 2015, 8:50 PM), <http://people.com/crime/white-woman-impregnated-with-black-mans-sperms-case-dismissed>; Charmaine Nelson, *What a Wrongful Birth Lawsuit Can Teach Us About Race*, HUFFPOST LIVING: CAN., [http://www.huffingtonpost.ca/charmaine-nelson/wrongful-birth-ohio\\_b\\_5946982.html](http://www.huffingtonpost.ca/charmaine-nelson/wrongful-birth-ohio_b_5946982.html) (last updated Dec. 7, 2014, 5:59 AM); Lonnae O’Neal, *Lonnae O’Neal: A Few Words About Suit for ‘Wrongful Birth’ of a Biracial Child*, WASH. POST (Sept. 10, 2015), [https://www.washingtonpost.com/lifestyle/style/lonnae-oneal-a-few-words-about-suit-for-wrongful-birth-of-a-biracial-child/2015/09/09/f9be4564-5705-11e5-8bb1-b488d231bba2\\_story.html](https://www.washingtonpost.com/lifestyle/style/lonnae-oneal-a-few-words-about-suit-for-wrongful-birth-of-a-biracial-child/2015/09/09/f9be4564-5705-11e5-8bb1-b488d231bba2_story.html); Rodriguez, *supra* note 1; *Should Sperm Bank Pay White Ohio Mom for Brown Baby?*, COLUMBUS DISPATCH, <http://www.dispatch.com/content/stories/local/2014/10/14/should-white-mom-be-paid-for-brown-baby.html> (last updated Oct. 14, 2014, 11:03 AM).

42. So-called “errors” of administrative and even medical practice have led to a number of legal disputes concerning race and matters such as insemination. See Quiroga, *supra* note 6, at 151–57 (discussing the experiences of interracial couples using sperm donors and how mostly white doctors reinforce racial boundaries by controlling the couples’ choice of sperm donors); see also Ronald Sullivan, *Mother Accuses Sperm Bank of a Mixup*, N.Y. TIMES (Mar. 9, 1990), <http://www.nytimes.com/1990/03/09/nyregion/mother-accuses-sperm-bank-of-a-mixup.html> (describing a white woman’s lawsuit against a fertility clinic for mistakenly substituting a black man’s sperm for her husband’s). The experience of Whites who have sought, but not achieved, race concordance with genetic children born through insemination seem to receive the most attention. Some, but not nearly enough, scholars have focused on the experiences of people of color and the sometimes very different approaches to race that they have in this context. See Quiroga, *supra* note 6, at 144, 151–57 (exploring experiences of women of color in the ART context). For a case involving a “mix-up” in the embryo implantation context, see generally *Perry-Rogers v. Fasano*, 715 N.Y.S.2d 19 (N.Y. App. Div. 2000) (describing an error in embryo implantation where a black couple’s fertilized embryo was implanted into a white woman along with the fertilized embryos that she and her white husband generated, producing “twins” of different race and resulting in a lengthy custody dispute).

43. FIONA J. KELLY, TRANSFORMING LAW’S FAMILY: THE LEGAL RECOGNITION OF PLANNED LESBIAN MOTHERHOOD 72 (2011) (emphasis omitted) (quoting MARILYN STRATHERN, REPRODUCING THE FUTURE: ESSAYS ON ANTHROPOLOGY, KINSHIP AND THE NEW REPRODUCTIVE TECHNOLOGIES 15 (1992)).

44. See Lenhardt, *supra* note 34, at 1324–25 (discussing, *inter alia*, the use of family law and structures in creating racial caste, subordination, and stigmatic meaning).

45. CAHN, *supra* note 25, at 33. For an article suggesting that ART might be a transformative force where race is concerned, see Kimberly M. Mutcherson, *Transformative Reproduction*, 16 J. GENDER, RACE & JUST. 187, 213–18 (2013).

46. ROBERTS, *supra* note 6, at 247. See also Quiroga, *supra* note 6, at 146–49.

from the “error” allegedly made in the *Cramblett* case seem relatively rare.<sup>47</sup> The real race problem lies in how often the practices deployed by physicians and clinics in promoting genetic kinship operate as planned. Working together, clinics and physicians have developed practices and “technologies that enable infertile patients to reproduce biologically in ways that create biogenetic ties while seemingly ensuring racial purity.”<sup>48</sup> Increasingly, they cater to would-be parents eager to produce a child with features similar to their own by providing catalogues that group donors by race, essentially “steering” patients to race-concordant choices.<sup>49</sup> In some cases, providers have even gone so far as to identify samples by the race of the donor, using color-coded vial caps or markings to designate whiteness or blackness.<sup>50</sup> Such practices prioritize race-concordance and discourage kinship outcomes that transgress norms pertaining to family monoraciality.<sup>51</sup>

ART obviously makes it possible for individuals who, because of infertility, membership in a same-sex relationship, or single status, might otherwise be unable to have a genetic child to do so.<sup>52</sup> The problem is that the objective of producing genetically tied families gets achieved in a way that reifies problematic “[s]ocial forces and racialized family ideology,”<sup>53</sup> even while, as in Jennifer Cramblett’s case, heteropatriarchal norms get challenged.<sup>54</sup> The emphasis placed on genetic ties and “racial purity” plays out in a way that reinstates monoraciality as a norm and privileges whiteness.<sup>55</sup> That the patients to whom ART industry players cater are overwhelmingly white and well-resourced accounts for this in large degree, as does the fact that the donors in highest demand are those who identify as white.<sup>56</sup> But the practices developed to fulfill the familial desires of these individuals demonstrate most

47. On the operation of the ART industry and its regulation, see Tamar Lewin, *Sperm Banks Accused of Losing Samples and Lying About Donors*, N.Y. TIMES (July 21, 2016), <https://www.nytimes.com/2016/07/22/us/sperm-banks-accused-of-losing-samples-and-lying-about-donors.html> (discussing errors made within the industry and the need for more regulation).

48. See Quiroga, *supra* note 6, at 148 (discussing physician and clinic priority placed on production of white babies).

49. Dov Fox, *Racial Classification in Assisted Reproduction*, 118 YALE L.J. 1844, 1846, 1852–54 (2009).

50. *Id.* at 1854. For more on race-related procedures and practices utilized by ART clinics and sperm banks, see generally Dov Fox, *Race Sorting in Family Formation*, 49 FAM. L.Q. 57 (2015).

51. See Quiroga, *supra* note 6, at 143 (discussing a 2004 example in which a doctor urged an African American woman who was mistakenly inseminated with sperm from a white donor to abort her pregnancy rather than deliver a mixed-race child). On the durability of monoracial kinship norms, see generally ONWUACHI-WILLIG, ACCORDING TO OUR HEARTS, *supra* note 33.

52. See ROBERTS, *supra* note 6, at 247–48; Bridges, *supra* note 33; Quiroga, *supra* note 6, at 143–44.

53. Quiroga, *supra* note 6, at 148.

54. *Id.* at 149 (“Donor insemination can also be subversive when used by queer or single women because it separates procreation from heterosexuality.”).

55. *Id.* at 146.

56. See ROBERTS, *supra* note 6, at 253–54 (discussing race and class barriers to clinic access).

dramatically how race gets deployed in a way that solidifies white privilege.<sup>57</sup> Facilitating race selection by coding and segregating donor samples, and prioritizing race concordance to such an extent that, by some accounts, physicians feel compelled to counsel patients against the dangers of producing mix-raced children,<sup>58</sup> reinforces a social hierarchy in which whiteness is prized, while degrading blackness and other departures from normative whiteness.<sup>59</sup> Instead of disrupting the complex dynamics that attend racial formation then, such strategies reinforce them, perpetuating the myth that race is biological, an objective “*essence*,”<sup>60</sup> rather than a set of shifting, social meanings.<sup>61</sup> Together, they have helped to make ART become a primary new site for the “social construction of race,”<sup>62</sup> for ascribing meaning to “human bodies” and the phenotypical characteristics associated with racial difference.<sup>63</sup> It shores up a racial hierarchy that pre-dates American slavery.<sup>64</sup>

57. See *id.*; Fox, *supra* note 49, at 1852–53; Quiroga, *supra* note 6, at 147–48.

58. Scholar Seline Szkupinski Quiroga opens her article exploring race and artificial insemination by recounting the following story of a clinic doctor’s response to “a fertility screw-up”:

In 2004, Laura Howard, a forty-year-old nurse, was artificially inseminated at a local fertility clinic. As she was leaving the clinic her doctor suddenly ran out to the lobby and called her back saying: “A horrible mistake has occurred. Come to my office. We need to talk.” Ms. Howard had been inseminated with the “wrong” sperm. According to her, the doctor was panicky and encouraged her to get an abortion. That weekend, her doctor called her repeatedly with suggestions on how to terminate her pregnancy. She rejected his counsel, saying, “For me, it’s still my child.”

Quiroga, *supra* note 6, at 143 (citations omitted).

59. ROBERTS, *supra* note 6, at 254–56; see also Williams, *supra* note 1.

60. MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S, at 54 (2d ed. 1994).

61. *Id.* at 55–56 (discussing, *inter alia*, the “sociohistorical process[es] by which racial categories are created, inhabited, and destroyed”). Setting aside the social consequences of race, biological scientists armed with knowledge from the sequencing of the human genome confirm that, “among modern humans, there’s no such thing as race.” Kimani Paul-Emile, *The Regulation of Race in Science*, 80 GEO. WASH. L. REV. 1115, 1116 (2012) (quoting Gail Dutton, *Correlating Genomics, Race, and Medicine*, 26 GENETIC ENG’G & BIOTECHNOLOGY NEWS, Jan. 1, 2006, at 1). No grounds for differentiating between individuals on this basis exist. OMI & WINANT, *supra* note 60, at 55. Genetically, “all human beings, regardless of race, are more than 99.9 percent the same.” Paul-Emile, *supra*, at 1116 (quoting *Reading the Book of Life; White House Remarks on Decoding of Genome*, N.Y. TIMES, June 27, 2000, at F8).

62. See OSAGIE K. OBASOGIE, BLINDED BY SIGHT: SEEING RACE THROUGH THE EYES OF THE BLIND 26 (2014) (discussing research and critiques regarding the social construction of race).

63. OMI & WINANT, *supra* note 60, at 55; see also OBASOGIE, *supra* note 62, at 20.

64. See R.A. Lenhardt, *Beyond Analogy: Perez v. Sharp, Antimiscegenation Law, and the Fight for Same-Sex Marriage*, 96 CALIF. L. REV. 839, 870–71 (2008) (explaining that familial ties were essential in the creation of racial categories and were used to determine who would be a slave or free in colonial America).

