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# BLACK MARRIAGE, WHITE PEOPLE, RED HERRINGS

Melissa Murray\*

IS MARRIAGE FOR WHITE PEOPLE? HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE. By *Ralph Richard Banks*. New York: Dutton. 2011. Pp. 189. Cloth, \$25.95; paper, \$16.

## INTRODUCTION

A staple of mystery novels, the red herring is a clue that misleads or diverts attention away from the actual issue. For example, in Agatha Christie's *The Mysterious Affair at Styles*,<sup>1</sup> the fractious relationship between the deceased's widower and the deceased's maid is meant to distract the reader from discovering that the two are not enemies, but lovers who have conspired to poison the deceased.

Ralph Richard Banks's *Is Marriage for White People?*<sup>2</sup> is worlds away from Agatha Christie's novels. Decidedly a work of nonfiction, Banks's book considers the plight of middle-class African Americans who, according to statistics, are the least likely of any demographic group to get and stay married. Despite these obvious differences, *Is Marriage for White People?* shares some important commonalities with Agatha Christie's mysteries. Banks seeks to solve a mystery, but red herrings draw attention away from the true issue that should be the subject of Banks's concern.

The mystery, of course, is the black marriage decline. In 1950, 78 percent of black families were headed by married couples.<sup>3</sup> In 2007, only 33 percent of black women and 44 percent of black men were married.<sup>4</sup> Though marriage rates are declining across the board, the point remains:

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1. AGATHA CHRISTIE, *THE MYSTERIOUS AFFAIR AT STYLES* (1920).
2. Ralph Richard Banks is the Jackson Eli Reynolds Professor of Law, Stanford Law School.
3. BUREAU OF THE CENSUS, SB/93-2, *BLACK AMERICANS: A PROFILE* (1993).
4. RICHARD FRY & D'VERA COHN, PEW RESEARCH CTR., *WOMEN, MEN AND THE NEW ECONOMICS OF MARRIAGE* 22 (2010), available at <http://pewsocialtrends.org/files/2010/10/new-economics-of-marriage.pdf>.

African Americans are among the most unmarried racial groups in the United States.<sup>5</sup> Banks asks: How did this happen? How did marriage go from being almost *de rigeur* among African Americans to being anomalous? Why do African Americans continue to lag behind other demographic groups in marriage rates? And what are the costs of this decline—for blacks and for everyone else?

Focusing on middle-class African Americans as a microcosm of the larger black community, *Is Marriage for White People?* attempts to solve the mystery of the black marriage decline by identifying its causes and consequences. Drawing from over one hundred interviews completed for the project, Banks concludes that the marriage decline and gap are the products of a skewed marriage market in which there is a surfeit of marriageable middle-class black women and a scarcity of similarly situated black men. To correct the market and increase marriage rates, Banks encourages middle-class black women to expand their pool of dating and marriage prospects to include nonblack men. Doing so, he argues, will, in the short term, help middle-class black women find the stable relationships they want. In the long term, this move will help ensure more black marriages (and all of marriage's benefits) in the future.

The trouble is that the book presents numerous red herrings that preoccupy the reader and divert attention from the real issue that should be of concern. The pressing public policy issue is not the black marriage decline, interracial marriage, or whether marriage is for white people. Rather, it is whether marriage should be the normative ideal for intimate life and the vehicle by which we confer a range of important public and private benefits. Banks's narrow focus on the black marriage decline prevents him from considering how the naturalization of the marital family as a privatized system of social provision impedes imagining new possibilities that better provide necessary social support and economic stability.

This Review proceeds in three parts. Part I provides a more detailed description of Banks's project. Part II focuses on the core of Banks's argument: his critique of economically "mixed" marriages and his interracial-marriage prescription. Part III shifts to consider how Banks's project would have benefited from greater engagement with marriage's institutional role in society. To this end, Part III considers what is lost in focusing narrowly on marriage and the marriage decline.

## I. THE PROBLEM OF BLACK MARRIAGE

Only a generation ago, almost everyone got married.<sup>6</sup> After all, marriage was the only legitimate—and legal—way to have sex and raise a family.<sup>7</sup>

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5. *Id.*

6. Kerry Abrams, *Marriage Fraud*, 100 CALIF. L. REV. 1, 56 (2012).

7. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 127 (1993); MORRIS PLOSCOWE, SEX AND THE LAW 1 (1951); Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1268 (2009).

Today, as Banks notes, many Americans have put sex and the baby carriage before marriage.<sup>8</sup> But even as marriage rates have declined in the United States, not all groups have retreated from marriage at the same rate. Even in this modern moment when marriage matters less for everyone, African Americans are the least likely of all demographic groups to get—and stay—married (p. 7). Today, nearly 70 percent of black women and more than 50 percent of black men are unmarried.<sup>9</sup>

Many commentators have noted both the marriage gap between blacks and other demographic groups and the black marriage decline.<sup>10</sup> Some of these commentators have viewed the disparity as a legacy of slavery.<sup>11</sup> More conservative pundits have attributed the trend to governmental welfare programs, which are thought to weaken incentives toward marriage.<sup>12</sup> Others attribute the decline to a more pluralistic family tradition that dates back to Africa—one in which the marital nuclear family is merely one option for organizing kinship structures.<sup>13</sup>

Banks considers, and quickly dismisses, these theories, shifting the discussion from the alleged moral and cultural failings of the black community to numbers and scarcity (p. 12). Focusing on the middle class, Banks reconceptualizes the black romantic landscape in market terms (Chapter Four). Incarceration and uneven educational and employment prospects continually plague black men, stymieing their opportunities for professional and personal success (p. 29). Black women have managed to avoid these obstacles. They complete high school and graduate from college at higher rates than black men, and they are more likely than their male counterparts to belong to the professional class (pp. 38–44).

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8. P. 7. Jason DeParle & Sabrina Tavernise, *For Women Under 30, Most Births Occur Outside Marriage*, N.Y. TIMES, Feb. 17, 2012, at A1, <http://www.nytimes.com/2012/02/18/us/for-women-under-30-most-births-occur-outside-marriage.html>. Naomi Cahn and June Carbone have also documented this shift, but they note that these trends are more pronounced in so-called “red” states that, paradoxically, hew to a traditional family-values framework. NAO-MI CAHN & JUNE CARBONE, *RED FAMILIES V. BLUE FAMILIES* 21 (2010) (noting that the five states with the highest teen birthrates voted Republican in 2004, and four of the five also voted Republican in 2008).

9. FRY & COHN, *supra* note 4, at 22.

10. *E.g.*, ORLANDO PATTERSON, *RITUALS OF BLOOD*, at xi (1998); David T. Ellwood & Jonathan Crane, *Family Change Among Black Americans: What Do We Know?*, J. ECON. PERSP., Fall 1990, at 65–69; Robert D. Mare & Christopher Winship, *Socioeconomic Change and the Decline of Marriage for Blacks and Whites*, in *THE URBAN UNDERCLASS* 175, 175 (Christopher Jenks & Paul E. Peterson eds., 1991); R. Kelly Raley, *Recent Trends and Differentials in Marriage and Cohabitation: The United States*, in *THE TIES THAT BIND: PERSPECTIVES ON MARRIAGE AND COHABITATION* 19, 23 (Linda J. Waite ed., 2000).

11. *E.g.*, *THE NEGRO AMERICAN FAMILY* 31, 41, 44 (W.E. Burghardt Du Bois ed., The New Am. Library 1969) (1908); PATTERSON, *supra* note 10, at 25–27. *See generally* E. FRANKLIN FRAZIER, *THE NEGRO FAMILY IN THE UNITED STATES* (Univ. of Notre Dame Press 2001) (1939).

12. *See, e.g.*, CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950–1980*, at 154–66 (1984); JAMES Q. WILSON, *THE MARRIAGE PROBLEM* 144 (2002).

