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King, Shani

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The Family Law Canon in a (Post?) Racial Era

SHANI KING*

While the debate about a post-racial society rages, our justice system continues to operate in a way that is race-conscious. It seems as though most of the discussion about race and the justice system concerns criminal justice, juvenile justice, education, and immigration. But race-consciousness also impacts family law. Nonetheless, the family law canon does not scrutinize race-based disparities in laws, procedures, and outcomes, and that omission feeds a mistaken notion of a race-blind or a post-racial society. One consequence of this omission is that it obscures race-based decision making by legislatures, judges, legal reform organizations, legal scholars, lawyers, and child welfare workers, and thereby immunizes race-based decision making from scrutiny. This Article suggests that the family law canon inaccurately describes a race-neutral or post-racial state for family law and that the canon should correct its colorblindness so that legal authorities can address the problems that structural racism creates for African-American families. Part I of this Article explores the family law canon and some of the examples that legal authorities and scholars constantly employ to minimize the distinctions that family law currently makes on the basis of race. Part II disputes the colorblind canonical story by showing that the law does not protect the autonomy of African-American families as much as it does that of white families. This section also explains why it matters that the family law canon has it wrong with respect to African-American families: in short, colorblindness immunizes racism and perpetuates inequality. Part III discusses why family law scholars—both those who advocate color consciousness and those who advocate colorblindness—tend to oversimplify the precedent that addresses the role of race in family law. The Article concludes by emphasizing the importance of legal scholarship that challenges the family law canon and invites family law scholars to broaden and challenge the canon.

* Associate Professor, University of Florida Levin College of Law; Co-Director, Center on Children and Families. J.D., Harvard Law School; B.A., Brown University; Mst., University of Oxford (2011). I would like to thank Anne Alstott, Doriane Coleman, Nancy Dowd, Jill Hasday, Ira Katznelson, Ian Haney López, Kenneth Mack, Jill Quadagno, Dorothy Roberts, Gabriela Ruiz, Angela Onwuachi-Willig, and Barbara Woodhouse for valuable insight throughout the process of writing this Article. I would also like to thank Laquesha Sanders and Grace Spulak for outstanding research assistance. Thank you to the participants in the 2010 Third National People of Color Conference. Lastly, I continue to be grateful to Martha Minow for her unwavering mentorship and support.
With Barack Obama's historic election to the Presidency of the United States, public discourse has focused on the idea of a "post-racial" society, or a "society in which race is no longer meaningful."1 Ironically, the election fueled enthusiastic debate about the arrival of a post-racial era in the United States, while highly-racialized conflicts continue to dominate the public consciousness. The infamous arrest of Harvard Professor Henry Louis Gates,
for example, dominated public discourse as it became highly racialized. And a Republican congresswoman’s recent statement about the GOP’s search for a “great white hope,” not to mention the recent hurling of racial epithets at Representatives John Lewis and Andre Carlson by people gathered at the Capitol to protest health care reform, evoke anti-black sentiment from the early 1900s.

The term “post-racial” signifies that race has been eliminated as a significant factor in the ordering and operation of U.S. society. The term means that the United States has “moved beyond race” and indeed has “transcended race.” The idea of a post-racial era is one in which the “nation [has] unburdened itself of the albatross of race.” Stanford Professor Richard Banks explains that “the election of Barack Obama does unsettle a longstanding narrative in which racism looms as an implacable and

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3 Paul Kane, ‘Tea Party’ Protesters Accused of Spitting on Lawmaker, Using Slurs, WASH. POST (Mar. 20, 2010, 10:25 PM), http://www.washingtonpost.com/wp-dyn/content/article/2010/03/20/AR2010032002556.html. Congresswoman Jenkins stated that “Republicans are struggling right now to find the great white hope.” John Hanna, Jenkins: ‘Great White Hope’ Remark Not About Obama, NEWSVINE.COM (Aug. 27, 2009, 10:47 AM), http://www.newsvine.com/_news/2009/08/27/3198014-jenkins-great-white-hope-remark-not-about-obama. The phrase “great white hope” is often associated with pre-Civil Rights Era racism and is thought to have become a commonly used phrase in the early twentieth century when white heavyweight boxer Jim Jeffries was lured out of retirement to fight an African-American boxer, Jack Johnson. See, e.g., Barbara Holdon-Smith, Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era, 8 YALE J.L. & FEMINISM 31, 73 (1996) (discussing the origin of the phrase “Great White Hope”); Katheryn Russell-Brown, Black Protectionism as a Civil Rights Strategy, 53 BUFF. L. REV. 1, 9 (2005) (discussing the origin of the term “great White hope”). Other incidents that contradict the idea that we are in a post racial era are: Congressman Robert Bennett’s prediction in 1999 that “George W. Bush’s presidential nomination was secure unless ‘some black woman [came] forward with an illegitimate child’”; the 2006 U.S. Senate election campaign of Harold Ford, Jr., in which opponents “aired commercials that drew attention to his interracial dating history”; and the reality that “Alabama only removed the antimiscegenation provision from its state constitution in 2000, with 40 percent of voters wishing to maintain the moribund provision.” Kevin Noble Maillard, Miscegenation: An American Leviathan, 36-SUM HUM. RTS. 15 (2009) (“Even in the age of President Barack Obama, the son of an African Father and a white woman from Kansas, American patterns of interracialism have remained relatively static. Interracial marriages still account for fewer than 5 percent of all marriages.”).


unyielding impediment to African-American advancement."\(^6\)

Similarly, sociologist Shelby Steele observes that "Obama's post-racial idealism told whites the one thing they most wanted to hear: America had essentially contained the evil of racism to the point at which it was no longer a serious barrier to black advancement."\(^7\) As Professor Cornel West notes, the term "post-racial" declares that "[r]ace doesn't exist. We're colorblind."\(^8\)

While the debate about a post-racial society rages, our justice system continues to operate in a way that is race-conscious. While it seems as though most of the discussion of race and the justice system concerns criminal justice,\(^9\) juvenile justice,\(^10\) education,\(^11\) and immigration,\(^12\) race-

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\(^6\) Banks, supra note 1, at 47.


\(^8\) Harold McNeil, West Discusses Obama's Victory, BUFF. NEWS, Nov. 7, 2008, at D10 (quoting Professor Cornel West).


consciousness also impacts family law. Nonetheless, the family law canon does not scrutinize race-based disparities in laws, procedures and outcomes, and that omission feeds a mistaken notion of a race-blind or a post-racial society. One consequence of this omission is that it obscures race-based decision making by legislatures, judges, legal reform organizations, legal scholars, lawyers, and child welfare workers, and thereby immunizes race-based decision making from scrutiny. In other words, since the family law canon inaccurately describes family law as post-racial, or colorblind, the canon immunizes racism and perpetuates racial inequality.

This Article suggests that the family law canon inaccurately describes a race-neutral or post-racial state for family law, and that the canon should correct its colorblindness so that legal authorities can address the problems that structural racism creates for African-American families. In other words, when we teach and write about family law, we fail to adequately and accurately discuss how law impacts African-American families, and thus

that "[r]ace-based [immigration] enforcement deserves special scrutiny because it disproportionately burdens persons of Latin American ancestry in the United States".


15 While the focus of this Article is on African-Americans, the family law canon is similarly post-racial with respect to other races and ethnicities, as well. For example, why do we not discuss in the typical family law course how immigration laws effectively determine the rights and responsibilities of family members of some races and ethnicities more than others? Similarly, why do we not discuss how laws privilege a particularly ethnocentric conception of a nuclear family, and how that affects racial groups and ethnic groups differently? Unfortunately, the protection that one’s family receives directly varies with one’s race and ethnicity (not to mention socioeconomic status, citizenship status, sex, or whether someone is able-bodied). While the popular narrative—the one that is taught in most family law courses—is one that reflects colorblind equality for all, and one in which family law no longer makes distinctions based on race, this narrative has blinded us to the realities of racial family law hierarchies in society.
family law has the appearance of being post-racial.\textsuperscript{16} But, as I suggest throughout this Article, this would change if we changed the family law canon. The argument here proceeds as follows: Part I explores the family law canon and some of the examples that legal authorities and scholars constantly employ to minimize the distinctions that family law currently makes on the basis of race. Part II disputes the colorblind canonical story by showing that the law does not protect the autonomy of African-American families as much as it does that of white families.\textsuperscript{17} This section also explains why it matters that the family law canon has it wrong with respect to African-American families: in short, colorblindness immunizes racism and perpetuates inequality. Part III discusses why family law scholars—both those who advocate color consciousness and those who advocate colorblindness—tend to oversimplify the precedent that addresses the role of race in family law. The Article concludes by emphasizing the importance of legal scholarship that challenges the family law canon and invites family law scholars to broaden and challenge the canon.

I. THE FAMILY LAW CANON

A. Defining Family Law

A canon is a way of thinking about a certain area of the law that is generally accepted within the legal community and defines that area of the law.\textsuperscript{18} What makes something canonical is, in part, its continued presence in

\textsuperscript{16} Some scholars, including Rachel Moran, Randall Kennedy and Robin Lenhardt, have explored the relationship between family law and race. See, e.g., RANDALL L. KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION (2003); RACHEL F. MORAN, INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE (2001); R.A. Lenhardt, Forgotten Lessons on Race, Law, and Marriage: The Story of Perez v. Sharp, in RACE LAW STORIES (Rachel F. Moran & Devon W. Carbado eds., 2008); Rachel F. Moran, Loving and the Legacy of Unintended Consequences, 2007 Wis. L. Rev. 239 (2007). Thus, I refer to some of these works in my appendix, as suggestions of works that should be included in family law courses to ensure that the family law canon does not remain colorblind. See infra Appendix. The point is not that there are no scholars who write about the significance of race to family law. The point is that this scholarship is not part of the family law canon.

\textsuperscript{17} This Article does not take issue with legitimate and lawful interventions that are designed to protect family members from violence, abuse, or neglect. The purpose of this Article is to expose the fact that these interventions are, in some cases, based at least in part on race, rather than legitimate and lawful factors, and that the family law canon ignores these cases.

\textsuperscript{18} See J. M. Balkin & Sanford Levinson, The Canons of Constitutional Law, 111 HARV. L. REV. 963, 984–85 (1998) (discussing the deep “canonicity of certain ways of thinking, talking, and arguing” that are “an important part of what makes canons
the foundational texts, stories, assumptions, problems, and narrative frameworks in minds of successive generations. This includes its presence, therefore, in family law scholarship, casebooks, and jurisprudence. While it is widely accepted that there are canons in some areas of the law, such as constitutional law, contracts, and property law, the canon of family law has only to date been explored directly and critically by Professor Jill Hasday in The Canon of Family Law, which appeared in the Stanford Law Review in 2004. Nonetheless, the family law canon is tremendously important constitutive of a particular culture or a particular discipline" such as law); Mark Tushnet, The Canon(s) of Constitutional Law: An Introduction, 17 CONST. COMMENT. 187, 187 (2000) (describing a canon as "a set of themes that organize the way in which people think about [a] discipline").

19 See LEGAL CANONS 3 (J.M. Balkin & Sanford Levinson eds., 2000); see also Hasday, The Canon of Family Law, supra note 13, at 825–26 (arguing that canons include the notion of a "set of foundational texts that exemplify, guide, and constitute a discipline," and also recognizing that it is generally accepted among legal authorities and legal scholars that stories and examples can be included in a canon). Balkin suggests a similar mode of transmission in his work on the transmission of cultural knowledge from one generation to the next. See J.M. BALKIN, CULTURAL SOFTWARE: A THEORY OF IDEOLOGY 42–90 (1998).

20 See LEGAL CANONS, supra note 19, at 8, 47, 66.

21 While Professor Hasday’s article is the first to explore the family law canon directly and critically, we can also use family law casebooks to reflect on the canon. Casebooks help compose the canon, but their authors’ decisions are implicit—we can only see the product of their deliberations (the casebook), rather than some account of their decision making processes. Thus, this Article is an invitation of sorts to dialogue with family law scholars in a way that may ultimately broaden and challenge the canon. We can do so by making our implicit decisions explicit and then questioning, critiquing, and reassessing the canon and how we transmit it to law students.

22 See generally Hasday, The Canon of Family Law, supra note 13. Hasday notes that the lack of scholarly work on the family law canon reflects the relatively low status of family law in the legal academy, and, for that matter, in the legal profession. Id. at 828 n.4. Hasday rightly recognizes that this is puzzling, given, inter alia, the place of family law in structuring people’s lives, including the lives of their children. Id. It is indeed puzzling, particularly because family law often involves complex interaction between very complex areas of the law, i.e., constitutional law and tax law. See id. ("[S]ome students may bring a bias against [family law] because it does not enjoy the prestige of, say, antitrust—although the total number of antitrust cases in one year makes up a good day’s work in an urban domestic relations court." (quoting LESLIE J. HARRIS & LEE E. TEITELBAUM, FAMILY LAW, at xxxv (2d ed. 2000))); id. ("While [family law] is a course that students like to study, many consider it less difficult and less serious than courses in commercial law, constitutional law, or taxation. Some consider family law a ‘marginal’ course rather than part of the ‘core’ curriculum." (quoting WALTER O. WEYRAUCH ET AL., CASES AND MATERIALS ON FAMILY LAW: LEGAL CONCEPTS AND CHANGING HUMAN RELATIONSHIPS 1 (1994)))); id. ("‘Family law is . . . ‘underneath’ other areas of the law. Its low status within the profession is well-known.’" (quoting Martha Minow, “Forming Underneath Everything that Grows:” Toward a History of Family Law, 1985 Wis. L.
because it effectively determines the parameters of any family law debate.\textsuperscript{23} If the canon is inaccurate, it diverts attention from what is really at stake. By defining the appropriate terms of a family law debate, the family law canon either forces us to confront the legal (and practical) consequences of the words that we use, or allows us to ignore these legal and practical consequences.\textsuperscript{24}

If the stakes are so high, why have so few directly and critically explored the family law canon? Canons are not often challenged, in part, because they operate at the level of “common sense, powerful enough, that [their] tenets are taken to require no reappraisal.”\textsuperscript{25} The virtual absence of discussion about the canon of family law speaks volumes about its power.\textsuperscript{26}

Professor Hasday argues that “the family law canon misdescribes both the content of family law and its governing principles.”\textsuperscript{27} In particular, Hasday challenges three of the most prominent themes of the family law canon.\textsuperscript{28} First, she explores the relationship between family law and social inequality and argues that the canon overstates the changes that have occurred over time and understates the distinctions that family law currently makes between families based on social class.\textsuperscript{29} This construction of the family law canon, according to Hasday, has allowed legal authorities to argue that family law does not perpetuate the oppressed status of historically oppressed people.\textsuperscript{30} Hasday then looks at the relationship between family law and federalism, and disputes the canon’s contention that family law has always been a local matter.\textsuperscript{31} This particular aspect of the family law canon has allowed legal scholars and other authorities to oppose certain attempts at federal family law on the basis that federal family law is, by definition, inappropriate and unprecedented. Lastly, Hasday explores the relationship between family law and welfare law and refutes the canon’s contention that family law and welfare law are wholly separate categories.\textsuperscript{32} Historically, Hasday explains, this construction of the family law canon has allowed

\textsuperscript{23} Hasday, \textit{The Canon of Family Law}, supra note 13, at 836.

\textsuperscript{24} See RICHARD A. POSNER, \textit{OVERCOMING LAW} 178 (1996) (arguing that analogic reasoning “is not reasoning but is at best preparatory to reasoning”).

\textsuperscript{25} Hasday, \textit{The Canon of Family Law}, supra note 13, at 827.

\textsuperscript{26} Inertia may also be at work here. Casebooks are typically republished for many years with only incremental “news” oriented amendments.

\textsuperscript{27} Hasday, \textit{The Canon of Family Law}, supra note 13, at 830.

\textsuperscript{28} Id.

\textsuperscript{29} Id. at 830, 833–71.

\textsuperscript{30} Id.

\textsuperscript{31} Id. at 831–32, 870–93.