Jennifer Cramblett repeatedly invokes this entrenched racial ordering in advancing her case,<sup>65</sup> notwithstanding the strength of available claims for negligence or contract non-performance that do not turn on race at all.<sup>66</sup> Notably, early LGBT family formation efforts, which surfaced at a time when legal recognition was nonexistent and ART was not widely available,<sup>67</sup> often emphasized the extent to which gay and lesbian caregiving units like Cramblett's constituted "families of choice"<sup>68</sup> forged by means that included friendship, adoption, and foster care as well as biology that,<sup>69</sup> almost by definition, stood in opposition to traditional family units.<sup>70</sup> Yet, Cramblett, perhaps reflecting "second generation"<sup>71</sup> efforts to reframe equal LGBT rights initiatives in terms that emphasize "the conjugal family" and traditional "household structure[s],"<sup>72</sup> focuses solely on "genetic connection."<sup>73</sup> Her claims barely stop short of an argument that her status—the mother of mixed-race Payton—is fundamentally unnatural.<sup>74</sup> Even with Cramblett's assertions of love for, and connection to, her daughter, the message conveyed is that Payton herself is somehow "wrongful."<sup>75</sup> On this account, the preschooler,

65. See, e.g., Cramblett Complaint at 2–3 (indicating Cramblett's preference for Payton and any subsequent children to have "traits similar" to Cramblett and Zinkon); *id.* at 3–4 (emphasizing Cramblett's desire for whiteness, as well as race concordance, in any children conceived); *id.* at 5 (addressing Cramblett's emotional distress upon learning she would give birth to a child with partial African American heritage); *id.* at 6 (emphasizing Cramblett's lack of "cultural competency" with respect to African Americans).

66. See Williams, *supra* note 1. For example, providing a sample from Donor X when Donor Y was requested would arguably provide a basis for an action. *Id.*

67. See KELLY, *supra* note 43, at 73.

68. See generally JEFFREY WEEKS ET AL., SAME SEX INTIMACIES: FAMILIES OF CHOICE AND OTHER LIFE EXPERIMENTS (2001) (discussing the development of families in non-heterosexual relationships); see also generally KATH WESTON, FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP (1991) (discussing LGBT families, choice, and alternative mechanisms for family formation).

69. See WESTON, *supra* note 68, at 2–3 (discussing the broad range of relationships encompassed under the term "family").

70. KELLY, *supra* note 43, at 72.

71. Bridges, *supra* note 33, at 1127.

72. DAVID L. ENG, THE FEELING OF KINSHIP: QUEER LIBERALISM AND THE RACIALIZATION OF INTIMACY 31 (2010) (also discussing how race played into these arguments); see also generally R.A. Lenhardt, *Integrating Equal Marriage*, 81 FORDHAM L. REV. 761 (2012).

73. See Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 214 (1995) (discussing the importance of genetic connections and genetic ties as they relate to questions of both personal identity and social power).

74. See OBASOGIE, *supra* note 62, at 21–23. Conceptions of "natural" familial relationships, notably, informed antimiscegenation laws and efforts to regulate interracial intimacy. See generally PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA (2009). For an example of the treatment of mixed-raced children under antimiscegenation law, see generally R.A. Lenhardt, *Forgotten Lessons on Race, Law, and Marriage: The Story of Perez v. Sharp*, in RACE LAW STORIES 343, 351–62 (Rachel F. Moran & Devon W. Carbado eds., 2008). On the barriers erected by an emphasis on monoraciality in the family context, see generally ONWUACHI-WILLIG, ACCORDING TO OUR HEARTS, *supra* note 33.

75. Cramblett Complaint, *supra* note 1, at 1, 7.

with her kinky hair and brown skin, represents not a dream fulfilled though the wonders of ART, but the “pollut[ion] [of] bloods,” something that dangerously troubles the natural order of things.<sup>76</sup>

The portion of the initial complaint detailing the moment that Jennifer Cramblett first learned that the sperm bank may have provided her with a sample from a black man, not the white man she and Zinkon had identified as a suitable donor, proves especially instructive. It explains:

14. When Jennifer called the defendant to order additional sperm, she spoke to the same receptionist as before. The receptionist remembered Jennifer from the previous September. The receptionist asked Jennifer to hold while her file was retrieved. When she returned, the receptionist said, “Okay, you want eight vials of sperm from *Donor No. 330*.” Jennifer replied, “No, I said we need vials of *No. 380*.” Jennifer was put on hold again for what seemed to her like an eternity.

15. When the receptionist returned for the second time, she asked Jennifer if she had requested an African American donor to which she replied, “No, why would I request that? My partner and I are Caucasian. You know that from our profiles.” She was placed on hold again. Finally, she was told that Dr. Spiros had been sent vials of sperm from *Donor No. 330*, and that Midwest Sperm Bank would have to “call to confirm.” Jennifer hung up immediately and called [her physician,] Dr. Spirtos.<sup>77</sup>

The complaint’s recounting of this exchange points to the ways in which the lawsuit’s overall strategy, which includes a demand for a jury trial, looks to exploit the staying power of deep-seated racial attitudes and tropes.<sup>78</sup> The incredulity Cramblett expresses underscores how deeply race shapes and constrains ideas about what constitutes family and the degree to which monoraciality—even within “new” kinship arrangements—has become commonsensical.<sup>79</sup> It affirms the often unspoken, but nevertheless still widely

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76. See Brackette F. Williams, *Classification Systems Revisited: Kinship, Caste, Race, and Nationality as the Flow of Blood and the Spread of Rights*, in *NATURALIZING POWER: ESSAYS IN FEMINIST CULTURAL ANALYSIS* 201, 234 (Sylvia Yanagisako & Carol Delaney eds., 1995) (discussing the extent to which interracial “reproductive acts . . . become productive acts” that ultimately “pose classificatory problems beyond the capability of a hierarchic mode of classification”).

77. Cramblett Complaint, *supra* note 1, at 4.

78. See generally R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 *N.Y.U. L. REV.* 803, 860 (2004) (discussing racial tropes and stereotypes).

79. OMI & WINANT, *supra* note 60, at 54–55, 60 (discussing social systems and practices leading to the misconception that race is natural). For a discussion of how ideas about race and family were discussed in equal marriage efforts, see generally Lenhardt, *supra* note 72.

held belief that a white woman, whether gay or straight, is not supposed to produce a child of color.<sup>80</sup>

These examples of how the “new” kinship draws on the past, while important, do not mean that the many shifts in modern family arrangements present no new issues for scholars of modern families.<sup>81</sup> They plainly do. “[R]acialized social systems,” while enduring in their impact on people, institutions and structures, are not static over time.<sup>82</sup> Rather, they are “variable,” shifting, and almost always “contested.”<sup>83</sup> Likewise, the meanings accorded to racial categories can change, just as “the position assigned to races in the racial structure” can change.<sup>84</sup> These shifts, including the ways in which race intersects with issues of class, gender, and sexuality in *Cramblett* and other cases, have real implications for families and how they are understood in our current context. To this extent, the redeployment of “old ideas and symbols” concerning race presents a host of new questions for family law scholars and others about how race and kinship are and, more normatively, ideally should be navigated in the 21st century.<sup>85</sup>

Coming as it does at a time when the equal marriage rights of same-sex couples have just been constitutionally confirmed and in which greater awareness of the structural dimensions of race exist, *Cramblett* raises a host of issues. Among these are matters pertaining to the race work that ART-facilitated reproduction and childrearing does for LGBT individuals.<sup>86</sup> For so long, the focus has been on the legitimizing effects that institutions like marriage deliver for the children of gay and lesbian families.<sup>87</sup>

80. Such beliefs have deep roots in this country. See generally Lisa Lindquist Dorr, *Arm in Arm: Gender, Eugenics, and Virginia's Racial Integrity Acts of the 1920s*, 11 J. WOMEN'S HIST. 143 (1999) (providing a history of Virginia administrative procedures executing the Racial Integrity Act and efforts to punish white women for producing interracial children). A desire to preserve the purity of white women animated extra-judicial lynchings of black men throughout the South and informed the proliferation of antimiscegenation laws in the post-bellum period. See Lenhardt, *supra* note 64, at 872–73 (discussing, *inter alia*, regulation of interracial relationships). Some jurisdictions even had extensive administrative systems and procedures designed to guard against and police white women's romantic involvement with men of color, particularly those of African American descent. *Id.*

81. See generally Bridges, *supra* note 33 (exploring post-*Windsor* issues concerning race and surrogacy).

82. Bonilla-Silva, *supra* note 23, at 470–72; see also OMI & WINANT, *supra* note 60, at 55 (discussing issues of “race” and “social structure”).

83. Bonilla-Silva, *supra* note 23, at 470, 472; see also generally Elise C. Boddie, *Adaptive Discrimination*, 94 N.C. L. REV. 1235 (2016).

84. Bonilla-Silva, *supra* note 23, at 472.

85. KELLY, *supra* note 43, at 72.

86. See generally Bridges, *supra* note 33 (discussing questions of race and legitimation raised by LGBT reliance on surrogacy arrangements).

87. See generally *id.* For example, in his majority opinion in *Obergefell*, Justice Kennedy emphasized legal marriage's capacity to affirm loving same-sex relationships, as well to legitimate any children they include, giving them a sense of their family's standing in the community in addition to conferring economic benefits. See generally *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015);

The *Cramblett* litigation makes it plain that attention should also be focused on the legitimizing effects that ART might play for couples, particularly at the intersection of race and sexual orientation. Because she and her then wife, Amanda Zinkon, had already legally married in New York, Jennifer Cramblett's litigation strategy did not go to the formal legitimacy of her union or even that of her child, who was born into a marital family.<sup>88</sup> Rather, it went ultimately to her status as a white lesbian. Numerous online comments cite the privilege or potential bias invoked by Cramblett and her requested relief, disparaging her decision to seek damages for her daughter's blackness.<sup>89</sup> However, in many respects, this commentary does not fully address the complexity of the issues raised by the lawsuit. As a lesbian, Cramblett arguably attempted not only to exercise her own whiteness by conceiving a white baby—although the complaint certainly suggests that—but also, at some level, she understood herself to have an entitlement and vested

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*see also id.* at 2590 (discussing, *inter alia*, marriage's capacity to alleviate stigma and "instability" in the lives of nonmarital children). By giving recognition and legal structure to their parents' relationship, Justice Kennedy had previously explained that marriage allows "children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013).

88. Gillispie, *supra* note 1. This said, many states would not have recognized it as such at that time. *See Obergefell*, 135 S. Ct. at 2597.

