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Redefining the Black Face of Affirmative Action: The Impact on Ascendant Black Women

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The racial and ethnic ancestries of blacks benefitting from affirmative action is changing, as foreign-born blacks and blacks with a non-black parent constitute disproportionately large percentages of blacks attending many selective higher education institutions. Coupled with the challenges arising from the educational achievement levels of black males during the past two decades, Brown and Turner examine the implication of these developments and the likelihood that they are creating further disadvantages for black women lawyers.

I. Introduction

By agreeing to hear the Fifth Circuit decision in *Fisher v. University of Texas*,¹ the Supreme Court once again decided to enter the fray of affirmative action and deliver its fourth major opinion addressing affirmative action in higher education. Thus, for the next several years, scholars, commentators, and journalist will discuss and debate the impact of this upcoming opinion on the admission prospects of underrepresented minorities to selective higher education programs with a history of discrimination. Many of these discussions will talk about the dire consequences for people of color, and the ramifications of the decision, particularly for blacks, if the Court strikes down or severely limits the consideration of race in the admissions process.

The term “black,” however, obscures a major development occurring with regard to which blacks benefit from affirmative action. A number of articles have appeared in the legal literature and popular media over the past decade pointing to the changing racial and ethnic ancestries of blacks benefitting from affirmative action.² These articles have noted that foreign-born blacks, their sons, and their daughters (we will call those with a foreign-born black parent “Black Immigrants”) and blacks with a non-black parent (we call individuals with one black and one non-black parent “Black Multiracials”), constitute disproportionately large percentages of blacks attending many selective higher education institutions. Furthermore, given the increasing numbers and percentages of Black Immigrants and Black Multiracials reaching the age at which most people attend colleges and universities, if current trends continue, the children of two American-born black parents (as determined by the application of the one-drop rule), will soon no longer constitute a “critical mass” of the black students benefitting from affirmative action. Some scholars have referred to this racial/ethnic group of blacks as “third generation” or “legacy” blacks. However, we will use the term “Ascendant Blacks” in order to denote

1. 631 F.3d 231 (2011) cert. gran ____ U. S. ____ (2012).

2. See, e.g., Kevin Brown and Tom I. Romero, II, *The Social Reconstruction of Race & Ethnicity of the Nation's Law Students: A Request to the ABA, AALS, and LSAC for Changes in Reporting Requirements*, 2011 MICH. ST. L. REV. 1133 (2012).



The experiences of women of color are the result of the intersection of patterns of racism and sexism. As a result of this intersectionality, discourse shaped by women of color tends to get marginalized in discussions about the issues that impact women and people of color.

the historical connection between this racial/ethnic group of blacks and the history of the ascendancy of blacks out of slavery and segregation. The ascendancy of this group of blacks made it possible for the dramatic increases in Black Multiracials and Black Immigrants attending universities that have occurred over the past fifty years and the proliferation of affirmative action admissions policies.

Regardless of whether the Supreme Court's opinion in *Fisher* limits, expands, or prevents the use of affirmative action, it is unlikely to address the changing racial and ethnic ancestries of blacks who are benefiting from affirmative action. As a result, unless there are dramatic changes in the admissions practices of selective higher education institutions to take account of the steadily declining numbers and percentages of Ascendant Blacks in their student bodies, the Court's decision in *Fisher* will be largely irrelevant for the very group of blacks originally responsible for the development of affirmative action programs.

In her 1991 groundbreaking article entitled *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, Kimberle Crenshaw noted that "identity-based politics has been a source of strength, community, and intellectual-development."³ However, one of the problems with such politics is that it often conflates or ignores intragroup differences. Crenshaw goes on to note:

Feminist efforts to politicize experiences of women and antiracist efforts to politicize experiences of people of color have frequently proceeded as though the issues and experiences they each detail occur on mutually exclusive terrains. Although racism and sexism readily intersect in the lives of real people, they seldom do in feminist and antiracist practices. And so, when the practices expound identity as women or person of color as an either/or proposition, they relegate the identity of women of color to a location that resists telling.⁴

Crenshaw points out that, frequently, the experiences of women of color are the result of the intersection of patterns of racism and sexism. As a result of this intersectionality, discourse shaped by women of color tends to get marginalized in discussions about the issues that impact women and people of color.

3. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991).

4. *Id.*



Despite how large the percentage of Black Immigrants and Black Multiracials are among black students at selective higher education institutions now, their percentages are likely to substantially increase over the next decade. This is due to the dramatic increases in foreign-born blacks admitted to the country and increases in Black Multiracials of college age over the next ten years.

When Crenshaw published her article over twenty years ago, there was little talk about the changing racial and ethnic ancestries of blacks in the United States. Since we are taking our lead from Crenshaw's intersectionality approach, we will do so from the perspective of Ascendant Black Women. Thus, in this essay, we will apply Crenshaw's intersectionality approach to the changing racial and ethnic ancestries of blacks attending selective higher education institutions. While these changes have received some public attention for the past ten years, the significance of these changes has yet to grab the attention of the general public or of admission officials at selective higher education programs. The reason for this may lie in the fact that Ascendant Black Women are the ones who bear the major brunt of the racial and ethnic changes of blacks benefitting from affirmative action, as opposed to Ascendant Black Men.

