

BLACK CITIZENSHIP THROUGH MARRIAGE? REFLECTIONS ON THE MOYNIHAN REPORT AT FIFTY

R.A. LENHARDT*

TABLE OF CONTENTS

- I. INTRODUCTION: BLACK CITIZENSHIP THROUGH MARRIAGE?
- II. UNPACKING THE MOYNIHAN REPORT'S ACCOUNT OF MARRIAGE AND BLACK CITIZENSHIP
- III. BLACK MARRIAGE INEQUALITY IN THE AGE OF *OBERGEFELL*
- IV. WHY NONMARITAL BLACK FAMILIES MATTER
- V. CONCLUSION: THE PLACE OF BLACK FAMILIES IN THE NEW MOVEMENT FOR CIVIL RIGHTS

I. INTRODUCTION: BLACK CITIZENSHIP THROUGH MARRIAGE?

What are the necessary conditions for full black citizenship and belonging? In one way or another, this question has informed and bedeviled American public debate since our nation's founding. In 2015, efforts to register a satisfactory answer to this inquiry have primarily centered on issues of policing and mass incarceration. The death of black men and women such as Michael Brown, Rekia Boyd, and Walter Scott at the hands of white police officers in places like Ferguson, Missouri; Chicago, Illinois; and North Charleston, South Carolina, have exposed the comparative insecurity and physical vulnerability of blacks in communities across the

* Professor of Law, Fordham Law School. I wish to thank Camille Gear Rich and the USC Gould School of Law for inviting me to participate in this important symposium, as well as the wonderful scholars who participated in that event. I benefitted tremendously from your comments and conversation. In addition, I want to thank Fordham Law School for the summer research grant that supported this essay.

country.¹ Given that relatively few of these cases have resulted in criminal indictments, let alone punishment, they have—as the activism of groups such as Black Lives Matter underscores—also raised troubling questions about the overall value placed on black life in our society.² So discordant are the statistics and relevant life prospects of blacks and whites in this context that even federal lawmakers who have staked their careers on tough-on-crime initiatives have felt compelled to make progress on legislation that would minimize racial disparities in sentencing and potentially work to stem the overwhelming tide of black men and women into the criminal justice system.³

Fifty years ago, the country found itself in the midst of a similarly intense debate about black belonging and standing in the United States. Passage of the landmark Civil Rights Act of 1964 had just been won and school desegregation efforts mandated by the U.S. Supreme Court’s decision in *Brown v. Board of Education*,⁴ while not uncontested, were under way.⁵ Yet, many questioned whether, without more, “equality of results [would] . . . follow” these and other civil rights gains.⁶ For his part, former Senator Daniel Patrick Moynihan—then an official with the U.S. Department of Labor—maintained that meaningful black “progress”⁷ would be elusive without targeted government support and a sustained focus on what, in his mind, constituted the single most important problem facing African America: “family structure.”⁸ In the 1965 memorandum addressing this subject that he drafted—a document now popularly referred to as “the Moynihan Report”—Moynihan acknowledged “the racist virus in the American blood stream,”⁹ but, in terms that still draw bitter criticism today, identified nonmarriage and the rise in single female-headed black

1 See Claudia Rankine, *The Condition of Black Life Is One of Mourning*, N.Y. TIMES MAGAZINE (June 22, 2015), <http://www.nytimes.com/2015/06/22/magazine/the-condition-of-black-life-is-one-of-mourning.html>.

2 See Editorial, *The Truth of ‘Black Lives Matter,’* N.Y. TIMES (Sept. 4, 2015), <http://www.nytimes.com/2015/09/04/opinion/the-truth-of-black-lives-matter.html> (discussing substantive issues raised by the “Black Lives Matter” movement).

3 See Carl Hulse & Jennifer Steinhauer, *Sentencing Overhaul Proposed in Senate With Bipartisan Backing*, N.Y. TIMES (Oct. 1, 2015), http://www.nytimes.com/2015/10/02/us/politics/senate-plan-to-ease-sentencing-laws.html?_r=0.

4 *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

5 WILLIAM JULIUS WILSON, *MORE THAN JUST RACE: BEING BLACK AND POOR IN THE INNER CITY* 95 (2009).

6 DANIEL PATRICK MOYNIHAN, U.S. DEP’T OF LABOR, OFFICE OF POLICY PLANNING & RESEARCH, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965) [hereinafter MOYNIHAN REPORT], <https://web.stanford.edu/~mrosenfe/Moynihan's%20The%20Negro%20Family.pdf>.

7 *Id.* at at 5, 29, 48.

8 *Id.* at 5.