\textsuperscript{32} Id. at 832, 892–98.
authorities to avoid having to justify why family law applies very different rules to the regulation of rights and responsibilities of poor families than it does to other families.\textsuperscript{33}

This Article builds on Professor Hasday's work and explores another theme that the family law canon misrepresents: the relationship between family law and race. While the family law canon includes the right to privacy, marriage, nonmarital families, adoption, domestic violence, divorce, division of marital property, alimony, child support, and child custody, it typically does not include a discussion of these topics in a way that accurately describes the relationship between family law and race. In other words, the way that we teach family law gives the appearance that family law is post-racial—an appearance that should change to reflect reality. Furthermore, and particularly important for the purposes of this Article, the family law canon fails to include child welfare and welfare law, and the relevance of these areas of the law for African-American families.\textsuperscript{34} Child welfare and welfare law are not generally taught within a standard family law course, notwithstanding the fact that they are unambiguously family law in that they regulate "the creation and dissolution of legally recognized relationships, and/or [determine] the legal rights and responsibilities of family members."\textsuperscript{35}

While Hasday identifies race and sexual orientation as areas in which the canon of family law understates the distinction that it still makes between families,\textsuperscript{36} this Article builds on Hasday's work by exploring the canon of family law in depth as it relates to African-Americans.\textsuperscript{37} As a general matter, this Article suggests that the family law canon has allowed legal authorities to avoid explaining why family law may employ different policies to regulate

\textsuperscript{33} Hasday, \textit{The Canon of Family Law}, supra note 13, at 832, 892–98.
\textsuperscript{34} See infra Part II.
\textsuperscript{35} \textit{Id.} at 871.
\textsuperscript{36} \textit{Id.} at 854–61.
\textsuperscript{37} When I refer to blacks, African-Americans, or black-Americans, I am referring both to a physical and sociocultural concept of race. Practically speaking, I am referring to those whom others would identify as African-American and to those who would self-identify as African-American. For a further discussion of the concept of race, see Shani M. King, \textit{Race, Identity, and Professional Responsibility: Why Legal Services Organizations Need African American Staff Attorneys}, \textit{18 CORNELL J.L. \\& PUB. POL’Y} 1, 3 n.2 (2008) (discussing the evolution of race as a sociocultural concept). For this Article, I have limited my explicit discussion to African-Americans and family law, but it is important to note that the way that Latinos, Native Americans, and Asians interface with family law is also affected by an individual's racial and ethnic background. For an analysis of the extent to which society and law work together to maintain heterosexual and monoracial couples as the normative center, see Angela Onwuachi-Willig \\& Jacob Willig-Onwuachi, \textit{A House Divided: The Invisibility of the Multiracial Family}, \textit{44 HARV. C.R.-C.L. L. REV.} 231, 234 (2009).
families based on their race. In other words, the family law canon has lulled
the legal community into believing that race is no longer a factor in the
creation or dissolution of legally recognized relationships and no longer
determines the legal rights of family members. As this Article explains
below, a more accurate account of the relationship between family law and
race suggests that we are decidedly not a post-racial family law society.38

B. The Family Law Canon Is Colorblind

1. Loving and Palmore

Loving v. Virginia,39 statutes governing interracial adoption, and
Palmore v. Sidoti40 are the canonical examples that legal authorities and
scholars constantly employ to support the notion that family law no longer
draws racial distinctions. After the Civil War, statutes prohibiting interracial
marriage (commonly referred to as antimiscegenation41 laws) became
widespread.42 Then, in 1967 the Supreme Court held in Loving v. Virginia
that antimiscegenation laws violate the Fourteenth Amendment to the United
States Constitution.43 Now, “legal scholars consistently identify Loving as
one of the most crucial decisions in family law, illuminating family law’s
nature and core values.”44 Eskridge asserts that “‘[n]o respectable scholar
disputes the correctness of Loving,’”45 and Randall Kennedy asserts that
“‘any constitutional theory that cannot support [Loving’s] result is a
constitutional theory that should not be supported.’”46

The hallowed place of Loving in the work of legal scholars and legal
authorities is significant because scholars use the example of interracial

38 See Haney López, Post-Racial Racism, supra note 1, at 1023–24 (considering
mass imprisonment from a racial stratification theory and arguing for a renewed focus on
“post-racial” racism).
41 For a discussion on the origin of the term “miscegenation,” see Jill Elaine Hasday,
42 See id. at 1345; Hasday, The Canon of Family Law, supra note 13, at 854; Emily
Field Van Tassel, “Only the Law Would Rule Between Us”: Antimiscegenation, the
Moral Economy of Dependency, and the Debate over Rights After the Civil War, 70 CHI.-
43 Loving, 388 U.S. at 2.
45 Id. at 855 (quoting WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX
MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 109 (1996)).
46 Id. (quoting RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE,
IDENTITY, AND ADOPTION 278 (2003)).
marriage generally, and Loving specifically, to show that family law no longer draws distinctions between families based on race. Some scholars use Loving as an example of the way in which the state is prohibited from "insist[ing] that race count as a factor in the ordering of people's most private lives," and as furthering the idea that "all invidious governmental racial classifications would be subjected to strict scrutiny and almost always struck down." Similarly, scholars observe that "[i]n the post Loving regime, at least in terms of race... no one has to worry about governments... thwarting desires to marry," and that pursuant to Loving, "the boundaries of...
race and place no longer have any bearing on the law of marriage between a man of one race and a woman of another."

The notion that race is no longer a permissible basis for the differential treatment of families is also reflected in the work of legal scholars who write on interracial adoption. Historically, many states prohibited interracial adoption by statute, or effectively prohibited it in practice, but this changed after the civil rights and social justice movements of the 1960s and 1970s. Today, scholarly commentary regarding the use of race in the adoption context generally focuses on how Loving and the Multiethnic Placement Act (MEPA), as amended in 1996, prohibit the consideration of race in the context of adoption. The MEPA prohibits any agency that receives federal funds from denying to any individual the opportunity to become an adoptive or foster parent based on the race, color, or national origin of the individual or child involved, and from denying or delaying the placement of a child for adoption into foster care on the basis of the race, color, or national origin of the child or the adoptive or foster parent. While prior to 1996, MEPA provided that states could consider “the cultural, ethnic, or racial background of the child and the capacity of the prospective foster or adoptive parents to meet the needs of a child of this background as one of a number of factors used to determine the best interests of the child,” these provisions have since


52 Hasday, The Canon of Family Law, supra note 13, at 857.

53 See Barholet, supra note 48, at 1176–78 (discussing the obstacles to interracial adoption by law and custom and the subsequent increase in interracial adoptions in part due to the “integrationist ideology” of the civil rights movement); Meyer, supra note 13, at 188 (explaining that laws and social norms proscribed interracial adoptions until the civil rights movement sparked interest in adoption across racial lines); Twila L. Perry, Transracial Adoption and Gentrification: An Essay on Race, Power, Family and Community, 26 B.C. THIRD WORLD L.J. 25, 28 (2006) (noting a substantial increase in interracial adoptions in the 1960s and early 1970s and citing as a reason “a growing social consciousness about race that emerged from the civil rights movement”).


FAMILY LAW CANON

587

been repealed. Thus, scholars stress that the “MEPA now not only prohibits race matching, but also no longer expressly allows agencies to consider the race, color or national origin of the adoptive parents or child as a factor in the placement decision.” Similarly, scholars suggest that adoption placements “must be colorblind,” and that “federal[ly] funded agencies are not allowed to use race at all in making foster care and adoptive placement decisions.”

Scholars also use Loving to support the argument that adoption must be colorblind. Hasday observes that “[i]n explaining their opposition to prohibitions on interracial adoption, scholars repeatedly observe that Loving has virtually eliminated legal distinctions between families based on racial composition, and that the remaining policies and practices disfavoring interracial adoption are the last vestiges of an old issue.” Scholars argue that Loving “deprived the state of authority over the perpetuation of racial separation by means of its legitimating function over marriage,” and suggest that Loving precludes denying adoptions or placement decisions on the basis of race and established a fundamental right to marry and to form a family regardless of race.

The notion of forming a family regardless of race was also addressed by the Court in Palmore v. Sidoti, which held that race could not be used as the sole factor in making child custody determinations. Many commentators have cited Palmore as an example of race not being a permissible factor in child custody determinations because the state is


58 Id.

59 Elizabeth Bartholet, Correspondence, Private Race Preferences in Family Formation, 107 YALE L.J. 2351, 2354 n.19 (1998); see also KAREN SPAR, CONG. RESEARCH SERV., ADOPTION: INTERETHNIC PLACEMENT LEGISLATION IN THE 104TH CONGRESS, at CRS-3 (1996).

60 Hasday, The Canon of Family Law, supra note 13, at 858.


65 Id. at 434.
prohibited from "insist[ing] that race count as a factor in the ordering of people's most private lives." In essence, the family law canon would have us believe that the law no longer treats African-American families differently than it does white families. But the canon is wrong; family law dictates very different consequences for African-American families than it does for others. One of the most critical differences is that African-American families do not benefit to the same extent as white families from the autonomous family unit, which holds a hallowed place in the canon of family law.

2. The Canon's Autonomous Family Unit

While family law was once governed by rules that gave black families virtually no control over their family composition, the story now told by legal scholars and legal authorities is that all families are "organic, autonomous legal entit[ies]." In other words, the story is that all families, including black families, are able to organize themselves as they see fit without the interference of the state.

Courts have certainly shaped the "autonomous family unit" story. In the seminal case of *Prince v. Massachusetts*, the Supreme Court found that there is a "private realm of family life which the state cannot enter." It is

66 Bartholet, supra note 48, at 1227 (emphasis omitted); see also Chip Chiles, *A Hand to Rock the Cradle: Transracial Adoption, the Multiethnic Placement Act, and a Proposal for the Arkansas General Assembly*, 49 ARK. L. REV. 501, 515–16 (1996) ("*Palmore v. Sidoti* is widely acknowledged as the Court's most direct statement regarding the use of race in child-placement decisions," noting that the Court found that the use of race violated the Equal Protection clause); Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 61 (1994) (noting that *Palmore* enforced a "collective's constitutional imperative for racial equality").


69 *Id.* at 166. While beyond the scope of this Article, it is interesting to note that the right to family is also protected by a number of international conventions. Often, the right to family and the right to privacy are intertwined, with the ultimate purpose of these instruments being the protection of the family unit, or the protection of the family unit from arbitrary interference. Article 12 of the Universal Declaration of Human Rights provides a good example: "No one shall be subjected to arbitrary interference with his/her privacy, family, home or correspondence, nor attacks upon his/her honour and reputation. Everyone has the right to the protection of the law against such interference or attacks." Universal Declaration of Human Rights, art. 12, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at 73–74 (Dec. 10, 1948). Article 17 of the International Covenant on Civil and Political Rights provides similar privacy-laden worded protection for the family unit. International Covenant on Civil and Political Rights, art. 17(1)–(2), Dec. 16, 1966, 999 U.N.T.S. 171.
this notion of an inviolable family that has given rise to separate but interrelated liberty interests that support the notion of an autonomous family unit that is largely protected from state interference. The Court has, in theory, protected the right to "establish a home and bring up children" and the "freedom of personal choice in matters of marriage and family life," and established a liberty interest in maintaining the integrity of a "recognized family unit," such as a parent-child relationship.

Similarly, the Court has announced that the family unit has the substantive right to maintain its integrity, explaining that it is necessary to "protect[] the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition," and that "[i]t is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." There does not appear to be a more protected and cherished social institution than the family, as the Supreme Court has told us that the family is our society's "most fundamental ... institution." The family's inviolable place in society "stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children." Thus, the Court has repeatedly recognized that matters involving family life are private and beyond the reach of undue state interference, ostensibly regardless of a family's racial composition.

Similarly, legal scholars describe the protected familial sphere as a "fundamental right to form a legally sanctioned family bond and the liberty to be free of undue state interference and discrimination in forging one's

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72 Lehr v. Robertson, 463 U.S. 248, 258 (1983). This notion began to surface much earlier, even in the context of the slave family. For example, in 1801 a Virginia court held that "an equal division of slaves, in number or value, is not always possible, and sometimes improper, when it cannot be exactly done without separating infant children from their mothers, which humanity forbids." Fitzhugh v. Foote, 7 Va. (3 Call) 13, 17 (1801).
75 Id. at 503-04.
most intimate relationships.”79 Legal scholars repeatedly emphasize the law’s default protection of “the integrity of the family,”80 that families have the right to be “free of regulation by the state,”81 and that “no one seriously questions the importance of maintaining the integrity of the nuclear family”82 or the “sanctity of marriage and family.”83 Similarly, courts recognize that “[i]n the United States, most rights and responsibilities for raising children rest with the parents, in accordance with the strong value placed on the sanctity of the family.”84

The notion that there is a stark line between the family and the state has been particularly noteworthy in the context of dependency, in which family law scholars have argued that the notion of “family autonomy” has resulted in too little intervention in families.85 In this context, scholars have argued that “[f]amily autonomy . . . is a pervasive feature of American family law,”86 that “a stark line divides the family from the state,”87 that “family autonomy serves to protect family integrity,”88 that “[a]bsent exigent

79 Woodhouse, supra note 63, at 300.
85 ELIZABETH BARTHOLET, NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE 3, 38, 98–110 (1999) (arguing that there is systemic underintervention by the child welfare system due to a general reluctance to intrude on family autonomy); Judith G. McMullen, Privacy, Family Autonomy, and the Maltreated Child, 75 MARQ. L. REV. 569, 569 (1992) (contending that “[a]ttempts to accommodate family autonomy . . . have significantly compromised the protection of our children”).
87 Id.
88 Id. at 1499.
circumstances, the state leaves parents alone to make their own decisions regarding child rearing," and that family autonomy "safeguards cultural and moral diversity in matters of child rearing, which in turn serves democratic principles." In short, the canon of family law would have us believe that the correct way "to interpret American cases dealing with family autonomy issues is to say that courts will, whenever possible, defer to parental authority and preserve the privacy that has come to be expected by families." Some scholars have indeed resisted the family law canon. For example, Peggy Cooper Davis notes that "[t]he scope of constitutional rights of family autonomy is largely undetermined" and laments that in the case of black families in particular, "[i]n the area of termination of parental rights, courts have not been protective of the family unit." But the canon has not yet been subjected to enough sustained and consistent challenge to alter the notion of an autonomous family unit.

II. THE FAMILY LAW CANON DOES NOT ACCURATELY REFLECT THE REGULATION OF AFRICAN-AMERICAN FAMILIES

The notion of an inviolable family and the increased protection for the family sphere has some foundation indeed. But this story of an "autonomous family unit" that is largely protected from the government does not accurately reflect the regulation of black families. It obscures a reality within family law that is not often discussed in legal scholarship, family law casebooks, or jurisprudence: family law’s failure to provide African-Americans the same degree of autonomy to organize or structure their families as it provides to whites. This reality is sadly ironic because of the central place of the stories of former slaves in the passage of the Thirteenth and Fourteenth Amendments. As Peggy Cooper Davis found, at that time Congress was "deeply affected by the widely publicized accounts of parental separations and fully responsive to the argument that rights of family are

89 Id. (footnote omitted). A leading family law casebook states that "the principle of parental autonomy (the freedom to rear children as parents see fit) has long constrained state intrusion into the family." D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 795 (4th ed. 2010).
90 Huntington, supra note 86, at 1499 (footnote omitted).
91 McMullen, supra note 85, at 581.
92 Peggy C. Davis & Richard G. Dudley, Jr., The Black Family in Modern Slavery, 4 HARV. BLACKLETTER J. 9, 14 (1987).
93 DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 234 (2002); Davis & Dudley, supra note 92, at 14 ("The thirteenth and fourteenth amendments were conceived by men who regarded the deprivation of family rights as a fundamental vice of slavery and the protection of family rights as an essential component of citizenship.").
The stories of family separation and the right of family were central to the Reconstruction Congress and, ironically, contemporary ideas of family autonomy were born out of an effort to eradicate racial oppression. Yet, today African-Americans do not have the same ability to organize their families as do whites. And a post-racial family law canon does not tell this story.

The most poignant evidence that family law is not colorblind is the fact that the autonomous family unit is less of a reality for African-Americans than it is for whites. Indeed, for many African-Americans, the autonomous family unit is largely a myth. The law’s disproportionate intrusion into African-American family life began with the slave codes and continues today through the application of traditional family law rules, such as the best interest standard, and through other systems—such as the social welfare and child welfare systems—that are not traditionally included in the family law canon, but nonetheless should be, as they affect family autonomy and structure.

A. The Myth of the “Autonomous Family Unit” for African-American Families

The canonical story is that during the time of slavery black families were highly regulated because white masters had the right to compose the slave...
family; but that now, however, the disproportionate regulation of black families is long behind us. According to this story, black families are now able to organize their families on an equal basis with other families. This story is reflected in virtually all of the leading family law textbooks, in which the evolution of the right to privacy in the context of the familial unit is routinely discussed in a race-neutral way, bereft of any historical grounding in the context of slavery.\textsuperscript{97} In fact, there is virtually no discussion of slavery at all in the leading family law casebooks, let alone in the context of a discussion of the evolution of the right to privacy, or the “autonomous family unit,” for African-American families.

