CONSTITUTIONAL BACKFIRES EVERYWHERE

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When advocates achieve victories for equal rights at the Supreme Court, moments of lively celebration and joyful optimism flow. For those who have long sought such rights recognition, the formal legal acknowledgement of their inherent dignity and right to claim equal social status can be profound: inspirational newspaper editorials are written, powerful and stirring speeches are made, the future looks bright.

Yet, as time goes on, these constitutional victories can fail to translate into the sort of significant, on-the-ground social change that would meaningfully raise the status of marginalized groups within the existing polity. The story becomes not one of massive social progression, but instead one of mostly preservation-through-transformation. Enormous legal shifts toward equality occur, but they repeatedly fail to fully dislodge existing hierarchies or create fundamentally equitable legal and social institutions. Instead, in spite of these legal and constitutional developments, old status quos and traditional hierarchies of race, gender, sexuality, and class persist.

Scholars have identified numerous obstacles and mechanisms that prevent constitutional rights recognition from translating into actual social change. This Article introduces and inducts constitutional backfires into this canon. This Article argues that, perhaps paradoxically, status quos are often preserved through a dynamic process of toggling between two seemingly opposite discriminatory practices, with constitutional decisions often mediating this toggling. Specifically, when a constitutional decision makes one form of discrimination less available, a constitutional backfire can occur, whereby the nearly opposite discriminatory practice rises instead. This practice then interacts with vestiges of the previous one in order to stabilize a pre-existing race/class/sex norm and stymie the possibility of social change.

This phenomenon is especially rampant in the context of marriage law and policy, where four examples of constitutional backfires can be seen. First, after the Supreme Court in Zablocki v. Redhail declared that states could not constitutionally prohibit poor persons from marrying, economically marginalized people found themselves instead bombarded by the discursive and practical harms of marriage promotion programs. Similarly, when the Supreme Court in Obergefell v. Hodges declared that states could not deny same-sex couples the right to marry, a wave of policies pushing towards marriage as almost obligatory began. For incarcerated persons, marriage which was once heavily promoted for its rehabilitative purposes has, in the wake of Turner v. Safley, become increasingly prohibited for individuals involved in the penal system, with the case also bringing about a significant reduction in prisoner rights more generally. Finally, when Planned Parenthood v. Casey provided a final formal rebuke of the historical regime of marital coverture, a form of reverse coverture arose to sustain existing hierarchical gender norms.

This Article describes how constitutional backfires mediate and influence these opposing discriminatory practices, and how these opposing practices ultimately function to stabilize systems of white supremacy, heteropatriarchy,

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and capitalism. Through this exploration, this Article makes three significant contributions. First, it deepens our understanding of the relationship between constitutional and social change, introducing an additional mechanism that impedes lasting social change despite constitutional victories. Second, it reveals how toggling between opposing discriminatory practices allows for the continued marginalization and regulation of particular populations. Finally, as intimate rights in particular appear increasingly precarious and at risk of potential deconstitutionalization by the Supreme Court, this Article uses the lessons of constitutional backfires to present alternative paths for social change and suggests new tools for forearming and strengthening equal rights outside of formal federal constitutional recognition.

I. INTRODUCTION

When advocates achieve constitutional successes advancing equal rights in the Supreme Court, moments of lively celebration and joyful optimism flow. For those who have long sought such rights recognition, the formal legal acknowledgement of their inherent dignity and right to claim equal social status can be profound: inspirational newspaper editorials are written, powerful and stirring speeches are made, the future looks bright.[1]

Yet, as time goes on, these constitutional victories can fail to translate into the sort of significant, on-the-ground social change that would meaningfully raise the status of marginalized groups within the existing polity. The story becomes not one of massive social progression, but instead one of mostly preservation-through-transformation.[2] Enormous legal shifts toward equality occur, but they repeatedly fail to fully dislodge existing hierarchies or create fundamentally equitable legal and social institutions. Instead, in spite of these legal and constitutional developments, old status quos and traditional hierarchies of race, sex, and class persist.

Scholars have identified numerous obstacles and mechanisms impeding the path between constitutional rights recognition and actual social change. These impediments include backlash,[3] the court's lack of independent enforcement powers,[4] and an institutional tendency towards conservatism,[5]

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1 *See, e.g.*, *Love Has Won: Reaction to the Supreme Court Ruling on Gay Marriage*, NY TIMES, (June 26, 2015) https://www.nytimes.com/2015/06/27/opinion/love-has-won-reaction-to-the-supreme-court-ruling-on-gay-marriage.html [https://perma.cc/JBT3-2FD7].

2 Reva Siegel introduced the concept of preservation-through-transformation in her article *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996).

3 *See*, *e.g.*, Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 1994 J. AM. HIST. 81 (1994) (explaining that the *Brown* decision was followed by a crystalized southern backlash); *see also* William N. Eskridge Jr., *Backlash Politics: How Constitutional Litigation has Advanced Marriage Equality in the United States*, 93 B.U. L. REV. 275 (2013).

4 *See*, *e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE, (2d ed. 2008) (stating that the structural constraints of the American court system make courts ineffective in producing change).