9 *Id.*

households, not the vestiges of Jim Crow segregation or ongoing racial discrimination, as far more deleterious to “the fabric of Negro society.”¹⁰ For Moynihan, the “establishment of a stable Negro family structure” had to be prioritized and with it, presumably, marriage as well.¹¹

This essay looks to surface and then interrogate the assumptions about black citizenship and marriage at the heart of the Moynihan Report. In doing so, it engages directly with arguments about marriage’s citizenship-conferring capacity articulated during Reconstruction by whites and many newly freedpersons, as well as the claims more recently advanced by LGBT rights advocates and even U.S. Supreme Court Justice Anthony Kennedy in his majority opinion in *Obergefell v. Hodges*, a decision that recognized the Fourteenth Amendment right of same-sex couples to marry.¹² Insofar as it examines the racial inequality that informs the spiraling rates of black marriage, the essay also intervenes in current debates about whether “black lives matter” in America.¹³ While post-Ferguson solutions for policing reforms or interventions have not often touched on matters of race and family, I argue that the racial inequality reflected in our criminal justice system cannot be easily divorced from that which still shapes and constrains the functioning of black families—marital or nonmarital—in the United States.¹⁴

The firestorm that marked the Moynihan Report’s release and the ongoing public debate about African American family life that it provoked means that the negative relationship between black citizenship and nonmarriage that Moynihan asserted has been well explicated. Yet, the positive account of marriage and citizenship underlying the Report’s analysis—the idea that entrance into marriage can secure African Americans with a measure of belonging long denied—has been insufficiently explored. This essay addresses this gap. It first unpacks the Report’s implicit assertion that marriage, and conformity with gender roles and norms, helps to secure black citizenship and then offers a critical analysis of that claim grounded in history and the realities of modern black family life.

10 *Id.*

11 *Id.* at [i].

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

13 Editorial, *supra* note 2.

14 For an account also linking inequality in the criminal justice and family contexts, see 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/>.

As I argue in a recent article in the *Hastings Law Journal*, marriage, as an historical matter, has too often functioned less as the black deliverance imagined and more as a mechanism for racial subordination—one that has worked to subjugate African Americans and other racial minorities, and to both racialize and pathologize need.¹⁵ Entrance into marriage did not work to secure full black belonging in the past and it, without more, is unlikely to do so anytime soon. *Obergefell* may have won marriage equality for same-sex couples, but given the cumulative racial disadvantage and uncertainty under which African America labors today, marriage inequality is likely to remain the norm for blacks—gay or straight—into the foreseeable future.¹⁶ In light of this truth, I advocate a shift in focus that prioritizes supporting nonmarital black families where they are and eliminating policies that thwart their effective functioning. For better or for worse, dealing with the reality of nonmarriage could do more to secure black citizenship and belonging in our post-Ferguson twenty-first century world than marriage ever did.

II. UNPACKING THE MOYNIHAN REPORT'S ACCOUNT OF MARRIAGE AND BLACK CITIZENSHIP

If the so-called “welfare queens” that the Moynihan Report infamously laments threatened to be the black community’s downfall in 1965, it was marriage that promised to be its salvation. One would be hard pressed, however, to find words to that effect in the Report’s pages. Instead, the story conveyed is one of failed citizenship through nonmarriage. Marriage promotion, to be clear, never emerges among the vague set of government interventions that Moynihan urges. It gained renewed life as a policy option in the Report’s aftermath, when scholars and policymakers building on Moynihan’s work seized the concept of marriage and strategies to incentivize it—such as the 1996 Personal Responsibility and Work Reconciliation Act designed to incentivize welfare recipients to marry—as a way to address the problems and inequality that the Report outlined.¹⁷ Nevertheless, the Moynihan Report’s intervention derives a great deal of

15 R.A. Lenhardt, *Marriage as Black Citizenship?*, 66 *HASTINGS L.J.* 1317, 1324-42 (2015).

16 See R.A. Lenhardt, *Race, Dignity, and the Right to Marry*, 84 *FORDHAM. L.J.* 53, 58-64 (2015) [hereinafter *Race, Dignity, and the Right to Marry*].