89. Consider some of the comments posted in response to an article that appeared in the Boston Globe. *See* Mark Gillispie, *White Ohio Woman Sues Over Sperm from Black Donor*, BOS. GLOBE (Oct. 3, 2014), <https://www.bostonglobe.com/news/nation/2014/10/02/white-ohio-woman-sues-over-sperm-from-black-donor/nIecajc428udAogN4u3uJ/story.html>. One commentator focused on Cramblett and her status as a white woman. *Id.* (found in the comments). A post by GrnMachine posted on October 3, 2014, at 12:08 p.m., included the following statement: "This woman's own words tell the tale: she felt 'disappointment, anger, and fear.' Fear of what, exactly? She and her partner wanted a child, and now they have one. She's suing for damages. Who exactly has been damaged? My sympathies are for the child." *Id.* (found in the comments). Another post logged by MB6961 at 5:00 p.m. the same day reads as follows:

I hope their second child is from the same donor. Suing for contractual issues I understand. But would they have sued if the mistake had been another white donor? Light skinned Latino? Samoan? No matter how she puts it, this sounds racist. And, that child must live with being a "mistake" worthy of a lawsuit. Many childless women would be happy in this couples' situation. Biracial children are not shunned today. They are part of every school system-rich and poor, with no notice. This couple is the problem.

*Id.* (found in the comments). Not everyone expressed such sentiments. The VastConspirator submitted a post at 1:21 p.m. on October 3, 2014, that read, in part:

[B]ut a contract has been broken and they're due damages. If they wanted a blonde, blue eyed donor from an Ivy League school and paid for such then they'd be due damages if they were fraudulently or mistakenly given someone else's sperm. I guess this is the part where you call me a racist.

*Id.* (found in the comments). For a discussion of whiteness and privilege, and how they have been manifested in the movement for equal marriage rights for LGBT couples, see ENG, *supra* note 72, at 41-43; *see also* Boddie, *supra* note 83, at 1257-61 (discussing white privilege generally); Barbara J. Flagg, *Foreword: Whiteness as Metaprivilege*, 18 WASH. U. J.L. & POL'Y 1, 2 (2005) (also discussing white privilege).

interest in that.<sup>90</sup> Instead, she likely sought to rehabilitate that privilege and to restore an accepted, valued social identity—whiteness—that had been undermined or “spoiled” by her intersecting, and still stigmatized, social identity as a lesbian.<sup>91</sup> Not unlike entrance into legal marriage, giving birth to a baby could not protect her against discrimination or secure equal treatment in contexts such as employment.<sup>92</sup> Having a child, however, held the promise of rendering her relationship with Zinkon and the status of mother that she hoped to assume “more real [and recognizable] to extended family members” and others.<sup>93</sup>

The complaint offers some support for the idea that Cramblett held this view. Apparently, the relationship that she had with her family prior to becoming a wife and mother was not easy. By Cramblett’s own account, her relatives had “not been capable of truly embracing Jennifer for who she is.”<sup>94</sup> Indeed, they typically opted not to “converse with her about her gender preference, and encourage[d] her not to ‘look different.’”<sup>95</sup> The complaint indicates that they regularly “signal[ed] their disapproval of her lesbianism” in a way that “compelled [her] to repress her individuality.”<sup>96</sup> Still, Cramblett and Zinkon elected to move from the more “racially diverse” Akron to the “small, homogenous” Uniontown in order to raise the child that they hoped to conceive and be “closer to family.”<sup>97</sup> The amount of attention given such extended kinship ties in the complaint suggests this issue was of some importance to the couple.

Cramblett, who with Zinkon invested a great deal of effort—and presumably money—in utilizing the services of Midwest Sperm Bank, obviously saw herself navigating the social terrain of her hometown more easily as the married, lesbian mother of a white child than one of color. In her vision of family life, residential segregation and non-diverse or intolerant institutions were not problems with which she had to directly contend with.

90. See generally Harris, *supra* note 18 (discussing concept of whiteness as property with respect to racial identity).

91. See ENG, *supra* note 72, at 47 (equating whiteness and compliance with “normative discourses of privacy, intimacy, bourgeois domesticity, marriage, family, and kinship”). On the effects of stigmatized identities more broadly, see generally ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1986); and Lenhardt, *supra* note 78 (discussing Goffman and research on racial stigma). For research examining the intersection between race and sexual orientation, in particular, see generally Darren Lenard Hutchinson, “Gay Rights” for “Gay Whites”?: *Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358 (2000).

92. Bridges, *supra* note 33, at 1141–43; Terri R. Day & Danielle Weatherby, *The Case for LGBT Equality: Reviving the Political Process Doctrine and Repurposing the Dormant Commerce Clause*, 81 BROOK. L. REV. 1015, 1022–23 (2016) (discussing ongoing discrimination LGBT individuals in areas such as employment at state and local levels).

93. KELLY, *supra* note 43, at 118.

94. Cramblett Complaint, *supra* note 1, at 6.

95. *Id.*

96. *Id.* at 6–7.

97. *Id.*



She could enjoy a kind of enhanced normative whiteness or restorative social privilege by virtue of parenting a white child who could, at least insofar as race is concerned, easily assimilate into the local community.<sup>98</sup> Unlike the racially diverse “families of choice” celebrated by many gays and lesbians prior to greater access to ART, a genetic, race-concordant child of a white mother could, at least on the surface, “pass” as race and heteronormative and allow her parents to do so in certain circumstances as well.

The unexpected reality of Payton’s “irrepressible” African American heritage disrupted this narrative of family and inclusion. As the “wrongful birth” claims initially advanced in the case suggest, Payton’s birth, from a race perspective, did little to enhance Cramblett’s overall standing and, if anything, diminished it.<sup>99</sup> For example, Payton’s arrival evidently further complicated, rather than repaired, Cramblett’s relationships with extended family.<sup>100</sup> In addition to their often expressed discomfort with her sexuality, Payton’s birth required Jennifer to contend with her relatives’ “often unconscious[] [racial] insensitive[ity],” which included the propensity of one uncle to “speak[] openly and derisively about persons of color.”<sup>101</sup> In this sense, Payton, rather than “normalizing” Jennifer, further queers her.

Payton’s blackness thus imposes a kind of associational harm on her birth mother.<sup>102</sup> It cancels out any modicum of privilege that Jennifer might have held prior to Payton’s birth and exposes her non-normativity. The complaint, significantly, addresses this effect in a paragraph detailing the asserted burden of mothering a child whose hair and features are different from one’s own:

24. As just one example, getting a young daughter’s hair cut is not particularly stressful for most mothers, but to Jennifer it is not a routine matter, because Payton has hair typical of an African American girl. To get a decent cut, Jennifer must travel to a black neighborhood, far from where she lives, where she is obviously different in appearance, and not overtly welcome.<sup>103</sup>

More than the inconvenience of having to make special arrangements for Payton’s care, Cramblett seems to lament how much having a child of color requires her to acknowledge and internalize the racial isolation and stratification from which she likely benefitted while growing up in the “too

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98. See generally Harris, *supra* note 18 (discussing societal benefits of whiteness).

99. See ONWUACHI-WILLIG, ACCORDING TO OUR HEARTS, *supra* note 33, at 199 (introducing the notion of collective harm in interracial family context).

100. See Cramblett Complaint, *supra* note 1, at 6 (discussing Cramblett’s concerns about attitudes of family members on race).

101. *Id.*

102. See ONWUACHI-WILLIG, ACCORDING TO OUR HEARTS, *supra* note 33, at 207–08 (discussing a case in which an employee alleged racial discrimination on the grounds that he was married to a person of color).

103. Cramblett Complaint, *supra* note 1, at 6.

racially intolerant” Uniontown.<sup>104</sup> She must not only confront, but also experience the negative effects of racial segregation. This gets framed as a problem because actually traveling to a predominantly “black neighborhood” with a mixed-race child marks Jennifer as “obviously different.”<sup>105</sup> But its larger, unspoken, lament may be that it further exposes Cramblett’s non-normativity more generally,<sup>106</sup> with her sexual difference as well as her status as the white mother of a child whose unintended blackness had, if the complaint is to be believed, propelled her into a state of despair and depression.<sup>107</sup>

Nominally, the lawsuit purports to concern itself primarily with toddler Payton’s individual needs. In addition to expressing reservations about the racism of her family of origin, Jennifer registers concern about the school options available to her daughter.<sup>108</sup> While the quality of the Uniontown educational program had been part of what motivated her and Zinkon to move back from comparatively diverse Akron, Cramblett now worries that the lack of racial diversity at both the school and neighborhood level could be detrimental to Payton.<sup>109</sup> Likewise, she expresses an overall fear about the emotional and psychological burden imposed by residence in a jurisdiction that does not reflect the racial diversity of her multi-racial family.<sup>110</sup> In the end, however, even these aspects of the complaint ultimately go less to Payton than to Cramblett’s own “parental well-being” and the white privilege that made it possible for her to elide so many of the race issues that she has been forced to confront as the mother to mixed-race Payton.<sup>111</sup> As one commentator observed, the *Cramblett* lawsuit exposes the extent to which Jennifer, as well as her former wife, Amanda Zinkon, “lived a confined and reprehensibly oppressive life before [Payton.] was born.”<sup>112</sup> Their “limited cultural incompetency”<sup>113</sup> and ignorance of African Americans and other minorities stems from a failure to see and internalize the serious

104. *Id.*

105. *Id.*

106. See ENG, *supra* note 72, at 30 (interrogating alleged normalizing effects of marriage and perceived membership in “conjugal family” for LGBT couples).

107. Cramblett Complaint, *supra* note 1, at 6–7. Merely taking one’s daughter to a black neighborhood to get her hair done, of course, does not necessarily reveal one’s sexual orientation. Gays and lesbians obviously reside in black communities as well as white. But something about the enterprise just described does, notwithstanding the arguments advanced by advocates during the campaign for equal marriage rights, refute the notion that ART or even legal marriage, without more, can truly make her LGBT family normatively equivalent to those involving heterosexual couples where basic respect and belonging are concerned.

108. *Id.* at 7.

109. *Id.*

110. *Id.* at 6–7.