Despite our lofty platitudes about being a nation of blind justice and equal opportunity, the American legal system has singled out blacks for the most “pernicious treatment” of any group for three centuries, possibly aside from Native Americans.\textsuperscript{98} The legacy of slavery is one of the subtexts of this

\textsuperscript{97} While the major family law casebooks discuss the evolution of the right to privacy in the context of the family, none explore explicitly how that evolution might vary based on race. Similarly, while two major family law casebooks briefly mention the lack of protection provided to African-Americans during the time of slavery, and one includes an excerpt from Professor Peggy Davis, no authors make any connection between a past lack of protections of slave families and a current lack of protections for black families. See, e.g., DOUGLAS E. ABRAMS ET AL., CONTEMPORARY FAMILY LAW 180 (2d ed. 2009) (briefly mentioning in a note that slaves could not legally marry and lacked protected family lives, without further discussing the current lack of protections for African-American families); JUDITH AREEN & MILTON C. REGAN, JR., FAMILY LAW: CASES AND MATERIALS (5th ed. 2006); LESLIE JOAN HARRIS, JUNE CARBONE & LEE E. TEITELBAUM, FAMILY LAW (4th ed. 2010); HARRY D. KRAUSE ET AL., FAMILY LAW: CASES, COMMENTS, AND QUESTIONS (6th ed. 2007); WEISBERG & APPLETON, supra note 89, at 18 (citing and excerpting an article by Professor Peggy Davis for her proposition that \textit{Meyer v. Nebraska} and \textit{Pierce v. Society of Sisters} are based on the antislavery impulses of the Fourteenth Amendment and as such recognize and embrace the autonomy of all families in contrast to the restrictions on the ability of African-American parents to raise and impart values to their children during slavery); \textit{id.} at 215–16 (providing an excerpt of John Blassingame’s study of slave life in which he discusses the regulation of slave families, but making no connection to the contemporary failure to protect and preserve African-American families).

\textsuperscript{98} The term American is used in this Article to refer to the United States of America. It is used because this term has achieved almost universal acceptance as a reference to the United States of America. The author pauses to acknowledge that its use is inaccurate because it ignores the fact that there are many other countries in North and South America.

Article and includes a color consciousness that is as intransient as it is complex. To begin the discussion of the myth of the "autonomous family..."
unit,” and how this myth underscores an often ignored relationship between family law and racial inequality, this Article first discusses the law regulating the black family during the time of slavery.

It is necessary to start here because it is the neglect of slavery in family law discussions that obscures the impact of its legacy on the country’s collective consciousness, and its impact on the consciousness of individual Americans. We have much to learn from this legacy, which reflects an “autonomous family unit” that is less autonomous for blacks than for whites; like the pre-civil war caste system, reflects both practical and logistical roadblocks to black family formation; asserts the incompetence and inherent unfitness of black parents and, in particular, black mothers; and reflects stories of family separation and the thwarting of attempts for black families to remain together.

1. The Roots of Regulation: Black Families as Creatures of the State

From the inception of the slave trade in 1619, the law governing slaves sought to strike a seemingly untenable balance. The law needed to accommodate the notion that slaves were property, while at the same time accommodate the principles of equality and human rights that were to be the bedrock principles of this Nation. While England’s common law system provided some guidance in striking this balance, the American legal system, which was still in its infancy, was left to develop its precedents and governing principles largely on its own.

race is an issue that I believe this nation cannot afford to ignore right now. . . . The fact is that the comments that have been made and the issues that have surfaced over the last few weeks reflect the complexities of race in this country that we’ve never really worked through—a part of our union that we have yet to perfect.”).

101 See HIGGINBOTHAM, IN THE MATTER OF COLOR, supra note 99, at 58–60 (noting the “exclusion of blacks from any basic concept of human rights under [colonial Virginia] law” even as Virginia statesmen created the noteworthy Virginia Bill of Rights that declared the equality, freedom, and intrinsic rights of all men); A. Leon Higginbotham, Jr. & Greer C. Bosworth, “Rather than the Free”: Free Blacks in Colonial and Antebellum Virginia, 26 HARV. C.R.-C.L. L. REV. 17, 20–21 (1991) (observing that Virginians “enacted repressive legislation to protect their property interests in slaves” despite their leaders’ worries about “the contradiction between their support for the ideals of freedom and equality in the Declaration of Independence and the Constitution and their opposition to those ideals for free blacks and slaves”).

102 See HIGGINBOTHAM, IN THE MATTER OF COLOR, supra note 99, at 19–60 (discussing Virginia’s pioneering role in developing slavery laws that would be emulated by other colonies); THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619–1860, at 42–43 (1996) (citing the English common law of property as a source of the colonial law of slavery); A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, Property First, Humanity Second: The Recognition of the Slave’s Human Nature in Virginia Civil Law,
During the nineteenth century, the American legal system developed, and the law specific to the regulation of the family was born.\textsuperscript{103} For the first time, the rights and obligations governing American family life were enshrined in law. For white settlers, the “proper” roles of husband and wife were now reflected in the law, and legal frameworks established rules for entering marriage and divorce.\textsuperscript{104} The law that eventually emerged defined “the family” as “an organic, autonomous legal entity,”\textsuperscript{105} and this definition is reflected in the writings of legal authorities and scholars to this day.

The newly emerging law governed only the lives of the families who were not slaves. Slave families were not autonomous legal entities.\textsuperscript{106} On the contrary, the law governing slaves specified that slaves were subject, first, to the will of their masters and second, to the will of all whites.\textsuperscript{107} Despite blood relationships, love, or caregiving formations, slaves could lawfully be sent to another plantation, another town, or another state.\textsuperscript{108} Thus, the notion of permanency for slave families was strikingly nonexistent, as slaves were seen as individual items of property rather than husbands, wives, fathers, or otherwise connected to other slaves as a family.\textsuperscript{109} The most fundamental and sacred life events—marriage, childbirth, and procreation—were manipulated in the interests of profit for the slave owner.\textsuperscript{110} While slaves did indeed form families, they did not have the blessing, or the protection, of law.\textsuperscript{111} And while black men and women did have long-term relationships

\textsuperscript{50} OHIO ST. L.J. 511, 513 (1989) (noting that the common law of property “provided a starting point for the law of slavery [in Virginia]”).

\textsuperscript{103} For a thorough examination of the development of the American legal system in the nineteenth century, see generally LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW (2d ed. 1985), and for a thorough examination of the development of family law during this time, see generally MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA (1985).

\textsuperscript{104} Burnham, supra note 67, at 189.

\textsuperscript{105} Id.

\textsuperscript{106} Id.

\textsuperscript{107} JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 546 (2d ed. 2001); see also GEORGE M. STROUD, A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA 154 (1856).

\textsuperscript{108} Burnham, supra note 67, at 189.

\textsuperscript{109} Peters, supra note 107, at 546 (“Because they were not considered persons, slaves had no legal rights.”); Burnham, supra note 67, at 189.

\textsuperscript{110} Peters, supra note 107, at 546; Burnham, supra note 67, at 189; see also FRANKLIN & MOSS, supra note 99, at 127–28 (discussing how the institution of slavery subjugated slave families). Jean Koh Peters explains that during this time, “all sexual relations between slaves were left to be regulated by their owners.” Peters, supra note 107, at 546.

\textsuperscript{111} Burnham, supra note 67, at 189.
during this time, they were never considered husband and wife under the law; consequently, their children were considered "illegitimate," having been born to a couple that was not legally recognized as married.\textsuperscript{112}

The lack of protection for the slave family was reflected throughout the law governing slaves.\textsuperscript{113} For example, the law protected the ability of masters to sell their slaves away from their families\textsuperscript{114} and even permitted the sale into slavery—irrespective of where their family may be—of any free blacks who were found without proof that they were free.\textsuperscript{115} Similarly, the marriage relationship between slaves was completely subject to the whim of the master, as "the right of the owner to separate the parties was a corollary of his property right."\textsuperscript{116} While selling married slaves away from one another

\begin{itemize}
\item \textsuperscript{112} \textit{Peters, supra} note 107, at 546.
\item \textsuperscript{113} \textit{Herbert G. Gutman, The Black Family in Slavery and Freedom, 1750–1925}, at 9 (1976); \textit{Peters, supra} note 107, at 546. Jean Koh Peters observes, "Thus as a bottom line, no slave relationships of any kind were ever acknowledged to be legal." \textit{Peters, supra} note 107, at 546.
\item \textsuperscript{114} In \textit{Justice and Jurisprudence and the Black Lawyer}, J. Clay Smith included a list of abridged selections from the American Slave Code (which he gathered from the abolitionist newspaper \textit{The Anti-Slavery Bugle}) that illustrate masters' dominion over their slaves. J. Clay Smith, Jr., \textit{Justice and Jurisprudence and the Black Lawyer}, 69 NOTRE DAME L. REV. 1077, app. at 1105–12 (1994). For example, Smith found that the Louisiana Civil Code provided that, "A Slave is one who is in the power of his master, to whom he belongs. The master may sell him, dispose of his person, his industry and his labor." \textit{Id.} app. at 1105. Similarly, he found that South Carolina \textit{Brevard's Digest} provided: "Slaves shall be deemed sold, taken, reputed, and adjudged in law to be chattels personal in the hands of their owners, and possessors, and their executors administrators, and assigns, to all intents, constructions and purposes whatever." \textit{Id.} app. at 1109.
\item \textsuperscript{115} For example, Smith found that the Mississippi Revised Code provided that, "Every negro or mulatto found in the State, not able to show himself entitled to freedom, may be sold as a slave," \textit{Id.} app. at 1108; the Georgia \textit{Prince Digest. Act Dec. 19, 1818} provided that, "Penalty for any free person of colour (except regularly articled seamen) coming into the state, a fine of one hundred dollars, and on failure of payment to be sold as a slave," \textit{Id.;} the North Carolina \textit{Act of 1799} provided that, "Any slave set free, except for menitious services, to be adjudged of by the county court, may be seized by any free holder, committed to jail, and sold to the highest bidder," \textit{Id.} app. at 1110; the Virginia Revised Code provided, "Any emancipated slave remaining in the state more than a year, may be sold by the overseer of the poor, for the benefit of the literary fund!" \textit{Id.} app. at 1111; and the Slave Code of the District of Columbia provided that, "Coloured persons residing in the city, who cannot prove their title to freedom, shall be imprisoned as absconding slaves," \textit{Id.} app. at 1112.
\item \textsuperscript{116} \textit{Harrison Anthony Trexler, Slavery in Missouri: 1804–1865}, at 87 (1914), \textit{in 32 Johns Hopkins University Studies in Historical and Political Science} 183 (1914).
\end{itemize}
was widely known to break the marriage bond, slaves were routinely separated at their owners' will. Thus, as a practical matter, "the pre-Civil War American caste system set up numerous practical and logistical roadblocks to conventional family relations such that slaves could maintain a de facto family life only with great difficulty."\footnote{In Slavery in Missouri, a comprehensive treatise on the rights of slaves in Missouri, Harrison Anthony Trexler highlights the anti-slavery movement's criticism of the right of owners to separate married slaves. Id.}

Slave narratives offer a particularly vivid window into the lack of control that slaves had over their relationships. These narratives can be particularly helpful in putting the lives of slaves in a fuller context, and they reveal nuances of slave life that are often not found in case law, as there was no legal remedy for most of the conditions about which slaves would otherwise have sought legal redress.\footnote{PETERS, supra note 107, at 546–47.} The narratives reflect both fear of being separated from family, as well as a sense of helplessness from being unable to stop such separation.\footnote{Higginbotham, Race, Sex, Education, supra note 99, at 688.} A former slave from Missouri, Malinda Discus, recalled:

"I remember that my mother used to gather us children around her and pray that we would not be separated. She was separated from her parents when eleven years old and brought to Missouri from Tennessee. She never saw any of her folks again and the last words her mother said to her was: 'Daughter, if I never see you again any more on earth, come to heaven and I will see you there.'"\footnote{See id. at 688–89.}

Eventually, Malinda's husband was sold.\footnote{Id. (quoting Interview with Malinda Discus (Feb. 1, 1938), in THE AMERICAN SLAVE: A COMPOSITE AUTOBIOGRAPHY 168 (George P. Rawick et al. eds., 1977) (hereinafter AMERICAN SLAVE)).} After being sold, he was asked to what extent he had been able to see his family. He responded: "Yes Suh, sometimes I did. I seen my brothers and sisters but they had different names. Then I heard my Pappy had died. I don't remember him. My Mammy was sold down South and I never seen her again 'til after the war was..."
over.” The stories of family separation and the lack of any protection for slave families are pervasive throughout slave narratives.

The status of family for blacks during slavery was summarized by one family law scholar:

Thus this system of family law can be summarized in painfully simple terms. The law not only did not recognize black families, but it also actively worked to prevent the formation of black families until the Civil War. An entire segment of American society lived in a system of family law that actively thwarted their attempts to live together in conventional family households.

Black families continued to suffer forced separation through the period that is commonly referred to in American history as “Reconstruction” and its backlash. One of the central aims of Reconstruction was to foster the so-called “new habits of social discipline in the freedmen.” One of the elements of this strategy was to enact “laws that permitted, or in some states required, local officials to remove a child from the home of an African American family when the child’s parents did not have the means to support the child.” While blacks were no longer subject to the absolute will of their owners during this time, African-Americans often had little control over the composition or structure of their own families, frequently being separated from their children if they were poor.

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124 Id. (quoting Interview with Mark Discus (Feb. 2, 1938), in AMERICAN SLAVE, supra note 122, at 172).
125 Id. Another example is that of Charles Johnson of Vernon County, Missouri: “‘Yes Ma’am, I was a born slave. My Master’s name was Caleb Goodlow. My Mistress, Mrs. Goodlow she cared for me and raised me from a little fella.’ ‘Parents?’ he replied. ‘I don’t know nothin’ bout no parents; can’t remember ever seein’ em.”’ Id. at 689 n.72 (quoting Interview with Charles Johnson (Sept. 8, 1937), in AMERICAN SLAVE, supra note 122, at 200).
126 PETERS, supra note 107, at 548; see DAVIS, supra note 94, at 30, 90–91 (discussing the prohibition of legally binding marriages during slavery and the disruption of bonds between slave partners and between slave parents and children); ALEXANDER TSESIs, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY 122 (2004) (noting that slaves experienced “great obstacles in maintaining stable family relationships”).
128 Id. at 1549.
129 Id. at 1550.
130 See ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION: 1863–1877, at 201 (1988) (explaining that the poverty of former slaves was used as justification for seizing black children and binding them out as unpaid laborers to former slaveowners and other white employers); GUTMAN, supra note 113, at 402–12 (discussing
While the passage of the Thirteenth and Fourteenth Amendments caused a number of blacks to have their marriages legally recognized, "black codes" attempted to reestablish economic and social control over a black population that, in the not-so-distant past, had been enslaved. The black codes were comprehensive legal schemes enacted to regulate the freedom of blacks, and they often included provisions that were hostile to black family formation, such as euphemistically titled "apprenticeship laws" that allowed "judges to bind black orphans and poor children, who were often black, to white employers." As they have throughout history, blacks fought to maintain family relationships notwithstanding these laws; they were sometimes able to take back their children, and were sometimes able to take their cases to court. Professor Dorothy Roberts has observed that once, "[t]hree hundred Black citizens sent a petition to President Andrew Johnson charging that '[t]he homes [were] invaded and [their] little ones seized at the family fireside, and forcibly bound to masters who [were] by law expressly released from any obligation to educate them in secular or religious knowledge."

Scholars have also observed the oppressive nature of these laws, recognizing that they were just "a slight extension of anti-bellum [sic] laws requiring all blacks over the age of twelve to have a white guardian." While in some states the black codes never ultimately became law, southern courts disproportionately enforced apprenticeship statutes. The theory behind apprenticeship statutes, at least in part, was that black parents were incompetent because they had not acted as parents during slavery, as the...
master could act in their place and subject their children to discipline.\textsuperscript{[138]} This theme is reflected in laws governing black families passed during the War on Poverty, as will be discussed below, and continuing until the present day.\textsuperscript{[139]}

2. The Present-Day Regulation of Black Families

There are many ways to tell the story of the current regulation of black families. This section begins by telling a story of disproportionate impact on African-American families, showing the impact of the child welfare and welfare systems on black families, in part, by virtue of their disproportionate representation in these systems. Next a story is told of intentional discrimination—both in the passage and implementation of the law—against African-American families. In other words, the law intentionally discriminates against African-American families to the extent that the poor were reconceptualized as undeserving and black.\textsuperscript{[140]} While some scholars, such as Dorothy Roberts, have told these stories, what is particularly important to consider for the purposes of this Article is that these stories are largely absent from the family law canon.


\textsuperscript{139} Roberts, supra note 93, at 235; see also Davis & Dudley, supra note 92, at 10–15 (using case studies to explore contemporary manifestations of the reliance on ostensibly pre-Fourteenth Amendment cultural, class, and racial blinders by child welfare professionals and the implications for black family life). That the legacy of slavery is still with us has been recognized by political theorist Judith Shklar, who has insightfully recognized how its neglect in historical accounts has obscured the impact of its legacy on this country’s collective consciousness, and indeed, on the consciousness of individual Americans. Judith N. Shklar, American Citizenship: The Quest for Inclusion 22–23 (1991); see also Ira Katznelson, When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America 51–52 (2005).