5 *See*, *e.g.*, Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1469–71 (2005).

among others.[6] This Article introduces constitutional backfires into this canon. This Article argues that, perhaps paradoxically, status quo and norm stabilization can result from a dynamic process of toggling between two opposing oppressive practices, with constitutional cases often mediating this toggling.[7] Specifically, when a constitutional victory renders one form of discrimination less available, a constitutional backfire can occur, whereby a nearly opposite discriminatory practice grows in its place. This new practice interacts with vestiges of the previous one in order to stabilize a pre-existing race/class/sex norm.[8]

Constitutional backfires are especially prominent in the context of marriage law and policy. In some ways, this is not surprising: marriage has been a fundamental part of American statecraft since the founding, and stabilizing marriage norms has long been a key mechanism for polity-shaping.[9] Far from being a mere private decision between two people, marriage performs some of the deepest "work of the state," instilling disciplinary norms, and cementing and fortifying traditional hierarchies like white supremacy and heteropatriachy.[10] Indeed, as "the foundation of the family and of society,"[11] the borders and boundaries of marriage are a crucial battleground for differing visions of the nation's polity and politics. Controlling the shape of marriage has profound political ramifications: marriage is a potent site of "social statecraft" where norms of race, sex, and gender are created, reinforced, and continually infused into society.[12]

Judicial recognition of equal rights to marriage for previously excluded or marginalized groups thus has the political potential to disrupt status quos and shift deeply entrenched hierarchical norms. Therefore, if those hierarchies are to be maintained, the status quo must adapt to squash this potential reordering, and marriage laws and policies must adjust to seemingly

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6 *See e.g.*, Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 NYU L. REV. 405, 444 (2018) (noting that law may function "to make raced and gendered power distribution and social domination look rational, neutral, and just—to make it seem outside of and before politics, and therefore objectively valid," which also stymies social change.

7 The opposing practices that constitutional backfires mediate are a form of "discriminatory dualism." *See* Sarah L. Swan, *Discriminatory Dualism*, 54 GA. L. REV. 869 (2020) (exploring the twinned practices of under and over policing, redlining and reverse redlining, and sexual harassment and shunning).

8 *See* PRISCILLA YAMIN, AMERICAN MARRIAGE: A POLITICAL INSTITUTION 149 (2015) (noting that "impulses by the state to regulate, integrate, emancipate, or exclude must not be seen as distinct but rather as interrelated processes").

9 *Id.*, at 148.

10 *Id.*, at 147.

11 Maynard v. Hill, 125 U.S. 190 (1888).

12 Alyosha Goldstein, *The Threat of Poverty Without Misery*, 33 FEMINIST FORMATIONS 117, 121 (2021).

accommodate and yet indirectly thwart these new constitutional recognitions. One significant way marriage law and policy accomplishes such maintenance is by moving away from a newly constitutionally-prohibited practice, and towards a seemingly opposite discriminatory practice. So, what was once marriage prohibition becomes marriage promotion, what was once marriage promotion becomes marriage prohibition, and what was once coverture becomes reverse coverture. The dominant practices rise and fall in accordance with constitutional shifts, constantly recalibrating to uphold and stabilize the race, class, gender, and sexuality-based social hierarchies currently inherent in the American political system.[13]

Four specific examples illustrate this phenomenon. The first example involves a switch from policies of marriage prohibition to policies of marriage promotion for economically marginalized people, with the Supreme Court case of *Zablocki v. Redhail* mediating this metamorphosis. Prior to *Zablocki*, many states had a long history of prohibiting poor people from marrying: as far back as the early twentieth-century numerous states had statutes either explicitly or implicitly preventing "paupers" and other poor persons from entering the halls of matrimony.[14] When *Zablocki v. Redhail* came to the Supreme Court in 1978, the constitutionality of these kinds of prohibitions was finally addressed, with the Supreme Court considering whether Wisconsin could constitutionally prohibit an unmarried parent who owed child support from marrying another person. The Supreme Court found that the statute was unconstitutional, with one justice decisively declaring that the state "must stop short of telling people they may not marry because they are too poor."[15]

However, the desire of states to use marriage as a tool to regulate the behavior of poor people continued. After *Zablocki* closed off the avenue of marriage prohibition, the impulse morphed instead into one of marriage *promotion*.[16] Rather than *preventing* poor people from marrying, after *Zablocki* the state of Wisconsin began launching marriage *promotion* programs focused on persuading or coercing poor people *to* marry, a move which was later copied by the federal government as well. Although a seemingly opposite

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13 *Id*.

14 Caroline Lyster, *Pauperism*, EUGENICS ARCHIVES (Apr. 29, 2014), https://eugenicsarchive.ca/discover/tree/535eed477095aa0000000246 [https://perma.cc/ACC5-TJ93]. *See also* Zablocki v. Redhail, 434 U.S. 374, 395 (1978).

15 Zablocki v. Redhail, 434 U.S. 374, 395 (1978) (Stewart, J., concurring).

16 *See infra* Part III.

practice, similar to its predecessor marriage promotion also inflicted dignitary and practical harms on economically (and often racially) marginalized people.

The landmark decision in *Obergefell v. Hodges* also mediated a switch between marriage prohibition and promotion.[17] Prior to the decision, many states had explicitly prohibited same-sex marriage.[18] These prohibitions both mapped onto and perpetuated homophobia and anti-gay sentiment. By 2015, however, in keeping with clear international trends and a growing understanding of civil rights, the Supreme Court finally declared in *Obergefell v. Hodges* that states could not constitutionally prohibit same-sex couples from marrying.

But in the wake of *Obergefell v. Hodges*, the discriminatory practice switched from predominantly one of exclusion to instead one of "disciplinary inclusion."[19] Instead of just opening the marriage door as one option for same-sex couples that desired to enter into matrimony, states began essentially slamming shut other doors that had been created, and started pushing same-sex couples, sometimes quite aggressively, through the marriage entrance. States "routinely responded to the legalization of same-sex marriage" by terminating existing nonmarital statuses or unilaterally converting domestic partnerships into marriages unless those partners formally opted-out,[20] rendering it "difficult—and in some cases practically impossible—for couples to choose not to marry."[21] Obligating same-sex marriage in this manner conflicts with concepts of queerness and upholds heteronormative hierarchies.[22]

Third, toggling between marriage promotion and prohibition has also impacted incarcerated individuals. This time, though, the constitutional backfire has travelled a different trajectory. Here, *promotion* largely turned into *prohibition*, with *Turner v. Safley* serving as a pivotal moment in the progression from one to the other. Whereas marriage was once heavily promoted as rehabilitative for prisoners—and sometimes coercively imposed on them in order to achieve this purpose[23]—in the latter part of the twentieth century, the trend began to turn towards instead *prohibiting* marriage for

17 Obergefell v. Hodges, 576 U.S. 644 (2015).

18 *Id.*

19 YAMIN, supra note 8, at 18.

20 Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 FORDHAM. L. REV. 1509, 1509 (2016).