Section I will discuss the evidence pointing to the changing racial and ethnic ancestries of blacks attending selective higher education institutions. Due to the "crisis" situation involving the educational achievement levels of black males, the changing racial and ethnic make-up of blacks benefitting from affirmative action effectively means that Black Immigrants and Black Multiracials are largely replacing Ascendant Black Women at selective higher education institutions. Thus, Section II will discuss how these racial and ethnic changes are primarily reducing the prospects of Ascendant Black Women being admitted into the student bodies of selective higher education institutions far more so than they are reducing the prospects for Ascendant Black Men. In addition, Black males are two to three times more likely to engage in interracial cohabitation and marriage than their black female counterparts. To the extent that Black Multiracials replace Ascendant Blacks in selective higher education institutions, it also means that selective higher education programs have institutionalized admissions practices that more likely provide preferences for the children of black men at the expense of the children of black women. Thus, Section III will discuss how the changing racial and ethnic

ancestry of blacks on affirmative action further disadvantages Ascendant Black Women in their roles as mothers. Finally, as Black Immigrants and Black Multiracials come to constitute disproportionately larger and larger percentages of blacks attending selective higher education institutions, this provides an additional incentive for Ascendant Blacks to procreate with individuals from another race or with foreign-born blacks. Yet, given the far greater propensity of black males to marry outside of the race, Ascendant Black Women are further disadvantaged because these changes provide a reason for black men to prefer other women. Section four will, therefore, discuss how Ascendant Black Women are even further disadvantaged by these changes due to the negative impact on their prospects as potential mates and spouses.

II. Evidence of the Changing Racial and Ethnic Ancestry of Blacks Attending Selective Higher Education Institutions

Since the origin of affirmative action and until the 2010/2011 academic year, selective higher education programs typically lumped all of their black students into a unified Black/African/African American category, regardless of their race or ethnicity.⁵ However, at a gathering of the Harvard Black Alumni in the summer of 2003, Harvard professors Lani Guiner and Henry Louis Gates noted that Black Multiracials and Black Immigrants comprised two-thirds of the black undergraduate population at their university.⁶ After the “Harvard Revelation,” a 2005 article in *Diverse Issues in Higher Education* pointed to a study of the black presence that entered twenty-eight selective colleges and universities in 1999. The study revealed that Black Multiracials made up seventeen percent of black freshmen and forty-one percent were either Black Multiracials or Black Immigrants. According to Dr. Michael T. Nettles, Vice President for Policy Evaluation and Research at the Educational Testing Service, “[i]f Blacks are typically 5% and 6% of the population at elite colleges, then the representation of native United States born African-Americans might be closer to 3%.”⁷ Specifically with regard to the increasing percentages of Black Multiracials among blacks enrolled in selective undergraduate institutions, a published study tallied the 2007 reports from the Consortium on Financing Higher Education (COFHE) Enrolled Student Survey. COFHE is an institutionally supported organization of thirty-one selective private colleges and universities and includes many of the most elite private institutions in the country. According to this study, nineteen percent of the black students indicated that they had a non-black parent. However, according to the 2000 Census counts, in 2007, only 6.3 percent of the black population between the ages of seventeen and twenty-one indicated another racial category. Statistics from the admissions office of Indiana University-Bloomington provides further evidence of the widespread nature of the increasing percentages of Black Multiracials among blacks enrolled in selective higher education institutions. According to those statistics, Black Multiracials comprised 18.7% of black students in their combined incoming freshman classes in the Fall of 2010 and 2011.

Despite how large the percentage of Black Immigrants and Black Multiracials are among black students at selective higher education institutions now, their percentages are likely to substantially increase over the next decade. This is due to the dramatic increases in foreign-born blacks admitted to the country and increases in Black Multiracials of college age over the next ten years. Since 1970,

5. However, in the fall of 2010, new Department of Education (DOE) regulations regarding the collecting and reporting of racial and ethnic data to the DOE went into effect. Under these new regulations, self-identified Black Multiracials are reported in a count of a new Two or More Races category as opposed to the black category. For an extended discussion of the history that led to the adoption of the new regulations and how they changed the collecting of racial and ethnic data see Kevin Brown, *Should Black Immigrants Be Favored Over Black Hispanics and Black Multiracials in the Admissions Processes of Selective Higher Education Programs?*, 54 *How. L. J.* 255, 256-57 (2011).