\textsuperscript{140} See Kenneth J. Neubeck & Noel A. Cazenave, Welfare Racism: Playing the Race Card Against America’s Poor 184–85 (2001) (citing research showing that states with the most restrictive welfare eligibility requirements were the mostly likely to have disproportionately black welfare populations); Lori Klein, Doing What’s Right: Providing Culturally Competent Reunification Services, 12 Berkeley Women’s L.J. 20, 29 (1997) (concluding that “[f]amilies of color are treated differently than white families, and to their disadvantage, at every step of the child dependency process”).}
While this Article discusses disproportionate impact and discriminatory intent separately for analytical simplicity (and because this is how our courts have bifurcated our conversation about race\(^{141}\)), it is important to consider, when reading the first section below, that this is a story about race, as opposed to a story about class per se\(^{142}\). While the child welfare and welfare systems disproportionately impact blacks because they are disproportionately poor, these systems are not otherwise racially neutral. Or, put another way, in this first section, the story is one in which these systems infringe on black family formation because they are poor and because they are black. In this first section, we can see class and race working together to contribute to a less autonomous family unit for African-American families; the discussion is about African-Americans “not only as an oppressed racial minority in a white society but as poor people in an affluent one.”\(^ {143}\) The next section of the Article tells a story in which the laws infringe on black families because they are black.


Although child welfare laws are not traditionally thought of as “family law,” they “regulate[] the creation and dissolution of legally recognized family relationships, and/or determine[] the legal rights and responsibilities of family members.”\(^ {144}\) And the child welfare system is one component of


\(^{142}\) While there is a story to tell about class, as family law does provide different rules to regulate poor families, this story has been told by others and I need not repeat it here. See Hasday, The Canon of Family Law, supra note 13, at 832, 892–98 (discussing how the exclusion of welfare law from family law has allowed the disparate treatment of poor families).


\(^{144}\) See Hasday, The Canon of Family Law, supra note 13, at 871, 893.
family law that regularly intrudes upon African-American families. This system is so prevalent in African-American communities that community activists and religious leaders have analogized it to the institution of slavery and described welfare agencies as "the new slave master." Dorothy Roberts has found that "[b]lack families are the most likely of any group to be disrupted by child protection authorities," and statistics from around the country support her conclusion. While black children make up

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145 In *Foster Care Reform in New York City: Justice For All*, Sally K. Christie discusses the disparate impact of the foster care system on African-American children and families. Sally K. Christie, *Foster Care Reform in New York City: Justice For All*, 36 COLUM. J.L. & SOC. PROBS. 1, 12–15 (2002). She also examines the Adoption Assistance and Welfare Act of 1980, the Adoption and Safe Families Act of 1997, and New York City’s efforts to reform its foster care system, and claims that “the devaluation of the black family through excessive state intervention sends a message of inferiority that harms black children and the group as a whole.” Id. at 17–18. As an attorney who has represented children in dependency proceedings, and as the son of a social worker who has a life-long dedication to children, I understand the need for intervention in families when children are at risk. But such intervention must take into consideration the destruction that it can cause to viable family systems and the cultural, class, and racial blinders that result in legislation and actions that were designed to and do disproportionately impact African-American families.

146 ROBERTS, supra note 93, at 69 (quoting Rev. Andy Williams, a member of Chicago’s black community). For examples of claims of racial discrimination that have been taken to federal court, see id. at 70.

147 Id. at 8. Probably the most striking illustration of this is the extent to which the representation in the dependency system stands in stark contrast even to the representation of other minorities. Roberts observes:

> Black children even stand out from other minorities. Latino and Asian American children are underrepresented in the national foster care population. Latino children make up only 15 percent of children in foster care although Latino children now outnumber Blacks in the general population. (Under U.S. Bureau of Census standards, children of “Hispanic origin” may be of any race.) Take, for instance, California, a state with a large Latino population. In 1995, 5 percent of all Black children in California were in foster care, compared to less than 1 percent of Latino children. Only 1 percent of children in foster care nationwide are from Asian/Pacific Islander families.

Id. (footnote omitted).

approximately fifteen percent of the children in this country, they make up thirty-one percent of the foster care population. \textsuperscript{149} In larger cities, the racial imbalance is even more apparent. \textsuperscript{150} "The proportion of Black children in out-of-home care in large states such as California, Illinois, New York, and Texas, ranges from three times to more than ten times as high as the proportion of white children." \textsuperscript{151} For example, eighty percent of the foster
care children in Chicago are black. While black children make up only nineteen percent of the child population in Illinois, they represent more than fifty-nine percent of the children in foster care. Similarly, in 2009, there were more than 16,000 children in the foster care system in New York City, and only 647 of these children were white. And in San Francisco in 2007, black children made up approximately sixty percent of the children in the foster care system, whereas black children made up only eleven percent of the population. 

Perhaps most striking is the extent to which the proportion of black families in the dependency system overshadows other minorities. For example, unlike black families, which are vastly and disturbingly overrepresented in the dependency system, Latino and Asian-American families are underrepresented in the dependency system. In fact, Latino

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About 30 percent of the children who live in New York City are white. Yet white children make up only 3 percent of its foster care caseload. Less than 24 percent in foster care are Latino and the vast majority—73 percent—are African American. Clearly, child welfare authorities consider foster care a last resort when it comes to white families.

Id. at 9. Poor black families are even more highly represented within the child welfare system. Id. If you are a poor black child living in Central Harlem, for example, you have a one in ten chance of being in foster care. Id. Another way to think about this is “that in every apartment building in Central Harlem, we could expect to find at least one [black] family whose children are in state custody.” Id.

155 About DCYF (May 15, 2008), A Message from Director Margaret Brodkin, San Francisco Dep’t of Child., Youth & Their Fam., http://www.dcyf.org/content.aspx?id=2934 (last visited July 16, 2010); Data: Stats About SF Families, San Francisco Dep’t of Child., Youth & Their Fam., http://www.dcyf.org/Content.aspx?id=982 (last visited July 16, 2010); see also Roberts, supra note 93, at 9.

156 Roberts, supra note 93, at 8 (observing that “Latino and Asian American children are underrepresented in the national foster care population”); see also Robert B. Hill, Casey-CSSP Alliance for Racial Equity in Child Welfare, An Analysis of Racial/Ethnic Disproportionality and Disparity at the National, State, and
children make up only twenty percent of the children in foster care despite outnumbering black children in the general population. In 2009, nearly three percent of all black children in California were in foster care, compared with less than one percent of Latino children. And only one percent of children in foster care nationwide are Asian-American. The Third National Incidence Study of Child Abuse and Neglect (NIS-3) also found that blacks receive disproportionate attention at all stages in the child protection process, such as referral, investigation, and service allocation.


AFCARS Report, supra note 149, at 2; U.S. Census Bureau, supra note 149 (showing that the population of children under the age of eighteen is 73,941,848, and that the population of Hispanic children under the age of eighteen is 16,092,537, or nearly twenty-two percent of the nation’s child population). Under U.S. Census Bureau standards, children of “Hispanic origin” may be of any race. Roberts, supra note 93, at 8 (footnote omitted).


AFCARS Report, supra note 149, at 2.


With regard to methodology, the definition of “emotional neglect” is broad and vague, and it keeps expanding. See Rich Daly, What’s Behind Soaring Numbers of ‘Emotional Neglect’ Cases?, 45 Psychiatric News 8 (2010), available at
Nat'l Coalition for Child Protection Reform, Child Abuse Is Way Down (Don't Tell Anyone): An Analysis of NIS-4 from the National Coalition for Child Protection Reform 3 (2010), available at http://www.nccpr.org/reports/NIS4.pdf [hereinafter NCCPR]. For example, the definition of emotional neglect under the NIS-4 includes new forms of maltreatment not included in the NIS-3 definition, such as "inadequate structure" and "exposure to maladaptive behaviors and environments." NIS-4, supra, at 3-9; NIS-3, supra note 148, at 2-12, 2-19. Similarly, under the NIS-4 maltreatment definition, "overprotective treatment" and "inappropriately advanced expectations" are standalone forms of maltreatment, whereas under the NIS-3 definition they are merely listed as examples of maltreatment under the miscellaneous category of "other emotional neglect/other inattention to developmental/emotional needs." NIS-4, supra, at 3-9; NIS-3, supra note 148, at 2-19. The two new forms of maltreatment are another example of vague classifications that are vulnerable to racial bias that can influence the sort of judgment calls needed to interpret the classifications. Also, whereas the NIS-3 defines/explains each form of maltreatment constituting the "emotional neglect" category (and other neglect categories), the NIS-4 does not unpack the meaning of any of the forms of maltreatment making up emotional neglect, leaving more discretion to survey workers who may not have the appropriate mental health training to recognize true emotional neglect and are not asked whether the suspected neglect is necessarily a consequence of parental behavior. NIS-4, supra, at 3-9; NIS-3, supra note 148, at 2-19; Daly, supra. Given the expanding definition of emotional neglect, especially considering that studies show that black children are more likely than white children to be reported for suspected child abuse, these increasing findings should be questioned. Yuhwa Eva Lu et al., Race, Ethnicity, and Case Outcomes in Child Protective Services, 26 CHILDREN & YOUTH SERVS. REV. 447, 457 (2004) (finding black children are more likely than white children to be reported for suspected child abuse).

The second reason to question the NIS-4's findings is that the NIS-4 coincides with the economic recession that hit black families the hardest. See NCCPR, supra, at 7; NIS-4 Supplementary Analyses on Race Differences, supra, at 11. This is particularly salient as there is a real danger of the conflations of circumstances related to poverty with per se neglect, given the NIS-4 newly expanded definition of neglect, which includes for the first time, "inadequate structure" and "exposure to maladaptive behaviors and environments."

And, third, the maltreatment with which the NIS-4 deals is mostly neglect related to poverty; the issue is not that black families have higher rates of abuse, neglect, and maltreatment, but rather that the system deals with these poverty-related problems in an especially punitive way.

There are a few additional things to note about the NIS-4. While the NIS-4 reported that black children had higher rates of maltreatment than white children under both the Harm Standard and Endangerment Standard, see NIS-4, supra, at 4-22, 4-27, the racial difference actually reflects smaller decreases in reported maltreatment for black children than the decrease in reported maltreatment of white children. Under the Harm Standard, the rate of physical abuse declined 38% for white children while it declined 15% for black children. Id. at 4-25. Under the Endangerment Standard, rates for physical abuse declined 46% for white children and 15% for black children. Id. at 4-29. The incidence rate for black children likely decreased less because black children are more likely than white children to be reported as physically abused. See Wendy G. Lane et al., Racial Differences in the Evaluation of Pediatric Fractures for Physical Abuse, 288 J. AM. MED.
These wildly disproportionate numbers have led some scholars who have extensively studied the child welfare system to conclude that “Black children . . . are separated from their parents with relative ease.”\footnote{Ass’n 1603, 1603 (2002) (finding that physicians are more likely to report black children with fractures to child protective services as suspected abuse victims even after controlling for likelihood of abuse).}

What these statistics also indicate is that African-American parents lack control over the composition of their own families. A national study of the delivery of child protective services includes a number of particularly sobering findings along

\footnote{It is also important to note that despite reporting a finding of “strong and pervasive” racial differences in the NIS-4, the authors state in the study’s supplementary analyses that “the NIS-4 detected no statistically reliable race-related changes since the NIS-3 in rates of all maltreatment, all neglect, physical neglect or educational neglect, under both definitional standards.” NIS-4 SUPPLEMENTARY ANALYSES ON RACE DIFFERENCES, supra, at 7; see NIS-4, supra, at 9.}
these lines, including the fact that even when African-American children have exactly the same relevant problems as white children, they are more likely to be separated from their families. In relevant part, the report noted the following:

African-American and Hispanic children are still more likely to be placed in foster care than white children when their caretakers are employed; the family is not on AFDC; neighborhood crime and drug problems are absent; families live in small counties; households have fewer than three problems; children have no disabilities, physical or mental health problems; and caretakers do not have a substance abuse problem.

The report concluded that, "[c]ontrolling for each of these situations, African-American children are still more likely to be placed in foster care than white children." Scholars have offered two reasons to explain why the child welfare system disproportionately impacts African-American families: African-Americans are disproportionately poor, and racism continues to permeate

\textsuperscript{162} U.S. DEP’T HEALTH & HUMAN SERVS., CHILDREN’S BUREAU, NATIONAL STUDY OF PROTECTIVE, PREVENTIVE AND REUNIFICATION SERVICES DELIVERED TO CHILDREN AND THEIR FAMILIES, EXECUTIVE SUMMARY (1997), available at http://www.acf.hhs.gov/programs/cb/pubs/97natstudy/execsum.htm [hereinafter NSPPRS]; see ROBERTS, supra note 93, at 17; Mark E. Courtney et al., Race and Child Welfare Services: Past Research and Future Directions, 75 CHILD WELFARE 99, 125 (1996) (finding that black children and families “experience poorer outcomes and are provided fewer services” than white children and families in the child welfare system); Lu et al., supra note 160, at 457 (finding that black children are the most likely to be removed from their homes and least likely to be reunited with their families).

\textsuperscript{163} NSPPRS, supra note 162.

\textsuperscript{164} Id.; see Robert B. Hill, The Role of Race in Foster Care Placements, in RACE MATTERS IN CHILD WELFARE: THE OVERREPRESENTATION OF AFRICAN AMERICAN CHILDREN IN THE SYSTEM 187, 197 (Dennette M. Derezotes et al. eds., 2005) (reanalyzing the NSPPRS data and finding that black children still were more likely than white children to be placed in foster care even after controlling for variables such as abuse allegation, child disability, caregiver substance abuse problems, and Medicaid benefits); Lu et al., supra note 160, at 454–56 (finding that black children were much more likely than white children to be placed in foster care in San Diego even after controlling for gender, age, and reason for referral); Barbara Needell et al., Black Children and Foster Care Placement in California, 25 CHILDREN & YOUTH SERVS. REV. 393, 393 (2003) (finding that black children were more likely than white children to be placed in foster care in California even after controlling for factors such as age, reason for maltreatment, and neighborhood poverty).

\textsuperscript{165} For an analysis of the historical and current connection between the child welfare system and social class, see Garrison, Why Terminate, supra note 148.
the system.\textsuperscript{166} It stands to reason that because the child welfare system was historically designed to address the needs and the problems of poor families,\textsuperscript{167} and because black families are disproportionately represented among the nation’s poor,\textsuperscript{168} it would be reasonable to expect that African-American families are similarly disproportionately represented in the child welfare system.\textsuperscript{169} It is not surprising, therefore, that the dominant explanation of the disproportionate overrepresentation of black children in the child welfare system is one rooted in poverty.\textsuperscript{170} This explanation that is tethered in poverty also makes some sense given the child welfare system’s historical roots in the philosophy of “child saving” that involved saving

\begin{footnotesize}
\textsuperscript{166} See Banks, supra note 1, at 42.

\textsuperscript{167} See Michael Grossberg, Changing Conceptions of Child Welfare in the United States, 1820–1935, in A CENTURY OF JUVENILE JUSTICE 3, 6–7, 10, 21 (Margaret K. Rosenheim et al. eds., 2002) (tracing the development of the child welfare system to English and colonial poor laws); Jane C. Murphy, Legal Images of Motherhood: Conflicting Definitions from Welfare “Reform,” Family, and Criminal Law, 83 CORNELL L. REV. 688, 702 (1998) (“Britain’s Elizabethan Poor Law, which separated the children of the poor from their families, served as a model for early child welfare programs in this country.” (footnote omitted)).

\textsuperscript{168} Andrea Charlow, Race, Poverty, and Neglect, 28 WM. MITCHELL L. REV. 763, 765 (2001).

\textsuperscript{169} ROBERTS, supra note 93, at 44; see CARMEN DE\textsc{N}AVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2008, at 13 (2009), available at http://www.census.gov/prod/2009pubs/p60-236.pdf (showing that in 2008, the poverty rate for blacks was 24.7 percent while the poverty rate for whites was 8.6 percent); Charlow, supra note 168, at 765 (“Given the over-representation of minorities living in poverty, it is not surprising that a disproportionate number of minorities are charged with child maltreatment.”); Andrea J. Sedlak & Dana Schultz, Race Differences in Risk of Maltreatment in the General Child Population, in RACE MATTERS IN CHILD WELFARE: THE OVERREPRESENTATION OF AFRICAN AMERICAN CHILDREN IN THE SYSTEM, supra note 164, at 48 (noting that given that “families of color are more likely to have low incomes, then one would expect children of color to be at a higher risk of abuse and neglect”).