21 *Id*.

22 Will Clark, *Love's Inequality*, L.A. REV. OF BOOKS (Mar. 7, 2016), https://lareviewofbooks.org/article/loves-inequality/ [https://perma.cc/XJJ5-EB4L].

23 Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1 (2012).

criminally convicted persons. In *Turner v. Safley,* the Supreme Court seemed to hold that states could not constitutionally engage in such prohibitions, but the Court applied such a low standard of scrutiny that marriage prohibition and a whole host of other rights-reductions for incarcerated persons blossomed in its wake, and marriage is now increasingly prohibited for individuals involved in the penal system, with significant racial implications.

Finally, shifts in approaches to spousal liability evince another constitutional backfire. Under coverture, the legal system that governed marriage in most Western democracies for hundreds of years, married women had no independent legal identity. Instead, they were "covered" by the legal identity of their husbands. As part of this, wives rarely bore sole legal responsibility for the torts and petty crimes they committed. Instead, husbands were hauled into court and frequently held legally responsible for their wives' transgressions.[24]

The path toward abolishing coverture began in the mid-1800s,[25] but the culmination of its formal demise occurred in 1992, in the Supreme Court decision in *Planned Parenthood v. Casey*.[26] But following *Planned Parenthood v. Casey*, a form of *reverse* coverture rose in coverture's stead. Now *wives*, not husbands, frequently face liability for the misdeeds of their spouses.[27] Like original coverture, this form of reverse coverture is also rooted in discriminatory gender norms and scaffolds up existing gender hierarchies.

In these four examples, the opposing modes of discriminatory practices stabilize the ideal of the white, middle-class, heterosexual family even in the face of constitutional victories challenging that norm. The constitutional victories "backfire" in the traditional sense of the word: they "rebound adversely on the originator" and result in "the reverse of the desired or

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24 Becky M. Nicolaides, *The State's "Sharp Line Between the Sexes": Women, Alcohol, and the Law in the United States, 1850-1980*, 91 ADDICTION 1211, 1217 (1996).

25 States started abolishing aspects of coverture in the late 1800s, but concepts of coverture continued to linger. *See* Marie T. Reilly, I*n Good Times and in Debt: The Evolution of Marital Agency and the Meaning of Marriage*, 87 NEB. L. REV. 373, 383–85 (2008).

26 Justice Sandra Day O'Connor, writing for a 5-4 majority, "rejected a law requiring women to obtain their husbands' permission for an abortion" in part because it was rooted in coverture, and coverture was "inconsistent with modern legal norms." *See* Susan Liebell, *Why Even Diehard Originalists Aren't Really Originalists*, WASH. POST (Oct. 21, 2020) https://www.washingtonpost.com/politics/2020/10/21/why-even-diehard-originalists-arent-really-originalists/ [https://perma.cc/5KM4-Q84G] (explaining that "coverture requires husbands to financially support their wives and requires married women to supply domestic service and sexual access").

27 *See generally* Hazel Glenn Beh, *Tort Liability for Intentional Acts of Family Members: Will Your Insurer Stand By You?* 68 TENN. L. REV. 1, 1 (2000) ("Increasingly, courts have been willing to entertain the notion of civil liability against family members for intentional misconduct of other family members.").

expected effect,"[28] or the "opposite effect of what was intended."[29] Rather than eliminating one offensive practice, they indirectly facilitate the rise of the nearly opposite offensive practice. While scholars have identified many impediments to translating constitutional success in the courtroom into actual social change on the ground, this Article adds constitutional backfires and the issue of opposing practices to this roster. It argues that constitutional backfires are an additional but previously unacknowledged process or mechanism that impedes lasting social change despite constitutional victories.

Through this exploration of constitutional backfires and the role of opposing practices in maintaining systems of white supremacy, heteropatriarchy, and capitalism, this Article shows that intimate rights, even while ostensibly receiving federal constitutional protection, have constantly been bent to serve to the statecraft goals of norm stabilization in ways that harm particular populations. The state has long recognized that marriage is an effective "vehicle of state-imposed discipline"[30] and of creating political exclusions and inclusions, and marriage has thus been an important "part of a state project of . . . cultivating a disciplined citizenry."[31] Access to marriage is indeed a crucial step in recognizing the equality of all of society's members, but "expanding marriage to new constituencies does little to undermine its disciplinary force; it merely expands the state's disciplinary reach to include new subjects."[32] In other words, the expressive value of access to marriage is tremendous and fundamental to equality, yet constitutional recognition of marriage rights has proven insufficient to independently bring about that equality.[33]

Marriage prohibition and promotion practices and coverture and forms of reverse coverture are all fundamentally "premised on the assumed . . . inferiority of the relevant groups,"[34] and all iterations of these practices can

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28 *Backfire*, Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/backfire#:~:text=%3A%20to%20have%20the%20reverse%20of,backfire [https://perma.cc/3LG9-6AGD].

29 *Backfire*, Encyclopedia.com Dictionary, https://www.encyclopedia.com/literature-and-arts/language-linguistics-and-literary-terms/english-vocabulary-d/backfire [https://perma.cc/QLJ7-ZWP8]. *See also* Gerald L. Neuman, *Law Review Articles that Backfire*, 21 U. MICH. J. L. REFORM 697, 697 (1988) (describing law review articles that have "an apparent influence on the course of legal development, but not in the manner that the author intended").

30 Murray, *supra* note 23.

31 *Id.* at 37.

32 *Id.* at 7.