17 See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, 110 Stat. 2105 (1996) (codified as amended at 42 U.S.C. §§ 601-603); see also Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 *CAL. L. REV.* 1647, 1648 (2005) (discussing the Personal Responsibility and Work Reconciliation Act of 1996 and marriage promotion efforts).

force from an affirmative narrative about marriage as citizenship enhancing.¹⁸

In slavery's wake, many—although by no means all—newly emancipated persons understood “the [m]arriage [c]ovenant [to be] at the foundation of all our rights.”¹⁹ Marriage, something denied them during bondage, provided both a vehicle for securing other civil rights—such as work, fair wages, or familial autonomy²⁰—as well as an avenue through which their overall fitness for full citizenship could be demonstrated or performed.²¹ It would be too much to suggest that Moynihan meant to be in conversation with this earlier generation of African Americans. And yet, the two dimensions of black life and families that the Report has typically been understood to address—those of structure and culture²²—both sound in a register of citizenship that was arguably quite salient during this time.

One perhaps sees this most immediately in the portions of Moynihan's analysis acknowledging that “[t]hree centuries of injustice ha[d] brought about deep-seated structural distortions in the life of the Negro American.”²³ Social scientists building on this work have, of course, addressed a broad range of social and economic questions that they do not relate directly to citizenship per se: matters concerning issues such as black joblessness, incarceration, and the link between nonmarital childbearing and poverty.²⁴ But we can nevertheless understand them to bear on the extent to which marriage, if not a formal gateway to other rights, speaks to the range of entitlements that inform full belonging.

The Report's reflections on “culture,” not insignificantly, address a different, yet still consequential dimension of citizenship. Here, Moynihan took the position that, while perhaps initially born of structural inequity, “[w]eaknesses of [the black] family structure” had taken on an independent life, advanced by a culture and pattern of individual decisionmaking, whose long-term impacts could not easily be reversed.²⁵ In other words, the “deterioration of the Negro family,” in his mind, had progressed to the

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

19 LAURA F. EDWARDS, *GENDERED STRIFE AND CONFUSION: THE POLITICAL CULTURE OF RECONSTRUCTION* 47 (1997).

20 *Id.* at 46-47.

21 *See id.* at 56 (noting assertions of black leaders during this period that “we are on trial before the tribunal of the nation” and exhortations to comply with prevailing intimacy norms as a way of demonstrating “we are worthy to be a free, self-governing people”).

22 WILSON, *supra* note 5, at 105-28 (discussing structural and cultural arguments made by the Moynihan Report and the reactions to them).

23 MOYNIHAN REPORT, *supra* note 6, at 47.

24 *See, e.g.*, Sara McLanahan, *Fragile Families and the Reproduction of Poverty*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 111 (2009) (discussing fragile nonmarital families and poverty); WILSON, *supra* note 5.

25 MOYNIHAN REPORT, *supra* note 6, at 30.

point that it was “capable of perpetuating itself without assistance from the white world.”²⁶

Poor black families, in Moynihan’s estimation, had become ensnared in a debilitating “tangle of pathology” that required immediate “national action.”²⁷ The Report offered a range of support for this conclusion, but found its strongest proof in the “matriarchal pattern of so many Negro families,” which the Report associated with both a “startling increase [in] welfare dependency” and irresponsible reproduction.²⁸ For Moynihan, the disproportionately high numbers of female-headed black households served primarily to promote “anti-social behavior” and “retar[d] the progress of [African Americans] as a whole.”²⁹ The “matriarchal structure” of the black community not only “impose[d] a crushing burden on the Negro male,” but, in his view, also “perpetuate[d] the cycle of poverty and deprivation” from which most black youth could never hope to escape.³⁰

For good reason, much of the criticism leveled at the Report concerned those sections advancing the theory just described—its embrace of patriarchy, as well as its principally race-based account of family disfunction.³¹ They paint, as the initial response to the Report attests, an exceedingly problematic picture of black family life. But they also tell a story about the performative dimensions of family and citizenship, and the social font of marriage more specifically that bears elaboration.

The former slaves mentioned earlier, those individuals who emphasized the potential for freedpersons to perform readines for citizenship by comporting with prevailing marriage norms,³² sought to exploit the extent to which laws pertaining to family, as well as citizenship are performative in nature.³³ As Professor Clare Huntington has explained, by engaging in repeated acts such as wearing a wedding ring or parenting a child, individuals communicate messages about what it means, for example, to be married or to be a parent.³⁴ Repetition of such performances “shape what sociologist Erving Goffman called a social front—a shorthand for conveying information about a category of people” that “tend[s] to be

26 *Id.* at 5, 47.

27 *Id.* at 29, 47 (“In a word, a national effort towards the problem of Negro Americans must be directed toward the question of family structure”).

28 *Id.* at 8, 12, 31.

29 *Id.* at 29, 30.

30 *See id.*; *see also* DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 16 (1997) (noting that “Moynihan thus endowed poor Black women—the most subordinated members of society—with the power of a matriarch”).