6. For support of statistics in this paragraph see Kevin Brown and Tom I. Romero, *supra* note 2, at 1181.

7. Ronald Roach, *Drawing Upon the Diaspora*, *DIVERSE ISSUES IN HIGHER EDUCATION*, Aug. 25, 2005, http://www.diverseeducation.com/artman/publish/article_4558.shtml.

the number of black immigrants, mostly from the Caribbean and Africa, coming into the United States has skyrocketed. The percentage of blacks that are foreign-born has increased from 1.1 percent in 1970, to 4.9 percent in 1990, to 8.8 percent in 2010.⁸ Thus, the percentage of Black Immigrants among the college age black population is on a steep upward trajectory. Increased interracial dating, cohabitation, and marriage have also increased the percentage of Black Multiracials. Census Bureau figures from the 2010 Census show that 7.4 percent of those who checked the black racial box, up from 4.8 percent in 2000, also designated another racial category.⁹ As one might expect, the younger blacks are the more likely they are to be multiracial. In 2010, the percentage of mixed-race blacks between the ages of fifteen and nineteen was only 6.5 percent. However, for blacks between the ages of five and nine it increased to 11.9 percent. As a result, the percentage of Black Multiracials among the black college age population will increase by over eighty percent in the next ten years.

Given the evidence of the overrepresentation of Black Immigrants and Black Multiracials currently attending selective higher education institutions and the expected increases in their percentage among the blacks of college age, Ascendant Blacks will almost certainly come to make up only a small percentage of the black students in many of our selective colleges and universities within the next ten years if they don't already. For example, at the authors' law school, of the fifteen blacks who enrolled in the first year Fall of 2011 class, eleven of them were either Black Immigrants or Black Multiracials.¹⁰

III. Implications for the Prospects of Ascendant Black Women Attending Selective Higher Education Institutions

In 1983, Walter Leavy introduced the black community to the provocative question: "Is the black male an endangered species?"¹¹ To emphasize the deteriorating condition of the African American male, Leavy pointed to a number of factors including high rates of unemployment, homicide, and imprisonment, as well as a decrease in life expectancy that negatively impacts their ability to prosper in life. Thirty years after Leavy's article, one place where we can see the consequences of these destructive influences on black males is with regard to their educational achievement levels. For some time, black women have outpaced black men in achieving educational success. In 1976, there were 1,033,000 black students enrolled in higher education institutions, of which 563,100 were women.¹² By 1990, the number of black women had almost doubled, while the number of black men rose only slightly. Thus, black women comprised 1,037,700 of the 1,640,000 black students in higher education institutions.¹³ As a result, while black women made up 54.3 percent of black higher education enrollment in 1976, their percentage climbed to 63.3 percent by 1990. The same gender disparity continued through the decade of the 1990s, with black women making up 63.4 percent of blacks enrolled in college in 2001.¹⁴ Data collected during the 2004–05 academic year illustrates not only the disparity in college enrollment, but also that black women earned almost twice as many bachelor's degrees as black men.¹⁵ In addition to outnumbering black men, black women may also

8. For 1970 and 1990 figures see Campbell Gibson & Emily Lennon, *Race and Hispanic Origin of the Population by Nativity: 1850 to 1990*, U.S. CENSUS BUREAU (1999), available at <http://www.census.gov/population/www/documentation/twps0029/tab08.html>. For 2010 figures see U. S. CENSUS BUREAU, *The Black Alone or in Combination Population in the United States: 2010 tbl.4* (2010), available at <http://www.census.gov/population/race/data/ppl-bc10.html>.

9. See Kevin Brown and Tom I. Romero, II, *supra* note 1, at 1174–5.

10. From personal observations and discussions, seven of the black first-year students are from Ghana, Liberia, Jamaica, Kenya, Nigeria, and Trinidad and Tobago, and the remaining four are Black Multiracials.

11. Walter Leavy, *Is the Black Male an Endangered Species?*, *EBONY*, Aug. 1983, at 41.

12. FLORENCE B. BONNER, MARIE-CLAUDE JIPGUEP-AKHTAR & R.J. HARRISON, *HOWARD UNIV., EDUCATIONAL ATTAINMENTS OF U.S. BLACK MALES AND FEMALES: 1971 TO 2003* (2010).

13. *Id.*

14. There were 1.1 million black women, but only 635,200 black men enrolled in higher education institutions in 2001. *Black Men Have Fallen Severely Behind in College Enrollments*, 47 *J. OF BLACKS IN HIGHER EDUC.* 21, 21 (2005).

15. The total number of bachelor's degrees earned by black women and men were 90,312 and 45,810. *African Americans Making Solid Gains in Bachelor's and Advanced Degrees: Black Women Far Out Ahead*, 57 *J. OF BLACKS IN HIGHER EDUC.* 62, 63 (2007).