13. MELVILLE J. HERSKOVITS, *THE MYTH OF THE NEGRO PAST* 180–83 (Beacon Press 1990) (1941); WILSON, *supra* note 12, at 119–26.

This results in an uneven marriage market with far more college-educated professional black women than similarly situated black men. Moreover, black men are more likely than black women to date and marry interracially, further reducing the already limited supply of middle-class black men available for marriage (pp. 33–38).

The uneven marriage market creates a power dynamic that severely disadvantages black women. Cognizant of their own scarcity (and the demand for middle-class husbands), black men “dictate the terms of their intimate relationships,” using “their disproportionate [market] power to establish relationships that are intimate but not committed, that entail sex but not marriage, and that offer benefits without responsibilities” (p. 62). Further, black men play the field as long as they can, deferring marriage to sow their wild oats (pp. 57–59). Relatedly, monogamy is elusive and “mansharing” is prevalent among middle-class blacks in dating relationships (pp. 50–54).

Black women have responded to these market dynamics in a number of ways. Some accept these market conditions, choosing to either remain single or date men who they know to be dating multiple women (pp. 59–63). Neither choice, however, furthers their chances for marriage. Others do what Banks terms “marrying down”—partnering with men who are less educated and less economically successful (Chapter Seven).

All of these responses concern Banks. According to him, remaining single deprives black women of the many joys of companionship and family,<sup>14</sup> as well as the economic benefits of pooling two middle-class incomes (pp. 10–11). Submitting to nonexclusive relationships permits some degree of companionship and intimacy—but with costs. As Banks documents, “mansharing” contributes to high rates of sexually transmitted diseases within the African American community (pp. 64–67). And though “marrying down” boosts marriage rates in the short term, these relationships are plagued with the problems caused by the disjunction between the partners’ educational levels and economic prospects (pp. 93–102).

Banks’s assessment of black marriage market conditions recasts in academic parlance the “man shortage” theory that has been widely discussed in black popular culture.<sup>15</sup> But the book does more than simply render the marriage gap and decline coherent. Banks also reframes the marriage gap and decline in market terms and then proceeds to explain their costs.

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14. Though Banks does not explore other forms of kinship and relationship that might be as fulfilling as (or more fulfilling than) marriage and the traditional marital family, other scholars have begun to consider these possibilities. See Katherine M. Franke, *Longing for Loving*, 76 *FORDHAM L. REV.* 2685, 2686 (2008); Laura A. Rosenbury, *Friends with Benefits?*, 106 *MICH. L. REV.* 189, 209–10 (2007).

15. See, e.g., AARON ANWAR SMITH, *IS THERE REALLY A SHORTAGE OF GOOD BLACK MEN?* (2010); Nikitta A. Foston, *Campus Dilemma: Coping with the Acute Male Shortage*, *EBONY*, Sept. 2004, at 128; *Has the Black Male Shortage Spoiled Black Men?*, *EBONY*, May 1987, at 116; Sabrina Lamb & Barry Jerrels, *Is There a Shortage of Black Men, or Are Women Just Too Picky?*, *EBONY*, Apr. 2007, at 74; *Where Are the Eligible Black Men?*, *EBONY*, Sept. 1980, at 36; Demetria L. Lucas, *Commentary: The Black Men Shortage*, *ESSENCE* (Dec. 29, 2009, 9:55 AM), <http://www.essence.com/2009/12/29/black-women-arent-the-only-ones-looking/>.

Obviously, a principal cost of the uneven marriage market and the marriage decline is that blacks are shut out of marriage's many benefits—whether salutary or practical. Blacks are less financially stable and secure than other racial and ethnic subgroups—a phenomenon that Banks partly attributes to low marriage rates.<sup>16</sup> Less obviously, the marriage decline exerts pressure on the black family. Black children are far more likely than their white counterparts to be born outside of marriage and raised in a single-parent family.<sup>17</sup> Further, the abortion rate among blacks exceeds that of other racial and ethnic groups—a fact that Banks associates with the stigmatic consequences of nonmarital births (pp. 81–82). Finally, the inability to forge lasting unions deprives African Americans of the personal fulfillment, satisfaction, and support that strong marriages provide. All of these issues, Banks contends, compound the black community's disadvantages.

So how should this imperfect marriage market and its many costs be remedied, thus securing the many benefits of marriage for the black community? Banks's solution is simple but provocative. He encourages middle-class black women to exert their own power by considering the prospect of interracial marriage with similarly situated (nonblack) men (p. 120).

Advising black women to exit the black marriage market is not something that Banks takes lightly. He candidly documents the many reasons why black women have resisted racial heterogamy, particularly with white men (pp. 121–69). Chief among them is the legacy of slavery and the (often) coercive sexual relationships that arose between white men and enslaved women,<sup>18</sup> as well as a strong desire to support black men and the beleaguered black family.<sup>19</sup> But Banks also notes the degree to which fear animates black women's resistance to outmarriage (Chapter Ten). There is the fear that they will not be accepted by white in-laws (pp. 144–47); fear that their own families will not accept a white son-in-law (pp. 147–51); fear that white partners will not understand their experiences as black women or worse, that they will be fetishized as an "exotic adventure" (pp. 151–59); and fear that their biracial children will be insufficiently tethered to the black community (pp. 159–66).

Though Banks concedes that these fears are "not irrational" (p. 166), he believes that they nonetheless "embody the echo of the past" (p. 169)—a

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16. Pp. 10–11. Others share this view. See, e.g., John McWhorter, *Santorum's Black-Poverty Solution Works*, THE ROOT (Jan. 18, 2012, 12:20 AM), <http://www.theroot.com/views/santorum-right-time?page=0,1>; Walter E. Williams, *Are the Poor Getting Poorer?*, CREATORS.COM, <http://www.creators.com/opinion/walter-williams/are-the-poor-getting-poorer.html>.

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

18. Annette Gordon-Reed, *Celia's Case*, in RACE ON TRIAL 30, 48 (Annette Gordon-Reed ed., 2002). But see Jason A. Gillmer, *Telling Stories of Love, Sex, and Race*, in LOVING V. VIRGINIA IN A POST-RACIAL WORLD 29 (Kevin Noble Maillard & Rose Cuison Villazor eds., 2012) (complicating the notion that all antebellum interracial sex was coercive).

19. Pp. 136–42; RENEE C. ROMANO, RACE MIXING: BLACK-WHITE MARRIAGE IN POSTWAR AMERICA 242 (2003).

past that is giving way to a more progressive future. Citing statistics demonstrating greater acceptance of interracial couplings, Banks concludes that black women should not be bound by their fears of interracial marriage (pp. 166–68). As in any relationship, there will be challenges, but these challenges are not insurmountable, and they may pale in comparison to the challenges facing intraracial couples who, although united by a shared racial background, lack a set of shared values (p. 103).

Banks's proposal is not simply about being more open and receptive to interracial dating and marriage—of seizing love wherever one might find it. His prescription is aimed at salvaging black marriage for the black community. Recall the discussion of the black marriage market in which black men, due to demand and scarcity, wield greater relationship power than black women. In the face of these market pressures, black women have “redouble[d] their commitment to black men” and the black family (p. 180). “But [that] strategy hasn’t worked so well” (p. 180). “To the extent that the problems of the black family stem from the numbers imbalance,” the commitment to black men and racial homogamy furthers that imbalance, and in so doing, “actually undermine[s] the black family that [black] women hope to salvage” (pp. 180–81).

Therein lies the paradox. If their goal is to bolster the beleaguered black community and salvage the black family, instead of doubling down on the black marriage market, black women should be walking away from it. Critically, this does not mean foregoing marriage altogether. Instead, Banks asks middle-class black women to “open[] themselves to interracial marriage” (p. 181). Doing so, Banks argues, permits black women to remedy the uneven market conditions that offer them too few options and black men too many. And though it requires them to subordinate their desire for intraracial marriages, it allows them a better chance to form the lasting partnerships they crave. Finally, Banks's interracial-marriage prescription addresses black women's concern for the black family and black community, laying the foundation for successful black marriages in the future. By exiting the black romantic market—and entering new romantic markets—black women will disrupt the extant market conditions that offer black men too many choices. No longer privy to an endless array of desirable prospects, black men will be forced to change their behavior in order to remain competitive. Banks speculates that “[i]f more black women married nonblack men, more black men and women might marry each other” (p. 181). In this way, “interracial marriage doesn’t abandon the race, it serves the race” (p. 181).