33 KATHERINE FRANKE, WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY 10–11 (2015).

34 R. A. Lenhardt, *Marriage as Black Citizenship?*, 66 HASTINGS L.J. 1317, 1331 (2015).

oppress and subordinate their targeted groups. Immense dignitary and social harms result from marriage prohibition, but promotion, too, works a kind of discrimination that impedes the path to equality. For poor persons, the switch from prohibition to promotion obscured the structural causes of poverty in favor of blaming it on the independent pathologizations of individuals (or perhaps more accurately, social groups), and implied that individuals are responsible for and able to exit poverty if only they would comply with a marital regime.[35] The indignities of being poor thus became justified as self-inflicted. For same-sex marriage, the switch to marriage promotion reflected the anemic version of dignity offered in *Obergefell v. Hodges*, in which dignity is not inherent, but must be earned by marrying.[36] Indeed, the denigration of other relational forms and the pressure to enfold same-sex couples within the bonds of marriage is an attempt to discipline queerness itself.[37] For incarcerated persons, the invigoration of marriage prohibition ensures continued stigma and exclusion from the political and social community, and for wives, practices of reverse coverture continue coverture's enforcement of gendered norms and extend the common trope of holding women responsible for male wrongdoing (seen most starkly in rape and sexual harassment law), upholding old hierarchies and status quos.[38]

The relevant constitutional cases in these areas thus do decrease the availability of a given discriminatory practice, but not its animating forces, which can remanifest in the form of a seemingly opposite practice. While this might be a disheartening observation at first blush, the vulnerability of even constitutionally-recognized rights to discriminatory practices that violate the spirit of those rights actually may suggest how to move forward in the face of potential deconstitutionalization. As intimate rights appear increasingly precarious and in danger of constitutional de-recognition by the current Supreme Court, this Article uses the lessons of these constitutional backfires to suggest new tools for forearming and strengthening equal rights outside of formal federal constitutional recognition. Constitutional backfires in marriage law and policy confirm the need for what political philosopher

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35 *Id*. at 1323.

36 *See* Yuvraj Joshi, *The Respectable Dignity of Obergefell v. Hodges*, 6 CALIF. L. REV. CIRCUIT 117, 118 (2015) (arguing that *Obergefell*'s reasoning "affirms the dignity of married relationships while dismissing the dignitary and material harms suffered by unmarried families").

37 Patrick Lagua, *Disciplining Queerness: A Queer Argument about Same-Sex Marriage*, 5 HINCKLEY J. POL. 57 (2004).

38 Of course, because of intersectional identities, this division into separately impacted groups is somewhat artificial. *See* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (asserting that the experiences of women of color occur at the intersection of racism and sexism).

Nancy Fraser has called "transformative remedies," which aim to correct injustice by targeting the root causes.[39] When each of these initial discriminatory practices was finally acknowledged to be a violation of a fundamental constitutional right, the constitutional decisions offered only an "affirmative remedy," one focused solely on correcting the specific problem.[40] This narrow approach inadvertently helped invigorate the opposing form: *Planned Parenthood v. Casey* clamped down on coverture but a form of reverse coverture arose; *Turner v. Safley* initially seemed to halt the march from marriage promotion to prohibition for incarcerated individuals but it actually paved the way for a rights reduction; *Zablocki v. Redhail* prohibited marriage prohibition connected to financial means but marriage promotion grew in its wake; and *Obergefell v. Hodges* confirmed that denying marriage to same-sex couples violated the Constitution, but compulsory marriage began to replace that denial.

In order to successfully advance social equality, transformative remedies are necessary. If formal federal constitutional recognition of intimate rights ultimately dissolves, as seems quite possible, such transformative remedies can emerge from grassroots efforts, local movements, and *state* constitutional recognition. Moreover, such a moment may prompt wholesale rethinking of the viability of continued reliance on institutions like marriage and the Supreme Court, and instead push toward more radical transformations.

To explain constitutional backfires, their role in norm stabilization and status-quo perpetuation, and the potential path forward for what are becoming increasingly precarious intimate rights, this Article proceeds as follows. Following this Introduction, Part II briefly describes the complicated relationship between constitutional and social change, and situates constitutional backfires in this context. Part III explores four examples of constitutional backfires in marriage law and policy and illustrates how the opposing practices they facilitate maintain and uphold particular norms and social hierarchies, stymying the potential for significant social change. Part IV mobilizes the insights from this exploration, and argues that in this particular historical moment, as the Supreme Court seems poised to dramatically limit or even deconstitutionalize broad swaths of intimate rights, the lessons of constitutional backfires offer new tools for forearming and strengthening equal rights outside of formal federal constitutional recognition.

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39 Nancy Fraser, *From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age*, 212 NEW LEFT REV. 68, 70 (1995).

40 *Id.* at 82.

II. A BRIEF HISTORY OF CONSTITUTIONAL RIGHTS RECOGNITION AND SOCIAL CHANGE

Translating constitutional rights recognition into significant, lasting, on-the-ground social change has proven to be a difficult endeavor.[41] Although the Supreme Court's "moments of majesty" in cases like *Brown v. Board of Education* (outlawing school segregation), *Loving v. Virginia* (striking down antimiscegenation laws), and *Obergefell v. Hodges* (affirming the constitutional right to same-sex marriage) inspire and lift up the possibility of social transformation, this potential can quickly deflate and dissipate.[42] Those seeking rights often optimstically highlight, venerate, and mythologize the promise inherent in these decisions, and savor the profound expressive significance of such rights-recognition when its occurs,[43] but "movements that mobilize around legal cases quickly learn that even victories [often] do not translate into significant material change."[44] Rather, these litigative victories, while still valuable and meaningful for their expressive component, "are not readily translated into sustained efforts for structural change."[45] Constitutional litigation alone is highly unlikely to "result in any great

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41 *See e.g.*, Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 DRAKE L. REV. 795 (2006).

42 Adam Serwer, *John Roberts and the Second Redemption Court*, THE ATLANTIC (Sept. 4, 2018). Serwer notes that these decisions themselves are

> few and far between. For most of its existence, the high court has been committed less to upholding the rule of law or the Constitution than to preserving its own legitimacy, unwilling to shield the powerless from the mob unless convinced that it has the political cover to do so. Like many things in America, the ideal rarely resembles the execution.