31 Frank F. Furstenberg, *If Moynihan Had Only Known: Race, Class, and Family Change in the Late Twentieth Century*, 621 *ANNALS AM. ACAD. POL. & SOC. SCI.* 94 (2009).

32 *See supra* text accompanying notes 19–21.

33 *See* Clare Huntington, *Staging the Family*, 88 *N.Y.U. L. REV.* 589 (2013).

34 Clare Huntington, *Obergefell’s Conservatism: Reifying Familial Fronts*, 84 *FORDHAM L. REV.* 23, 24 (2015).

narrow, reflecting the typical and sometimes idealized performance” and, very often, traditional norms.³⁵

We can understand Moynihan to have made strategic use of such fronts in drafting the Report. His appraisal of the potential dangers inherent in “the often reversed roles of husband and wife” in African America and his predictions about what nonmarital births mean for black citizenship resonate partly because of the norms regarding gender, sexuality, and family that traditional marriage has established.³⁶ Thought by earlier generations to inform good governance, citizenship, and successful functioning of family units, such norms constituted the yardstick against which the nonmarital families addressed in the Report were evaluated.³⁷ For example, marital norms determined the extent to which black female heads-of-household—the subgroup Moynihan focused on—were classified as hypersexual or nurturing, resourceful or domineering, “good” or “bad” citizens. Ultimately, such norms shape the metrics against which all relationships—whether marital or nonmarital—are measured.

At bottom, the overall theory of race and nonmarital disorder featured in the Moynihan Report—in both its structural and “cultural” dimensions—derives a good deal of its content from an opposing narrative of marriage as primarily black citizenship enhancing. The problem is that, while pervasive, this underlying narrative is deeply flawed. In reality, marriage in this country has very often been deployed as a tool of racial subordination for African Americans and, as I explain elsewhere, for groups such as Native Americans, Puerto Ricans, and Asian Americans.³⁸ Images of former slaves “rush[ing] to marry [upon Emancipation], often in mass ceremonies,” as many freedpersons did, tend to be the touchstone for those who see marriage as a kind of black liberation.³⁹ But focusing on this snapshot in time badly obscures the full history of black marriage in America.

The limited aperture that the moment of Emancipation provides allows no room, for example, to consider slavery and the extent to which the exclusion of black slaves from marriage during that period reinforced not only their designation as non-citizens, but also the degree to which they were regarded as sub-human.⁴⁰ Nor does that framework easily facilitate inquiries into race and marriage-related laws and policies introduced much later in time. In other works, I examined a 1920s Richmond, Virginia ordinance that went so far as to determine a non-white person’s eligibility

35 *Id.*

36 MOYNIHAN REPORT, *supra* note 6, at 5, 30, 47.

37 See CATHERINE J. DENIAL, MAKING MARRIAGE: HUSBANDS, WIVES AND THE AMERICA STATE IN DAKOTA AND OJIBWE COUNTRY 12 (2013).

38 Lenhardt, *supra* note 15, at 1324–35.

39 AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 44 (1998).

40 See Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221, 229, 239–40 (1999) (discussing, *inter alia*, legal incapacity of slaves to marry).

to live in a certain neighborhood by referencing the antimiscegenation law then in effect.⁴¹ By referencing antimiscegenation law, the ordinance obviously functioned to shape notions of ideal race and family.⁴² Furthermore, insofar as it facilitated racial segregation and determined access to shelter, wealth, and social capital over time on the basis of race, the ordinance also structured future racial disadvantage.⁴³ Like laws pertaining to education, housing, or employment, marriage has effectively functioned to marry African Americans to a tier of second-class citizenship in which they still reside.⁴⁴ Without an orientation that treats a broad range of family-related systems as relevant inquiries into citizenship, the import and structural effects of ordinances such as the Richmond ordinance would likely otherwise go unnoticed.⁴⁵

Significantly, even aspects of the Post-Emancipation Period are occluded by a narrow focus on the moment of former slaves' entrance into legal marriage. Research by historians and legal scholars, such as Katherine Franke, suggests that Reconstruction-era marriage laws often functioned more to reassert control over former slaves than to affirm their intimate choices and new status as citizens.⁴⁶ Whites saw marriage as a way to reconstruct the South, as well as the nation overall.⁴⁷ It afforded them a means of reasserting regulatory control over black lives and—as norms at that time dictated that any dependency be internalized by households, not government—of evading responsibility for tremendous poverty of families emerging from bondage.⁴⁸ Officials at all levels of government thus devoted themselves to the goal of “creating black husbands and wives,” using coercion to induce marriage, and harsh punishments wherever possible to ensure compliance with its norms.⁴⁹ Under Southern Black Codes, for example, black men unable to curb the indigence of their families often found themselves imprisoned and their children involuntarily

41 See Lenhardt, *supra* note 15, at 1339–40, n.128; see also R.A. Lenhardt, *According to Our Hearts and Location: Toward a Structuralist Approach to the Study of Interracial Families*, 16 J. GENDER RACE & JUST. 741, 763–64 (2013). See *Richmond v. Deans*, 37 F.2d 712 (4th Cir. 1930).