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outperform their black male counterparts in the classroom. For example, some surveys of honor roll students at the nation's historically black colleges and universities show that upwards of eighty percent of these students are women.¹⁶

As a result of the institution of affirmative action programs, when graduate schools at predominately white institutions first started admitting blacks into their programs in large numbers, black males were the primary beneficiaries. However, the predominance of black males over black females in selective higher education institutions no longer exists. For instance, black men historically comprised the majority of blacks pursuing legal education. It was not until 1956 that the first black woman graduated from Harvard Law School; nearly a century after the first black man had earned a law degree there.¹⁷ Yet, by the 1998–99 academic year, black women constituted 64.7 percent of all black first-year law students. By 2008, however, black women received 1893 law degrees compared to only 1109 for black men.¹⁸ With regard to medical school, black males also historically outnumbered black women. In 1972, black men accounted for 86 percent of all black medical school graduates.¹⁹ Four years later, of the 711 black graduates from medical school, 72.6 percent were males.²⁰ By 2008, however, black women received almost twice as many medical degrees as black men, 751 compared to 396.²¹ In 2004–5 academic year, the total number of master's degrees earned by black women more than doubled those of black men, 38,748 and 15,733, respectively.²² With regard to professional degrees, black women earned 64 percent of all of those awarded to African Americans in 2005.²³ Richard Banks in his recent book *Is Marriage for White People?* noted that in 2008, there were more than twice as many black females in graduate school than black males—125,000 as opposed to 58,000.²⁴

As troublesome as the decline in the participation rates of black males in higher education programs noted by the statistics above may be, these statistics show that for some time, black women have far outpaced black males in academic success. Thus, the increasing percentages of Black Immigrants and Black Multiracials among blacks at selective higher education institutions points to the conclusion that they are much more likely to be replacing Ascendant Black Women than Ascendant Black Men.

16. *Black Women Now Dominate African-American Law School Enrollments*, 30 J. OF BLACKS IN HIGHER EDUC. 64, 65 (2001).

17. *Id.*

18. *Id.*

19. Trueblackness, *Black Women Dominate Best Medical Schools*, GROUPS.YAHOO.COM (Dec. 26, 2003), <http://groups.yahoo.com/group/trueblackness/message/7153>.

20. *A Half-Century of Progress of Black Students in Medical Schools*, 30 J. OF BLACKS IN HIGHER EDUC. 28, 30 (2001).

21. RALPH RICHARD BANKS, *IS MARRIAGE FOR WHITE PEOPLE?: HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE* 37–38 (2011).

22. *African Americans Making Solid Gains in Bachelor's and Advanced Degrees: Black Women Far Out Ahead*, 57 J. OF BLACKS IN HIGHER EDUC. 63, 66 (2007).

23. *Id.* at 67

24. RALPH RICHARD BANKS, *IS MARRIAGE FOR WHITE PEOPLE?: HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE* 37 (2011).



The increasing acceptance of interracial marriage has also increased the numbers of such marriages, as well as interracial cohabitation.

IV. Implications for Ascendant Black Women as Mothers

Another consequence of the changing racial and ethnic ancestry of blacks at selective higher education institutions is what it means for Ascendant Black Women as mothers. Because black men are much more likely to be involved in interracial dating and marriage than black women, Black Multiracial children are more likely to have a black father than a black mother.²⁵ Thus, by preferring Black Multiracials to Ascendant Blacks in the admissions of selective higher education institutions, these institutions are also providing a preference that more likely benefits the children of black males at the expense of the children of Ascendant Black Women.

In 1960, before selective higher education institutions engaged in efforts to open their institutions to blacks, interracial marriage between blacks and whites was still illegal in over twenty states. Of the almost twelve million blacks over the age of fifteen in the country, only 51,000 were married to whites and black women were slightly more likely to have a white spouse than black men.²⁶ Acceptance of interracial marriages in the United States, however, has increased dramatically since the 1960s. Surveys in the 1960s showed that about ninety-two percent of whites stated they would not consider marrying an African American.²⁷ As late as 1965, forty-eight percent of whites in a national poll indicated approval of anti-miscegenation laws. In the South, the feeling was even stronger with seventy-two percent of whites and thirty percent of blacks approving of such laws. In a 1997 Gallup poll, however, seventy-seven percent of blacks and sixty-one percent of whites indicated their approval of interracial marriages.²⁸ The percentage of those who object to interracial marriage has continued to decrease. This is especially true among younger adults, the ones in their prime reproductive years. According to a 2010 Pew Research Center Report, almost all Millennials (18 to 29 year olds) accept interracial dating and marriage.²⁹ The Report notes that ninety-two percent of white and eighty-eight percent of African American Millennials say that they would be fine with a family member marrying someone outside of their group.

25. At least one study of information from the 2008 American Community Survey data also showed that U.S.-born black men are more likely to marry foreign-born black women than U.S. born black women are to marry foreign-born black men. According to the study, of the 79 foreign-born black men included in their data who married in 2008, 40.5% married U.S. born black women. In contrast of the 70 foreign-born black women included in their data who married that year in the survey 50% married U.S. born black men. Zhenchao Qian and Daniel T. Lichter, *Changing Patterns of Interracial Marriage in a Multiracial Society*, 73 J. OF MARRIAGE & FAMILY 1065, 1072 tbl. 2 (2011).

26. U.S. CENSUS BUREAU, *Race of Wife by Race of Husband: 1960, 1970, 1980, 1991, and 1992* tbl.1 (1998), available at <http://www.census.gov/population/socdemo/race/interractab1.txt>.