Id. (citing Brown v. Bd. of Educ., 347 U.S. 483 (1954); Roe v. Wade, 410 U.S. 113 (1973); Lawrence v. Texas, 539 U.S. 558 (2003)).

43 Yet, the expressive dimension of such rights-recognition is profound, particularly for those who have been shut out of those rights. Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 878 (2013).

44 Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 954 (2007). Orly also notes that

> courts played an important role in keeping the sit-in movement going, ending the Montgomery bus boycott by providing the boycotters with leverage, furthering school desegregation by threatening to cut off federal funds under Title VI, and upholding affirmative action programs. But in each case courts were effective because a political movement was supporting change.

Rosenberg, *supra* note 41, at 815.

45 Lobel, *supra* note 44, at 954.

transformation of American society" in future, either.[46] The unfortunate reality is that even the most tremendous victories tend to be "incremental, gradualist, and moderate" and do little to "disturb the basic political and economic [and racial and social] organization of modern American society."[47]

Constitutional law scholars have carefully identified and theorized numerous reasons why this is so.[48] Chief among the reasons are the problems of backlash, the court's lack of independent enforcement powers, and the tendency of constitutional litigation to flatten or dull the potency of what would otherwise be more radical claims to social justice.

The backlash thesis, explored by scholars like Gerald Rosenberg and Michael Klarman, suggests that major constitutional decisions like *Brown* failed to achieve tangible, on-the-ground change and may have actually hindered the social goal sought.[49] These scholars suggest that when Supreme Court constitutional holdings are more progressive than the current public sentiment, they can have a perverse effect: the "rulings mobilize opponents, undercut moderates, and retard the cause they purport to advance."[50] So, even though such victories are important and inspiring and teeming with expressive value, their concrete, measurable impact may be quite narrow.[51]

Indeed, *Brown v. Board of Education*—"the most well-known and widely celebrated case in Supreme Court history"—is a prime example of backlash.[52] Although it was an incredibly important symbolic victory for racial equality, "*Brown* had almost no immediate direct impact on desegregation . . . not only did the Court fail to directly bring about school integration, but the decision also failed to produce positive indirect effects that would have aided the civil rights movement."[53] Instead, according to

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46 *Id.* at 955.

47 JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE 233 (1978), *quoted in* Lobel, *supra* note 44, at 955. See also Osamudia James, *Superior Status: Relational Obstacles in Law to Racial Justice & LGBTQ Equality*, 63 B.C.L. REV. 199 (2022).

48 *See generally* Mary Ziegler, *Framing Change: Cause Lawyering, Constitutional Decisions, and Social Change*, 94 MARQUETTE L. REV. 263 (2010) (explaining the main arguments in this regard).

49 Mark S. Kende, *Foreword*, 54 DRAKE L. REV. 791, 792 (2006).

50 Ziegler, *supra* note 48, at 271 (quoting Michael J. Klarman, Brown *and* Lawrence (*and* Goodridge), 104 MICH L. REV. 431, 482 (2005)).

51 *Id.*

52 Rosenberg, *supra* note 41, at 809.

53 NeJaime, *supra* note 43, at 885, 886 (quoting Klarman, *supra* note 3, at 84). Nevertheless, scholars like Gerald Torres disagree with this view. As he queries:

these backlash scholars, the decision "crystallized southern resistance to racial change," giving rise to "massive resistance" which "propelled politics in virtually every southern state several notches to the right on racial issues."[54] And following the decision, the impact on actual school segregation was minimal: nearly ten years after the decision, a mere 1.2% of Black children living in the former Confederate states attended nonsegregated schools.[55] In other words, "for nearly ninety-nine of every one hundred African-American children in the South a decade after *Brown*, the finding of a constitutional right changed nothing."[56] Those numbers were temporarily raised when Congress warned it would pull federal funding from segregated school districts,[57] but factors like repeated conservative mobilizations, subsequent judicial undermining in cases like *Milliken v. Bradley*, rising residential segregation, and growing economic inequality, have once again lowered those numbers, to the extent that "students in many metropolitan areas . . . experience levels of segregation and racial isolation comparable to those in the 1960s and 1970s."[58]

> What is the relationship between the victory in *Brown*—even though it was not a substantial victory in terms of transforming public schools—and the change in the national debate about the legitimacy of race discrimination? I think that it is a complicated picture, a very complicated picture, and I am not going to attempt to draw direct causal links. But I am going to suggest that what it did was change the background belief of people who were fighting against race discrimination in the South about what was possible.

Gerald Torres, *Some Observations on the Role of Social Change on the Courts*, 54 DRAKE L. REV. 895, 897 (2006).

54 Klarman, *supra* note 3, at 82 (1994).

55 Rosenberg, *supra* note 41, at 809.

56 *Id*.

57 By 1973, 91.3 percent of black children were "attending public school with whites." Klarman, *supra* note 3, at 84.

58 *See* WILL MCGREW, U.S. SCHOOL SEGREGATION IN THE 21ST CENTURY: CAUSES, CONSEQUENCES, AND SOLUTIONS, WASH. CTR. FOR EQUITABLE GROWTH 2, 26 (2019), https://equitablegrowth.org/wp-content/uploads/2019/10/101519-school-seg.pdf [https://perma.cc/8Z7Z-NCS2] (citing GARY ORFIELD & ERICA FRANKENBERG, CIVIL RIGHTS PROJECT, *BROWN* AT 60: GREAT PROGRESS, A LONG RETREAT AND AN UNCERTAIN FUTURE (2014), https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf [https://perma.cc/8Z7Z-NCS2]; ERICA FRANKENBERG, JONGYEON EE, JENNIFER B. AYSCUE & GARY ORFIELD, CIVIL RIGHTS PROJECT, HARMING OUR COMMON FUTURE: AMERICA'S SEGREGATED SCHOOLS 65 YEARS AFTER *BROWN* (2019), https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/harming-our-common-future-americas-segregated-schools-65-years-after-brown/Brown-65-050919v4-final.pdf [https://perma.cc/F7Y8-6G6P]; Milliken v. Bradley, 418 U.S. 717 (1974) (holding it is impermissible for school district lines to be redrawn for the purpose of combating segregation unless the segregation was caused by the discriminatory acts of the school district)).