Banks's interest in the African-American marriage decline contributes to an extant conversation about marriage in contemporary society. In recent years, mainstream lesbian, gay, bisexual, and transgender (“LGBT”) rights groups have focused on securing marriage equality as a critical component of their effort to expand legal protections for LGBT persons. Though Banks does not weigh in on the question of same-sex marriage, he too is interested in expanding marriage's constituency by increasing marriage rates among African Americans (pp. 180–81). In this way, Banks broadens the conversation to consider access to marriage for other marginalized groups.

Written in a conversational tone with an eye toward engaging lay audiences, *Is Marriage for White People?* differs from Banks's academic writing. Nevertheless, it too showcases many of his scholarly talents. For example, the interview testimonials that pepper the book reveal Banks to be a skilled interviewer, capable of eliciting deeply personal responses from his subjects. Indeed, the book is most satisfying when it uses these interviews to craft a searing (and at times unsettling) portrait of the intimate lives of African Americans. The book unabashedly focuses on lives, not law, which is to say that it is primarily interested in setting forth a cluster of issues that impact the way in which African Americans construct and experience their intimate lives. But importantly, the book is not a static and descriptive endeavor. Banks intends to spark discussion and conversation about the black marriage decline. And he succeeds.

Still, one wonders whether the discussion that Banks launches is sufficiently far-reaching. Banks sets forth the parameters of the debate, focusing on explaining and remedying the black marriage gap and decline. But is this focus unduly narrow? Is interracial marriage the magic bullet solution for the black middle class? Is marriage a panacea for all that ails the black community (and America more generally)? Are declining marriage rates the problem, or merely symptomatic of something larger? Is this cluster of issues—marriage markets, marriage rates, and interracial marriage—a red herring distracting us from more challenging and pressing issues? In the subsequent Parts, I take up these questions.

## II. MARRIAGE IN BLACK AND WHITE

*Is Marriage for White People?* tackles many of the issues that lie at the intersection of race, marriage, and family life. Despite its virtues, however, certain aspects of the book merit further discussion. This Part considers a core component of Banks's project: his critique of economically "mixed" marriages and the interracial-marriage prescription that proceeds from this critique. My aim is not so much to challenge Banks's interracial-marriage prescription, which is admirably focused on expanding the universe of possibilities for intimate partnership. Instead, I hope to call attention to some of the underappreciated aspects of Banks's critique of economically mixed marriages and its concomitant call for interracial marriage.

### A. *Mixed Marriages—Racial Solidarity v. Class Solidarity*

At the heart of the book is Banks's critique of what he terms "mixed" marriages. Banks's wordplay is intentional. Though the term "mixed marriages" traditionally has referred to interracial unions, Banks is not concerned with the prospect of interracial marriages—indeed, they are a core part of his prescription for the black marriage decline (pp. 179–81). Instead, the "mixed marriages" to which he refers are the *intraracial* unions of economically unequal partners who lack a set of shared values (Chapter Seven).



The critique of economically mixed marriages responds directly to the rash of public commentary promoting them. Numerous voices within the black community (and some outside of it) have pilloried middle-class black women for being “too picky” in their choice of mates.<sup>20</sup> Instead of insisting on marriage to a college-educated, professional black man, black women should open their eyes to the loving, hard-working, blue-collar black men around them.<sup>21</sup>

Banks usefully debunks this now-common trope, revealing the challenges these mismatched couples face. Chief among them is a lack of shared values, which Banks attributes to the couple’s different educational levels and socioeconomic statuses. According to Banks, a common racial background may bring two people together, but in time, divergent educational and professional experiences will trump the couple’s shared racial background, dooming the relationship.

This take on these mixed marriages is a sobering counterpoint to those who insist that black women can find good partners if only they would divest themselves of their outsized expectations. In making this point, Banks surfaces class as a salient factor in intimate life and in the intimate lives of African Americans.

But Banks’s decision to prioritize class solidarity over racial solidarity is problematic. As an initial matter, the book gives the impression that economically mixed marriages are a recent phenomenon among African Americans—that they are a response to the skewed dating market. But this account seems anachronistic. Professional black women have married non-professional black men for generations. During the Jim Crow era, it was not uncommon for a college-educated teacher to be married to a nondegreed tenant farmer, as black women often had greater opportunities than black men to pursue education and professional training.<sup>22</sup>

If, as this history suggests, economically mixed marriages have long been part of the black community, the question is what has changed such that these class disparities now produce the relationship conflicts that Banks describes? One might speculate that today, the educational and professional opportunities available to black women and black men alike far exceed those available in past generations. Consequently, the gap between professional status and nonprofessional status may seem vastly wider than during the Jim Crow era. Regardless of their root cause, the differences between the

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20. NATOEIGHT “THE RAKE” DASHWOOD, TRUTH BE TOLD . . . : THE BOOK OF BRUTAL HONESTY FOR BLACK WOMEN 55–57 (2011); Chris Benson, *Do Black Women Set Their Standards for Marriage Too High?*, EBONY, Jan. 1981, at 96; *Secrets of Women Who Marry Over and Over . . . (and Over) Again*, EBONY, Sept. 1989, at 142, 144; Linsey Davis & Hana Karar, *Single, Black, Female—and Plenty of Company*, NIGHTLINE (Dec. 22, 2009), <http://abcnews.go.com/Nightline/single-black-females/story?id=9395275>.

21. Zondra Hughes, *When She Earns More Than He*, EBONY, May 2006, at 77; Laura B. Randolph, *White Collar Blue Collar Love*, EBONY, May 1989, at 48; Muriel L. Whetstone, *Why Professional Women Should Consider Blue-Collar Men*, EBONY, Mar. 1996, at 25.

22. See PAULA GIDDINGS, *WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA* 329–30 (1984).

economically mixed marriages of today and those of prior generations suggest the inherent instability of class as a social construct—a point that Banks does not explore, even as he touts the benefits of intraclass marriages.

Moreover, by prioritizing class solidarity, Banks sidesteps many of the same problems he associates with racial solidarity. For example, Banks correctly points out that black men and women, regardless of their shared racial background, often have wildly divergent life experiences, perspectives, and values (pp. 103–08). Banks assumes that these differences are primarily the product of class differences (and that a common race is insufficient to overcome them). But he resists the idea that the same sort of intragroup differences—and the challenges they present—might exist among those of similar socioeconomic or educational backgrounds. For example, he downplays the racialized disagreements that often arise in interracial marriages (even where the couple belongs to same socioeconomic class), suggesting that such disagreements are minor issues that a couple can—and should—overlook.<sup>23</sup>

By presenting class as a unifying—and universal—experience, Banks risks reinscribing the rigid class distinctions that have plagued American society. More importantly, his notion of class solidarity smacks of an age when men and women were advised to “stick to their own kind.” This is ironic as it mirrors Banks’s critique of racial solidarity in marriage. Banks rejects the idea that black women who marry outside their race are traitors. Indeed, he finds this proposition offensive, demeaning, and illiberal because it is tantamount to romantic segregation, forcing black women to “stick to their own (racial) kind.” But is the prospect of sticking to your own class more normatively appealing than sticking to your own race? Is the former less like intimate segregation than the latter? These kinds of questions make clear that though Banks is admirably committed to expanding the possibilities for intimate partnership, his interracial-marriage prescription actually reinscribes other undesirable limitations on the kinds of lives and forms of intimacy that we value, celebrate, and encourage.