\textsuperscript{170} ROBERTS, supra note 93, at 26; see U.S. GOV’T ACCOUNTABILITY OFFICE, AFRICAN AMERICAN CHILDREN IN FOSTER CARE: ADDITIONAL HHS ASSISTANCE NEEDED TO HELP STATES REDUCE THE PROPORTION IN CARE 17–18 (2007), available at http://www.gao.gov/new.items/d07816.pdf (reporting that in a survey of U.S. states, poverty was the most commonly cited factor to explain the overrepresentation of black children in the child welfare system); see also Naomi Cahn, Race, Poverty, History, Adoption, and Child Abuse: Connections, 36 LAW & SOC’Y REV. 461, 462 (2002) (reviewing DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002)) (arguing that “[c]lass, rather than race, still seems . . . to be one of the dominant motivations for exposing children to the child welfare system”); Charlow, supra note 168, at 775 (attributing the overrepresentation of black children in the child welfare system to poverty).
\end{footnotesize}
children from the ills of poverty, \(^{171}\) including the so-called “orphan trains” in the late nineteenth and early twentieth century.\(^{172}\)

Nonetheless, while one might suspect that poverty is sufficient to explain the disproportionate representation of African-Americans in the system, “the overwhelming weight of the evidence indicates that racial bias is at work.”\(^{173}\) Further evidence of this racial bias is that even when controlling for income by considering black and Latino households that earn less than $15,000, which is the income level that correlates most highly with maltreatment and an income level at which blacks and Latinos are similarly represented, Latino children are still considerably less likely to be involved in the child welfare system.\(^{174}\)

Given the disproportionate representation of African-Americans in the child welfare system, laws that govern this system disproportionately affect African-Americans. One child welfare law that has restricted African-Americans’ choice over the structure and composition of their families is the

\(^{171}\) ROBERTS, supra note 93, at 26; see also Judith Areen, Intervention Between Parent and Child: A Reappraisal of the State’s Role in Child Neglect and Abuse Cases, 63 GEO. L.J. 887, 899 (1975) (“For the poor, state intervention between parent and child was not only permitted but encouraged in order to effectuate a number of public policies, ranging from the provision of relief at minimum cost to the prevention of future crime. For all others, the state would separate children from parents only in the most extreme circumstances, and then only when private parties initiated court action.”); Susan L. Brooks & Dorothy E. Roberts, Social Justice and Family Court Reform, 40 FAM. CT. REV. 453, 453 (2002) (noting that “child saving” is the basis of the child welfare system); Grossberg, supra note 167, at 22–27 (describing the development of the child saving movement in the late nineteenth century).


\(^{174}\) ROBERTS, supra note 93, at 48; see Ann F. Garland et al., Minority Populations in the Child Welfare System: The Visibility Hypothesis Reexamined, 68 AM. J. ORTHOPSYCHIATRY 142, 146 (1998) (finding that although a near equal proportion of blacks and Latinos live below the poverty level in San Diego County, black children are much more likely to be involved in the child welfare system).
Adoption and Safe Families Act (ASFA). This law makes it easier to terminate parental rights in the dependency system. Moreover, ASFA weakens the requirement that child services agencies make "reasonable efforts" to reunify families by providing exceptions to the requirement of providing such efforts, speeding up the time frame for the termination of parental rights, and providing states financial incentives to terminate parental rights in the process of freeing children for adoption. ASFA operates in this manner notwithstanding the reality that children in foster care, who are overwhelmingly African-American, often languish for years without ever being adopted. Moreover, as the norm for child welfare service agencies is


177 ROBERTS, supra note 93, at 109-11. The rush to terminate parental rights in the context of dependency proceedings is a trend that seems to conflict with a general emphasis by children’s advocates on protecting the relationship between parents and children. Garrison suggests that the case of foster children is unique “because, in contrast to the general emphasis on relationship protection that has characterized advocacy on behalf of children, advocates have here argued in favor of faster and easier termination of the parent-child relationship.” Garrison, Parents’ Rights, supra note 161, at 373; see David J. Herring, Inclusion of the Reasonable Efforts Requirement in Termination of Parental Rights Statutes: Punishing the Child for the Failures of the State Child Welfare System, 54 U. PIT. L. REV. 139, 143 (1992) (arguing that the effect of delaying permanency for children by attempting to reunite foster children with their natural parents punishes children); George H. Russ, Through the Eyes of a Child, “Gregory K.”: A Child’s Right to Be Heard, 27 FAM. L.Q. 365, 384-85 (1993) (arguing that it would be in the child’s best interest to have a lower standard of proof when a termination proceeding is brought by the child). On the other hand, some have argued that faster and easier termination proceedings are not necessarily in a child’s best interests. See, e.g., Garrison, Why Terminate, supra note 148, at 447, 449-51 (surveying model acts that would ease the process of the termination of parental rights).

178 Scholars have consistently found that once in foster care, black children are less likely to be reunited with their families than are white or Latino children, and are also less likely to be adopted. See Richard P. Barth, Effects of Age and Race on the Odds of Adoption Versus Remaining in Long-Term Out-of-Home Care, 76 CHILD WELFARE 285, 288 (1997); S. Finch et al., Factors Associated with the Discharge of Children from Foster Care, 22 SOC. WORK RES. & ABSTRACTS 10, 10-18 (1986), cited in Barth, supra, at 286. Notwithstanding what might seem like an intuitive conclusion that once parental rights are terminated a child will then be adopted, Marsha Garrison observes, “since termination does not guarantee placement in a permanent home, looser termination standards alone cannot ensure that children will escape the limbo status of foster care.” Garrison, Why Terminate, supra note 148, at 425. Garrison also observes that “o[nce] a child enters foster care, he has about a 50% chance of remaining there for at least two
to provide inadequate family preservation and reunification services, so-called “concurrent permanency planning,” in which children are placed simultaneously on an adoption track and a reunification track very early in the proceedings, is likely to serve as a “‘fast track’ to adoption” of black children. As two well-known family law scholars have found, “[t]here is currently too much state disruption and supervision of poor minority families. Any innovations in the family court system, then, should [instead] be aimed at minimizing coercive intervention in families and at family preservation.”

Years; the longer he remains in care, the more likely he is to lose contact with his natural parents and to change foster homes.” Id. at 426 (citations omitted); see also AFCARS REPORT, supra note 149, at 1 (the average length of stay for children in foster care in 2008 was approximately twenty-seven months); N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVS., supra note 154 (indicating that the median length of stay in foster care in New York City was approximately two years in 2009); CHILDREN’S DEFENSE FUND & CTR. FOR LAW & SOC. POLICY, CHILD WELFARE IN ILLINOIS 1 (2010), available at http://www.childrensdefense.org/child-research-data-publications/data/state-data-repository/cwfi2010/child-welfare-financing-illinois-2010.pdf (indicating that the average length of foster care stay in Illinois in 2009 was approximately forty-nine months); DANIELSON & LEE, supra note 158, at 9 (stating that the average length of foster care stay for black children in California in 2007 was approximately two years).

See SHIRLEY BETTER, INSTITUTIONAL RACISM: A PRIMER ON THEORY AND STRATEGIES FOR SOCIAL CHANGE 103–04 (2d ed. 2008) (discussing how negative financial incentives undermine the child welfare system’s obligation to strengthen and preserve families); McRoy, supra note 173, at 43 (explaining that the foster care population has increased in part because family preservation services are supported by limited funding while foster care and adoption assistance programs are more generously supported).

ROBERTS, supra note 93, at 111, 149.

Brooks & Roberts, supra note 171, at 455. In Social Justice and Family Court Reform, Brooks and Roberts emphasize that they do not completely oppose government intervention, but rather, that the goal should be to support families, and to intervene on a voluntary, noncoercive basis. Id.; see also Donald N. Duquette, Looking Ahead: A Personal Vision of the Future of Child Welfare Law, 41 U. MICH. J.L. REFORM 317, 333 (2007) (contending that “[t]he best way to improve the child protection legal system . . . is to strengthen the general social support for families, [thereby] protecting more children by voluntary, non-coercive means and diverting large numbers of children who today would enter the child welfare system”); Deborah Paruch, The Orphaning of Underprivileged Children: America’s Failed Child Welfare Law & Policy, 8 J.L. & FAM. STUD. 119, 164 (2006) (arguing that “[i]ntervention should be authorized only to protect children from very specific harms” and that federal and state funding should be reallocated to preventative services supporting family preservation); Dorothy E. Roberts, The Community Dimension of State Child Protection, 34 HOFSTRA L. REV. 23, 36 (2005) (suggesting that child welfare policymakers develop “community-building alternatives to the current reliance on coercive interventions and foster care that are less costly both in monetary and human terms, but that protect children as well”); Jane M. Spinak, Reforming Family Court: Getting It Right Between Rhetoric and Reality, 31 WASH. U.
The current state of the child welfare system leads to the inexorable conclusion that the families of children who enter the child welfare system are not typically strengthened, and, in contrast, the bonds of children with their families are frequently broken. While the canon’s notion of the autonomous family unit suggests that the family unit is practically inviolate for all, the lack of relative control that African-Americans have over their families is eerily reminiscent of the slave codes and Reconstruction, when African-American families had little control over their own composition.

Yet the family law canon fails to reflect this reality. For example, family law casebooks rarely cover the child welfare system, and if they do, they relegate the topic to a few pages, often in the back of the book. Furthermore, the relatively limited discussion that exists on the child welfare system fails to adequately address racial disparities that permeate the system. For

J.L. & POL’Y 11, 18 (2009) (arguing that coercive intervention should be “a last resort” in the effort to assist the disproportionately poor and minority families in family court).

182 ROBERTS, supra note 93, at 17; see BETTER, supra note 179, at 103–04 (arguing that federal subsidies for the child welfare system provide a perverse financial incentive to remove children from their homes instead of strengthening and preserving families); McRoy, supra note 173, at 43 (stating that one reason for the growth of the foster care population is that preventive services are supported by fixed funding, while “[r]eimbursement to states for foster care payments and adoption-assistance programs are open-ended and dependent on the number of children placed in out-of-home care and the cost of their care”).

183 See, e.g., ABRAMS ET AL., supra note 97, at 369–74; AREEN & REGAN, supra note 97, at 1189–1303; HARRIS, CARBONE & TEITELBAUM, supra note 97, at 991, 1003–04, 1008–12; KRAUSE ET AL., supra note 97, at 53–60, 488–524; WEISBERG & APPLETON, supra note 89, at 809–918. Specialized texts for courses on children in the legal system discuss racial disparities in the dependency system more so than traditional family law textbooks. The segregation of these discussions in Child, Parent and State and Children and the Law textbooks underscores the strength and intractability of the family law canon. And even these specialized texts fail to convey the extent of racial bias in the child welfare system. See, e.g., DOUGLAS E. ABRAMS & SARAH H. RAMSEY, CHILDREN AND THE LAW: DOCTRINE, POLICY AND PRACTICE 414–26 (3d ed. 2007) (mostly limiting discussion of racial bias to a brief note about racial disparities in the context of reporting on female substance abusers); SAMUEL M. DAVIS ET AL., CHILDREN IN THE LEGAL SYSTEM: CASES AND MATERIALS 504–693, 694–741 (4th ed. 2009) (discussing child welfare in chapters on child protection and foster care, respectively, but with no discussion of race); LESLIE J. HARRIS & LEE E. TEITELBAUM, CHILDREN, PARENTS, AND THE LAW: PUBLIC AND PRIVATE AUTHORITY IN THE HOME, SCHOOLS, AND JUVENILE COURTS 691–92, 698–702 (2d ed. 2006) (limiting discussion of racial bias in the child welfare system to an excerpt of an article in which the author states that race exacerbates the vulnerability of mothers in the child welfare system, and an excerpt of a Dorothy Roberts article discussing the negative impact of the ASFA on black children and families); ROBERT H. MNOOKIN & D. KELLY WEISBERG, CHILD, FAMILY, AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW 264, 355–59 (6th ed. 2009) (limiting discussion of racial bias in the child welfare system to a brief mention of
example, in *Family Law*, by Harris, Carbone, and Teitelbaum, child welfare is only briefly addressed in the back of the book, and the book notes only that children of color are “disproportionately represented in the foster care system and less likely to be adopted,” without any examination of the reasons for the overrepresentation. Similarly, in *Contemporary Family Law*, by Abrams, Cahn, Ross, and Meyer, there are only six pages in the entire casebook devoted to child welfare, with no discussion of race at all. In *Family Law: Cases and Materials*, by Areen and Regan, child welfare is relegated to the second to last chapter of the book (so it is less likely to be covered), and there is no discussion of the racial disparities that permeate the system save a reference to “cultural bias” on one page. And in *Family Law: Cases, Comments, and Questions*, by Krause, Elrod, Garrison, and Oldham, the discussion of race is limited to one problem that notes the racial disparities in the reporting of prenatal drug and alcohol use in one Florida county.

Instead of engaging in a thorough discussion of the impact of the child welfare system’s impact on African-American families, family law casebooks focus on foster care in the context of adoption—such as the Indian Child Welfare Act (ICWA) and interracial adoption—and frame racial issues around the pros and cons of interracial adoption. For example, in

criticisms that child abuse procedures are racially discriminatory, and an excerpt of a Dorothy Roberts’ article discussing the adverse impact of the ASFA on black families).

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185 See ABRAMS ET AL., supra note 97, at 369–74.

186 AREEN & REGAN, supra note 97, at 1189, 1189–1303.

187 KRAUSE ET AL., supra note 97, at 509; see id. at 53–60, 488–524 (relegating main discussion of child welfare to the last section of the chapter on the rights and obligations of children, parents, and the state).

188 See, e.g., ABRAMS ET AL., supra note 97, at 1099–1103; AREEN & REGAN, supra note 97, at 1359–76; HARRIS, CARBONE & TEITELBAUM, supra note 97, at 992–1011 (discussing the ICWA, a National Association of Black Social Workers (NABSW) position paper, and presenting scholars on both sides of the interracial adoption debate); KRAUSE ET AL., supra note 97, at 361–64. Notably, even when an article discussing the impact of the child welfare system on black families is excerpted in a section on adoption, its curious location in this section (as opposed to the section on child welfare) reflects a family law canon that obscures the connection between child welfare and race. See, e.g., ABRAMS ET AL., supra note 97, at 1100 (discussing the opposing sides of the interracial adoption debate by juxtaposing Ruth-Arlene W. Howe’s article, classifying interracial adoption as cultural genocide, with Randall Kennedy’s article advocating against race-matching); KRAUSE ET AL., supra note 97, at 363 (discussing criticisms of interracial adoption with Cynthia G. Hawkins-Leon’s article discussing the applicability of the ICWA to the African-American community and the disproportionate impact of the foster care system on black children and families as “a form of cultural genocide” (citation omitted)); WEISBERG & APPLETON, supra note 89, at 960–62 (discussing the role
Contemporary Family Law, the discussion of race takes place in the context of foster care and is limited to a discussion of the pros and cons of transracial adoption. In Family Law: Cases and Materials, the discussion of race in the foster care system is discussed in the context of what should be included in the standard for determining a child’s best interest in the context of adoption, and in Family Law: Cases, Comments and Questions, the discussion of race in the foster care system takes place in the context of a discussion of the support for and opposition to race-matching in adoption, including a discussion of the ICWA and critical perspectives on interracial adoption. In short, the family law casebooks are part of the family law canon that fails to accurately and adequately describe the relationship between family law and race.

b. Welfare Law’s Disproportionate Impact on African-American Families

Welfare laws comprise another legal scheme that affects the ability of people who live in poverty to control the composition of their own families. But welfare law is not part of the family law canon. Furthermore, since African-American families disproportionately comprise the number of impoverished families in the United States, welfare law disproportionately impacts African-Americans. Here, again, is an example of race and

that race should play in choosing an adoptive family with an excerpt from Dorothy Roberts’s book discussing interracial adoption and the impact of the child welfare system on black families placed in the section on adoption).

189 See Abrams et al., supra note 97, at 1099–1103 (including a discussion of the ICWA, a NABSW position paper, and presenting scholars on both sides of the interracial adoption debate).

190 See Areen & Regan, supra note 97, at 1359–76 (including a discussion of the ICWA and Twila Perry’s article on transracial adoption).

191 See Krause et al., supra note 97, at 361–64.

192 Although textbooks include some discussion of race and family law, see supra notes 97, 183–84, 186–91, the coverage of race in the context of adoption hardly makes a dent in the extensive relationship between race and family law that is not accurately or adequately covered by the canon. This coverage does not change the inexorable conclusion to be drawn from the currently constructed canon of family law—race has been eliminated as a significant factor in the ordering and operation of U.S. society.


194 For example, recent statistics show that although blacks make up 12.9% of the population, they make up 36% of the welfare population. USA QuickFacts, U.S. Census Bureau, http://quickfacts.census.gov/qfd/states/00000.html (last visited Aug. 16, 2010); U.S. Dep’t Health & Human Servs., Temporary Assistance for Needy Families Program (TANF): Eighth Annual Report to Congress, at x (2009), available at http://www.acf.hhs.gov/programs/ofa/data-
poverty working together. Blacks are disproportionately subject to laws that
govern the poor, and these laws are designed and implemented (in part) to
regulate misguided and discriminatory notions of black families.

In his dissent in *Bowen v. Gilliard*, Justice Brennan recognized welfare
law’s impact on African-American families. In *Bowen*, the Court was
faced with a challenge to a federal statutory scheme that required that a
family’s eligibility for welfare benefits take into account the income of all
parents and siblings living in the same home, including child support
payments. As a result of this statutory scheme, a child who chose to live
with his mother would be forced to relinquish his father’s child support
payment. In other words, this scheme, which the majority opinion upheld
as constitutional, involved a “direct and substantial” intrusion into the

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195 See U.S. DEP’T HEALTH & HUMAN SERVS., supra note 194 (reporting that African-Americans constitute 36% of the families that receive Temporary Assistance for Needy Families (TANF) benefits); see also BETTER, supra note 179, at 92, 94 (“[T]here has been the conscious and unconscious manipulation of [public welfare] policies to reinforce white skin privilege and white supremacy.”); NEUBECK & CAZENAVE, supra note 140, at 184–94 (giving examples of the implementation of racially discriminatory welfare policies in a number of states).