As suggested by the notable improvement when Congress threatened financial consequences for recalcitrant school districts, the Supreme Court's lack of independent enforcement power also hinders judicial decisions from effecting actual on-the-ground change. Courts "have very few tools to [e]nsure that their decisions are carried out," and must instead rely on individuals in administrative and elected offices to implement or make real their rulings.[59] Sometimes the popular support to do this is lacking.[60] Particularly when the litigation involves "issues of significant social reform" and "contested values," opposition to Supreme Court decisions "may induce a withdrawal of the elite and public support crucial for implementation."[61] When that happens, "[t]he structural constraint[]" of the Court's limited powers of enforcement renders it "virtually powerless to produce change."[62] In plain terms, "[w]here there is local hostility to change, court orders will be ignored. Community pressure, violence or threats of violence, and lack of market response all serve to curtail actions to implement court decisions."[63]

Finally, the constitutional litigative process itself might subvert the possibility of social change.[64] As scholars like Tomiko Brown-Nagin and Nicholas Bowie note, when constitutional claims come to the Court, they are coming to a historically deeply conservative institution that has spent most of its lifespan upholding traditional social hierarchies and status quos.[65] The reality is that, "[a]s a matter of historical practice, the Court has wielded an antidemocratic influence on American law, one that has undermined federal attempts to eliminate hierarchies of race, wealth, and status."[66] And, "for most of U.S. history the Supreme Court has supported and reinforced racial discrimination against non-whites."[67]

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59 ROSENBERG, *supra* note 4, at 16.

60 Ziegler, *supra* note 48, at 275.

61 ROSENBERG, *supra* note 4, at 16.

62 *Id.* at 420.

63 *Id.* at 421.

64 Tomiko Brown-Nagin, *The Constitution, the Law, and Social Change: Mapping the Pathways of Influence, in* THE CAMBRIDGE COMPANION TO THE UNITED STATES CONSTITUTION (Karen Orren & John W. Compton eds., 2018).

65 *See also* Rosenberg, *supra* note 41, at 796 (noting that "[t]raditionally, courts in the U.S. have protected privilege" and have been "dedicated to preserving the status quo and unequal distributions of power, wealth, and privilege").

66 Nikolas Bowie, Assistant Professor of L., Harv. L. Sch., *Written Statement*, *before the* PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES (June 30, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony-1.pdf [https://perma.cc/ZB3D-F5KK].

67 Rosenberg, *supra* note 41, at 795, 796 (noting that "[t]his is an unpleasant fact that most citizens do not know and most lawyers ignore").

When bringing a rights claim to this historically conservative institution, the Court's "moderate, elitist, and utilitarian" tendencies mean that even when a resulting holding is progressive, the holding is usually a highly negotiated compromise "among members of the elite and their effort 'to find consensus amidst cultural conflict,'" diluting the potential potency of the rights-claim being made.[68] Further, that dilution itself is then legitimated: "[w]hen social demands are fused into legal action and the outcomes are only moderate adjustments of existing social arrangements, the process in effect naturalizes systemic injustice."[69] Returning to the *Brown v. Board of Education* example, "when a court decision declares the end of racial segregation but de facto segregation persists, individuals become blind to the root causes of injustice and begin to view continued inequalities as inevitable and irresolvable."[70] Such "symbolic victories," while hugely expressively important, then come to simultaneously participate in the "'continued subordination of racial and other minority interests,' while pacifying the disadvantaged who rely on it."[71] Successful constitutional rights litigation does result in a judicial declaration of rights, which of course has value, but when those rights fail to manifest on the ground, the end result is the reification of a system in which "meaningful change" remains elusive and the "dominant ideologies, institutions, and social hierarchies of the time" instead continue unabated.[72]

Backlash, enforcement problems, and the Court's institutional tendencies all point to the "variability, contingency, and complexity that presents itself as we try to map the relationship between courts and social change."[73] But

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68 Ziegler, *supra* note 48, at 272 (quoting Brown-Nagin, *supra* note 64). By comparison,

> Williams Eskridge suggests that even definitional litigation campaigns can have both benefits and costs to social movements. He shows that movements and law have a dialectical relationship: movements propose doctrines and constitutional revolutions that the courts adopt, albeit often in modified form. In turn, constitutional law "influence[s] the rhetoric, strategies and norms of social movements." In Eskridge's view, law helps to define and even create identity-based social movements, first by enforcing discrimination against them and then by giving "concrete meaning to the 'minority group' itself." Later, law gives identity-based social movements a chance to demand social change and permits them to reemerge as mass political mobilizations.

Id. at 270 (quoting William N. Eskridge, Jr. *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 422 (2001)).

69 Lobel, *supra* note 44 at 957.

70 *Id.*

71 *Id.* at 957, 958 (quoting GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA 5 (1993)).

72 Lobel, *supra* note 44 at 957.

73 Jane S. Schacter, *Sexual Orientation, Social Change, and the Courts*, 54 DRAKE L. REV. 861, 863 (2006).

while the "dynamics that drive particular outcomes" are inevitably diverse and complicated, patterns do emerge.[74] Constitutional backfires are one such pattern. When a significant constitutional decision renders one kind of discriminatory practice unavailable, the opposite practice can become more popular. Marriage prohibition evolves into marriage promotion, marriage promotion evolves into prohibition, and coverture evolves into forms of reverse coverture. Simultaneously, modified strains of the first practice usually continue to circulate quietly in some form, just as strains of the second are often latent yet present when the first form dominates, and the two practices continually rise and fall, switching places to subvert the potential for social change.