### *B. Mixing Marriage and Gender Roles*

Other aspects of Banks’s critique of mixed marriages also raise concerns. According to Banks, such marriages often fail because the wife, with her college degree and professional status, wields greater economic power and control in the relationship.<sup>24</sup> Saddled with the responsibilities of family

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23. P. 173. Relatedly, Banks does not consider statistical studies discussing marital conflict and divorce rates among interracial couples. See Jenifer L. Bratter & Rosalind B. King, “*But Will It Last?*”: *Marital Instability Among Interracial and Same-Race Couples*, 57 *FAM. REL.* 160 (2008); Diane Felmlee et al., *The Dissolution of Intimate Relationships: A Hazard Model*, 53 *SOC. PSYCH. Q.* 13 (1990); Tim B. Heaton, *Factors Contributing to Increasing Marital Stability in the United States*, 23 *J. FAM. ISSUES* 392 (2002).

24. Chapter 6. This theme has been advanced within the popular black press. See Marilyn Marshall, *Can a Marriage Survive When the Wife Earns More?*, *EBONY*, Mar. 1983, at 44; *Are Men More Insecure with Mates Who Earn More Money?*, *JET*, Apr. 10, 2000, at 14.

breadwinner, the power wife resents her less-accomplished husband (pp. 100–02). Perpetually emasculated and eclipsed by his wife’s education and professional standing, the blue-collar husband lashes out (pp. 93–95). Their twin resentments fuel marital discord, ultimately dooming the relationship.<sup>25</sup> Though Banks notes that one issue for these marriages is the absence of common values, like a shared commitment to education and professional development, an equally challenging problem, it seems, is that “the partners [are] cast in the roles of husband and wife but without the shared script that guided prior generations” (p. 97).

Some might celebrate this gender-role inversion as a progressive development, as proof of how far women—and black women, in particular—have advanced in the workplace. But, according to Banks, this role reversal prompts anxiety and discord rather than celebration. Feeling inadequate, black men resent their wives for “usurping” the breadwinner role (p. 98), while black women chafe at “being the sole support for their famil[ies]” (p. 100). Though the book professes an optimistic faith in marriage as an institution, it is nonetheless informed by a more pessimistic intuition that African Americans are incapable of change, clinging stubbornly to the traditional roles that marriage prescribes.

Though Banks does not bemoan black women’s economic advances, implicit in his critique of mixed marriages is a tacit acceptance of the male breadwinner–female dependent model that has traditionally served as the marital model.<sup>26</sup> This is curious given that this gendered model is one that has always had a more tenuous foothold in the black community.<sup>27</sup> Unlike most Anglo-American families, where the male breadwinner–female dependent model is common, black families frequently have departed from or modified this model.<sup>28</sup>

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25. Pp. 100–02. Banks suggests that these gender dynamics have fueled divorce rates among African Americans. Pp. 93–95. It should be noted, however, that high rates of divorce among African Americans are not necessarily a modern phenomenon. See Dylan C. Penningroth, *African American Divorce in Virginia and Washington, D.C., 1865–1930*, 33 J. FAM. HIST. 21, 22 (2008) (“Between 1865 and 1930, thousands of African Americans got divorced. This was an important part of black life, but it has not attracted very much attention . . .”).

26. See Melissa Murray, *Made with Men in Mind: The GI Bill and Its Reinforcement of Gendered Work After World War II*, in FEMINIST LEGAL HISTORY 84 (Tracy A. Thomas & Tracey Jean Boisseau eds., 2011) (discussing the predominance of the male breadwinner–female dependent model). Critically, Banks is less skeptical of the many economically mixed marriages in which the husband outearns the wife. The book describes Joe Lehman and Teresa Johnson, a white businessman and a black interior designer. Though “[h]e’s rich [and] she’s not,” the marriage is successful, and Banks appears untroubled by their income disparity. See pp. 170–76.

27. See Twila L. Perry, *Family Values, Race, Feminism and Public Policy*, 36 SANTA CLARA L. REV. 345, 368–69 (1996).

28. Interestingly, in departing from the traditional model, black families historically have structured relationships that are consistent with the economically “mixed” marriages that Banks disavows.

Then, as now, black men's economic prospects have been shifting and uneven, requiring families to rely on two incomes, rather than one.<sup>29</sup> Accordingly, black women, unlike their white counterparts, often worked outside of the home, assuming a critical role in providing for the family.<sup>30</sup> Because they worked outside of the home, many black women were unable to assume the traditional female role of full-time homemaker and family caregiver, enlisting the assistance of extended family and fictive kin in this task.<sup>31</sup> In view of this history in which black families routinely deviated from prevailing gender scripts, improvising on extant gender norms but nonetheless managing to build strong marriages and families, it is curious that Banks matter-of-factly concludes that "[h]owever enticing improvisation may seem, it often produces discord" (p. 101).

To be sure, Banks attempts to distance himself from the normative weight of traditional gender roles. For example, he notes that though these gender roles might seem "sexist" to modern sensibilities, they "reflect an enduring cultural script" arising from a "social and cultural context within which many adults were raised" (p. 98). He muses that fidelity to these roles may fade in successive generations (p. 101), but at no point does he challenge or disavow these gender scripts or the retrograde vision of marriage that they undergird. Indeed, Banks credits the breadwinner-dependent model for setting forth clear roles to guide spouses,<sup>32</sup> and in so doing, he implicitly underwrites their normative value.

Banks's tacit acceptance of this dated model is a counterpoint to those who have denounced it because it impedes women's equal citizenship and advancement.<sup>33</sup> Many have called for the disruption of the model in favor of one in which both partners assume more equal responsibility for breadwinning and carework.<sup>34</sup> Others point to the changing demographics of family life, noting that the proliferation of families headed by same-sex couples and dual-earner spouses challenges the continued primacy of the male

29. PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT* 53 (2d ed. 2000).

30. JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 167 (2000).

31. See COLLINS, *supra* note 29, at 178–83 (explaining that it is common for women in the African-American community to rely on extended networks of friends and family for help with child rearing); Laura T. Kessler, *Transgressive Caregiving*, 33 FLA. ST. U. L. REV. 1, 18–19 (2005); Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 391–92 (2008).

32. P. 97. Interestingly, Banks's call for class solidarity in marriage may be in tension with the male breadwinner–female dependent model. One might argue that even if they marry similarly situated men who are able to assume the breadwinner role, college-educated professional women may be reluctant to forego career aspirations in order to take on the traditional female dependent role.

33. The Supreme Court, for example, has struck down legislation premised on the breadwinner–dependent model. See *Califano v. Westcott*, 443 U.S. 76, 88 (1979); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Stanton v. Stanton*, 421 U.S. 7, 14–15 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

34. E.g., Joan Williams, *From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition*, 76 CHI.-KENT L. REV. 1441 (2001).

breadwinner–female dependent model.<sup>35</sup> With this in mind, regardless of the troubles mixed marriages may face, the departure from extant gender norms could be seen as a progressive move to be lauded and supported more robustly, rather than challenged or questioned. Indeed, one might query whether these economically mixed marriages would be more successful if the inverted model of the female breadwinner–male dependent were more widely accepted, encouraged, and supported.

Critically, greater acceptance of and support for an alternative gender script is not just a feminist pipe dream. Even before the Great Recession, more American families were shifting from the single (male) breadwinner model to one in which families relied on two incomes.<sup>36</sup> As women continue to outpace men in pursuing college and postgraduate degrees,<sup>37</sup> many families likely will resemble the economically mixed marriages that Banks chronicles. Perhaps Banks is correct that “white follows black,” and these relationships will buckle under the weight of a lost gender ideal. Or perhaps this new reality will compel us to give up the ghost of marriages past, allowing us to embrace the ways our family lives have evolved to confront a new economy and its challenges.