197 Id. at 589 (majority opinion).

198 Id. at 615 (Brennan, J., dissenting).

199 Id. at 610.
lives of many families on welfare. The dissenting justices recognized that eliminating the ability of a father to provide child support could severely affect that child’s well-being and the father’s connection with the child.\textsuperscript{200} The dissent also recognized that this regulation would have a disproportionate effect on African-American families, not only due to the larger percentage of African-American families on welfare, but also because a high percentage of African-American families are headed by one parent.\textsuperscript{201}

Legislative changes to welfare laws that significantly overhauled the system, including the Personal Responsibility and Work Opportunity Reconciliation Act and Temporary Assistance for Needy Families, also disproportionately impact African-American families.\textsuperscript{202} Scholars recognized

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\textsuperscript{200} Id. at 619.

\textsuperscript{201} See id. at 613 n.5. For scholarship discussing how various rules regarding child support and reimbursement of state outlays interact to break families apart, see generally Daniel L. Hatcher, \textit{Child Support Harming Children: Subordinating the Best Interests of Children To the Fiscal Interests of the State}, 42 \textit{Wake Forest L. Rev.} 1029 (2007). Hatcher argues that the governmental policy of seeking reimbursement of welfare costs through child support enforcement often results in increased turmoil between family members when, for example, mothers are forced to repeatedly sue fathers to establish and enforce child support orders, and when fathers are alienated from their children (due to embarrassment or the desire to hide from enforcement efforts) when they cannot make child support payments. Id. at 1081. Hatcher also suggests that mothers may also be alienated from their children under this scheme when children see their mothers suing their fathers in court. \textit{Id.}; Daniel L. Hatcher & Hannah Lieberman, \textit{Breaking the Cycle of Defeat for “Deadbroke” Noncustodial Parents Through Advocacy on Child Support Issues}, 37 \textit{Clearinghouse Rev.} 5, 6 (May-June 2003) (discussing how the current child support system can harm families and explaining how supporting noncustodial parents is an antipoverty policy that benefits families).


Not only are members of these groups already overrepresented among the ranks of the poor, but the government officials responsible for enforcing drug laws focus disproportionate attention on African-American and Hispanic Communities. Although African-Americans make up only 12% of the U.S. population, they constituted 55% of the 280,000 people convicted of felony drug crimes in state court in 1992. Today, almost 90% of those individuals sentenced to state prison for drug possession are African-American or Hispanic. The combination of racial bias in law enforcement and poverty virtually guarantees that the weight of the Gramm
that the new welfare scheme, by requiring individuals on welfare to work without providing additional child care assistance, likely contributed to an increase in African-American children in foster care.\textsuperscript{203}

B. Family Law's Discriminatory Intent

In the earlier discussion of child welfare and social welfare laws, this Article explored how laws that govern poor families disproportionately impact African-Americans. This section further explores how that disproportionate impact is not solely a function of statistics—it is also the case that our policies toward the poor, especially as shaped during the Great Society Era, were distorted to the extent that the poor were reconceptualized as undeserving and black. This distortion was fueled by racist sentiment and is at the core of policy decisions afflicting the (black) poor.\textsuperscript{204} As is discussed below, these policy decisions were reflected both in the passage of laws as well as in their implementation.\textsuperscript{205} Despite its impact on African-

\textit{Id.} (footnotes omitted).

\textsuperscript{203} Roberts argues that welfare reforms are directly responsible for the reduction in impoverished mothers’ ability to retain parental rights and have sharply increased the breakup of African-American families by forcing black children into foster care, and to a lesser extent, into the care of wealthier adoptive parents. ROBERTS, \textit{supra} note 93, at 187–92.

\textsuperscript{204} See Haney López, Post-Racial Racism, \textit{supra} note 1, at 1027–28 (placing racial stratification in context in a way that does not minimize other forms of racism).

\textsuperscript{205} See NEUBECK & CAZENAVE, \textit{supra} note 140, at vii (concluding that the ease with which political elites abolished the primary safety net protecting poverty-stricken mothers and children would have been impossible if politicians, policy analysts, and the mass media had not “spent decades framing and morphing welfare into a . . . ‘black problem’”); Edelman, \textit{supra} note 194, at 389 (discussing how welfare has been used as “a high-profile, racialized political issue” culminating in the passage of the 1996 welfare reform law); Risa E. Kaufman, Bridging the Federalism Gap: Procedural Due Process and Race Discrimination in a Devolved Welfare System, 3 Hastings Race & Poverty L.J. 1, 9 (2005) (finding “growing evidence that this increased discretion given to ground level workers introduces a significant risk of racial bias and discrimination influencing their individual determinations, particularly with regard to sanctioning and access to support services”); Dorothy E. Roberts, Child Welfare and Civil Rights, 2003 U. Ill. L. Rev. 171, 177 (2003) (“The racial disparity in the child welfare system—even if related directly to economic inequality—ultimately results from racial injustice.”); Christina White, Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act, 1 Nw. J.L. & Soc. Pol’y 303, 320–21 (2006) (“The ASFA reveals . . . that Congress places no such value in maintaining the bonds between a black child and her biological parents. Deeply rooted stereotypes about black family dysfunction place no value on the relationship between poor, black parents and their children. . . . These racist
American families, this story has failed to make its way into the family law canon.

Much of the welfare and child welfare law that disproportionately impacts African-American families originated in the 1960s and 1970s during President Johnson's Great Society Era. At that time, the black Civil Rights Movement was at its apex in the United States. Scholars have documented virulent opposition to the War on Poverty because of its association with the Civil Rights Movement of the 1960s. In The Color of Welfare: How Racism Undermined the War on Poverty, Jill Quadagno shows that as the Civil Rights Movement shifted its focus from integration to economic justice, "crucial linkages" developed between the War on Poverty and the Civil Rights Movement such that "[p]rograms targeted to the poor, and especially the black poor, were rapidly subsumed by the civil rights movement." The confluence of the Civil Rights Movement, the War on Poverty, and the use of social programs to effectuate racial justice ultimately increased the backlash against social welfare programs, as they were associated with a controversial civil rights platform that was met with considerable hostility (particularly in the South).

Stereotypes about black family dysfunction are indiscriminately applied and make it difficult to imagine poor, black parents actually caring for their children. With legislation like the ASFA, the child welfare system becomes a misnomer. It focuses on punishing what white America has deemed 'disgraceful parenting' instead of deciding what is actually best for the child."

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206 See ROBERTS, supra note 93, at 16.
208 QUADAGNO, supra note 207, at 28.
209 It is important to remember the historical context of the War on Poverty. Quadagno explains:

The New Deal represented a breakthrough toward a more social democratic, Keynesian welfare state. It also set in motion a great migration of blacks out of the South. The migration undermined the political compromise that had allowed the South to function as a separate nation and forced all Americans to confront the impediments to racial equality that had previously been considered "the southern problem." That confrontation occurred during the 1960s when the civil rights movement demanded that Americans live up to their political ideology and guarantee full democratic rights to all, regardless of race.

Id. at 188–89. In When Affirmative Action Was White, Ira Katznelson documents the political compromises that were made in the design and the administration of the War on Poverty, which ultimately reflected an accommodation of racial oppression. KATZNELSON, supra note 139, at 25–52. This accommodation was made, Katznelson explains, so that the way of life to which the South had been accustomed would not be disrupted, or as Harry Byrd, leader of Virginia's democratic machine, suggested, it would not disrupt the way that the South had dealt with the negro question. Id. at 4, 44. This
At the same time, liberalism came to mean something new. Instead of a universalistic conception that defined liberalism as a synecdoche for “intervention for the common good,” liberalism became associated with governmental intervention to protect the civil rights of African-Americans.210

Nearly every social program—welfare, job training, community action, housing—became more than components of the welfare state that one supported or reviled depending upon whether one favored government intervention (a liberal) or opposed it (a conservative). Rather, because the reconstruction of race relations became inextricably woven into the very fabric of the Great Society, support for social programs came to mean support for integration. It also meant that if one opposed government intervention on behalf of civil rights, then one also opposed the social programs that helped enforce them.211

Support for the War on Poverty was initially high, but it waned when it became linked to civil rights.212 Sociologists have found that programs that are targeted to the poor get considerably more public support than programs targeted to African-Americans.213 As Quadagno explains, because the War on Poverty activated the inherent conflict between positive and negative liberty. The positive liberties it extended to African-Americans were viewed by the working class as infringements on their negative liberties, the liberty for trade unions to discriminate in the selection of apprentices and to control job training programs; the liberty to exclude minorities from representation in local politics; the liberty to maintain segregated neighborhoods. The resentment these infringements triggered destroyed the New Deal coalition of northern wage workers and southern racial conservatives, the stable Democratic party base for three decades.

The reconstruction of liberalism had concrete political consequences, for the War on Poverty activated the inherent conflict between positive and negative liberty. The positive liberties it extended to African-Americans were viewed by the working class as infringements on their negative liberties, the liberty for trade unions to discriminate in the selection of apprentices and to control job training programs; the liberty to exclude minorities from representation in local politics; the liberty to maintain segregated neighborhoods. The resentment these infringements triggered destroyed the New Deal coalition of northern wage workers and southern racial conservatives, the stable Democratic party base for three decades.

Id. Additionally, “[r]educing government intervention became a rallying point only when social programs threatened the negative liberties of white Americans.” Id. at 194.

212 Id. at 196.

213 Id. at 172; see EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES 31–32, 50 n.24 (2003) (discussing survey results showing substantial support among whites for government services assisting the poor but significantly less support for government programs benefitting blacks); Martin Gilens, Racial Attitudes and Opposition to Welfare,
on Poverty promoted racial equality, it "created a backlash against the welfare state."214 During this time conservatives talked the game of equality but actively resisted its implementation in many areas; they routinely raised the issue of welfare, characterizing it as a contest between hard-working, tax-paying whites and undeserving, lazy, poor blacks who did not deserve the tax dollars of the hard-working whites.215 Ultimately, the social welfare policies that developed during this time consciously regulated not only the poor, but explicitly African-Americans:

No program better exemplifies the racially divisive character of the American welfare state than Aid to Families with Dependent Children (AFDC). Conservatives attack AFDC for discouraging work and family formation and for rewarding laziness. Such comments are really subtly veiled messages about family structures and employment patterns among African Americans. However, often the attacks are neither veiled nor subtle.216

Housing policies also changed when the War on Poverty became linked to civil rights, and federal subsidies "plummeted after 1968, when white homeowners, backed by the powerful real estate lobby, resisted residential integration."217

This history of social welfare laws shows that these laws disproportionately affect African-American families because African-Americans are disproportionately poor and because these laws were explicitly designed to regulate African-Americans. And as the racial composition of welfare changed, the image of the welfare mother changed with it.218 During the Progressive Era, the image of the welfare mother was a

214 QUADAGNO, supra note 207, at 155.
215 ALEXANDER, supra note 143, at 47.
216 QUADAGNO, supra note 207, at 117. Quadagno explains that, "as the furor of the civil rights movement wound down, there was a widespread backlash against spending on social programs that benefited the poor, especially the black poor." Id. at 145-46.
217 ROBERTS, supra note 93, at 16; see QUADAGNO, supra note 207, at 97-99, 101-02, 108, 113-15 (discussing the opposition of whites to government efforts to integrate housing as a part of the civil rights agenda, which resulted in a decrease in federally subsidized housing).
worthy white widow who was on welfare so that she could attend to her maternal duties and take care of her children. But the change in the racial composition of welfare brought with it a new welfare dependency stigma, work requirements, reduced benefits, and a new image of the welfare mother as the "immoral Black ‘welfare queen.’" As Michelle Alexander explains, "Black ‘welfare cheats’ and their dangerous offspring emerged, for the first time, in the political discourse and media imagery." As the public’s perception of welfare became increasingly associated with black mothers, it lost its popularity, became much less generous, and became a program that was focused on modifying the behavior of African-American mothers.

The 1960s also saw race-based changes to child welfare policies that tracked the changes in the welfare system described above. As this country rejected a social welfare solution to poverty as the clientele became increasingly black, it similarly modified its child welfare system by reducing services to African-American families and by becoming considerably more punitive. In describing the passage of MEPA, Roberts explains:

219 Roberts, supra note 93, at 174; see Neubek & Cazenave, supra note 140, at 44, 45 (discussing the limitation of public assistance mostly to white widows who met high moral standards and kept a “suitable home” for their children); Brito, supra note 218, at 419–21 (discussing the Progressive Era women’s campaign to win welfare aid for deserving white widows and the near complete exclusion of black women).

220 Roberts, supra note 93, at 177; see Better, supra note 179, at 95 (arguing that the negative imagery of a black woman as a “welfare queen” served to justify cuts in welfare benefits); Brito, supra note 218, at 415 (calling the “devasting image [of the ‘Black Welfare Queen’] ... instrumental in smoothing the way for conservative reformers to impose work requirements, strict time limits and other punitive reform measures on welfare mothers”).

221 Alexander, supra note 143, at 45.

222 Roberts, supra note 93, at 268; see Neubek & Cazenave, supra note 140, at 132–40 (discussing the shift in public opinion about welfare recipients and the accompanying drop in value in welfare benefits and implementation of paternalistic policies aimed at controlling black welfare recipients); Williams, supra note 218, at 1177–79 (noting that once black women became the image of the welfare mother, welfare became less acceptable and federal legislators began to impose mandatory work requirements on women receiving welfare benefits).

The passage of the federal adoption law corresponded with the growing
disparagement of mothers receiving public assistance and welfare reform's
retraction of the federal safety net for poor children. In the public's mind,
these undeserving mothers—just like the unfit mothers in the child welfare
system—are Black. . . .

. . . Maternalist thinking no longer justifies public aid because the
public views this aid as benefiting primarily Black mothers. The public
devalues Black mothers' work in particular because it sees these mothers as
inherently unfit and even affirmatively harmful to their children. There is
little reason, then, to support their caregiving work at home. To the
contrary, contemporary poverty discourse blames Black single mothers for
perpetuating poverty by transmitting a deviant lifestyle to their children. Far
from helping children, this view holds, payments to Black single mothers
merely encourage this transgenerational pathology.224

Rather than societal failings, the situations of many African-Americans
were reconceptualized as individual failings, due in part to policy driven by
stereotypical notions of black people that have stubbornly persisted since
slavery, through Reconstruction, and have continued to the present.225 The
stereotypes of poor black women—whether as incompetent or pathological—
are not new.226 Neither is the idea that stereotypes about black families being
dysfunctional influence policy.227 Of particular relevance here are the

224 ROBERTS, supra note 93, at 173–79; see NEUBECK & CAZENAVE, supra note 140,
at 34 (noting that under the image of the welfare mother, black women are “bad mothers”
who “behave badly themselves and transmit the wrong values to their offspring”).
225 Thomas and Mary Edsall explain that in the late 1960s and early 1970s, there
was a change from a belief that people's stations in life, specifically the poor, were due to
structural inequalities to a belief that where people found themselves was due to
individual failures and, thus, was not society’s responsibility. THOMAS BYRNE EDSALL
WITH MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON
226 ROBERTS, supra note 93, at 28; see Gwendolyn Mink, The Wages of
in the early twentieth century, “[t]he racial specificity of the Anglo American maternal
ideal held Black women outside the boundaries of domesticity, as breeders, sluts, and the
caretakers of other women’s homes and children”); NEUBECK & CAZENAVE, supra note
140, at 45 (stating that “[g]endered racism [in the administration of welfare programs
during the early 1900s] . . . invoked stereotypes of African-American women that
harkened back to slavery, including their supposed laziness, immorality, and sexual
promiscuity”).
227 ROBERTS, supra note 93, at 60–61 (exploring various stereotypes related to
dysfunctional black families, including black mothers as inherently and pathologically
unfit). In The Black Family in Modern Slavery, Peggy C. Davis and Richard G. Dudley
stereotypical images of the black mother.\textsuperscript{228}

The images of black mothers’ carelessness linger from slavery, where the so-called “Mammy” did not nurture or take care of her own children, but instead selflessly nurtured those of her master.\textsuperscript{229} The “matriarchal” family structure, or the proliferation of single, unwed motherhood being responsible for the disintegration of the black family, was a myth that some argue was supported by Daniel Patrick Moynihan’s 1965 report, \textit{The Negro Family: The Case for National Action}.\textsuperscript{230} In his report, Moynihan (then Assistant Secretary of Labor and Director of the Office of Policy Planning and Research under President Johnson) characterized black culture as a “tangle of pathology,”\textsuperscript{231} which was pathological, in part, due to its matriarchal family structure that purportedly “seriously retards the progress” of African-Americans.\textsuperscript{232} The welfare queen stereotype was also behind politics, present a set of case histories that provide examples of how misguided understandings of African-Americans can result in destructive interventions into “viable family systems.” Davis & Dudley, \textit{supra} note 92, at 10. Such examples include whether it is the mischaracterization of black culture as “bizarre” or “schizophrenic,” unjustified labeling of a black mother as “explosive” or “paranoid,” or the lack of acceptance of kinship or fictive kinship systems commonly used in the black community. \textit{Id.} at 11. Davis observes that “cultural and class blinders interfered with official judgments concerning the appropriate response to concerns about the welfare of Black children.” \textit{Id.} at 14.