111. See *id.* at 7 (delineating, *inter alia*, challenges race presents for raising children of color).

112. Williams, *supra* note 1.

113. Cramblett Complaint, *supra* note 1, at 6.

consequences of racial discrimination and persistent segregation in the United States.<sup>114</sup>

Even so, by engaging the problems that attend segregated housing and schools, and the psychological impacts that join such exclusion now, the *Cramblett* lawsuit also focuses on issues of “white racism” and its costs, especially for families of color, which must contend daily with the challenges for which Jennifer Cramblett seeks damages. It highlights the role of family law systems in racial formation and invites important questions about the impact of race on family success and flourishing. To this extent, it also helps to underscore how central issues of family and kinship should be in current debates about structural inequality.<sup>115</sup> “Black Lives Matter,” but black families do too in ways that family law scholars and others engaged in work pertaining to families ignore to their peril. In many ways, then, the misguided *Cramblett* case and others like it issue a call to arms for family advocates and theorists. Its framing invites a greater focus on issues such as structural racial inequality,<sup>116</sup> racialized space,<sup>117</sup> race-based discrimination, and even mass incarceration, which has had a devastating impact on families of color, particularly those that are African American.<sup>118</sup> In other words, *Cramblett*, insofar as it marries these issues of race with still pressing matters of LGBT rights, belonging, and standing, speaks directly to our current context and the issues of family it informs.

### III. COLORBLIND KINSHIP AND ITS LIMITS

Family law scholars would seem an obvious choice to engage the questions of race and kinship raised by the previous section’s discussion of the *Cramblett* case. How should we think about the race work performed by ART in a world where LGBT families have received legal recognition, but remain the targets of homophobia and discrimination? Does the fact that ART enables sexual minorities who otherwise might not be able to have genetic children make the reification of racial categories and norms ART advances any less troubling?<sup>119</sup> What about the positioning of minorities in this context, given that they make up an especially small percentage of ART users and

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114. See Williams, *supra* note 1 (discussing the history of communities such as Levittown and other “examples of the long-term distortion that discriminatory mortgage underwriting had in configuring [racially segregated communities and] the wealth gap between blacks and whites”).

115. See generally Lenhardt, *supra* note 34 (discussing the relationship between marriage and racial subordination).

116. See generally *id.* (issuing a “call for action” for scholars to discuss concerns regarding black families and citizenship).

117. On racialized space and territoriality, see generally Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401 (2010).

118. See, e.g., Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, ATLANTIC (Oct. 2015), <http://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246>.

119. See Bridges, *supra* note 33, at 1126.

frequently conceptualize family and kinship ties more capaciously, in ways that may afford blood relatives and friends the same status and worth within the realm of kin.<sup>120</sup> How should research in this area respond to the evidence that structural racial inequality informs family functioning in multiple ways?

In many ways, however, family law scholars have not positioned themselves well to provide the necessary answers at this time. Legal scholars of the family have been at the forefront of efforts to map and understand the “new” kinship.<sup>121</sup> Their work offers critical insights into how developments—such as divorce and the incidence of blended families;<sup>122</sup> the growth in interracial families;<sup>123</sup> increases in non-marital parenting;<sup>124</sup> declining marriage rates;<sup>125</sup> and the definitive entrance of LGBT couples in that institution—have changed how we understand and imagine modern families, among other things.<sup>126</sup> However, research in this area, on the whole, has largely ignored the issues of race and has not seriously engaged with issues of racial stratification facing families in the 21st Century.<sup>127</sup>

Existing scholarship may concede that family law systems and structures sometimes reflect racial inequality, but too often it does not consider the ways in which they might actually produce disadvantages or shape ideas about race.<sup>128</sup> The wide embrace of ART as a tool for formation provides strong evidence for this. Questions of gender and sexual orientation in this context

120. *Id.* at 1137–38.

121. *See id.* at 1152–53 (raising questions about surrogacy and race in the LGBT context).

122. *See generally* Deborah Dinner, *The Divorce Bargain, The Fathers’ Rights Movement and Family Inequalities*, 102 VA. L. REV. 79 (2016) (discussing, *inter alia*, incidence of divorce in families).

123. *See generally* ONWUACHI-WILLIG, ACCORDING TO OUR HEARTS, *supra* note 33 (discussing multiracial families).

124. *See, e.g.*, Lenhardt, *supra* note 34, at 1324 (discussing race and nonmarital parenting); Melissa Murray, *Accommodating Nonmarriage*, 88 S. CAL. L. REV. 661 (2015) (discussing how courts often conflate non-married couples as married).

125. *See* Lenhardt, *supra* note 34, at 1323 (discussing race and marriage decline).

126. *See generally* Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (holding that LGBT couples have the right to marry).

127. *See supra* Part II.

128. *See* R.A. Lenhardt, *Race, Dignity, and the Right to Marry*, 84 FORDHAM L. REV. 53, 60–61 (2015) (advocating greater attentiveness to family law structures and pointing out the traditional system’s role in creating inequality). *See generally*, CARBONE & CAHN, *supra* note 35 (discussing how economic inequality has changed marital dynamics); Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167 (2015) (discussing nonmarital families); Laura A. Rosenbury, *Work Wives*, 36 HARV. J.L. & GENDER 345 (2013) (discussing gender roles in the work context).

have received broad attention from scholars.<sup>129</sup> But race has not.<sup>130</sup> For the most part, the hard work of discerning the operation of race and law in the “new” kinship context has been taken up by a small handful of critical-race thinkers who locate themselves within this field of law. These scholars have offered the most impactful critiques of the ART industry’s racialization of assisted reproduction<sup>131</sup> and, thus far, are delivering the most influential work on, among other things, how to think about the intersection of race and sexual orientation in a post-*Windsor* context.<sup>132</sup> For example, in a 2014 essay, Professor Khiara Bridges builds on the critique of ART delivered in Dorothy Robert’s groundbreaking book, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty*, to ask how critical race thinkers should evaluate LGBT couples’ reliance on gestational surrogates in forming families post-*Windsor*.<sup>133</sup> But family law scholars have largely declined to join efforts to excavate race and its operation in this context.

The failure to meaningfully engage race in thinking about kinship has not been limited to the ART context, however. As others have observed, this failure runs throughout family-law scholarship, even as the impact this body of literature has in the legal academy and on thinking about family law institutions grows.<sup>134</sup> Recently, scholars writing in this area have taken on the hard and essential work of, among other things, rethinking entirely the family-

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129. See, e.g., CAHN, *supra* note 25 (discussing ART use, effects on family, and regulation); Sara L. Ainsworth, *Bearing Children, Bearing Risks: Feminist Leadership for Progressive Regulation of Compensated Surrogacy in the United States*, 89 WASH. L. REV. 1077 (2014) (advocating for feminist leadership with respect to the regulation of ART and compensated surrogacy in particular); Susan B. Apel, *Access to Assisted Reproductive Technologies*, 12 MICH. ST. U.J. MED. & L. 33 (2008) (discussing access to ART); Douglas NeJaime, *Griswold’s Progeny: Assisted Reproduction, Procreative Liberty, and Sexual Orientation Equality*, 124 YALE L.J. F. 340 (2015) (exploring, *inter alia*, ART, procreation, and sexual orientation).

130. And where race has been engaged, it has often been without deep exploration of how race produces different outcomes for families in this area. I considered this problem in a recent blog post emphasizing the implications of state laws requiring physician participation in insemination. See R.A. Lenhardt, *Race, Love, and Promise*, CONCURRING OPS. (June 26, 2015), <https://concurringopinions.com/archives/author/robin-lenhardt> (reviewing MARTHA M. ERTMAN, *LOVE’S PROMISES: HOW FORMAL AND INFORMAL CONTRACTS SHAPE ALL KINDS OF FAMILIES* (2015)). Low-income LGBT couples of color, without the insurance or financial resources necessary to secure medical support, often find themselves resorting to informal methods of procreation, such as home insemination with sperm samples provided by a friend or family member. *Id.* Even where written contracts have been formalized, this lack of medical involvement can create problems where child custody is concerned. *Id.*

131. See, e.g., ROBERTS, *supra* note 6, at 250–52.

132. See Bridges, *supra* note 33, at 1141–52 (arguing that opponents of interracial surrogacy should reconsider their opinion after *Windsor*).

133. *Id.* at 1140–41.

134. Perry, *Family Law, Feminist Legal Theory*, *supra* note 33, at 252 (discussing the failure to engage race in feminist accounts of family law).

law canon,<sup>135</sup> identifying emerging areas of family contest and law,<sup>136</sup> and making sense of demographic trends touching on institutions and relationships at the center of the family.<sup>137</sup> Such projects are critical to the field and necessarily implicate race. Yet, engagement with issues of racial inequality and discrimination remains either nonexistent or muted in these contributions. Readers may be invited to consider places where important precedents implicate race or the fact that people of color may be overrepresented in groups affected by emerging law, but the relevant texts stop short of offering any theories or discussion on how to think about this information and what it means for family law.<sup>138</sup>

For example, in a 2015 Stanford Law Review article, Professor Clare Huntington builds on her foundational work mapping modern family law and its impact on the functioning of families<sup>139</sup> to explore the failure of family law scholars to internalize the extent to which existing family law's reliance on marriage as a frame for structuring families and legal rules overlooks an important reality: "[F]amily life [itself] increasingly is not" based on that institution.<sup>140</sup> Noting the declining and "seismic shift[s in] . . . marriage rates," Huntington provides a portrait of the growing number of nonmarital families in the United States, giving special attention to those with children, and addresses the failure of existing law to provide rules useful in navigating the nonmarital landscape.<sup>141</sup> She also advances a "theoretical framework for legal regulation" in this context that contemplates "different legal rules, institutions, and social norms" for nonmarital families.<sup>142</sup> In making this significant contribution, Huntington not only addresses the implications for low-income families, but notes the overrepresentation of families of color, particularly those that are African American, in the ranks of the unmarried.<sup>143</sup> The article nicely explains the challenges faced by all so-called "fragile families."<sup>144</sup> However, Huntington never fully explores the unique

135. See generally JILL ELAINE HASDAY, FAMILY LAW REIMAGINED (2014) (offering an alternative framework for thinking about the family law canon).

136. See generally Huntington, *supra* note 128 (arguing that marriage can be separated from parenthood but relationships cannot).

137. See Rosenbury, *supra* note 128 (using the gender lens to explore issues of caregiving); see also generally CARBONE & CAHN, *supra* note 35 (emphasizing class in exploring the marriage gap).

138. See generally HASDAY, *supra* note 135 (discussing, *inter alia*, issues of race in the family law canon without interrogating deeply how race affects families and family law systems); Huntington, *supra* note 128 (discussing the representation of racial minorities among nonmarital families without exploring the effects of race and inequality in this context).

139. See Huntington, *supra* note 128, at 223–24 (suggesting a new legal framework for the modern, nontraditional family).

140. *Id.* at 184.

141. *Id.* at 184–224.

142. *Id.* at 224; see also *id.* at 224–39.