### C. *The Interracial-Marriage Prescription*

The upshot of Banks’s critique of economically mixed marriage is his interracial-marriage prescription, arguably the most widely discussed—and controversial—aspect of the book.<sup>38</sup> Speaking to middle-class black women, Banks urges them to abandon their desire for intraracial marriage (and the economically mixed marriages that this impulse engenders), and instead consider the prospect of dating and marrying nonblack men.

Leaving aside (for the moment) the degree to which it is actually quite conventional, Banks’s interracial-marriage prescription depends on assumptions that are far from settled. For example, in advocating that black women date and marry interracially, Banks suggests that there is a vast pool of eligible nonblack men willing and eager to date and marry black women (p. 128). Anticipating resistance to this claim, he rehearses the traditional accounts that have been used to explain the low rates of interracial dating and marriage among black women and attempts to refute them. In particular, Banks refers to studies of internet dating sites, which have documented members’ stated racial preferences for potential dating partners (pp. 123–24). According to one 2009 internet dating study, “black women specifically

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35. See, e.g., Barbara A. Atwood, *Marital Contracts and the Meaning of Marriage*, 54 ARIZ. L. REV. 11, 21–22 (2012).

36. See Heather Boushey, *The New Breadwinners*, in THE SHRIVER REPORT: A WOMAN’S NATION CHANGES EVERYTHING 31, 64 (Heather Boushey & Ann O’Leary eds., 2009).

37. Mary Ann Mason, *Better Educating Our New Breadwinners*, in THE SHRIVER REPORT, *supra* note 36, at 161.

38. See, e.g., Imani Perry, *Blacks, Whites and the Wedding Gap*, N.Y. TIMES, Sept. 18, 2011 (book review), at BR11, <http://www.nytimes.com/2011/09/18/books/review/is-marriage-for-white-people-by-ralph-richard-banks-book-review.html>.

were the least preferred racial group for white men” (p. 123). The study also found that “when Internet daters were allowed to explicitly exclude certain groups, more than 90 percent of white men who stated racial preferences excluded black women” (p. 123). Further, Banks reports that the operators of OkCupid, an internet dating site, found that of all racial groups, black women sent the most messages initiating contact and received the fewest replies (p. 124).

Banks concedes that these studies confirm that black women are disadvantaged in the interracial dating market, and with white men in particular (p. 124). Nevertheless, he valiantly tries to refute the force of these findings. If some white men do express racial preferences in dating, he muses, they “likely do so for the simple reason that they don’t think black women would be attracted to them” (p. 125). Others, he rationalizes, may exclude black women from their dating pool “for reasons of efficiency rather than dislike” (p. 125). Citing a 2009 internet dating study finding that white men who exclude black women from their pool of potential partners are more likely to express a body-type preference, Banks speculates that “[s]ome men might use race as a proxy for weight” (p. 126). He concludes that “[m]en who state a racial preference when their real concern is weight might in fact be open to dating a black woman who is not overweight” (p. 126). Banks also points out that these studies confirm that there are many white men who state no racial preferences for dating at all—men who ostensibly are open to the prospect of dating black women (overweight or not) (p. 127).

Banks’s attempts to dismiss the significance of this empirical evidence are unconvincing, especially in view of studies confirming white men’s racial preferences for dating partners. In a telephone survey in which 1,116 adult respondents in Southern California were asked if there were racial/ethnic groups they would not marry, M. Belinda Tucker and Claudia Mitchell-Kernan found that white men were more likely to exclude black women than any other race.<sup>39</sup> Indeed, of those who indicated that they would consider race in determining whom to marry, white men’s opposition to a black wife (72.5 percent) far exceeded that of white women to a black husband (44.7 percent).<sup>40</sup> As other scholars have discussed, these studies suggest the influence of an aesthetic hierarchy that “positions white women at the top . . . and black women at the bottom.”<sup>41</sup>

Though Banks acknowledges these aesthetic preferences (pp. 121–22), he does not marshal them to help explain black women’s disadvantaged position in online dating. Instead, he speculates that simple misunderstandings are at work, understating the extent of white men’s interest in, and desire for, black women. But rather than guessing at what white men *really* mean when they create an online dating profile that excludes black women, Banks could simply credit their preference for nonblack women as just that—a

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39. M. Belinda Tucker & Claudia Mitchell-Kernan, *Social Structural and Psychological Correlates of Interethnic Dating*, 12 J. SOC. & PERS. RELATIONSHIPS 341, 350 (1995).

40. *Id.*

41. Russell K. Robinson, *Racing the Closet*, 61 STAN. L. REV. 1463, 1504 (2009).

preference. A preference that is perhaps shaped (whether consciously or not) by racial stereotypes and biases, but one that is no less a choice than black women's desire for black men with "swag" whose physical features mirror their own.

Banks's rationalization of these issues reflects his desire to steer black women toward a new romantic frontier populated by eager, if misunderstood, nonblack suitors. But Banks's romantic landscape overlooks the many structural impediments that hinder black women who seek love and marriage outside of their race. For example, Banks does not account for residential segregation as a deterrent to interracial romance. Though the term "residential segregation" conjures up images of redlining and restrictive covenants, it also encompasses specific settlement patterns and preferences among demographic groups.<sup>42</sup> While seemingly innocuous, these residential settlement patterns powerfully shape the nature and quality of romantic encounters. As Russell Robinson observes, "Residential segregation is a primary influence on romantic preferences," as "living and/or working in a neighborhood or workplace in which one race predominates makes it difficult to connect romantically with a person of a different race."<sup>43</sup>

These concerns seem particularly pronounced for the black women to whom Banks directs his interracial-marriage prescription. Certainly, some live in intraracial enclaves, making it more difficult to meet and date men of other races. For those who live and work in integrated spaces, the limited numbers of similarly situated couples may deter interracial romance. Though there is growing acceptance of interracial dating and marriage, the phenomenon of residential segregation persists and may thwart the formation of such couples.

For those who do make an interracial love match, the relative dearth of well-integrated communities in which interracial families might comfortably reside may also present challenges—a point that Banks does not explore. In an essay discussing *Loving v. Virginia*,<sup>44</sup> the Supreme Court case striking down prohibitions on interracial marriage, Bennett Capers considers the importance of Central Point, Virginia, the town where Richard and Mildred Loving met. Anomalous in the 1960s South, Central Point "developed an interesting history of black–white sexual relationships over the years."<sup>45</sup> Be-

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42. For example, Prince George's County, Maryland, is a well-known enclave for affluent blacks seeking the comfort and ease of a shared racial community. See Sheryll D. Cashin, *Middle-Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for Metropolitan America*, 86 CORNELL L. REV. 729, 741–43 (2001); David J. Dent, *The New Black Suburbs*, N.Y. TIMES MAG., June 14, 1992, at 18.

43. Russell K. Robinson, *Structural Dimensions of Romantic Preferences*, 76 FORDHAM L. REV. 2787, 2788 (2008).

44. 338 U.S. 1 (1967).

45. Robert A. Pratt, *Crossing the Color Line: A Historical Assessment and Personal Narrative of Loving v. Virginia*, 41 HOW. L.J. 229, 234 (1998).

cause of this history, Central Point was a place where the Lovings “knew they could live as husband and wife.”<sup>46</sup>

Although interracial unions are increasingly accepted,<sup>47</sup> communities like Central Point, which are more welcoming of interracial relationships, remain rare,<sup>48</sup> and their absence particularly burdens interracial couples. As Capers observes, “*Loving* happened because the Lovings saw Central Point as a place . . . where they would be welcomed. As a place they could call home.”<sup>49</sup> At the time they brought their landmark lawsuit, the Lovings were living in Washington, D.C., which permitted interracial marriages.<sup>50</sup> But they were not happy in the Nation’s capital.<sup>51</sup> Mildred Loving missed her family and “especially [her sister] Garnet.”<sup>52</sup> But beyond yearning for family and friends, it is likely that the Lovings missed “being at home” in Central Point.<sup>53</sup> That is, they missed living in a place where their intertwined hands “drew little attention.”<sup>54</sup>

While there has been considerable progress on these issues since 1967, when the Lovings prevailed in their landmark lawsuit,<sup>55</sup> these kinds of structural impediments may nonetheless pose obstacles to interracial unions.<sup>56</sup> Certainly, not all interracial relationships crumble in the face of these obstacles. But for some, the absence of places like Central Point, where interracial couples feel that they can live comfortably, may complicate the prospect of exploring an interracial romance.<sup>57</sup>

Residential segregation is only one structural pitfall in the romantic landscape that Banks imagines. Others might include the web of laws that form the backdrop of most American workplaces—arguably a highly integrated

46. I. Bennett Capers, *The Crime of Loving: Loving, Lawrence, and Beyond*, in *LOVING v. VIRGINIA IN A POST-RACIAL WORLD*, *supra* note 18, at 114, 119.