27. ROBERT J. SICKELS, *RACE, MARRIAGE AND THE LAW* 117, 121 (1972).

28. See Maria Root, *The Color Of Love*, AM. PROSPECT, Apr. 8, 2002 at 54. Another survey of American attitudes showed that in 1997, 67 percent of whites and 83 percent of African Americans approved of interracial marriages. See HOWARD SCHUMAN, CHARLOTTE STEEH, LAWRENCE BOBO & MARIA KRYSAN, *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS* 285 (1997).

29. See PEW RESEARCH CTR. PUBLICATIONS, *Almost All Millennials Accept Interracial Dating and Marriage* (Feb. 1, 2010), <http://pewresearch.org/pubs/1480/millennials-accept-interracial-dating-marriage-friends-different-race-generations>.

The increasing acceptance of interracial marriage has also increased the numbers of such marriages, as well as interracial cohabitation.³⁰ The percentage of blacks with a spouse of another race increased from 1.1 percent in 1970 to 2.4 percent in 1980 to 4.1 percent in 1990 and, for single race blacks in 2000, to 7.0 percent.³¹ Viewing the increasing percentages of blacks who marry outside of the race, however, obscures the differences in interracial marriage rates broken down by gender. Among racial minorities, blacks are the only group where the men are more likely to marry outside of the race than the women.³² Whereas the percentage of married black males who married outside of the race increased from 1.5 percent in 1970 to 5.8 percent in 1990, for married black women the percentages only increased from 0.8 percent in 1970 to 2.3 percent in 1990. Data from the 2000 Census also revealed that 9.7 percent of married black men, but only 4.1 percent of married black women, reported having a spouse of another race. Younger blacks are even more likely to cohabit and marry outside of their race. A study comparing Census data from 1990 to that of 2000 of married couples between the ages of twenty and thirty-four,³³ pointed out that native-born African Americans between the studied ages who married outside of the race increased from the 1990 figure of 8.3 percent to 14.2 percent for single-race black men. If multiracial black men were included, then the percentage goes to 15.4 percent. For native-born black women, the increases were from the 1990 figure of 3.3 percent to 5 percent for single-race black women, and 6 percent if multiracial black women were included.³⁴ A recent Pew Center Research Report also noted that interracial marriages make up a much larger percentage of new marriages by blacks, when compared to the total of blacks currently married. Thus, in 2008, 22.0 percent of black male and 8.9 percent of black female newlyweds married outside of their race, compared to 12.5 percent of all married black males and 5.5 percent of all married black females.³⁵

We have not been able to find data that reports the percentage of Black Multiracials who have a black father as opposed to a black mother. The above data on interracial marriage and cohabitation, however, suggests that black men are two to three times more likely to marry or cohabit outside of the race than black women. While these figures do not specifically tell us that Black Multiracials are far more likely to have a black father than a black mother, they strongly suggest that is the case. Thus, to the extent that Black Multiracials are replacing Ascendant Blacks in selective higher education institutions, effectively, it means that the children of black fathers are more likely to benefit from a preference based on affirmative action in the admissions process in comparison to the children of black mothers.

V. Implications for Marriage and Companionship Prospects of Ascendant Black Women

Recent articles have reported that the African American community has seen a dramatic decline in the rate of marriage among black women, especially among highly educated black women.³⁶ U.S.

30. While many individuals will get married, an alternative to marriage is cohabitation. Cohabitation is normally a short-term, marriage-like arrangement. It has contributed to a reduction in marriage rates in early adulthood and an increase in the average age of first marriage.

31. Sharon M. Lee & Barry Edmonston, *New Marriages, New Families: U.S. Racial and Hispanic Intermarriages*, 60 POPULATION BULL. 1, 12 tbl. 2 (2005), available at <http://www.prb.org/pdf05/60.2NewMarriages.pdf>.

32. *Id.*

33. See Zhenchao Qian & Daniel T. Lichter, *Social Boundaries and Marital Assimilation: Interpreting Trends in Racial and Ethnic Intermarriage*, 72 AMER. SOC. REV. 68, 79 (2007).

34. *Id.* The study also saw similar increases in the percentage of blacks involved in interracial cohabitation arrangements. The authors stated that the percentage of African American males in interracial cohabitation arrangements increased from 14.7 percent to 21.9 percent between 1990 and 2000. For black women the increase was more modest, from 5.6 percent to 6.2 percent. *Id.*

35. JEFFREY S. PASSELL ET AL., PEW RESEARCH CTR., MARRYING OUT: ONE-IN-SEVEN NEW U.S. MARRIAGES IS INTERRACIAL OR INTERETHNIC 11-12 (2010), available at <http://pewresearch.org/pubs/1616/american-marriage-interracial-interethnic>. For 2010, the percentage of black males who married that year who married outside of the race increased to 23.6% and for black females to 9.3%. See PAUL TAYLOR, WENDY WANG, KIM PARKER, JEFFREY S. PASSELL, EILEEN PATTEN & SETH MOTEL, PEW RESEARCH CTR., THE RISE OF INTERMARRIAGE: RATES, CHARACTERISTICS VARY BY RACE AND GENDER 9 (2012), available at <http://www.pewsocialtrends.org/files/2012/02/SDT-Intermarriage-II.pdf>.