143. See *id.* at 186–91, 187 n.88 (addressing demographics of nonmarital families).

144. The moniker comes from the Fragile Families and Child Wellbeing Study, a groundbreaking analysis of nonmarital families by researchers from Princeton University and

implications that these challenges have for families of color or, to the extent they can be scaled more easily than some other groups—which is true of nonmarital African American fathers who manage to spend more time with their nonmarital children than their peers of other races—why and how that has been the case.<sup>145</sup> The point here is not, of course, that the analysis provided and reforms proposed are not useful. They most certainly are. And yet, greater engagement with race could have told us more about the ways in which current law falls short; provided more information about the unique position occupied by nonmarital families fifty years after the provocative Moynihan Report and its statements about the black family;<sup>146</sup> and, more positively, shed more light on the lessons to be learned from such families.<sup>147</sup>

Similarly, recent research on marriage decline often does not interrogate the significance of race disparities in that context. This body of scholarship tries to explain the precipitous drop in marriage rates over the last few decades, when the percentage of married Americans fell from more than 70% to barely more than 50.<sup>148</sup> Interventions by scholars in the area have focused overwhelmingly on issues of class or gender in trying to understand such developments.<sup>149</sup>

For example, *Marriage Markets: How Inequality Is Remaking the American Family*, an important and very influential book by June Carbone and Naomi Cahn—leaders and trailblazers in family law scholarship—“link[s] family change to inequality and class,”<sup>150</sup> arguing that “marriage and other intimate

Columbia University. See Sara McLanahan & Irwin Garfinkel, *About the Fragile Families and Child Wellbeing Study*, FRAGILE FAMILIES & CHILD WELLBEING STUDY, <http://www.fragilefamilies.princeton.edu/about> (last visited Apr. 23, 2017).

145. See Huntington, *supra* note 128, at 190; see also JO JONES & WILLIAM D. MOSHER, U.S. DEP’T OF HEALTH & HUMAN SERVS., NATIONAL HEALTH STATISTICS REPORTS: FATHERS’ INVOLVEMENT WITH THEIR CHILDREN: UNITED STATES 2006–2010, at 6–9 (2013); Marcia J. Carlson et al., *Coparenting and Nonresident Fathers’ Involvement with Young Children After a Nonmarital Birth*, 45 DEMOGRAPHY 461, 473 (2008).

146. See generally OFFICE OF POLICY PLANNING & RESEARCH, U.S. DEP’T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965); R.A. Lenhardt, *Black Citizenship Through Marriage?: Reflections on the Moynihan Report at Fifty*, 25 S. CAL. INTERDISC. L.J. 347 (2016).

147. See Lenhardt, *supra* note 34, at 1360 (discussing the potential impact a focus on nonmarital families could have on other families).

148. PEW RESEARCH CTR., THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES 10 (2010) [hereinafter DECLINE OF MARRIAGE], <http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf>; see also Lenhardt, *supra* note 34, at 1345. The overall percentage of married couples in the United States fell from 72% in 1960 to 52% in 2008. DECLINE OF MARRIAGE, *supra*, at 1. Rates for African Americans, in particular, fell from a little more than 60% to a low of 32% during roughly the same period. *Id.* at 9.

149. See generally CARBONE & CAHN, *supra* note 35 (analyzing how factors such as class and gender have driven the change in marriage trends); Camille Gear Rich, *Marriage Markets and the Price of Masculinity*, 94 TEX. L. REV. 387 (2015) (critiquing the book for failing to conduct a gender-based analysis of the sources of decline).

150. CARBONE & CAHN, *supra* note 35, at 5.

relationships [are best understood] as the product of markets.”<sup>151</sup> Carbone and Cahn divide upper, middle, and lower-class groups into distinct markets and use these economic classifications as a way to explain, first, why wealthier individuals presently are more likely than poor or middle class individuals to marry,<sup>152</sup> but also how one’s class location informs “family behavior,” choices, and expectations.<sup>153</sup> In doing so, the authors note race-based differences between groups on measures such as non-marital births,<sup>154</sup> but never deploy race as a lens through which to view and understand shifts in family capacity and norms pertaining to marriage, divorce, and childrearing.<sup>155</sup> Instead, they use class as the primary vehicle for describing how likely certain groups are to marry or cohabit, for example, and “to make more visible the way that society creates expectations about behavior and/or channels societal resources.”<sup>156</sup>

Not insignificantly, this sidelining of race in family law scholarship just described relates to a pervasive “normative ideology of racial nonrecognition” more often associated with judicial cases outside of family law.<sup>157</sup> The Supreme Court, with the exception of cases like *Loving v. Virginia*,<sup>158</sup> has generally not had occasion to call for color-blindness or race-neutrality in family matters in the same way that it has in cases involving race-based discrimination or even affirmative action.<sup>159</sup> This is not for lack of cases involving race matters. Rather, perhaps to underscore that there is a single “institution of the family . . . deeply rooted in this Nation’s history and tradition,” the Court simply made clear its reluctance or, in some cases, unwillingness to acknowledge the impact that racial bias or inequality played in a particular family-related case.<sup>160</sup> This dynamic, as I noted in a previous

151. *Id.* at 8.

152. *See id.* at 2 (noting that “elite women have become the *most* likely to marry”).

153. *See id.* at 8 (discussing how the interactions within class create marriage markets).

154. *Id.* at 17.

155. *See id.* at 2 (suggesting that more than race is required for an analysis of the shift in marriage trends).

156. *Id.* at 6.

157. OBASOGIE, *supra* note 62, at 115.

158. *See generally* *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating antimiscegenation law provisions that prohibited people of different races from marrying).

159. *See generally* *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198 (2016) (university admissions); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (school assignment); *Johnson v. California*, 543 U.S. 499 (2005) (prison assignment); *Shaw v. Reno*, 509 U.S. 630 (1993) (congressional redistricting); *Hernandez v. New York*, 500 U.S. 352 (1991) (jury selection); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (public contracting). For a critique of color-blindness, see generally Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 1 (1991).

160. *See* *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977). The Court’s decision, which marks its 40th anniversary this year, represents the Court’s most authoritative statement about kinship ties and stands as a notable example. In that case, the Court invalidated the East Cleveland zoning ordinance that criminalized certain extended family configurations; however,



article, was most recently on display in Justice Kennedy's majority opinion in *Obergefell*.<sup>161</sup> In justifying his conclusion that same-sex couples have a Fourteenth Amendment right to marry, Justice Kennedy considered the Court's decision in *Loving*.<sup>162</sup> Instead of acknowledging the strong message that *Loving* communicates about the illegitimacy of antiscegenation "measures designed to maintain White Supremacy"<sup>163</sup> or its affirmation that "racial classifications" require the "most rigid scrutiny,"<sup>164</sup> Justice Kennedy recast the decision as one essentially unrelated to race.<sup>165</sup> He maintained that *Loving* spoke not to "interracial marriage," but to the "abiding connection between marriage and liberty" under the Due Process Clause more generally.<sup>166</sup> In other words, Justice Kennedy essentially wrote race—as well as the history of racial subordination and bias that the *Loving* Court confronted in reaching its holding—entirely out of the case.<sup>167</sup>

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it made no mention of the fact that the defendant, 63-year old grandmother, Mrs. Inez Moore, and her family were African American or that the ordinance at issue had been passed days after the Hough race riot in the neighboring city of Cleveland, Ohio. See Minutes of East Cleveland, Ohio, City Commission Proceeding 1 (July 26, 1966) (on file with author); see also *Shooting Ends Hough Calm*, PLAIN DEALER, July 23, 1966, at 1 (discussing Hough riots); Peggy Cooper Davis, Moore v. City of East Cleveland: *Constructing the Suburban Family*, in FAMILY LAW STORIES 77, 84 (Carol Sanger ed., 2008) (same); REPORT OF THE NATIONAL ADVISORY COMMITTEE ON CIVIL DISORDERS 244 (1968) (same). These and other aspects of the case made it plain that, at a minimum, race was the backdrop against which the case played out. However, Justices made no mention of it except to note, as Justice Brennan did in his concurrence which Justice Marshall joined, that extended families were well-represented in some communities, including those that were African American. Moore, 431 U.S. at 509–10 (Brennan, J., concurring). In fact, my research into the case indicates that Justice Powell, who authored the opinion for the Court, was vehemently opposed from viewing Moore as a race case of any sort. See Justice Lewis Powell, Jr., Notes on Justice William Brennan's February 14, 1977 Draft Dissenting Opinion in Moore v. City of East Cleveland, No. 75-6289, Powell Archives, File TM, WB, and JFP Drafts and Notes at 1 (on file with author) (declining to join Brennan draft dissenting opinion on grounds that "I see no racial overtones here").

161. Lenhardt, *supra* note 128, at 55–56.

162. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015) (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

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

164. *Id.* (quoting *Korematsu v. United States*, 323 U.S. 214, 216 (1944)).

165. See *Obergefell*, 135 S. Ct. at 2599. The Court's reluctance to consider race in cases concerning family is evident in other cases as well. See generally Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277 (2015) (noting the effects that the Court's failure to acknowledge disproportionate impact laws pertaining to illegitimacy had on African American families in decisions concerning unmarried fathers).

166. *Obergefell*, 135 S. Ct. at 2599–602.

167. See Lenhardt, *supra* note 128, at 56 (critiquing the *Obergefell* majority opinion for erasure of race issues presented by *Loving*). The Court has since failed to engage issues of race and family. See generally Moore v. City of East Cleveland, 431 U.S. 494 (1977). These failures are additionally present in the Court's many decisions addressing legal provisions disadvantaging "illegitimate" children. See Mayeri, *supra* note 165, at 1349. As Serena Mayeri observes in a recent law review article, the Court's decisions in this area never acknowledge the fact that provisions concerning illegitimacy often surfaced in the wake of desegregation efforts and functioned as an essential form of racial regulation. *Id.* The Court's decision in *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552

The scholarly discourse around the “new” kinship, in particular, works a similar erasure and is informed by the color-blind approach to family in the Court’s cases just described. On the surface, it appears to be an unobjectionable, even objective way of felling conceptual terrain in a burgeoning area of legal activity and change. But the asserted neutrality of provisions bearing on kinship is often illusory. In the same way that the roles of husband and wife within families are not gender-neutral, kinship in this country is not now and, indeed, has never been beyond race.<sup>168</sup>

The focus on the “new” kinship in recent scholarship has elevated concerns about class, gender, and sexual orientation over those pertaining to race.<sup>169</sup> To this extent, it can be misread to suggest that we are post-racial, that the racial inequality and abuses of the past are no longer relevant.<sup>170</sup> As David Eng explains in a book addressing modern kinship ties, old “[I]egacies of racial domination and segregation become subsumed” within new terms such as “intimacy, privacy, family, and kinship.”<sup>171</sup> This sublimation of race and the power dynamics that attend it means that the operations of race become occluded, as do the struggles of families of color.<sup>172</sup> Whiteness and the claims of previously marginalized individuals like gays and lesbians have essentially become the normative starting point for scholarly inquiry on modern families.<sup>173</sup>

The limited aperture to examine race and family provided by the current, color-blind framing of the kinship means that the analyses of family and family law decision making by judges and other actors that are conducted in this area are necessarily flawed.<sup>174</sup> Insofar as it uses whiteness as its lodestar and regards racial inequality as an artifact of the past, current research obscures the ways in which race still informs everyday life for families of color and the distinct ways in which they might navigate that territory, whether it be in the quality of the schools that children attend or the nature of available housing stock.<sup>175</sup>

(2013), which involved section 1912 of the Indian Child Welfare Act also bears mentioning. In his opinion for the majority, Justice Alito raises questions about the Indian Child Welfare Act’s purpose and seems to minimize the importance of the Native American heritage of the birth father seeking custody of the child in that case. *Id.* at 2561.