42 For research on race effects of antimiscegenation law, see, e.g., RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* 17–28 (2001); RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 216–23 (2003).

43 See Lenhardt, *supra* note 15, at 1339–40, 1335.

44 *Id.*

45 See also *id.* at 1338–39, n.127 (noting an example of North Carolina law that incorporated antimiscegenation law in a Jim Crow provision determining eligibility for school enrollment).

46 *Id.* at 1327; Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J. L. & HUMAN. 251, 253 (“Rather than escaping from the coercive power of the state, the newly emancipated former slaves encountered the state in new institutional garb. Marriage ... provides the best ... example of the degree to which African Americans had to be ‘domesticated’ before they could be admitted into society as full citizens”).

47 R.A. Lenhardt, *Race, Dignity, and the Right to Marry*, 84 FORDHAM L. REV. 53, 57 (2015); LAURA F. EDWARDS, *GENDERED STRIFE AND CONFUSION: THE POLITICAL CULTURE OF RECONSTRUCTION* 27 (1997); Franke, *supra* note 46, at 294.

48 Franke, *supra* note 46, at 302; EDWARDS, *supra* note 47, at 33.

49 Lenhardt, *supra* note 15, at 1327; Franke, *supra* note 46, at 282–90.

placed in “apprenticeships.”⁵⁰ Such so-called punishments, which were clearly thinly veiled attempts to replicate antebellum labor arrangements, effectively reinforced notions of black criminality and pathologized black need and “dependency” in ways that public institutions relating to criminal justice, public benefits, and child welfare arguably still reflect.⁵¹

In sum, the Moynihan Report’s forecast of nonmarriage-induced civic doom trades on a promise of full citizenship through marriage that has never been fulfilled. Even the very brief history offered in this Section shows that black marriage has not been uniformly citizenship enhancing; indeed, it has very often been citizenship diminishing. This, of course, does not mean that poverty and nonmarital childbearing posed no difficulties for the black families that Moynihan considered in 1965. But it does suggest that we need to reevaluate the true challenges to inclusion that black families faced then and that other similarly situated African Americans face today.

III. BLACK MARRIAGE INEQUALITY IN THE AGE OF *OBERGEFELL*

Is access to marriage rights necessary to ensure full belonging in the twenty-first century? In *Obergefell*, the Court, with Justice Kennedy writing for the majority, answered this question in the affirmative, holding that lesbian and gay couples are entitled to “equal dignity” and access to marriage, an “enduring bond, [through which] persons together can find other freedoms, such as expression, intimacy, and spirituality,” irrespective of their sexual orientation.⁵² In doing so, the Court resolved one of the most important questions of our day. But it raised other questions, both for LGBT Americans and for others. Among these is the question whether, without more, merely ensuring formal access to marriage rights can ever be adequate. In other words, can we reasonably expect marriage to be citizenship enhancing for African Americans, gay or straight, today?

On the numbers, it seems pretty clear that the answer to this question is no. If anything, marriage inequality seems likely to be the norm for blacks for the foreseeable future. Today, African Americans are the most

50 Mary Farmer-Kaiser, “With a Weight of Circumstances Like Millstones About Their Necks”: *Freedwomen, Federal Relief, and the Benevolent Guardianship of the Freedmen’s Bureau*, 115 VA. MAG. HIST. & BIOGRAPHY 413, 416, 428–29 (2007).

51 ROBERTS, *supra* note 30, at 220–21, 223 (discussing, *inter alia*, pathologization of black need); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 851–64 (2004) (discussing stereotypes about black criminality). For a discussion of how the stigma attached to black dependency plays out in child welfare, see Leah Hill, *Do you See What I See—Reflections on How Bias Infiltrates the New York City Family Court—The Case of the Court Ordered Investigation*, 40 COLUM. J.L. & SOC. PROBS. 527 (2006–2007).