36. Linsey Davis & Hana Karar, *Single, Black, Female -- and Plenty of Company*, ABC NEWS/NIGHTLINE (Dec. 22, 2009); Ralph Richard Banks, *An Interracial Fix for Black Marriage*, WALL STREET J. (Aug. 6, 2011).

Census data between 1970 and 2010 highlights the dramatic decrease in the rate of marriage among black women. The percentage of black women over the age of eighteen who were married declined from sixty-two percent in 1970 to forty-three percent in 1990.³⁷ In 2010, twenty-three percent of white women had never married.³⁸ However, this contrasts very favorably with the 45.2 percent rate for black women.³⁹ The 2010 figure for black women represents an increase from the 42.7 percent figure in 2005 and the 44 percent figure in 2008.⁴⁰ At least one critic of this recent data pointed to the fact that while the numbers show younger black women (beginning at eighteen years old) are unmarried, when analyzing black women who are thirty-five and older, the percentage drops from 43 percent to 25 percent.⁴¹ Thus indicating that black women get married later on in life.⁴² While this may be true, the total percentage of unmarried black women thirty-five and older was still twice that of their white female counterparts.⁴³

There are a number of reasons for the difficulties black women encounter in finding a suitable mate. Of any minority group of women, black women are the least likely to marry outside of their race. For example, in 2000, only 4.1 percent of married black women were married outside of the race. In contrast, 57.6 percent American Indian, 21.6 percent Asian women, 45.8 percent of Hawaiian women, 18.2 percent of Some other Race women and 56.6 percent of multiracial women who were married had married outside of their race.⁴⁴ As a result, their potential marriage pool is primarily restricted to black men. However, black women significantly outnumber black men. Recent data shows that there are 1.9 million more black women over the age of fifteen than black men,⁴⁵ with black women making up almost fifty-five percent of this portion of the black population.⁴⁶ As a result, there is a tremendous gender imbalance between the numbers of black women of marrying age when contrasted with the numbers of black men.

The marriage pool of black men is then further constrained by a number of other negative factors. In a thirty-year period, the U. S. prison population increased from 300,000 to almost two million.⁴⁷ This large American prison population has had a devastating impact on the marriage pool of eligible black men. According to statistics from the U.S. Bureau of Justice, in July 2009, about 840,000 black men in United States prisons made up approximately forty percent of all male inmates,⁴⁸ and an estimated 32.2 percent of African American males will spend part of their life in prison versus 17.2

37. Kyle D. Crowder & Stewart E. Tolnay, *A New Marriage Squeeze for Black Women: The Role of Racial Intermarriage by Black Men*, 62 J. OF MARRIAGE AND THE FAMILY 792, 792 (2000).

38. Eric Johnson, *Nightline Face-Off: Why Can't Successful Black Women Find a Man?*, ABC NEWS/NIGHTLINE (Apr. 21, 2010). See also U.S. CENSUS BUREAU, *America's Families and Living Arrangements: 2010* tbl. A1 (White alone) (2010), available at <http://www.census.gov/population/www/socdemo/hh-fam/cps2010.html>.

39. U.S. CENSUS BUREAU, *America's Families and Living Arrangements: 2010* tbl.A1 (Black alone) (2010), available at <http://www.census.gov/population/www/socdemo/hh-fam/cps2010.html>.

40. BLACKDEMOGRAPHICS.COM, *African American Population: Marriage in Black America*, <http://www.blackdemographics.com/population.html> (2010).

41. Ivory A. Toldson & Bryant Marks, *New Research Shatters Myths and Provides New Hope for Black Love and Marriage*, EMPOWER MAGAZINE, Aug. 8, 2011, available at <http://www.empowernewsmag.com/listings.php?article=2051>.

42. Angela Stanley, *Black, Female and Single*, N.Y. TIMES (Dec. 10, 2011), <http://www.nytimes.com/2011/12/11/opinion/sunday/black-and-female-the-marriage-question.html?pagewanted=all>.

43. Ivory A. Toldson & Bryant Marks, *supra* note 41. .

44. Sharon M. Lee & Barry Edmonston, *New Marriages, New Families: U.S. Racial and Hispanic Intermarriages*, 60 POPULATION BULL. 1, 12 tbl. 2 (2005), available at <http://www.prb.org/pdf05/60.2NewMarriages.pdf>.

45. Ivory A. Toldson & Bryant Marks, *supra* note 41.

46. According to 2010 Census figures, of the 30,450,000 blacks over the age of 15, 16,630,000 were women (16,630,000/30,450,000 = 54.7%). See U.S. CENSUS BUREAU, *America's Families and Living Arrangements: 2010* tbl.A1 (Black Alone or in Combination with One or More Other Races) (2010), available at <http://www.census.gov/population/www/socdemo/hh-fam/cps2010.html>.

47. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN AN AGE OF COLORBLINDNESS* 6 (2010).

48. Heather C. West, *Prison Inmates at Midyear 2009-Statistical Tables*, U.S. DEPT. OF JUSTICE BUREAU OF JUSTICE STATISTICS, June 2010, at 19 tbl.16, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim09st.pdf>.



Another factor in the decreased income potential of black men is the changing labor market in the United States.

percent of Hispanic males and 5.9 percent of white males.⁴⁹ Wisconsin sociology professor Pamela Oliver further points out that, “about a third of African American men are under the supervision of the criminal justice system, and about 12% of African American men in their twenties and thirties are incarcerated.”⁵⁰

The pool of marriageable black men is further reduced because a large number of black men cannot provide a stable source of income to support a family. For example, when incarcerated black men are released from prison, they find that having a criminal record will also reduce their employment prospects. Since the Internet has made it far easier to do criminal background checks of potential employees, a prospective employee’s criminal background is far more likely to be disclosed in the hiring process today;⁵¹ most employers admit that they would not hire an applicant that they knew had a criminal record.⁵² Ex-offenders typically have several characteristics employers find undesirable such as less education, fewer job skills, and higher rates of untreated drug addiction and mental illness. However, there are additional characteristics that ex-offenders possess related to their criminal record that makes them unattractive to potential employers. For example, those released from prison have a very high rate of recidivism during the first three years.⁵³ For prospective employers this creates concerns about the long-term employment prospects of ex-offenders, as well as the possibility that their criminal behavior could affect the employer’s workforce. In addition, employers are concerned about liability stemming from possible negligent hiring lawsuits if the employee harms someone while on the job.⁵⁴

Another factor in the decreased income potential of black men is the changing labor market in the United States. Over the past forty years employers have automated or outsourced overseas many of the high-paid, low-skilled jobs that less-educated workers used to do. Black male workers were disproportionately employed in those industries that suffered from international competition.⁵⁵ Also, as noted above, far fewer black men earn college degrees than black women. Thus, fewer black males can take advantage of the increased job opportunities and income potential that a college degree generates. One study, however, points out that black men still earn more than black women and are

49. Michael Connett, *Employer Discrimination Against Individuals With A Criminal Record: The Unfulfilled Role of State Fair Employment Agencies*, 83 TEMP. L. REV. 1007, 1012 (2011).

50. See Pamela Oliver, *Racial Disparities in Criminal Justice*, UNIV. OF WIS., <http://www.ssc.wisc.edu/~oliver/RACIAL/RacialDisparities.htm> (last visited Mar. 2, 2012).

51. See James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 177, 207 (2008) (reporting that growing number of states are making criminal record information publicly available on state websites).

52. JEREMY TRAVIS ET AL., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 31 (2001). See also Adrienne Lyles-Chockley, *Transitions to Justice: Prisoner Reentry as an Opportunity to Confront and Counteract Racism*, 6 HASTINGS RACE & POVERTY L.J. 259, 271 (2009) (stating that employers are “more reluctant to hire ex-offenders than any other group of disadvantaged persons.”).

53. See Patrick A. Langan & David J. Levin, U.S. Dep’t of Justice, *Recidivism of Prisoners Released in 1994*, BUREAU OF JUSTICE STATISTICS 1 (2002) (reporting that “67.5% of prisoners were rearrested for a new offense” within three years of release).

54. See, e.g., Ryan D. Watstein, Note, *Out of Jail and Out of Luck: The Effect of Negligent Hiring Liability and the Criminal Record Revolution on an Ex-Offender’s Employment Prospects*, 61 FLA. L. REV. 581, 584 (2009).

55. See Jessica Gordon Nembhard, Steven C. Pitts & Patrick L. Mason, *African American Intragroup Inequality and Corporate Globalization in AFRICAN AMERICANS AND THE ECONOMY* 217 (Cecial Conrad et al. eds., 2005).

overrepresented in several occupations that do not require a college degree, but still provide a good income.⁵⁶ These occupations include managers, truck drivers, police officers, construction workers, bailiffs, corrections officers, jailers, janitors, and building cleaners. However, while these occupations may provide sufficient incomes, this does not guarantee that these working-class black men are compatible with college-educated black women.