168. See Zinn, *supra* note 27, at 71 (noting that “like class and gender hierarchies, racial stratification is a fundamental axis of American social structure”); see also Lenhardt, *supra* note 146 (arguing that marriage regulation has long been a tool for racial subordination).

169. See *supra* notes 121–27 and accompanying text.

170. See *supra* notes 128–34 and accompanying text.

171. ENG, *supra* note 72, at 45.

172. *Id.*

173. See *id.* (observing extent to which priority placed on “(gay) intimacy, privacy, family, and kinship” in current debates obscures history of racial subordination).

174. On family law decision making and the dangers of color-blind analyses, see King, *supra* note 28, at 579–80.

175. See, e.g., MIGNON R. MOORE, *INVISIBLE FAMILIES: GAY IDENTITIES, RELATIONSHIPS, AND MOTHERHOOD AMONG BLACK WOMEN* (2011) (noting the differences between ways in which black women navigate gay identity).

Likewise, it falls short of the mark where the experiences and choices of Whites in the family context are concerned. The tendency is to treat whiteness as neutral, the original position, and to focus only on minorities when racial difference comes up.<sup>176</sup> However, the *Cramblett* case and the story of Jennifer Cramblett and her extended family help to reveal the fallacy of this approach. Young Payton's birth had a discernable impact on how Jennifer experienced her community and standing within it.<sup>177</sup> Fully understanding how family systems interact will require deeper knowledge of race and racial stratification across the board and must include considerations of white privilege and how it gets exploited.<sup>178</sup>

Intersectional analyses like the one deployed in Part II as a way of understanding the race work that ART performs for LGBT individuals like Jennifer Cramblett also suffer under current approaches.<sup>179</sup> The theory of intersectionality examines the ways in which separate systems of discrimination and hierarchy, such as race, gender, sexual orientation, or class "mutually construct one another."<sup>180</sup> It sees these systems as constantly interacting "across multiple systems of oppression," resurfacing and influencing how social identities are experienced and constructed.<sup>181</sup> Unfortunately, anemic interpretations of race make it impossible to see the "points of intersection" and "convergence" that exist.<sup>182</sup> This not only impairs efforts to fully comprehend how race gets constructed in the United States, but also seriously diminishes scholars' ability to conduct race analyses that yield useful insights. Without a deep understanding of race, for example, Justice Kennedy's rewriting of *Loving* in the *Obergefell* case goes unnoticed and the doctrinal distinctions in the Court's approaches to race and sexual orientation would be overlooked.<sup>183</sup> Likewise, the ways in which family law structures that bear on race intersect with other institutional structures cannot be fully detected in the absence of a more robust account of race.

Finally, blindness to the operation of race in the family context has an obvious negative impact on the ability of family law scholars to offer institutional critiques and proposals for reform that might improve conditions

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176. Margalynne J. Armstrong & Stephanie M. Wildman, *Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight*, 86 N.C. L. Rev. 635, 638 (2008) (arguing that white norm and white privilege should be at the forefront in racial discussions).

177. See *supra* note 101 and accompanying text.

178. Armstrong & Wildman, *supra* note 176, at 645 (noting ways in which Whites are able to exploit their whiteness to gain "access to citizenship, material goods, political power, and social standing").

179. See *supra* Part II.

180. Patricia Hill Collins, *Gender, Black Feminism, and Black Political Economy*, 568 ANNALS AM. ACAD. POL. & SOC. SCI. 41, 48 (2000).

181. *Id.* at 47-48.

182. ENG, *supra* note 72, at 40.

183. See *id.* For an exploration of doctrinal differences in the treatment of race and sexual orientation, see generally Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151 (2016).

for all families. To see this, consider the earlier described class-based analysis of marriage decline offered by Carbone and Cahn.<sup>184</sup> They address race, but do not fully explore it. Their primary focus on class as a social construct, as a result, never takes full account of the ways in which race has also figured into marriage regulation and choice. Marriage, as I have elsewhere explained, has a long history linked to the racial subordination of minority groups like African Americans and others.<sup>185</sup> This history of oppression is essential to understanding the state of marriage today, the barriers that exist to entry, and the choices that individuals make with respect to their intimate relationships and decisions to parent.<sup>186</sup> To ignore this history is to miss an essential part of the puzzle as to why, for example, African Americans stand as the most unmarried group of any in the United States.<sup>187</sup> Class certainly explains part of this gap. However, it cannot, without a deeper account of race, begin to account for it all.

#### IV. CENTERING RACE IN KINSHIP STUDIES

Family law scholars who are serious about theorizing and offering solutions for the problems faced by 21st Century families must begin to grapple with race in earnest. Working through all that racial inequality has, can, and will mean for families cannot be achieved with just a cursory nod toward issues of racial difference, however. Feminist accounts of family have contributed to our understanding by advancing rich, textured accounts of how gender and gendered hierarchies inform familial roles, obligations, and entitlements.<sup>188</sup> Important work has been done on issues such as the treatment of caregiving,<sup>189</sup> marriage,<sup>190</sup> divorce and alimony,<sup>191</sup> and domestic

184. See *supra* notes 150–57 and accompanying text.

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

186. *Id.*

187. *Id.* at 1344–45.

188. See generally, e.g., MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995) (exploring the nuclear family, patriarchy, and conceptions of caregiving); JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000) (examining matters of gender and family in the work context); Katharine T. Bartlett, *Feminism and Family Law*, 33 *FAM. L.Q.* 475 (1999) (discussing feminist reforms in divorce, sex and reproduction, and domestic violence); Rosenbury, *supra* note 25 (discussing friendship and caregiving); Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 *NW. U. L. REV.* 65 (1998) (considering premarital contracts and enforcement issues).

189. See generally FINEMAN, *supra* note 188.

190. See generally Deborah A. Widiss, *Changing the Marriage Equation*, 89 *WASH. U. L. REV.* 721 (2012) (considering gender, sexual orientation, and spousal roles in modern marriages).

191. See generally Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 *GEO. L.J.* 2227 (1994) (discussing continuing effects of coverture laws in the alimony context); see also generally Perry, *Alimony: Race, Privilege, and Dependency*, *supra* note 33 (offering a critical race-feminist account of alimony).

violence,<sup>192</sup> among many other topics. Over time, scholars have also increasingly paired such feminism-grounded interventions with a greater focus on class.<sup>193</sup> In contrast, race, notwithstanding the important interventions of Critical Race theorists mentioned earlier, remains under-theorized in family law scholarship as a whole.<sup>194</sup> This needs to change.

To do this, scholars, as a whole, can no longer be content merely to gesture toward race issues in thinking about kinship and offering solutions for the problems that modern families face. In the same way that class and gender-based analyses have become indispensable to work in this area, race must become viewed as a critical lens for interpreting families and the laws and policies that inform their functioning in society.<sup>195</sup> We should no longer be content with having issues of race on the margins of current theoretical work. Instead, they should be at the very center of such research. In other words, the time to integrate race into family law scholarship is long overdue.

Calls for greater engagement with race issues in the family context are not new. In law, as well as in disciplines such as sociology and feminist studies, others have observed that “what is happening to families in the United States and how this country’s racial order is being reshaped are seldom joined.”<sup>196</sup> These scholars have similarly underscored that family-based research’s “potential to expose the reality of racial hierarchies.”<sup>197</sup> Whether because thinking about race as a dominate source of social division proves counterintuitive for some, or perhaps because of the “existence of racial hierarchies among women,” the obstacles to forward movement have proven formidable.<sup>198</sup> This article intervenes less to sound a new call or to offer a magic bullet, and more to advance the cause by offering greater insight into what it would mean, in practical terms, to center race in family law scholarship and why doing so would be especially beneficial at this time. Unsurprisingly, the demographic shifts;<sup>199</sup> economic stratification;<sup>200</sup> changes in employment

192. See generally Suzanne A. Kim, *Reconstructing Family Privacy*, 57 HASTINGS L.J. 557 (2005–2006) (considering gender, privacy, and domestic violence issues).

193. See *supra* notes 150–87 and accompanying text.

194. See *supra* note 33.

195. A recent Fordham Law Review symposium on the Supreme Court’s decision in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), reveals the potential increased examination of race in family law cases. See R.A. Lenhardt & Clare Huntington, *Kinship*, 86 FORDHAM L. REV. (forthcoming 2017).

196. Zinn, *supra* note 27, at 69.

197. Perry, *Family Law, Feminist Theory*, *supra* note 33, at 243; see generally Zinn, *supra* note 27.

198. Perry, *Family Law, Feminist Theory*, *supra* note 33, at 243 (discussing how family law has developed to include ideas of racial hierarchy).

199. See Lenhardt, *supra* note 34, at 1344–47 (discussing shifts in marriage rates).

200. See generally CARBONE & CAHN, *supra* note 35 (discussing issues of class divides in marriage context); Huntington, *supra* note 128 (discussing the rise of nonmarital families).

opportunities for men and women;<sup>201</sup> and expansion of rights and protections for LGBT Americans that precipitated earlier calls to engage race in the family context have only increased in their impact over time.<sup>202</sup> What stands out is not merely this progression, however, but how it intersects with other recent shifts and developments. In our current context, race exists as one of the most discussed and engaged social forces, as conversations about advocacy groups such as “Black Lives Matter,”<sup>203</sup> scholarship on structural racial inequality,<sup>204</sup> and growing interest in phenomena such as implicit bias suggests.<sup>205</sup> But it is also one of the most contested.