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

unmarried group of any in the country.⁵³ While marriage decline affects all groups,⁵⁴ it has been steepest in African America. In 2008, black marriage rates stood at merely 32 percent, down from 61 percent in 1960.⁵⁵ As with other groups, marriage rates tend to be lowest among poor blacks and those with low levels of educational attainment. Still, research makes it plain that “blacks in all educational groups [are] less likely to be in intact marriages”⁵⁶ or never to have marriage at all.⁵⁷

Loving relationships between blacks—whether romantic, parental, or involving other caregiving—increasingly operate outside of legal marriage, a space that decisions like *Obergefell*, even if unintentionally, have rendered even more non-normative.⁵⁸ Studies indicate that African Americans are more likely than their white counterparts to cohabit.⁵⁹ They are also more likely to have and parent children within nonmarital relationships.⁶⁰ In the 1960s, the nonmarital black birth rate that raised alarms for Moynihan was 20 percent.⁶¹ Due to a nationwide increase in nonmarital births, that rate of 20 percent has now been surpassed by the white population, whose percentage of nonmarital birth was only 2–3 percent in the early 1960s.⁶² Significantly, the percentage of black–nonmarital births has nearly tripled since the 1960s.⁶³ Currently, nonmarital births among black high school graduates comprise more than 70 percent of all black births in the United States.⁶⁴

Stereotypes about black “welfare queens” and “deadbeat dads” might suggest that not just socioeconomics, but also attitudes about family and

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

54 See PEW RESEARCH CTR., THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES 9 (Nov. 18, 2010) [hereinafter DECLINE OF MARRIAGE], <http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf> (noting overall decrease in the percentage of married Americans fell from 72 to 52 percent between 1960 and 2008).

55 *Id.*

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

57 DECLINE OF MARRIAGE, *supra* note 54, at 29.

58 For more on this, see Huntington, *supra* note 34, at 27-30.

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

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

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

62 *Id.* at 5; see also Robert A. Hummer & Erin R. Hamilton, *Race and Ethnicity in Fragile Families*, THE FUTURE OF CHILD, Fall 2010, at 113, 116 (Among white women, the share of unmarried births in 1970 (6 percent) more than quadrupled by 2006 (27 percent)).

63 MOYNIHAN REVISITED, *supra* note 61, at 4.

64 WHEN MARRIAGE DISAPPEARS, *supra* note 56, at 56, fig.S2.

marriage, in particular, might place African Americans outside the main. Research by Kathryn Edin and Maria Kefalas, however, suggests otherwise; their interviews with poor women indicate that, if anything, “[t]he poor avoid marriage not because they think too little of it, but because they revere it.”⁶⁵ African Americans consistently rate marriage as important and are very likely to express a desire to marry in the future.⁶⁶ Uncertainty and fears about not fulfilling traditional marriage roles, however, appear to prevent low-income, black heterosexual couples from actually marrying.⁶⁷ They decouple childbirth and marriage because the belief is that to “do [marriage] ‘right’ [they must] begin with a solid economic footing.”⁶⁸

Put differently, structural inequality, along with traditional marriage norms, has erected a barrier to marriage that only increasingly low numbers of African Americans can scale. We tend to think of marriage inequality as distinct from the kinds of structural racism and disadvantage that we have grown accustomed to discussing in places like Ferguson, Missouri, or even New York City, where black men and women have tragically lost their lives at the hands of white police officers. Yet, research suggests this same inequality informs the increase in black–nonmarital families, what sociologists now refer to as “fragile families.”⁶⁹ Structural inequality—in areas such as housing, employment, education, and mass incarceration—works in ways that keep marriage out of reach for many poor blacks. As I explained in another article, “[f]or poor black women, socioeconomic circumstances translate into very high levels of ‘uncertainty’ in their intimate relationships and lives more broadly.”⁷⁰ In addition to placing tremendous strain on adults and children alike in nonmarital families,⁷¹ it significantly reduces the chances that a black women will find a romantic partner or, for that matter, achieve some measure of financial security.⁷²

That modern marriage reflects black inequality is undeniable. So too are the ways in which marriage and other family law systems increasingly function to structure that inequality.⁷³ For example, in a recent article, I urged a focus on the incident involving the shooting death of Walter Scott

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

66 *Id.* at 132, 237.

67 LINDA C. MCLAIN, THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY 138–44 (2006).

68 *Id.* at 140–41.

69 See McLanahan, *supra* note 24, at 111.

70 Lenhardt, *supra* note 15, at 1351 (citing Linda M. Burton & M. Belinda Tucker, *Romantic Unions in an Era of Uncertainty: A Post-Moynihan Perspective on African American Women and Marriage*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 132, 135–39 (2009)) (describing the problem of “uncertainty” and its impact on the marriage choices of blacks).