Another factor that reduces the marriage pool for black women stems from one discussed earlier. Black men are two to three times more likely to engage in interracial dating or cohabitation than black women.⁵⁷ Further, studies have pointed out that “black/white intermarriages tend to occur when the white spouse trades the privilege of racial status for the higher status of a better-educated black partner.”⁵⁸ Thus, there is evidence which suggests that interracial marriages increase as both black men and women obtain higher levels of education; this is particularly true for black males.⁵⁹ This is important because students attending selective higher education programs tend to come from higher socio-economic backgrounds. For example, one report that looked at 146 selective colleges and universities in the United States, noted that approximately seventy-four percent of all students hail from the upper-income quartile, whereas only three percent come from the lowest-income quartile, and only 10 percent are from the bottom half of the SES distribution.⁶⁰

Thus, another stark reality of the changing racial and ethnic ancestry of blacks attending selective higher education institutions for Ascendant Black Women is the impact on their prospects of finding that companion with whom they will have and raise children. With the current overrepresentation of Black Immigrants and Black Multiracials attending selective colleges and universities and their increasing percentages approaching college age, over the next ten years Black Immigrants and Black Multiracials will virtually crowd Ascendant Blacks out of selective higher education institutions. Thus, based on this reality, it is now sound advice to tell an Ascendant Black that if they want their child to graduate from one of these institutions “they should seek to have children by someone who is either foreign-born or of another race.” However, given the broader marriage and co-habitation opportunities presented to black males as opposed to black females, such advice further reduces the prospects of Ascendant Black Women to find that acceptable companion, because black males are presented with yet another reason to select someone other than them.

VI. Conclusion

As the nation waits with bated breath for the Supreme Court to decide the *Fisher* case, the nation’s attention should also focus on an issue of almost equal importance: the changing racial and ethnic ancestries of blacks benefitting from affirmative action. It is a well-settled principle that affirmative action

56. See generally Robert T. Palmer & Dina C. Maramba, *African American Male Achievement: Using a Tenet of Critical Theory to Explain the African American Male Achievement Disparity*, 43 EDUC. AND URBAN SOC’Y 431 (2010) (stating 725,922 black men earn more than \$75,000 as compared to 528,204 black women).

57. At least one study of information from the 2008 American Community Survey data also showed that U.S.-born black men are more likely to marry foreign-born black women than U.S. born black women are to marry foreign-born black men. According to the study, of the seventy-nine foreign-born black men included in their data who married in 2008, 40.5 percent married U.S. born black women. In contrast of the seventy foreign-born black women included in their data who married that year in the survey 50 percent married U.S. born black men. See Zhenchao Qian and Daniel T. Lichter, *Changing Patterns of Interracial Marriage in a Multiracial Society*, 73 J. OF MARRIAGE & FAMILY 1065, 1072 tbl 2 (2011).

58. SIMON CHENG & SEENA MOSTAFAVIPOUR, *THE DIFFERENCES AND SIMILARITIES BETWEEN BIRACIAL AND MONORACIAL COUPLES: A SOCIODEMOGRAPHIC SKETCH BASED ON THE CENSUS 2000* 6 (2005), available at

http://www.allacademic.com/meta/p_mla_apa_research_citation/0/2/2/1/9/pages22192/p22192-1.php.

59. See Ivory A. Toldson & Bryant Marks, *supra* note 41.

60. See OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., *Race-Neutral Alternatives in Postsecondary Education: Innovative Approaches to Diversity* (2004), available at <http://www.ed.gov/about/offices/list/ocr/edlite-raceneutralreport2.html>. See also Anthony Carnevale & Stephen J. Rose, CENTURY FOUNDATION, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions* 11 (2003), available at http://tcf.org/publications/pdfs/pb252/carnevale_rose.pdf.

was enacted to remedy past discrimination, particularly the systematic racism inflicted upon African Americans embodied in the institutions of slavery and Jim Crow segregation. After all, the Supreme Court's opinion in *Grutter v. Bollinger*,⁶¹ approved an affirmative action plan that sought to obtain a critical mass of underrepresented minorities with a history of discrimination. As O'Connor noted,

"By virtue of our Nation's struggle with racial inequality, such [underrepresented minority] students are both likely to have experiences of particular importance to the Law School's mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences."⁶²

How can we as a society justify affirmative action based upon benefiting groups with a history of discrimination when we eliminate the one group, Ascendant Blacks, who not only come from the group most victimized by that history of discrimination, but also the very group that affirmative action was primarily created to assist.⁶³

This essay took a unique approach by analyzing the changing racial and ethnic ancestry of blacks attending selective higher education programs. However, it did so from the perspective of Ascendant Black Women. This allowed us to point out that these changes negatively impact Ascendant Black Women in terms of reducing their opportunities for attending a selective higher education program; negatively impact them in their roles as mothers because their children are far less likely to benefit from affirmative action than the children of black males; and reduces their prospects to find long-term relationships with males. The changing racial and ethnic ancestry of blacks on affirmative action has received some publicity in the popular media and the legal literature; however, it has not truly caught the nation's attention. It may very well be that a principal reason why more discussion has not occurred about the changing racial and ethnic ancestry of blacks benefitting from affirmative action is because Ascendant Black Women are the ones paying most of the price.

61. 539 U.S. 306 (2003).

62. *Id.* at 333, 338.

63. Kevin Brown, *Should Black Immigrants Be Favored Over Black Hispanics and Black Multiracials in the Admissions Processes of Selective Higher Education Programs?*, 54 *How. L. J.* 255, 294 (2011).



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