As President Barack Obama, the first African American President, left office after eight years, reports indicate that racial bias and white supremacist efforts by the so-called alt-right are on the rise.<sup>206</sup> The Trump administration, bolstered by these same dangerous and worrisome forces, promises a reduction in government support and either divestment in, or a complete gutting of, programs involving issues from immigration to health care that will affect all communities,<sup>207</sup> but that seem likely to adversely affect individuals and families of color most of all.<sup>208</sup> As federal policy seems intent upon

201. See generally WENDY WANG ET AL., PEW RESEARCH CTR., BREADWINNER MOMS (2013), [http://www.pewsocialtrends.org/files/2013/05/Breadwinner\\_moms\\_final.pdf](http://www.pewsocialtrends.org/files/2013/05/Breadwinner_moms_final.pdf) (discussing gender, workforce issues, and changes in identity of family breadwinners).

202. See generally Zinn, *supra* note 27 (discussing shifts in family produced by LGBT kin units and movement for marriage rights).

203. See Clare Foran, *A Year of Black Lives Matter*, ATLANTIC (Dec. 31, 2015), <https://www.theatlantic.com/politics/archive/2015/12/black-lives-matter/421839> (addressing the debate over the goals and impact of the Black Lives Matter movement); The Editorial Bd., *The Truth of ‘Black Lives Matter,’* N.Y. TIMES (Sept. 3, 2015), <https://www.nytimes.com/2015/09/04/opinion/the-truth-of-black-lives-matter.html> (further discussing the Black Lives Matter movement).

204. See *supra* note 23.

205. For an important discussion of the operation of implicit bias, see generally MAHZARIN R. BANAJI ET AL., BLIND SPOT: HIDDEN BIASES OF GOOD PEOPLE (2015).

206. See Joseph Goldstein, *Alt-Right Gathering Exults in Trump Election With Nazi-Era Salute*, N.Y. TIMES (Nov. 20, 2016), <https://www.nytimes.com/2016/11/21/us/alt-right-salutes-donald-trump.html>; Katie Reilly, *Racist Incidents Are Up Since Donald Trump’s Election. These Are Just a Few of Them*, TIME (Nov. 13, 2016), <http://time.com/4569129/racist-anti-semitic-incidents-donald-trump>.

207. See, e.g., Krishnadev Calamur, *What Trump’s Executive Order on Immigration Does—and Doesn’t Do*, ATLANTIC (Jan. 30, 2017), <https://www.theatlantic.com/news/archive/2017/01/trump-immigration-order-muslims/514844>; Julie Hirschfeld Davis & Robert Pear, *Trump Issues Executive Order Scaling Back Parts of Obamacare*, N.Y. TIMES (Jan. 20, 2017), <https://www.nytimes.com/2017/01/20/us/politics/trump-executive-order-obamacare.html>; Derek Thompson, *Trump Has a Message for Poor Immigrants: Get Out*, ATLANTIC (Feb. 1, 2017), <https://www.theatlantic.com/business/archive/2017/02/trump-immigrants/515310>.

208. See U.S. DEP’T OF LABOR, THE AFRICAN-AMERICAN LABOR FORCE IN THE RECOVERY 2 (2012). A 2012 report from the U.S. Department of Labor indicated that “[b]lack workers are more likely to be employed in the public sector than are either their white or Hispanic counterparts.” *Id.* According to the same report, “nearly 20 percent of employed Blacks worked for state, local, or federal government compared to 14.2 percent of Whites and 10.4 percent of Hispanics.” *Id.* This means that they may be especially vulnerable to changes in public sector jobs. For example, the House of Representatives recently passed legislation making it permissible for lawmakers to decrease the salaries of individual federal employees. H.R. 5, 115th Cong. § 3

denying opportunity to many racial minorities, however, new possibilities for state and local innovative initiatives that could work to protect or even enhance equality and access on the ground increasingly get discussed.<sup>209</sup> Amidst these contradictory dynamics, of course, sit families. Where they are concerned, this moment could not be more important. The possibility of greater opportunity sits in direct opposition to the threat of a dramatic scaling back of opportunity and the equality it signifies.

We have not yet begun to grapple in earnest with the role of family and family law in racial formation in the United States.<sup>210</sup> This can only change, however, if scholars begin to internalize the importance of race “as an organizing principle of social relationships” in society that affects not just minorities, but *all* members of society, as Part I’s analysis of the *Cramblett* case underscores.<sup>211</sup> On this account, race stands not as a biological trait, but a social construction that functions as a multi-valent mechanism for racial signification and hierarchy that both draws on and reconstitutes “the racial legacies” of the past—e.g., slavery and Jim Crow segregation. And it does this through a constantly shifting web of practices and systems that structure society and, to that extent, directly inform the functioning of social units, to include families.<sup>212</sup> Familial norms and laws, especially those bearing on marriage, parenting, and familial roles, help to determine both how race is defined and experienced as well as the social location that a familial unit will occupy at a given point in time.<sup>213</sup> Understanding this fully means greater attentiveness to the role of family systems and structures in producing race and structure of opportunity for kin groups.<sup>214</sup>

(2017). The move was intended to be a fiscally responsible move by the lawmakers who endorsed it. *See id.* But, because of the overrepresentation of African Americans in federal government positions, the measure—in addition to giving Congress more power directly to affect the economic prospects individual workers than it has since the Civil War—arguably poses a unique threat to African Americans. *See* U.S. DEP’T OF LABOR, *supra*, at 2 (discussing data on race and labor).

209. *See generally* Sheila R. Foster & Christian Iaione, *The City as a Commons*, 34 YALE L. & POL’Y REV. 281 (2016) (exploring city as commons and site for innovation); Olatunde C.A. Johnson, *The Local Turn: Innovation and Diffusion in Civil Rights Law*, 79 LAW & CONTEMP. PROBS. 115 (2016) (discussing state and local civil-rights-enhancing initiatives); Lenhardt, *supra* note 38 (arguing for viewing localities as potential equality innovators); R.A. Lenhardt, *Race Audits*, 62 HASTINGS L.J. 1527 (2011) (advocating for equality innovations by communities and localities).

210. Rich, *supra* note 33, at 1374.

211. Bonilla-Silva, *supra* note 23, at 466.

212. *See* OMI & WINANT, *supra* note 60, at 54 (discussing racial formation and social structures). For an interesting take on this dynamic and the problem of “adaptive discrimination,” see Boddie, *supra* note 83, at 1257–61.

213. *See* Zinn, *supra* note 27, at 73.

214. *See* Lenhardt, *supra* note 24 (advocating greater attention to race effects of family law systems and structures); *see also* Howard Winant, *Race and Race Theory*, 26 ANN. REV. SOC. 169, 171, 180 (2000) (generally discussing the need to attend to race, social structure, and stratification).

Importantly, the enhanced focus on race called for here would not mean that gender, class, or sexual orientation-based analyses of family become irrelevant.<sup>215</sup> As has already been indicated, they have been extremely influential in understanding modern families.<sup>216</sup> Rather than advocating for the singular prioritization of race, this article imagines the adoption of a set of scholarly commitments likely to reposition race in current discourse and delineate more fully how race intersects with other hierarchies in ways that affect family functioning and well-being for all groups.<sup>217</sup>

The question, of course, is how should one go about doing this? What set of issues need to be engaged? What strategies should be employed? In this short Article, I do not look to articulate definitive answers to such questions. Rather, my aim is to articulate a number of principles and that can be deployed in trying to achieve race-centered analyses. These principles, which together offer greater specificity on the substantive content that race-centered analyses of the modern family incorporate, reflect core tenets of Critical Race Theory<sup>218</sup> and Critical Race Feminism,<sup>219</sup> as well as feminist insights more broadly. They enable critical analyses that:

- (1) understand race, not as biological, but as the product of dynamic socio-historical forces that give meaning and content to racial categories at both the macro and micro levels;<sup>220</sup>
- (2) attend to the role of family norms, systems, and structures in the process of racial formation, as well as the ways in which “race creates certain patterns in the way families are located and embedded in different social environments”;<sup>221</sup>
- (3) treat race, ethnic, multiracial, and intersecting identities (e.g., race, gender, sexual orientation, disability) and “communities as particularly fruitful points for exploration”;<sup>222</sup>
- (4) situate whiteness as a critical area of study and interrogation in the family context;

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215. See Zinn, *supra* note 27, at 73 (“Studying the intersection of gender, race, and class in minority families has enormously enhanced family scholarship.”).

216. See *supra* notes 119–27 and accompanying text.

217. See Perry, *Family Law, Feminist Theory*, *supra* note 33, at 246–48.

218. See generally CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995) (discussing key Critical Race Theory scholarship and tenets).

219. See generally CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 2d ed. 2003) (discussing key Critical Race Feminism scholarship and principles).

220. See OMI & WINANT, *supra* note 60, at 55 (defining race not as biological, but as “a concept which signifies and symbolizes social conflicts and interests by referring to different types of human bodies”).

221. Zinn, *supra* note 27, at 79.

222. Jennifer Gordon & R.A. Lenhardt, *Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives*, 75 *FORDHAM L. REV.* 2493, 2516 (2007).



- (5) systematically interrogate gender, class, sexual orientation, and race hierarchies and power arrangements in considering the functioning and well-being of kinship units and the roles that they incorporate;
- (6) engage structural, and often intersecting inequalities and their role in perpetuating racial disadvantage for families across social systems, as well what the effects of “uncertainty” such systems impose means for family functioning;<sup>223</sup> and
- (7) deploy a broad definition of kinship ties that embraces not just genetics, but also affective ties that have historically been important in defining family in communities of color.<sup>224</sup>

Family law scholarship that incorporates these and other principles would be much better situated to address the circumstances facing all families and more likely to result in innovations in theoretical and doctrinal thinking with long-term impacts.<sup>225</sup> It would also help to cement certain methodological approaches to the study of the family that would be very productive. While the analyses imagined can, of course, take many forms, I envision them being bolstered by methodologically rich strategies of inquiry that emphasize:

- (1) broad historical approaches in considering racial signification and the operation of race in families that provides context and a theoretical foundation for expanded study;
- (2) interdisciplinarity, incorporating insights from a range of disciplines—e.g., sociology; anthropology; law; political science; psychology, etc.—in studying families and gaining insight into possible reforms;
- (3) narrative and intersectional inquiries that give texture and depth to accounts of the everyday experience and needs of modern families and their members;
- (4) empirical inquiries and comparative examinations that deepen understandings of race and modern families in the United

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223. 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) (discussing temporal “uncertainty” and its effects on black women’s willingness to marry).