47. See, e.g., Susan Saulny, *Black and White and Married in the Deep South: A Shifting Image*, N.Y. TIMES, Mar. 20, 2011, at A1 (discussing the increasing acceptance of interracial relationships in parts of the Deep South).

48. E.g., SHERYLL CASHIN, *THE FAILURES OF INTEGRATION* 43 (2004) (“Truly integrated neighborhoods are rare.”); Capers, *supra* note 46, at 119.

49. Capers, *supra* note 46, at 119.

50. See *Loving v. Virginia*, 388 U.S. 1, 3 (1967).

51. Pratt, *supra* note 45, at 237.

52. *Id.*

53. See *id.*

54. See *id.* at 235.

55. WENDY WANG, PEW RESEARCH CTR., *THE RISE OF INTERMARRIAGE* 35 (2012), available at <http://www.pewsocialtrends.org/files/2012/02/SDT-Intermarriage-II.pdf> (noting increasing tolerance of interracial relationships, including black–white relationships).

56. Angela Onwuachi-Willig & Jacob Willig-Onwuachi, *Finding a Loving Home*, in *Loving v. Virginia IN A POST-RACIAL WORLD*, *supra* note 18, at 181, 181–95; see also Susan Saulny, *In Strangers’ Glances at Family, Tensions Linger*, N.Y. TIMES, Oct. 13, 2011, at A1, <http://www.nytimes.com/2011/10/13/us/for-mixed-family-old-racial-tensions-remain-part-of-life.html> (discussing the challenges that interracial families often face).

57. Elizabeth F. Emens, *Intimate Discrimination: The State’s Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1399 (2009).



space in which interracial romances might develop.<sup>58</sup> Though many Americans meet and date prospective partners in the workplace, they do so in the shadow of sexual harassment laws, anti-nepotism policies, and other measures aimed at “sanitizing” the workplace of any sexual or romantic content.<sup>59</sup> Though these laws may effectively curb unwanted overtures between colleagues, they may also deter the formation of welcomed workplace romances.<sup>60</sup> Concerns about running afoul of these laws, and concerns about workplace propriety more generally, may be especially pronounced among those seeking interracial romance, as such romances may be more atypical—and therefore, more visible—in the workplace.

Thus, while Banks’s interracial-marriage prescription is an important intervention that relieves black women of the onus of singlehandedly redeeming the black family and black community, dating and marrying interracially may not be as simple as Banks imagines. Despite Banks’s explanations, data showing the degree to which black women are disadvantaged in the interracial dating market suggest that nonblack partners may not be as open to dating black women as Banks believes. Further, there are broader structural issues that affect romantic opportunities, and thus should be explored and addressed if Banks’s aspirations for interracial marriage are to bear fruit.

In assessing Banks’s critique of economically mixed marriages and his interracial-marriage prescription, this Part took Banks and his arguments on their own terms. The following Part, however, shifts focus from the parameters that Banks has drawn to consider questions and challenges that the book implicates but does not address.

### III. BLACK MARRIAGE AND RED HERRINGS

Recall the red herring, which writers purposefully deploy to divert the reader’s attention. In *Is Marriage for White People?*, the title itself functions as the ultimate red herring, attracting attention and provoking the reader to consider its underlying inquiry: *is marriage only for white people?* As Banks acknowledges, he selected the title with the intent of turning heads and attracting readers.<sup>61</sup> Though the title provokes attention, it does not succeed in

58. See Marion Crain, *Arm’s-Length Intimacy: Employment as Relationship*, 35 WASH. U. J.L. & POL’Y 163, 172 (2011); Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 17 (2000) (“The single most important arena of racial and ethnic integration is the workplace. . . . [E]ven the partial demographic integration that does exist in the workplace yields far more *social* integration—actual interracial interaction and friendship—than any other domain of American society.”).

59. See Laura A. Rosenbury, *Working Relationships*, 35 WASH. U. J.L. & POL’Y 117, 120–22 (2011); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2090 (2003).

60. See Schultz, *supra* note 59, at 2191.

61. Ralph Richard Banks, *How Did I Choose the Title for This Book?*, IS MARRIAGE FOR WHITE PEOPLE?, <http://ismarriageforwhitepeople.stanford.edu/how-did-i-choose-the-title-for-this-book/> (last visited Jan. 3, 2013) (“My research assistant at the time told me that my suggested titles were all boring, and that if I wanted people to read the book, I needed a more attention getting title.”).

the way most red herrings do. In fiction, the red herring creates a sense of suspense and surprise, ultimately enhancing the reader's enjoyment of the story. But in the context of a sociolegal inquiry like *Is Marriage for White People?*, the red herring is more problematic than pleasurable.

According to Banks, "The title asks not only whether marriage isn't for black people, but also whether it isn't for white people."<sup>62</sup> This suggests that Banks would agree that it is worth exploring whether the marriage decline indicates problems with marriage as an institution that go beyond race and failed romantic markets. It suggests that the question that *should* preoccupy us is not simply whether marriage is for white people but whether marriage is (and should be) for *anyone*.

But these are not the questions that concern Banks. In asking "Is marriage for white people?," Banks assumes marriage's normative priority, and seeks only to include more black people in the marital fold. In some respects, this goal is laudable, if quite conventional. But one cannot help but be wistful for the revolutionary project that might have been. By focusing on the black marriage decline and increasing marriage rates among blacks, Banks forfeits the chance to launch a more ambitious project that confronts these issues and, in the process, interrogates marriage's position as the normative ideal for intimate life.

Critically, Banks's unquestioning acceptance of marriage is rooted in a choice that he makes in pursuing this project. In his prior work on the marriage decline, Banks adopted the standard posture of a legal academic, dispassionately parsing the data and offering observations and solutions.<sup>63</sup> However, in *Is Marriage for White People?*, Banks was pulled in a different direction. As he acknowledges, his "conversations with black women transformed [his] vision for th[e] book" (p. 186). Responding to their "sense that their story had not been told," Banks began to regard the book "as a small effort to remedy that" oversight, making their lives—and their intimate struggles—visible to the world (p. 186). Accordingly, *Is Marriage for White People?* does not simply analyze the black marriage decline—it is Banks's attempt to speak to and for black women.

In choosing to depict his subjects' romantic struggles authentically, Banks reflects—but does not challenge—his subjects' desire for marriage (or successful marriage-like partnerships). Consequently, *Is Marriage for White People?* is, by Banks's own admission, "much less normative"<sup>64</sup> than it could be. And because Banks chooses to "meet [his subjects] where they

62. *Id.*

63. See, e.g., R. Richard Banks, *The Aftermath of Loving v. Virginia: Sex Asymmetry in African American Intermarriage*, 2007 WIS. L. REV. 533; R. Richard Banks & Su Jin Gatlin, *African American Intimacy: The Racial Gap in Marriage*, 11 MICH. J. RACE & L. 115 (2005).