III. CONSTITUTIONAL BACKFIRES AND THE FUNDAMENTAL RIGHT TO MARRY

In marriage law and policy, constitutional backfires abound.[75] This likely reflects the high political stakes at issue in this area: because marriage is so fundamental to the American social and political order, constitutional rights recognition in this area carries the possibility of profound social change and the potential for reworking deeply entrenched status hierarchies.[76]

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74 *Id.* at 868.

75 Constitutional backfires are a subset of a larger phenomenon of opposing practices participating in a durable system of discrimination is broader than these constitutional backfires. Sometimes, legislation can correspond with a rise in an opposing practice. *See, e.g.*, Swan, *supra* note 7. And the history of marriage as it relates to formerly enslaved peoples also involves a transition from prohibition to promotion. Prior to the Civil War, slaves could not marry. "In slaveholding states before the Civil War, slaves had no access to legal marriage, just as they had no other civil right; this deprivation was one of the things that made them 'racially' different." NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 4 (2000). In fact, "[s]lavery and marriage were so incompatible that a master's permission for a slave to be (legally) married was interpretable as manumission." *Id.* at 33. After the Civil War, however, marriage became an important tool for inducting black citizens into the polis in a particular way. As Katherine Franke writes, after the Civil War, many Southern states went from not allowing African-Americans to marry, to imposing marriage upon them, wanted or not. FRANKE, *supra* note 33, at 16. These states "*automatically* married African Americans who lived in relationships that appeared 'marriage-like' without their consent, or at times, even knowledge. People who had been living together in a variety of arrangements suddenly found themselves actually married." Elizabeth Clement, *A Historian's Comments on Katherine Franke's Wedlocked*, CONCURRING OPINIONS (Feb. 28, 2016). This state-mandated change in status had significant detriments and the state used this change in status in oppressive ways. *See* Franke, *supra* note 33.

76 Indeed, the Preamble to the United States Constitution embeds the idea of marriage in the very founding of the nation, as "[t]he American Constitution declared its aim was to secure 'a more perfect Union'" and achieve "domestic tranquility." *See* ANN MCGRATH, ILLICIT LOVE: INTERRACIAL SEX AND MARRIAGE IN THE UNITED STATES AND AUSTRALIA 5 (2015).

Historically, marriage's many exclusions (such as no interracial marriage, no same-sex marriage, no marriage between enslaved persons) and strict governance through regimes like coverture set the social order and defined the status of the "politically qualified subject[s] of the state."[77] By "draw[ing] lines among the citizenry" and determining "what kinds of sexual relations and which families will be legitimate," the rules of marriage perpetuate the larger social order and our understanding of the categories of gender, race, sexuality, and class.[78] Specifically, marriage has "shaped gender by assigning men and women different familial roles;"[79] it has "shaped our understandings of race . . . through the prevention of interracial marriage, and by normalization practices that worked to pathologize black Americans,"[80] and it has "shaped our understandings of sexuality by historically limiting its availability to heterosexuals."[81]

The role of marriage in upholding these social understandings and hierarchies makes it an important site for both those advocating for progressive social change and those seeking to further entrench existing systems of subordination. It is thus not surprising that that marriage law has become a fundamental battlefield for progressive and conservative movements. Those seeking broad social equality know that changes in marriage law and policy could have a profound impact. At the same time, those seeking to preserve the status quo are also aware of that risk, and need a mechanism to neutralize the possibility of social change when those constitutional claims are successful. Constitutional backfires fulfill this role. Often, when one practice is declared unconstitutional, its opposite can gain in popularity, creating a "constitutional backfire" that "rebound[s] adversely on the originator" and has "the opposite effect of what was planned."[82] So, the "salient pattern" becomes "continued contestation" and subsequent changes to the institution of marriage as a result of constitutional litigation, yet constitutional backfires help to ensure that the broader social order remains relatively untouched.[83]

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77 JESSICA AUCHTER, THE POLITICS OF HAUNTING AND MEMORY IN INTERNATIONAL RELATIONS 6 (2014).

78 COTT, *supra* note 75, at 4.

79 YAMIN, *supra* note 8, at 148.

80 *Id.*

81 *Id.*

82 *Backfire*, Encyclopedia.com Dictionary, https://www.encyclopedia.com/literature-and-arts/language-linguistics-and-literary-terms/english-vocabulary-d/backfire [https://perma.cc/ERK3-99NE].

83 YAMIN, *supra* note 8, at 148.

This Part uses four examples—marriage prohibition and promotion for economically and racially marginalized groups, marriage prohibition and promotion for same-sex couples, marriage promotion and prohibition for incarcerated persons, and coverture and forms of reverse coverture for wives—to show how constitutional backfires reify and uphold existing social orders and the norm of the white, middle-class, heteronormative family as the ideal social and political foundation, even in the face of successful rights-recognizing constitutional litigation.[84]

A. Marriage Prohibition and Promotion for Racially and Economically Marginalized Groups

A century ago, poor people were prohibited from marrying in many states.[85] Such prohibitions grew in large part from the eugenics movement, which had gained significant momentum in the early 1900s. Lured by the promises of that movement, states sought to encourage "[d]esirable genetic traits" like white, wealthy, and healthy, and to minimimize "undesirable traits" like non-White, poor, and physically or mentally disabled.[86] States turned to marriage law to assist in this endeavor of "reproductive statecraft,"[87] and consequently, during the "Progressive" Era of the early twentieth century, the United States "saw a dramatic proliferation of laws that prohibited the marriages of many citizens on the basis that they lacked biological or hereditary fitness."[88] A majority of states believed that a lack of money was equivalent to a lack of biological or hereditary fitness,[89] and concerns about the reproduction of people prone to poverty motivated a

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84 *See, e.g.*, Melanie Heath, *State of Our Unions: Marriage Promotion and the Contested Power of Heterosexuality*, 23 GENDER & SOC. 27, 27 (2009).