\textsuperscript{228} \textbf{ROBERTS, supra} note 93, at 60–61; see \textbf{MINK, supra} note 226, at 51 (“Severe and pervasive prejudice meant that single, African American mothers were assumed to be morally unfit and uneducable—by definition ‘unworthy[]’ of receiving welfare benefits during the early twentieth century); \textbf{NEUBECK & CAZENAVE, supra} note 140, at 44, 45 (noting that black mothers were seen as unworthy of public assistance in the early 1900s due to the view that they were “incapable of being adequate caregivers”).

\textsuperscript{229} \textbf{ROBERTS, supra} note 93, at 61. Roberts further explains how this view was reinforced after emancipation: “Whereas the virtuous white mother cared for the home and depended on her husband’s wages, economic conditions forced many Black mothers to earn a living outside the home,” and thus “[t]he ideal of motherhood . . . never applied to Black women and made them appear deviant and neglectful.” \textit{Id.} at 62; see also \textbf{BELL HOOKS, AIN’T I A WOMAN: BLACK WOMEN AND FEMINISM} 84–85 (1981); \textbf{DEBORAH GRAY WHITE, AR’N’T I A WOMAN?: FEMALE SLAVES IN THE PLANTATION SOUTH} 46–61 (1985) (discussing the mythology of the black Mammy and debunking the notion that she was neglectful of her own family).


\textsuperscript{231} \textit{Id.}

\textsuperscript{232} \textit{Id.; ROBERTS, supra} note 93, at 63 (“According to Moynihan, ‘At the heart of the deterioration of the fabric of the Negro society is the deterioration of the Negro family. It is the fundamental cause of the weakness of the Negro community.’”). Haney López notes that “Moynihan’s deepest concern was the black family. It was the ‘Negro family,’ Moynihan asserted, that ‘is the fundamental source of the weakness of the Negro community at the present time.’” Haney López, \textit{“A Nation of Minorities”}, \textit{supra} note 14,
campaign strategies, and policy decisions during this time. Ronald Reagan, for example, rode the image of the welfare queen into office, which “became a not-so-subtle code for ‘lazy, greedy, black ghetto mother.’”233 In Chain Reaction: The Impact of Race, Rights, and Taxes on American Politics, the Edsalls explain that “one of Reagan’s favorite and most-often-repeated anecdotes was the story of a Chicago ‘welfare queen’ with ‘80 names, 30 addresses, 12 Social Security cards,’ whose ‘tax-free income alone is over $150,000.’”234 This stereotypical mythological character was also fashioned by political scientist Charles Murray, who, in the 1980s argued that the option of welfare caused black women to forgo marriage, while at the same time, have more children to qualify for more welfare235—a claim that has been thoroughly refuted.236

233 ALEXANDER, supra note 143, at 48; ROBERTS, supra note 93, at 64–67.
234 ALEXANDER, supra note 143, at 48 (quoting EDSALL & EDSALL, supra note 225, at 148).
236 Dorothy E. Roberts, Irrationality and Sacrifice in the Welfare Reform Consensus, 81 VA. L. REV. 2607, 2609 (1995) (noting that the claim that welfare incentivizes welfare recipients to have children “is refuted by empirical research and plain common sense”); see ROBERTS, supra note 93, at 65 (“It would be completely irrational for a mother on welfare to assume the tremendous costs and burdens of caring for an additional child given the meager increase in benefits that results. The vast majority of women on welfare have only one or two children.”); see also David T. Ellwood & Lawrence H. Summers, Poverty in America: Is Welfare the Answer or the Problem?, in FIGHTING POVERTY: WHAT WORKS AND WHAT DOESN’T 78, 93–94 (Sheldon H. Danziger & Daniel H. Weinberg eds., 1986) (providing data showing that welfare did not affect the structure of black families); Sara McLanahan, Charles Murray and the Family, in UNIV. OF WISCONSIN-MADISON, INST. FOR RESEARCH ON POVERTY, LOSING GROUND: A CRITIQUE 1, 2–3 (1985), available at http://www.eric.ed.gov/PDFS/ED263295.pdf (providing statistical evidence showing that the unmarried birth rate among blacks actually “declined during the early seventies when welfare benefits were increasing”); id. at 4–5 (arguing that “the general decline in marriage, as well as the growth of female-headed families, is a response to broader social changes that began well before the dramatic rise in welfare benefits during the sixties”).
Some argue that animus against black mothers drove the discriminatory intent behind laws that govern families, such as the one challenged in *Bowen v. Gilliard*. More specifically, “the popular image of the welfare queen helped to drive the passage of child exclusion laws—or ‘family caps’—in a number of states, denying any increase in benefits to mothers who have children while already receiving public aid.” As those who have watched news reports with an eye for stereotypes and not-so-subtle racist images know, the public hates the welfare queen because she steals taxpayer money, is selfish, and cannot be trusted to spend the money on her children to whom her deviant lifestyle would pass. These stereotypes have maintained, albeit changing in form and sometimes name, over many decades. Stereotypes about black families that confirm that they must be treated differently and that justify state intervention as a means of protecting their children are prolific. And ultimately, these stereotypes drive social and child welfare laws that are intended to regulate African-American families and intrude into the family unit.

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239 ROBERTS, *supra* note 93, at 65; see PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 79 (2d ed. 2000) (noting that the black welfare mother “is portrayed as being content to sit around and collect welfare, shunning work and passing on her bad values to her offspring”); MARTIN GILENS, WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY 97–101 (1999) (providing results of surveys showing negative public attitudes toward black mothers receiving welfare benefits).
240 ROBERTS, *supra* note 93, at 65 (explaining that stereotypes about “Black maternal unfitness . . . are reincarnated so persistently and disseminated so thoroughly that they become part of the unconscious psyche”); see Appell, *supra* note 161, at 585 (stating that the disproportionately black families interacting with the child protection system are viewed as “pathological, incompetent, and less worthy of preservation” by the system’s mostly white employees and agencies). See generally White, *supra* note 205 (arguing that the child welfare system through the ASFA devalues black families, infringes on the autonomy of black parents to raise their children, and perpetuates the racial oppression of the black community).
241 Malcolm X famously “spoke with bitterness about the role of the state in the disintegration of his family.” Davis & Dudley, *supra* note 92, at 9. Malcolm recounts:

“When the state Welfare people began coming to our house . . . [t]hey acted and looked at . . . [my mother] and at us, and around in our house, in a way that had about it the feeling—at least for me—that we were not people. . . . My mother was,
Incidentally, the response to critics who would say that this Article (and this section in particular) has failed to provide sufficient evidence of racial motivation is, in part, that direct proof of racial motivation is not necessary to show discrimination. As this Article has discussed above, there is considerable evidence that race combines with broader inequities to break up black families disproportionately. But of course, today, it is hard to find direct proof of racism in news reports, in statements by caseworkers, or in judicial decisions. And, not only is it rare for racial motives to be articulated, but they are often subconscious.\textsuperscript{242} There is overwhelming evidence that measurements of implicit attitudes of bias are often disassociated from explicit racial prejudice.\textsuperscript{243} So, even those who do not believe they harbor negative images and stereotypical notions of blacks—and do not want to

\textit{Id.} (quoting MALCOLM X WITH THE ASSISTANCE OF ALEX HALEY, THE AUTOBIOGRAPHY OF MALCOLM X 12–13 (1965)). Tellingly, “Malcolm X described the subsequent order making each of her eight children a ward of the state as ‘Nothing but legal, modern slavery—however kindly intentioned.’” Davis & Dudley, supra note 92, at 10. Although this perspective is obviously not one of an objective disinterested observer, it is nonetheless important as “it serves to illustrate the other side of appropriate concern for troubled and impoverished black families.” \textit{Id.} at 10.


\textsuperscript{243} Dovidio et al., \textit{supra} note 242, at 531–36.
harbor such images—may not be free from subconscious bias. Just because we are not aware of a bias does not mean that it does not exist.

It is also important to consider that the existence of racism does not require that race be the only factor in a decision maker’s mind and that it very rarely is. Government officials may be primarily motivated by a desire to protect children, but may also consider race in making an ultimate decision. Harvard Law School Professor Randall Kennedy has debunked a related argument in the context of racial profiling. Kennedy argues that race only being a marginal factor “cannot logically negate the existence of racial discrimination,” as “[t]aking race into account at all means engaging in racial discrimination.” It may also be argued that the disparate initial circumstances of blacks and whites negate the existence of any racism. The problem is that there is considerable evidence that the playing field is not level. This includes evidence of systemic and institutional discrimination in many areas, including employment, housing, education, and social services.

C. Best Interests Test

Another example that shows that family law is not colorblind—and thus, that the relationship between family law and race should inform the family law canon—is the application of the best interests test in family law cases. Legal scholars suggest that race plays into determinations of custody in implicit and hidden ways, such as through a best interests test that is so vague.

244 Id.; Brian A. Nosek et al., Harvesting Implicit Group Attitudes and Beliefs From a Demonstration Web Site, in 6 GROUP DYNAMICS: THEORY, RESEARCH, AND PRACTICE 101, 111–12 (2002).
245 See ROBERTS, supra note 93, at 93.
as to invite "race, class, and cultural bias upon judicial interpretation,"\textsuperscript{248} through court-ordered investigations by child protective services, and through the inherently biased process for custody determinations in New York's family court system.\textsuperscript{249}

While the best interests test is facially race-neutral, and is generally taught as if it is racially neutral, it is decidedly not post-racial. In his seminal book, \textit{What's Wrong With Children's Rights}, Martin Guggenheim strongly criticized the best interests test as dangerously indeterminate, arguing that: 

"[a] best interests inquiry is not a neutral investigation that leads to an obvious result [and] is an intensely value-laden inquiry;"\textsuperscript{250} that "[o]nce the best interests test became the standard [in child custody disputes], there were no constraints on what the court was allowed to consider as relevant;"\textsuperscript{251} and that "[t]he best interests standard necessarily invites the judge to rely on his or her own values and biases to decide the case in whatever way the judge thinks best."\textsuperscript{252} Of particular relevance to this Article, Guggenheim observed that "[a] child's 'right' to limit parental authority only to those decisions that further the child's best interests broadly authorizes state officials to oversee and control families."\textsuperscript{253}

This "value-laden inquiry," as Guggenheim described it,\textsuperscript{254} invites racial bias into judicial decision making. For example, in the seminal case of \textit{Santosky v. Kramer}\textsuperscript{255} in which the Supreme Court held that before a state terminates parental rights, the Due Process Clause of the Fourteenth Amendment requires that the State establish its allegations by at least "clear and convincing evidence,"\textsuperscript{256} Justice Blackmun, writing for the Court,

\begin{itemize}
  \item 248 Fitzgerald, \textit{supra} note 66, at 62.
  \item 251 GUGGENHEIM, \textit{supra} note 250, at 39.
  \item 252 Id. at 40.
  \item 253 Id. at 247.
  \item 254 Id. at 39.
  \item 255 455 U.S. 745 (1982).
  \item 256 Id. at 769.
\end{itemize}
recognized “the indeterminacy of the ‘best interests’ standard in the termination of parental rights, and that race, class, and cultural bias regularly taint child abuse and neglect adjudications, disproportionately subjecting poor and minority families to hostile state scrutiny of their family lives.”

Scholars echo the same general refrain as Professor Guggenheim and the same specific refrain as the Supreme Court in Santosky. For example, one scholar argues that “[t]he ‘best interests of the child’ standard invites the same race, class, and cultural bias upon judicial interpretation as child abuse and neglect statutes,” and scholars point out “that the best interests of the child standard seem[s] to promote underlying biases regarding race, gender, culture, and family.” In short, the best interests standard, like child welfare and social welfare laws, is not colorblind and should inform the relationship between race and family law and the family law canon.

D. Because It Is Inaccurately Colorblind, the Family Law Canon Insulates Racism and Perpetuates Racial Inequality

It matters that the family law canon ignores the continued salience of race for African-American families because the idea of colorblindness immunizes racism and perpetuates racial inequality. In the context of family law, race functions as a form of social stratification. This fact is evident from the way in which race is instrumental to the misallocation of resources. Historically, the primary function of racial stratification was to rationalize exploitation. Slavery is the quintessential example of this theory.

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257 Philip S. Welt, Adoption and the Constitution: Are Adoptive Parents Really “Strangers Without Rights”?, 1995 ANN. SURV. AM. L. 165, 220 (1995); see Santosky, 455 U.S. at 763 (“Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, such proceedings are often vulnerable to judgments based on cultural or class bias.” (citations omitted)).

258 Fitzgerald, supra note 66, at 62.


260 Haney López, Post-Racial Racism, supra note 1, at 1041; see WILLIAM J. WILSON, POWER, RACISM, AND PRIVILEGE: RACE RELATIONS IN THEORETICAL AND SOCIOHISTORICAL PERSPECTIVES 24 (1973) [hereinafter WILSON, POWER, RACISM, AND PRIVILEGE] (noting the use of racial stratification by a dominant group “to exploit the labor of the minority group in order to increase or maximize rewards”); CARTER A. WILSON, RACISM: FROM SLAVERY TO ADVANCED CAPITALISM 17, 20 (1996) [hereinafter WILSON, RACISM] (arguing that an “exploitative and oppressive economic structure[”] is the basis for racial oppression).
Family law policies that destabilize and deconstruct African-American families, if not acknowledged, will continue to contribute to social stratification and deny African-Americans access to economic, political, and social resources. Some scholars argue that on some level this is deliberate: Professor Ian Haney López explains, "[i]n the post-civil rights era, . . . racial stratification seems principally concerned with protecting the wealth, power, and prestige already secured." What better way for those with the resources to maintain their privileged position than to destabilize the primary institution necessary for providing access to social, economic, and political opportunity—the African-American family?

The creation of racial categories here is accomplished through mechanisms that perpetuate structural racism—all of which are extant in the family law arena, including on the societal, institutional, and individual level. In a compelling and important discussion of "racial stratification," Ian Haney López engages in a thorough discussion of the formation of racial categories, much of which is relevant to my argument here. Nonetheless, without attributing greater salience to one of these elements over the other, the mechanism that is the focus here is racial ideology and how racial ideology in the context of family law contributes to the formation of racial categories.

Various theories without any legitimate foundation, including white supremacist theories, have long justified the subjection of African-Americans and other individuals of color, and colorblindness has now emerged as a new

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261 Haney López, Post-Racial Racism, supra note 1, at 1041; see Wilson, Power, Racism, and Privilege, supra note 260, at 24 (citing slavery as an example of exploitation through racial stratification); Wilson, Racism, supra note 260, at 17–19 (discussing the economically exploitative basis of slavery).

262 Haney López, Post-Racial Racism, supra note 1, at 1041 ("To be sure, wealth extraction continues today, and not just through inertia, but also in newly innovated guises such as the increasing exploitation of undocumented workers.").

263 Id. at 1051–52. Trying to identify a precise reason for family law's disproportionate effect on blacks, a single overriding cause, in other words, is a misguided enterprise given how institutional racism works. Roberts, supra note 93, at 97. Black families are broken apart "because of the interplay of societal, structural, and individual factors that feed into each other." Id. As Dorothy Roberts explains, "To address the systemic discrimination against Black families, then, it is most helpful to attribute the disparity to a web of racial injustice that includes all of these causes." Id.

264 Haney López, Post-Racial Racism, supra note 1, at 1051–68.

265 See, e.g., Howell Cobb, A Scriptural Examination of the Institution of Slavery in the United States 25–75 (1856) (justifying slavery on the argument that Africans were the cursed descendants of Ham, son of the biblical figure Noah); Wilson, Racism, supra note 260, at 74–75 (discussing pseudo-scientific theories about the biological inferiority of blacks that were used to justify their oppression in the eighteenth and nineteenth centuries).
racial ideology that can take their place. It is no longer acceptable to subjugate blacks based on explicit racial beliefs, but colorblindness is becoming institutionalized, obscuring the contextual power relations in society.

African-American families are broken up by family law rules that bear no relation to racism, as colorblindness allows for rationalizations that reflect racial inequality as being the natural order of things. As Haney López suggests “[t]he seeming naturalness of racial inequality may support, and in turn be supported by, the colorblind proscription on race-talk, but it seems to be an independent, powerful aspect of racial commonsense.”

Ignoring the role of race allows people to believe that the system is fair. It obscures the reality that differential treatment is rooted in racial privilege. By professing colorblindness, the family law canon ignores the reality that family law continues to disproportionately regulate African-American families and the reality that some family laws are designed to regulate African-American families. As a result of its inaccurate colorblindness, the canon immunizes racism because it sanctions the status quo, which is racially stratified.