71 Hummer & Hamilton, *supra* note 62, at 124.

72 See Harknett & McLanahan, *supra* note 60, at 804, 808.

73 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>.

in Charleston, South Carolina.⁷⁴ On the surface, few would make a connection between Scott's death upon being shot as he ran away from a white police officer and family law.⁷⁵ But the reason Scott ran turns out to be quite salient here. Newspaper reports filed in the wake of the incident suggest that Scott ran because he feared arrest on an outstanding warrant to pay almost twenty thousand dollars in back child support.⁷⁶ Reports suggest that, more than any payments, Scott sought to avoid jail and the likelihood that his incarceration would lead to the loss of his employment, as it had on another a similar occasion.⁷⁷ The child support obligations at issue in Scott's case admittedly did not concern marriage directly, as they apply to the married and unmarried alike. At the same time, though, child support requirements reflect patriarchal norms privileging patriarchal arrangements like those touted by Moynihan, financial support, and the internalization of dependency that traditional marriage reflects. Such norms work in ways that render existing policy overly punitive and blind to the unique circumstances that apply to communities of color constrained in multiple ways by structural racial inequality.⁷⁸

IV. WHY NONMARITAL BLACK FAMILIES MATTER

Advocacy groups such as “Black Lives Matter”—which have been instrumental in raising awareness about the race effects of mass incarceration and policing methods deployed in many communities of color—have, along with scholars and policymakers, increasingly begun to bring a critical lens to issues of racial inequality in other areas. Important work in this regard has, for example, helped to underscore the need to see places like Ferguson in a broader context that implicates not just police practices, but also issues of zoning, education, and housing policy, among other things.⁷⁹ Our conversations have begun to open beyond the doctrinal siloes privileged in current Supreme Court jurisprudence. They have not, however, begun meaningfully to incorporate inquiries into family law and racial inequality in the way that the statistics set forth in the previous section suggests that they should. This needs to change. And our starting point for such a shift should be black–nonmarital families.⁸⁰

⁷⁴ *Race, Dignity, and the Right to Marry*, *supra* note 16, at 61–62.

⁷⁵ Michael S. Schmidt & Matt Appuzo, *South Carolina Officer Is Charged with Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), <http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html>.

⁷⁶ Frances Robles & Shaila 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>.

⁷⁷ *Id.*

⁷⁸ CLARE HUNTINGON, FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS 193–95, 208–20 (2014).

⁷⁹ See Richard Rothstein, *The Making of Ferguson*, AMERICAN PROSPECT (Oct. 15, 2014), <http://prospect.org/article/making-ferguson-how-decades-hostile-policy-created-powder-keg>.

⁸⁰ See *supra* text accompanying notes 59–64.

Research indicates that, in addition to being a site at which racial inequality both gets reflected and produced, nonmarital black families mark the places where some of the greatest need and obstacles to full black citizenship exist. The Princeton and Columbia University affiliated Fragile Families and Child Wellbeing Study (“FFCWS”)—which tracked 5000 children, born mostly to unmarried parents, in large U.S. cities, between 1998 and 2000⁸¹—tells us that, while nonmarital families are more likely to be disadvantaged than other groups,⁸² nonmarital black families tend to be the most fragile of the fragile. The single women heading such families tend to live below or near the poverty line, to live in neighborhoods that they regard as unsafe, and to be recent recipients of public assistance.⁸³ These families—although obviously affected by inequality and bias in ways that differ dramatically from those felled by police violence—matter too.

For years, we have, as the Moynihan Report itself indicates, been overly reliant on strategies that effectively look to drag nonmarital families into marital unions at any cost. But, it seems clear, for reasons already articulated, that continued reliance on such measures will not bear fruit. Thus, I have argued that, instead of focusing on marriage, legal scholars, advocates, and policymakers would do better to focus on nonmarriage and its potential to promote black citizenship. To be clear I do not advocate the abolition of marriage. Instead, the proposal I advance imagines situating nonmarriage alongside marriage as a framework for loving black relationships. The goal would be to ensure the “flourishing” of all black families, rather than pathologizing those that never enter traditional marriage either by choice or because of the structural inequality they confront.⁸⁴

Adopting such a focus would have several benefits. First, it would help to improve existing family law. As other scholars have noted, this area of the law largely ignores nonmarital families insofar as marital unions set the dominant norm.⁸⁵ An effort to develop a “postmarital family law” with new norms and rules that better aid nonmarital families in navigating the challenges and poverty that they face would, Huntington has argued, be very beneficial.⁸⁶ Additionally, focusing on nonmarital families would help to identify the ways in which existing programs and initiatives should be modified to eliminate the disparate racial impact that measures such as those at play in the fatal Walter Scott incident can have on African

81 Center for Research on Child Wellbeing, *About the Fragile Families and Child Wellbeing Study*, <http://www.fragilefamilies.princeton.edu/about.asp> (last visited Nov. 11, 2015) (“roughly three-quarters” of the children followed were born to unmarried parents).