224. See generally Colleen L. Johnson, *Perspectives on American Kinship in the Later 1990s*, 62 J. MARRIAGE & FAM. 623 (2000) (discussing a variety of kinship forms). Significantly, “patterns of kinship organization . . . [often] differ by race.” *Id.* at 632. African Americans, for example, tend to include “fictive kin”—ties forged through informal adoption, godparenting, foster care arrangements, and friendship—in their kin networks in addition to individuals related by marriage or blood. *Id.* at 629.

225. Perry, *Family Law, Feminist Theory*, *supra* note 33, at 257; see also Zinn, *supra* note 27, at 69, 73.

States by looking at how family laws and systems in other jurisdictions understand and address issues pertaining to race in the family context;

- (5) innovative research collaborations across disciplines that are grounded in communities and focused on the real-life experiences of kinship groups;

Ultimately, what even this very cursory sketch sets out is a research agenda for centering race in family law scholarship that identifies numerous areas of scholarly inquiry. An infinite number of topics for exploration exists. This said, three key categories or areas of study into which such topics might fall merit mention: (1) racial formation and family functioning; (2) race, family law institutions, decision making, and policy; and (3) family law systems, structures, and racial inequality. Some overlap across these and other categories will, no doubt, occur. Nevertheless, mapping their borders with some definition will help to surface the possibilities for research and new insights into family going forward.

In general, issues of racial formation—with perhaps the exception of issues pertaining to antimiscegenation law and interracial families—have been understudied in family law scholarship,<sup>226</sup> even though racial formation and family formation issues tend to be constitutive of one another.<sup>227</sup> The first category described envisions projects that would help to resolve this unfortunate oversight, while also focusing attention on how race informs family functioning. On the front end, it would encompass, but also move beyond discussions of subjects such as antimiscegenation law<sup>228</sup> to reach the issues of race, family, and the growing reliance on assisted reproductive technologies raised by *Cramblett*, among other issues. This means that the various technologies for producing blackness and mixed-race identities would be addressed by projects in this area, as well as whiteness. As I indicated earlier, the greater focus on whiteness that other legal scholars and disciplines have taken up in the wake of recent debates about criminal justice and the treatment of minorities by law enforcement is one that I believe family law scholars should also adopt.<sup>229</sup> If nothing else, cases like *Cramblett* point to the need for scholars of the family to think hard about how white privilege and identity function. We need to know more about the different positioning of

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226. Rich, *supra* note 33, at 1372–73.

227. *Id.* at 1344.

228. See Lenhardt, *supra* note 64, at 870–72 (discussing the history of antimiscegenation provisions).

229. For works examining whiteness, see, for example, RUTH FRANKENBERG, *WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS* (1993); STEVE GARNER, *WHITENESS: AN INTRODUCTION* (2007); and NELL IRVIN PAINTER, *THE HISTORY OF WHITE PEOPLE* (2010). See also Flagg, *supra* note 89 (discussing the privileges associated with whiteness).

families by race in the family law system and what it means for families of all races on the ground.

Projects trained on how race affects family functioning, the second set of issues covered by this category would be similarly wide-ranging. In addition to contributions that might, for example, consider the challenges faced by LGBT, black, or multi-racial families or post-marital families, I see projects that would interject race as a meaningful area of study in some fields that have thus far been primarily understood in terms of class or gender. For example, research might look more closely how racial inequality informs the functioning of non-marital or “fragile” families<sup>230</sup> or so-called “breadwinner Moms” of all backgrounds.<sup>231</sup> Likewise, the different positioning of low-income women of color with respect to their upper-income white peers or even their same-race peers could emerge as a potentially fruitful area of study.<sup>232</sup>

The second avenue of study described above would address how gets played out in family-related institutions, informs decision making by actors within such institutions, and plays into family-related rules policy, to include any reforms offered to address the needs of modern families. We can point to important scholarly contributions addressing the child welfare system or racial bias in child custody decision making.<sup>233</sup> Still, we know far less than we should about the topics for exploration identified. For example, the effects of implicit or even explicit bias in the courtroom or in agencies charged with protecting child welfare have not been adequately explored. Nor do we have good information on how decision makers conceptualize race in the first place. Centering on race in this realm would begin to unpack this and invite new inquiries into issues such as no-fault divorce, child support, alimony, welfare, and even transracial adoption and any differential outcomes where race is concerned.<sup>234</sup> This is an area ripe for comparative law or empirical research that provides much needed data and insights on these and other issues.

Finally, the issues of race and structural inequality mentioned in Part III would be featured in the third area of researched created by analyses that devote more attention to race. Elsewhere, I have lamented the failure of activists and scholars in other areas both to appreciate the ways in which family law structures and systems inform race and disadvantage minorities in particular, and how much families are affected by the structural inequality in

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230. See Lenhardt, *supra* note 34, at 1348–53 (discussing fragile nonmarital black families).

231. See WANG, *supra* note 201, at 1 (reporting on the results of a poll indicating the number of households with the mother as a primary source of income has increased greatly).

232. See Perry, *Family Law, Feminist Theory*, *supra* note 33, at 246–47; Zinn, *supra* 27, at 78 (discussing the differences between how white and black women have entered the workforce).

233. See generally ROBERTS, *supra* note 31 (studying racism in the child welfare system).

234. Perry, *Family Law, Feminist Theory*, *supra* note 33, at 248–52.

areas such as criminal justice, housing, and education.<sup>235</sup> For me, the tragic death of Walter Scott at the hands of a white police officer in North Charlestown, South Carolina, highlighted by advocacy groups such as Black Lives Matter powerfully demonstrates the costs of failing to attend to the structural dimensions of family law.<sup>236</sup> Scott was shot in the back after running from a police stop because he feared being sent back to jail.<sup>237</sup> Importantly, as his brother explained, Scott was not fearful because he had committed a serious offense of law, but because he lacked the funds to satisfy his outstanding child support obligations.<sup>238</sup> Scott therefore risked not only being sent to jail because his income could not support the payments requirement, but also because going to jail, as he knew from prior experience, would mean the loss of both his job and also the hope of making even partial payments that could help support his children.<sup>239</sup> There are other examples of how ignorance of intersecting inequalities limit the life possibilities of families of color, and how continued inattention to the impact that inequality of any sort has on families distorts legal outcomes and policy.<sup>240</sup>

By centering race in family law scholarship, scholars in this area can begin to lead the way in research on inequality and its impacts. Focusing on families, not just individual victims, can help to deepen research on structural racial inequality. For example, new research by Stanford sociologist Jennifer Eberhardt and others explores the impact of “black spaces” and the extent to which individuals and groups get stereotyped not just on the base of their race, but on the basis of the racial stereotypes and stigma ascribed to the physical areas that they inhabit.<sup>241</sup> This research has tremendous significance where race and social perception are concerned. Because the activation of black stereotypes in such contexts tends to be so strong, it may significantly distort public policy with respect to black areas and shape attitudes about inhabitants in ways that are difficult to disrupt.<sup>242</sup> As the authors of the study note:

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235. Lenhardt, *supra* note 128, at 60–61.

236. Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer Is Charged With Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), <https://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html>.

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

238. *Id.*

239. *Id.*; see also Lenhardt, *supra* note 128, at 61.

240. Coates, *supra* note 118. For a discussion of the issues pertaining to child support and incarceration raised by the Walter Scott incident, see generally Brito et al., *supra* note 33. See also Cammett, *supra* note 33, at 364–69 (describing disparate racial impact in incarceration).

241. See generally Courtney M. Bonam et al., *Polluting Black Space*, 145 J. EXPERIMENTAL PSYCHOL. 1561 (2016) (conducting four experiments that indicate that physical spaces are also associated with negative racial stereotypes).

242. *Id.* at 1578.

Negative characteristics of Black spaces that may appear normal and natural have been constructed by decades of policies and practices separating Black people from society and depriving them of basic resources. Without historical knowledge, people may continue to detach themselves from the spaces where Black people are overrepresented and do little to protect them.<sup>243</sup>

This has obvious consequences for black families living within these spaces and the discrimination, over-policing, and other challenges that they might face because of racial stereotypes. As I noted in a blog entry concerning race and family flourishing, it arguably already has an impact on how people of color residing in such spaces get assessed, and the likelihood that they will be subject to government interventions with which their white peers living in wealthier or simply predominantly white spaces do not have to contend.<sup>244</sup>

#### V. CONCLUSION: INCLUSIVE KINSHIP

In this nation's 240-year history, there has never been a time when race has not been determinative in defining kinship and the treatment to be accorded familial units. Slavery and ongoing debates with respect to immigration bear this out, but so do the negotiations that families and their members engage in daily in areas such as education, residential housing, and criminal justice.<sup>245</sup> Too often judicial doctrine and even scholarship designed to explicate the issues confronting modern families work to paper over this truth in ways that resonate with colorblind norms, but not the reality of how families of all races live.

This article has been an effort to turn this tide by setting forth a vision of inclusive kinship and family. It has advocated for a scholarly embrace of the role of family in racial formation and the operation of race in family formation. It has also tried to discuss with particularity the commitments and analyses that should be incorporated as a matter of course into research in this area. In doing so, its goal has been to strengthen the nature of the interventions available to family law scholars engaged in theorizing and analyzing issues of kinship. By recognizing that all families, not just those that are racial minorities, are shaped by race, we open the door to better scholarly outputs and, ultimately, a deeper and more capacious understanding of what kinship and family mean in the 21st Century. We also position ourselves to advance solutions and reforms to family law systems, structures, and institutions more likely to create real change.

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243. *Id.*

244. *See* Lenhardt, *supra* note 24 (discussing differential treatment of families based on race, class, and geography).

245. *See* R.A. Lenhardt, *Family Law as Racial Formation* (unpublished manuscript) (on file with author).

As noted earlier, however, my ambitions for change have not been trained on family law alone, although as my focus on family law scholars suggests, I see work concerning families as an important area for innovation on issues of race and equality. My intervention has instead also been focused on shifting the nature of the discourse and problem-solving in areas like criminal justice that deeply affect and very often have serious implications for families. The conversation about structural racial inequality in that context and in others, such as housing, employment, and education, too rarely get framed in a way that internalizes their sometimes devastating impact on family units in particular. “Black Lives Matter.” But “black families” do too. In other words, race informs not only the opportunities available to racial groups and families, but also to the families of which they are part in ways we cannot afford to overlook. To account for this in full, families and their concerns must be factored into policy discussions pertaining to structural inequality. We should not exclude family law scholars or families from the important national conversation about race and its effects now underway.