64. Ralph Richard Banks, *Author's Remarks at the USC Center for Law, History and Culture Panel Discussion: Is Marriage for White People?*, YOUTUBE (Oct. 5, 2011), <http://www.youtube.com/watch?v=mrcpvjJzugs>. ("The book . . . started off . . . as a critique of marriage as a legal institution. . . . But once I began to talk to people, I realized that they were much less critical of marriage. . . . [As a consequence], the book became much less normative.")

are,” *Is Marriage for White People?* is less critical and transformative than it could be.<sup>65</sup>

For example, a more critical eye toward marriage as an institution might have compelled Banks to deconstruct his subjects’ desire for marriage. This inquiry would have complicated these desires, perhaps revealing them to be (largely) the products of a legal system that historically has channeled individuals into marriage for the purpose of disciplining sexuality and privatizing dependency,<sup>66</sup> and modern sensibilities that link marriage with sexual respectability.<sup>67</sup> Deconstructing the desire for marriage also would have presented Banks with the opportunity to craft an alternative portrait of black women’s intimate lives—one in which marriage’s priority was not presented as natural and inevitable, but as a choice that could be reevaluated and challenged.

More importantly, greater engagement with marriage as an institution would have spurred a broader discussion of marriage’s role in society and the reasons why the declining marriage rate has provoked such deep-seated concern. Historically, marriage—the legal locus for sex—was a prerequisite for adult life.<sup>68</sup> Though marriage is no longer a legal requirement for sex and family,<sup>69</sup> society (and the state) persists in prioritizing marriage and the marital family above other forms of kinship and relationship.<sup>70</sup>

And though much has been made of the shift toward viewing marriage as a means of personal fulfillment, marriage continues to ensure economic provision and security, relieving the state of this burden. The 1996 welfare reforms make this aspect of marriage clear. In addition to “ending welfare as we know it,”<sup>71</sup> the reforms launched a broad effort to “promote marriage”

65. *Id.* In his other work, Banks has been more critical of the status quo, challenging accepted conventions in family law. See R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents’ Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875 (1998) (challenging race matching in adoption); R. Richard Banks, *The Illusion of Color-blindness in Antidiscrimination Law*, at 9–11 (2008) (unpublished manuscript), available at [http://works.bepress.com/r\\_banks/1/](http://works.bepress.com/r_banks/1/) (critiquing the standard practice of “facilitative accommodation” in adoption proceedings).

66. See generally Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1 (2012) (discussing marriage’s role in disciplining sexuality and privatizing dependency).

67. See Mariana Valverde, *A New Entry in the History of Sexuality: The Respectable Same-Sex Couple*, 32 FEMINIST STUD. 155 (2006) (discussing the links between marriage and sexual respectability).

68. See JOHN D’EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 16 (2d ed. 1997); FRIEDMAN, *supra* note 7, at 127; PLOSCOWE, *supra* note 7, at 1; Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756, 777 (2006); Murray, *supra* note 66, at 12.

69. Murray, *supra* note 7, at 1293.

70. Murray, *supra* note 31, at 446; Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1255–56 (2010). Critically, some scholars have challenged marriage’s priority and called attention to the way in which law marginalizes nonmarried people. See Rachel F. Moran, *How Second-Wave Feminism Forgot the Single Woman*, 33 HOFSTRA L. REV. 223, 285 (2004).

71. Remarks on Signing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and an Exchange With Reporters, 2 Pub. Papers 1325, 1327 (Aug. 22, 1996).

among poor families,<sup>72</sup> providing states with monetary incentives when beneficiaries of public assistance married.<sup>73</sup> These efforts and incentives did more than provide poor families with the spiritual and moral benefits of marriage (though this was deemed a vital part of the project); marriage was expressly understood as a means of improving their material circumstances.<sup>74</sup> As the logic went, in addition to its many personal benefits, marriage would provide an additional income, relieving the need for public assistance, and providing the family with economic stability.<sup>75</sup>

Arguments offered in support of marriage equality for same-sex couples reflect this view of marriage as a vehicle for providing public and private benefits and social and economic security. Expanding marriage to include same-sex couples would improve health care coverage, as spouses are generally covered under most employer-provided health plans.<sup>76</sup> It also would legitimize the children of same-sex couples, ensuring that, among other things, they would have intestate rights to their parents' private and public benefits.<sup>77</sup> Likewise, expanding marriage would provide certain immigration benefits to the same-sex spouses of American citizens.<sup>78</sup>

With this frame in mind, the LGBT rights movement's prioritization of marriage equality is sensible—marriage is a crucial conduit to a wide array of public and private benefits. But importantly, all of these ends might be achieved—for same-sex couples and everyone else—without marriage. Instead of providing health care access to spouses through marriage, we might simply reform health care to provide greater coverage to all citizens (and noncitizens). Instead of relying on marriage to ensure the economic security of children, we could think about a more robust system of public support for children and families. Instead of relying on marriage to convey the fruits of citizenship, we might invest in more coherent immigration reform. Instead of acceding to marriage's role in privatizing dependency and conferring much-needed benefits, we might begin a more transformative discussion about other public interventions that could address these questions.

To further illustrate marriage's role as a vehicle for providing social and economic security, consider a comparative perspective. In the United States, new parents immediately face the challenges of reconciling work and parental responsibilities. Even before their children are born, they begin the quest

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72. Murray, *supra* note 7, at 1282 n.135.

73. Kaaryn Gustafson, *Breaking Vows: Marriage Promotion, the New Patriarchy, and the Retreat from Egalitarianism*, 5 STAN. J. C.R. & C.L. 269, 288 (2009); THEODORA OOMS ET AL., CTR. FOR LAW & SOC. POLICY, BEYOND MARRIAGE LICENSES: EFFORTS IN STATES TO STRENGTHEN MARRIAGE AND TWO-PARENT FAMILIES 5–10 (2004).

74. Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CALIF. L. REV. 1647, 1675–78 (2005).

75. *Id.* at 1679–80.

76. Morgan Bassichis et al., *Building an Abolitionist Trans and Queer Movement with Everything We've Got*, in CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX 15, 17–19 (Eric A. Stanley & Nat Smith eds., 2011).

77. *Id.*

78. *Id.*

for the parental Holy Grail: quality, affordable child care. Countless hours are spent researching child care options, and eventually, parents “choose” between either spending a small fortune on paid child care or having one of the parents (usually the mother) leave the workforce to provide (unpaid) child care. The quotidian challenges of child rearing are organized and managed privately within the family unit with minimal assistance from the public sector.<sup>79</sup>

The European safety nets<sup>80</sup> help contextualize the thin level of public support for American families. In France, new parents enjoy a wealth of public benefits intended to facilitate parenting and family life. French parents enjoy access to advice nurses, state-subsidized day care and preschool, paid parental leave, and state-subsidized health care.<sup>81</sup> Scandinavian countries also boast a robust system of public provision that includes state-subsidized health care coverage, paid parental leave, state-subsidized child care, and state-provided cash allotments for children.<sup>82</sup> This is not to say that these European models should be emulated in full. I mean only to suggest that in these European countries, the economic challenges of family life are not “private” problems to be handled at the level of the individual. Instead, the management and health of the family and its members are a matter of public concern and investment.

Tellingly, this robust system of public provision is not the only difference between American families and their French and Scandinavian counterparts. As Banks notes, marriage rates in these European countries are lower than they are in the United States (p. 23). But critically, this “decline is not perceived as a crisis,” as it is in the United States (p. 24). As Banks elaborates, the French and the Scandinavians “are untroubled by the marriage decline in part because, unlike in the United States, couples maintain long-term stable relationships without being married” (p. 24). This is a stark contrast to the United States, where nonmarital families (whether headed by single parents or cohabiting adults) are more likely to be unstable.<sup>83</sup>

But these facts prompt another insight: the reason why the French and Scandinavian marriage declines do not result in unstable families, and thus do not provoke the same crisis mentality as the American marriage decline, is that marriage does not serve the same functions in these countries as it does in the United States. In the United States, less marriage equals greater

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79. See Clare Huntington, *Mutual Dependency in Child Welfare*, 82 NOTRE DAME L. REV. 1485, 1509 (2007).