82 Hummer & Hamilton, *supra* note 62, at 121.

83 *Id.*

84 *Id.* at xii.

85 Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 173 (2015).

86 *Id.*

Americans and other minority groups. The primacy of marriage as a regulatory device today means that family-related laws will persist in relegating blacks to second class status unless greater attention gets directed toward the way in which, for example, tax policy incentivizes marriage by extending benefits to married couples that are not available to nonmarital individuals,⁸⁷ or that initiatives such as the Temporary Assistance for Needy Families (“TANF”) program—which places durational limits on welfare support and mandates that support recipients enter the workforce within a certain period⁸⁸—ensure access to child care and other support necessary to the success of the program and its participants, a group in which women of color are overrepresented.⁸⁹

Further, focusing on nonmarital families and the conditions necessary for their flourishing could provide us with important information about what works in such familial units and why. Instead of beginning with the presumption that nonmarital families possess only “weakness[es]” and entirely lack strengths,⁹⁰ scholars and policymakers might be encouraged to examine the nature of the capacities that fragile black families develop in trying to navigate their circumstances. For example, some research indicates that black fathers navigate the challenges of co-parenting better than some other groups.⁹¹ Black men, in particular, do better maintaining ties with their nonresident children than their white counterparts.⁹² Developing programs that utilize these and other strengths, and focus on generating new capacities in this realm, could be very beneficial.

These and other suggestions for better supporting nonmarital families to ensure that they are not left to shoulder the burden of dependency and cumulative disadvantage alone, could be beneficial to all families, but especially those that are “fragile” and black. While many of the benefits discussed are economic in nature, the ideas explored here could generate positive effects in other areas as well. Among other things, developing nonmarital alternatives for family support would, as I have argued in other

87 See generally MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA’S POLITICAL IDEALS* (2010). See JILL ELAINE, *FAMILY LAW REIMAGINED* 53–54 (2014) (providing that “a ‘marriage bonus’ exists when a married couple pays less in taxes than the couple would pay if unmarried”); see also ROBERTS, *supra* note 30, at 213–19, 223 (discussing issues of race and family cap programs generally and New Jersey family cap policy and welfare).

88 Ariel Kalil & Rebecca M. Ryan, *Mother’s Economic Conditions and Sources of Support in Fragile Families*, *THE FUTURE OF CHILD.*, Fall 2010, at 39, 52; ROBERTS, *supra* note 30, at 219–22.

89 See *Id.* at 215 (providing that “although most families who receive AFDC are not black, black women disproportionately rely on this form of government aid to support this children... it is fair to say, then, that welfare policies designed to discourage childbearing will disproportionately affect Black women and have these very women in mind.”). For a recent example of a case in which the absence of such support led to one single, black mother’s arrest and subsequent conviction, see Sarah Jarvis, *Mom Who Left Kids in Car Sentenced to 18 Years Probation*, *USA TODAY* (May 15, 2015), <http://www.usatoday.com/story/news/nation/2015/05/15/shaneshya-taylor-kids-in-car/27375405/>.

90 MOYNIHAN REPORT, *supra* note 6, at 30.

91 Huntington, *supra* note 85, at 190.

92 Marcia J. Carlson et al., *Coparenting and Nonresident Fathers’ Involvement with Young Children After a Nonmarital Birth*, 45 *DEMOGRAPHY* 461, 473 (2008)

works, reframe notions of race, gender, and family-based citizenship overall. Incorporating nonmarriage into family law and policy could—insofar as they are likely to be the most unmarried group in the country for some time to come—dramatically change how African Americans are situated in the polity.⁹³

V. CONCLUSION:
THE PLACE OF BLACK FAMILIES IN THE NEW MOVEMENT
FOR CIVIL RIGHTS

This Article has challenged the historical, normative, and empirical foundation for the narrative of “marriage as primarily citizenship enhancing” underlying the Moynihan Report. Yet, the Report’s conclusion—that matters of race and family should be at the forefront of thinking about civil rights and opportunity—is one that I very much endorse. A focus on ensuring the flourishing of *all* families, whether they comport with traditional marriage norms or not, could go a long way toward advancing black civil rights and belonging in the twenty-first century.

⁹³ See Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L. J. 1641, 1654–60 (2003).