III. THE CANON’S PERSISTENCE: WHY WE FAIL TO CHALLENGE IT

Having concluded that the family law canon is inaccurate in its colorblindness and that this inaccuracy hurts African-American families, this
section explores some of the reasons why the canon’s colorblindness is unchallenged. Given the negative consequences for families, why do family law scholars—both those who advocate color consciousness and those who advocate colorblindness—tend to oversimplify the precedent that addresses the role of race in family law? The answer to this question is complex, but one reason is the family law canon itself. The canon of family law reflects the colorblindness principle that many judges, lawyers, and scholars consider the premise of Brown v. Board of Education\(^\text{270}\) and Shelley v. Kraemer,\(^\text{271}\) despite the more fundamentally sound view of the role of race in the law which is clearly articulated in more recent cases, such as Loving v. Virginia\(^\text{272}\) and Palmore v. Sidoti\(^\text{273}\) (but also, ironically, in a fundamentally sound read of Brown itself). Nonetheless, it is what many consider the premise of Brown and Shelley that has found its way into the family law canon, and that makes it easy for conscientious scholars to oversimplify precedent. In other words, the idea that family law is colorblind has solidified itself in the minds of many judges, scholars, and practicing lawyers.

In both Shelley and Brown, on equal protection grounds, the Supreme Court rejected state action promoting racial discrimination against blacks.\(^\text{274}\) In Shelley, the Court held that judicial enforcement of racially restrictive covenants violated the Fourteenth Amendment’s Equal Protection Clause,\(^\text{275}\) and that the purpose of the Fourteenth Amendment “was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color.”\(^\text{276}\)

In Brown, the Court held that state-sponsored racial segregation in public education violated the Equal Protection Clause.\(^\text{277}\) In doing so, the Court observed:

“What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no

\(^{270}\) 347 U.S. 483 (1954).
\(^{271}\) 334 U.S. 1 (1948).
\(^{272}\) 388 U.S. 1 (1967). In this section, I offer one possible reading of these cases. For an important discussion of Loving as being the first decision to see colorblindness and segregation as compatible, see generally Rachel F. Moran, Loving and the Legacy of Unintended Consequences, 2007 Wis. L. Rev. 239 (2007).
\(^{274}\) See Brown, 347 U.S. at 495; Shelley, 334 U.S. at 20.
\(^{275}\) Shelley, 334 U.S. at 20.
\(^{276}\) Id. at 23.
\(^{277}\) Brown, 347 U.S. at 495.
discrimination shall be made against them by law because of their color?" 278

In Shelley and Brown, therefore, equal protection under the law meant the prohibition of state-sponsored racial discrimination and segregation. But over time, in the eyes of many judges, scholars and lawyers, the premise of these cases has become one of colorblindness, and this premise is now taken to require no reappraisal. 279 Haney López laments:

The particular rationales for treating affirmative action and Jim Crow alike increasingly matter less and less: it's now simply our constitutional law, an Equal Protection bromide strenuously asserted but rarely defended—as when Justice Thomas emphatically declares that “laws designed to subjugate a race” and those that “foster some current notion of equality” are, in each instance, “racial discrimination, plain and simple.” 280

In Parents Involved in Community Schools v. Seattle School District No. 1, the Supreme Court confirmed that it takes colorblindness as the premise of these cases, interpreting Brown as requiring an adherence to colorblindness. 281 According to the majority, a strict adherence to Brown would require that even benign racial classifications should be struck down, as the use of race in classification is always invidious. 282 In every case and in every context, this would seem to be true. Or, in the now oft quoted words of Chief Justice Roberts, “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” 283

The legacy of Shelley and Brown, this Article suggests, is the ideal of colorblindness as a social objective, where colorblindness means the promotion of racial equality and the disapproval of any state action making distinctions based on race. But the idea that we are no longer permitted to make distinctions about people based on their race ignores the persistence of race as a basis for social stratification. Nonetheless, this Article’s main objective is not to argue that as a normative matter the law should (or should

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278 Id. at 490 n.5 (quoting Strauder v. West Virginia, 100 U.S. 303, 307–08 (1880)).
282 See id. at 752 (Thomas, J., concurring); Jess Bravin & Daniel Golden, Court Limits How Districts Integrate Schools: Race-Based Policy Ban Augurs Broad Changes; Clash Over Brown Case, WALL ST. J., June 29, 2007, at A1.
283 Parents Involved, 551 U.S. at 748.
not) be used to overcome past racial harms and to create a non-racially stratified and non-socially stratified society. What is important to emphasize for the purposes of this Article is that it is what many consider the premise of Shelley and Brown that has found its way into the family law canon, and that makes it easy for conscientious scholars to oversimplify precedent. In other words, the idea that the family law canon is colorblind has solidified itself in the minds of many judges, scholars, and practicing lawyers. Instead, the family law canon should adopt a more nuanced and fundamentally sound view of these cases, perhaps like the Court’s reading of the Constitution in Loving and Palmore.

In both Loving and Palmore, the Court was concerned about invidious racial classifications. As in Shelley and Brown, the use of race in Loving and Palmore was pernicious and had the purpose of entrenching the subordination of blacks and giving legal effect to racial prejudice, but the Court’s view in these latter cases is one that a careful reading shows is more nuanced than one based solely in colorblindness. In Loving, the Court expressed the need to eliminate state-sponsored “invidious racial discrimination,” asserted that such racial classifications were “designed to maintain White Supremacy,” and stated that the Equal Protection Clause required “that the freedom of choice to marry not be restricted by invidious racial discriminations.” And in Palmore, the Court noted that racial classifications tended to “reflect racial prejudice,” and maintained that the Equal Protection Clause prohibited the law from giving effect to private racial biases.

The family law canon, in response, promoted colorblindness. If the above quoted excerpts were all that there was to these cases, this view might be right. But in Loving and Palmore, the Court’s holding was more nuanced than a reading steeped in the common perception of Brown and Shelley might reveal. In Loving, the Court took issue with the fact that the State of Virginia’s antimiscegenation statute was based solely on race. Also, in

286 Id. at 11.
287 Id. at 12.
288 Palmore, 466 U.S. at 432.
289 Id. at 433–34.
290 See Hasday, The Canon of Family Law, supra note 13, at 857 (discussing how family law scholars use Loving as a canonical example to argue that “family law no longer draws [racial] distinctions between families.... [and] no longer bans ‘color-blind romance’” (footnote omitted)).
291 Loving, 388 U.S. at 11.
Palmore, the Court rejected the state court’s ruling because race was the only factor in the court’s custody decision.\(^\text{292}\) Thus, Loving and Palmore suggest that the Court was of the view that race can be a factor, although not the sole factor and never an invidious one, in state action determining how to structure families. These cases suggest that the canon of family law is not actually colorblind or post-racial.

The same applies to Brown, of course, notwithstanding the fact that this decision is commonly read in a colorblind way. In Brown, the Court in no way embraced an anticlassification conception of the Constitution. At the time that Brown was decided, only black children were struggling to attend white schools\(^\text{293}\) and consequently, the promise of Brown was racial integration, which was to be accomplished by racially conscious solutions to integrate public schools that were resisting integration and were discriminating against African-Americans.\(^\text{294}\) A more nuanced reading of Brown suggests that race-consciousness in certain circumstances is consistent with the Equal Protection Clause of the Fourteenth Amendment. In his dissent in Parents Involved, Justice Breyer explained: “[S]ince this Court’s decision in Brown, the law has consistently and unequivocally approved of both voluntary and compulsory race-conscious measures,”\(^\text{295}\) and recognized that the race-consciousness had “been accepted by every branch of government and is rooted in the history of the Equal Protection Clause

\(^{292}\) Palmore, 466 U.S. at 432.

\(^{293}\) See, e.g., J. HARVIE WILKINSON III, FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978, at 11 (1979) (“Everyone understands that Brown v. Board of Education helped deliver the Negro from over three centuries of legal bondage.”); Charles L. Black, Jr., The Lawfulness of the Segregation Decisions, 69 YALE L.J. 421, 425 (1960) (“History, too, tells us that segregation was imposed on one race by the other race; consent was not invited or required. Segregation in the South grew up and is kept going because and only because the white race has wanted it that way—an incontrovertible fact which in itself hardly consorts with equality.”).

\(^{294}\) Brown v. Bd. of Educ., 347 U.S. 483, 483–95 (1954); see also Parents Involved in Cnty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 803 (2007) (Breyer, J., dissenting) (recognizing that the Constitution permits race-conscious desegregation plans that are narrowly tailored); id. at 862–63 (Breyer, J., dissenting) ("[T]he Equal Protection Clause outlaws invidious discrimination, but does not similarly forbid all use of race-conscious criteria."); id. at 864 (Breyer, J., dissenting) ("[S]ince this Court’s decision in Brown, the law has consistently and unequivocally approved of both voluntary and compulsory race-conscious measures . . . ."). This reading of Brown was supported by dozens of subsequent cases in which school districts were told to engage in race-conscious practices. See, e.g., Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 455 n.3 (1979); Davis v. Bd. of Sch. Comm’rs, 402 U.S. 33, 37–38 (1971); Green v. Cnty Sch. Bd., 391 U.S. 430, 441–42 (1968).

\(^{295}\) Parents Involved, 551 U.S. at 864 (Breyer, J., dissenting).
Notwithstanding what this nuanced reading of Loving, Palmore, and Brown suggests about the place of colorblindness in family law, the notion of colorblindness exists. As a normative matter, modern courts have insisted that race should not count in a discriminatory way against African-Americans. Not unrelated, but quite separate, is the issue of whether racial remedies should be permitted to overcome past harms and create a non-racial legal and social reality. This Article does not aim to resolve whether colorblindness is a good norm or is a willful means to protect white supremacy. My goal here is much more modest: I aim to point out a deep omission in the family law canon.

Many social scientists have studied the persistence of the notion of colorblindness. Some attribute the desire of many people to see this society as post-racial to the absolution of racial guilt. In other words, some argue that white people may embrace colorblindness because it absolves them of guilt, even though, in reality, discrimination, racism, and othering processes exist. A corollary argument is that the belief in a colorblind society makes it easier for people to believe that they are doing their part for race relations, even though they do not live among, go to school among, socialize among, or work alongside African-Americans. This has been described as the “production of white innocence [that is necessary] for the realization of a ‘post-racial’ . . . politic.” And, as Haney López argues, colorblind governmental policies ostensibly facilitate the defense of racially privileged

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296 Id. at 828 (Breyer, J., dissenting). In coming to this conclusion, Breyer found evidence of race-consciousness in over fifty-one federal statutes that used racial classifications, over 100 state statutes, actions of presidential administrations for the past half-century, and actions of local school districts. Id. at 828–29 (Breyer, J., dissenting).

297 “Othering” refers to using the other to define oneself. See Shani King, Challenging MonoHumanism: An Argument for Changing the Way We Think About Intercountry Adoption, 30 Mich. J. Int’l L. 413, 426 & n.52 (2009). One of the first proponents of this idea was the German philosopher, G.W.F. Hegel. See G.W.F. Hegel, The Phenomenology of Mind 214–67 (J. B. Baillie trans., rev. 2d ed. 1949). In more recent times, this term has been adopted by post-colonialist scholars to critique analytical structures “that identify previously colonized peoples through binary opposition structures that reflect a hierarchical inferiority.” King, supra, at 426. And, “[a]ccording to [those] analytical structures, the post-colonial is an antipodal and lesser ‘other,’ essential for creating the Western identity of ‘self’ as the normative center.” Id. Edward Said’s book, Orientalism, is generally accepted as the founding work of post-colonial studies. Id. at n.51. Post-colonialist approaches have been used to analyze intercountry adoption, see, e.g., id. at 426–52 (using a post-colonialist framework to critique law review discourse on intercountry adoption), and the juvenile justice system, see, e.g., Kenneth B. Nunn, The Child as Other: Race and Differential Treatment in the Juvenile Justice System, 51 DePaul L. Rev. 679, 682 (2002) (discussing “treatment of African American children as the ‘other’ in the juvenile justice system”).

stratification. Whatever its origins, colorblindness is becoming institutionalized, which obscures context and power relations related to race. As a result, African-American families are broken up by family law rules that ostensibly bear no relation to racism, as colorblindness allows for rationalizations that reflect racial inequality as being the natural order of things. After all, if we convince ourselves (as we did during the War on Poverty) that racial inequality results from individual failings and not race, we convince ourselves that racial inequality is acceptable.

IV. CONCLUSION

The family law canon determines what is considered family law. This, in turn, affects the nature and the scope of family law debates among scholars and practitioners. It determines which questions are legitimate questions in a family law debate and shields certain laws and their effects from scrutiny. Because of their very nature, canons are difficult to alter, but it is up to professors, teachers, and scholars to transmit questions, doubts, and arguments about the family law canon to colleagues and successive generations of law students.

As discussed above, the family law canon fails to scrutinize race-based disparities in laws, procedures, and outcomes, and that omission feeds a mistaken notion of a race-blind or a post-racial society. One consequence of this omission is that it obscures race-based decision making by legislatures, judges, legal reform organizations, legal scholars, lawyers, and child welfare workers, and thereby immunizes race-based decision making from scrutiny. In other words, since the family law canon inaccurately describes family law as post-racial, or colorblind, the canon immunizes racism and perpetuates racial inequality.

300 Id. at 1061.
301 See id. at 1064–65.
302 Some argue that African-Americans who refuse to move beyond racism and get on with their lives are engaging in self-defeating “victimology,” and have characterized blacks refusing to get beyond race as engaging in “therapeutic alienation: alienation unconnected to, or vastly disproportionate to, real-life stimulus, but maintained because it reinforces one’s sense of psychological legitimacy, via defining oneself against an oppressor characterized as eternally depraved.” JOHN H. MCWHORTER, LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA 1–49 (2000); JOHN MCWHORTER, WINNING THE RACE: BEYOND THE CRISIS IN BLACK AMERICA 6 (2005); see also SHELBY STEELE, THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA 45 (1990). These are complicated psychological and sociological phenomena that this Article will not address at length.
The race question is so important to discuss honestly in the context of family law scholarship and education because of the power of attorneys in the United States and the impact that their work can have on the lives of families. On one level, of the three branches of government, the Judiciary is almost exclusively comprised of attorneys. And on the other, it is largely attorneys who pass laws in the Legislative Branch, lobby to get these laws changed, challenge the constitutionality of these laws, and represent the families who are subject to these laws.

Challenging the canon will highlight its colorblind perspective and reveal the extent to which precedent allows color consciousness in family law, whether it is a situation in which not acknowledging the role of race in family law perpetuates racial inequality, or it is a situation in which not acknowledging the role of race means not fully considering the best interests of children. Challenging the canon will call attention to the ways in which race is still a significant factor in society, in how people arrange their private lives and families, and in the law that governs these families.

Challenging the canon will help us have an honest discussion about the race-consciousness that is currently present in family law and in lesson plans, scholarship, and casebooks. For example, what racial ideologies are being promoted in these materials? Ones that support certain forms of race blindness, while allowing other forms of race-consciousness? For instance, blindness regarding the adoption of minority children, but race-consciousness regarding the adoption of white children? Or more pointedly, why do casebooks reject references to biology, but encourage discussion of culture—as in, the culture of poverty? Is the colorblindness in family law the “reactionary colorblindness,” discussed by Ian Haney López, which is the result of a reactionary ideology of group difference that has been invoked to “utterly displace any attention to the on-going dynamic of status subordination and the continued necessity of social reconstruction”? In other words, are our family law casebooks a tool in the promulgation of colorblindness as a specific racial ideology?

For now, professors and scholars should challenge the canon for the benefit of honest academic debate and for the families for whom canons have real consequences. The longer we refuse to include the “American Dilemma” in conversations about family law, the longer we will continue to promote racial inequality.


305 This term was coined by Gunnar Myrdal, a Swedish economist, and is taken to refer to historical and current race-based oppression of blacks by whites. See generally GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (1944).
Thus, this author invites legal scholars to continue this dialogue. While legal scholars surely reflect on the canon in the process of creating lesson plans, producing scholarship, and compiling casebooks, the decisions they make throughout the process are implicit—we can only see the product of their deliberations. This author’s hope is that we can continue, as family law scholars, to contribute to this process in an explicit way so that we understand exactly how we are transmitting the canon to our students and our successors. It is up to us to reshape the family law canon through our scholarship and teaching. We cannot, after all, change judicial decisions or modify or repeal statutes by individual fiat. Thus, it is our scholarship and our teaching that will shape how future generations of lawyers talk, think, and understand the law that governs families. Introspection of this sort may result in a more race-conscious approach for family law casebooks that does not obscure the connection between race and family law. One form this may take is a new set of chapters within family law textbooks on race and the family. Such chapters might, for instance, explicitly bring forward the theme that we have moved from explicitly racist laws to laws that have racialized content that is more subtle and hidden, but nevertheless should be of concern to lawyers and scholars.
APPENDIX: A FEW SUGGESTED TEACHING MATERIALS TO CONTRIBUTE TO A RACE-CONSCIOUS FAMILY LAW CANON