80. Regardless of the European safety net’s fragility, its existence suggests that using marriage and the family as the vehicles for accommodating dependency is neither natural nor inevitable. It is a choice that may be reexamined and reevaluated.

81. BARBARA R. BERGMANN, *SAVING OUR CHILDREN FROM POVERTY: WHAT THE UNITED STATES CAN LEARN FROM FRANCE* 6, 15, 27–88 (1996); see also Joseph Shapiro, *France’s Model Health Care for New Mothers*, NPR (July 10, 2008), <http://www.npr.org/templates/story/story.php?storyId=92116914> (noting public support for French mothers).

82. See, e.g., Martha N. Ozawa, *Social Welfare Spending on Family Benefits in the United States and Sweden: A Comparative Study*, 53 FAM. REL. 301, 302 (2004).

83. ANDREW J. CHERLIN, *THE MARRIAGE-GO-ROUND* 16–19 (2009).

familial instability because marriage *is* the social safety net—or at the very least, the means by which we patch what is left of the disintegrating social safety net. In the absence of state-supported child care, health care, and other social programs that address economic dependency, individual families must shoulder the burden of researching and paying for child care, foregoing a second income to care for young children at home, and maintaining employment to ensure health care coverage.

Certainly, none of this necessarily *requires* that individuals be married, but marriage does ease the burden of performing all of these tasks. Married couples benefit from either an additional income or an additional person to shoulder child-care responsibilities while the other spouse works. Married people are able to share health-care coverage, and other private and public benefits, with their immediate family members. Marriage provides a crucial means of accommodating familial dependency, absolving the state from responsibility for these obligations.

Accordingly, it is not hard to see why declining marital rates do not prompt the same kind of anxiety in France and Scandinavia. For these countries, less marriage does not inevitably lead to more fragile families. Their systems of social provision ensure that individuals and families are supported, whether married or not. For societies like our own that lack a robust public safety net, declining marriage rates are a threat to the assumption of privatized provision, portending unchecked dependency and vulnerability.<sup>84</sup>

Given marriage's status as our *de facto* social safety net, it is no wonder that scholars like Banks take declining marriage rates so seriously, offering solutions to stanch the marriage decline and improve marriage rates within the black community and elsewhere. But it is not entirely clear that these are the public policy interventions that are needed.

The focus on declining marriage rates and the effort to reverse this trend echo the neoliberalist politics that have been ascendant in the United States since the 1980s. Neoliberalism “devolve[s] issues formerly considered collective, such as the management of economic risk, from government to individual families.”<sup>85</sup> Insisting on a civil society “devoted to efforts to properly discipline the individual self, the ultimate locus of moral, economic, and political responsibility,” neoliberalism successfully dismantled key components of the New Deal / Great Society social safety net and replaced them with policies that emphasized personal responsibility and individual

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84. Of course, one could decide that the likelihood of constructing a more robust social safety net is so remote that it makes sense to rely on the private family as a means of ensuring the economic provision of a significant portion of the population. But it is not apparent why marriage—and the sexual relationship between two adults—ought to be prioritized over other kinship relationships as the means for ensuring social provision. We might focus on other relationships as the unit for allocating public benefits. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 228–36 (1995).

85. Angela P. Harris, *From Stonewall to the Suburbs?: Toward a Political Economy of Sexuality*, 14 WM. & MARY BILL RTS. J. 1539, 1558 (2006).

choice.<sup>86</sup> Instead of public solutions to social ills, this neoliberalist turn looks to the private sphere—the family and the individual—to remedy these problems.

In many ways, *Is Marriage for White People?*, with its focus on the intimate lives and choices of black women, recalls the neoliberalist appeal of private solutions for public problems. How do we fix the economic plight of the black community? Stabilize the black family by achieving more—and better—marriages. And how do we get more and better marriages amongst this beleaguered constituency? Focus on the individual and persuade black women to make better choices about how and with whom they partner.

Critically, reducing the problem to questions of individual choice diverts our attention away from a serious discussion of whether public interventions of the sort seen in France and Scandinavia might be necessary to supplement—or indeed, supplant—these private solutions. Though Banks acknowledges the links between mass incarceration, uneven educational and employment prospects, and the skewed marriage market (pp. 30–44), he does not explore solutions for these challenging issues.<sup>87</sup> Instead of broad, systemic, and structural interventions for these problems (which are enormous problems irrespective of their effects on black marriage rates), *Is Marriage for White People?* aims to correct the black marriage decline by focusing on the private choices of individual black women.

Not only does focusing on individual romantic choices divert attention from broader structural reforms, it also forfeits an important opportunity to question marriage's already overdetermined position in our society. *Is Marriage for White People?* assumes that everyone who can get married *should* get married. In so doing, Banks reinforces the intuition that marriage is and *should be* the most valued form of kinship and belonging, and the principal way in which we accommodate the dependency of society's most vulnerable members.

The events of the last few years challenge this last intuition. As financial institutions have crumbled and markets have buckled, marriage has become an unreliable guarantor of economic security—for African Americans and everyone else. In this climate, marriage's inability to effectively serve its privatizing function has led many to question its relevance in their lives, prompting them to experiment with other structures for organizing intimate life.<sup>88</sup> On this account, a retreat from marriage does not necessarily signal

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86. *Id.*

87. Banks, however, plans to explore these issues in subsequent work. Banks, *supra* note 65 (noting that these issues and questions are the subject of “the next book”).

88. The elusiveness of the nuclear family model was underscored during a campaign stop in West Philadelphia. There, presidential candidate Mitt Romney identified two-parent families as a critical factor for children's educational success. A local education leader immediately pushed back, explaining that two-parent families were unrealistic in that community. *Romney Faces Tough Questions on Education Proposals*, BOSTON GLOBE, May 25, 2012, at A11, <http://www.bostonglobe.com/news/nation/2012/05/24/romney-faces-tough-questions-education-proposals/WV1UqwZXehvf19SgT4IrJ/story.html>. A few months earlier, the *New York Times*

deviance or diminished marital prospects alone. Instead, it may be a rational response to the fact that marriage has lost its luster, becoming one of several options that individuals may pursue in constructing their intimate lives. Our preoccupation with marriage gives these other forms of kinship and belonging—friendship, extended family, networked families, nontraditional families—short shrift. More troublingly, however, our focus on marriage thwarts efforts to determine how these marital-family alternatives support intimate life, and to consider whether they should be publicly supported and prioritized.

#### CONCLUSION

*Is Marriage for White People?* aims to remedy the African American marriage gap and decline. However, in the end, it underwrites society's persistent preoccupation with marriage. Critically, this preoccupation with marriage is also a red herring, diverting attention from the other issues at hand. By focusing on marriage, we maintain the fiction that the marital family is the "natural" structure for intimate life, and the "natural" means by which we ensure economic stability and provision. Moreover, the emphasis on marriage perpetuates the view that broad social problems can be remedied by focusing solely on changing individual behavior—that appeals to individual will and personal responsibility alone will suffice. And as long as we focus on this red herring, we need not engage in the hard work of identifying thoughtful public policy interventions to address the wide-ranging social issues that the marriage decline implicates.

Of course, Banks is not solely responsible for tackling these thorny problems. Banks has asked this question—"Is marriage for white people?"—because we, as a society, have signaled that marriage is important. But its importance is not merely affective and relational. Marriage is an integral part of our social welfare system, and accordingly, we insist that it should be for everyone. But this intuition, and all that undergirds it, is too limited. Banks has launched an important discussion about the future of marriage for African Americans, but it is not the only discussion we should be having. It is worthwhile to think about why marriage is so elusive for so many African Americans. But it would also be worthwhile to think about building a society where the absence of marriage did not matter so much—for black people and everyone else.

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chronicled the rise of nonmarital births and single-parent households. See DeParle & Tavernise, *supra* note 8.