85 Brooke Carlaw, *Early American Eugenics Movement*, FIRST WAVE FEMINISMS (Dec. 12, 2019).

86 *Id.* (noting that groups like the American Breeders Association "supported eugenic research with the goal to improve human breeding" and offered advice to public policy makers on how to achieve this goal).

87 "Reproductive statecraft" refers to the state using laws and policies governing reproduction in order to achieve a particular kind of citizenry. *See* SONIA CORRÊA, MARGARETH ARILHA, & MAÍSA FALEIROS DA CUNHA, REPRODUCTIVE STATECRAFT: THE CASE OF BRAZIL, IN REPRODUCTIVE STATES: GLOBAL PERSPECTIVES ON THE INVENTION AND IMPLEMENTATION OF POPULATION POLICY, Rickie Solinger and Mie Nakachi, eds. 2016.

88 Caroline Lyster, *Pauperism*, EUGENICS ARCHIVES (Apr. 29, 2014), https://eugenicsarchive.ca/discover/tree/535eed477095aa0000000246 [https://perma.cc/4XTN-TJSA].

89 Carlaw, *supra* note 85.

wave of legislation explicitly or implicitly prohibiting poor individuals from marrying.[90]

Enthusiasm for prohibiting poor people from marrying had dissipated somewhat by the mid-1900s,[91] but strands of the impulse continued to circulate.[92] This eventually came to a head in the 1978 Supreme Court case of *Zablocki v. Redhail*.[93] In *Zablocki*, the Supreme Court considered whether a Wisconsin statute which prevented a noncustodial parent from marrying when child support was owing violated the Equal Protection Clause of the Fourteenth Amendment.[94] The Wisconsin law mandated that individuals with child support obligations had to first obtain judicial permission in order to marry, and that said permission would only be granted if applicants could show they did not have child support debt owing and that their future children were unlikely to need public assistance.[95] Many low-income

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90 One such piece of legislation, passed in Washington in 1909, read as follows:

> No woman under the age of forty-five years, or man of any age, except he marry a woman over the age of forty-five years, either of whom is a common drunkard, habitual criminal, epileptic, imbecile, feeble-minded person, idiot or insane person, or person who has theretofore been afflicted with hereditary insanity, or who is afflicted with pulmonary tuberculosis in its advanced stages, or any contagious venereal disease, shall hereafter intermarry or marry any other person within this state.

REM. & BAL. ANN. CODES & STATUTES WASH., § 7152 (1910). "Paupers" were implicitly included in the category of "feebleminded" in this legislation. Lyster, *supra* note 88. Harriet Spiller Daggett notes that "[s]everal states" prohibit "'pauper'" marriage, though suggests that such marriages "should be preferred to a further increase in illegitimacy." Harriet Spiller Daggett, *Legal Controls in Family Law*, 23 IOWA L. Rev. 215, 229 (1938); *see also* 1 CHRISTOPHER GUSTAVUS, A TREATISE ON STATE AND FEDERAL CONTROL OF PERSONS AND PROPERTY IN THE UNITED STATES 893–94 (2002) ("Not only is the welfare of society threatened by the transmission of a shattered mental or physical constitution to the children, but also by bringing them into the world, when the parents are not possessed of the means sufficient to provide for them. The only difficulty in the enforcement of such a law, as in the cases of constitutional insanity and disease, lies in determining in what cases the danger is threatening enough justify the interference of the law; and in the case of poverty, there is the further difficulty of proving the condition of pauperism, which would operate as a bar to marriage. It would probably be impossible to enforce the rule against any but public paupers, those who are dependent upon public alms, and can, therefore, be easily identified. Such a regulation at one time prevailed in Maine, and it was held, when the constitutionality of the law was called into question, that the State may by statute prohibit the marriage of paupers.") (citing Brunswick v. Litchfield, 2 Me. 28 (1822)).

91 The movement away from eugenics occurred following the horrors of the eugenics legacy of Germany's Third Reich. *See* Carlaw, *supra* note 85.

92 *See* Lyster, *supra* note 88.

93 Zablocki v. Redhail, 434 U.S. 374, 387 (1978).

94 *Id.* at 375–77; Tonya L. Brito, R. Kirk Anderson & Monica Wedgewood, *Chronicle of a Debt Foretold:* Zablocki v. Red Hail*, in* THE POVERTY LAW CANON: EXPLORING THE MAJOR CASES 241 (2016) (noting that the legislation itself "date[d] back to 1957, when the Wisconsin legislature ordered a review of the state's marriage and divorce statutes").

95 *Zablocki*, 434 U.S. at 375.

Wisconsin residents could not satisfy this standard, and they were denied access to marriage on this basis.[96]

Roger Red Hail, an Oneida man living in Milwaukee who wanted to marry his then-pregnant fiancée, was one of them.[97] Nineteen years old at the time, he owed thousands of dollars in child support for a child he fathered as a sixteen-year-old high school student.[98] He and his family, along with 33.1 percent of American Indians living in the area, were deeply impoverished,[99] and as a teenager he had been ordered to pay a "shockingly high" amount of child support that he could not possibly repay on his meager minimum wage salary.[100] Milwaukee Legal Services, a legal aid organization focused on poverty law issues, assisted him in bringing forward the case, shepherding it all the way to the Supreme Court.[101]

The Court held that this kind of marriage ban on impoverished persons was indeed unconstitutional. The Court found that the impact of the legislation was to permanently prohibit some individuals from marrying, as they would literally never be able to pay their child support debt and meet the statutory requirements for judicial permission. They were, in the words of the Court, "absolutely prevented from getting married."[102] The Court found that this was unconstitutional, with Justice Stewart in concurrence bluntly declaring that the state "must stop short of telling people they may not marry because they are too poor."[103]

Zablocki thus represented a moment of potential rupture in the oppressive discipline and humiliation the state often visits on the poor. It offered the possibility of dignity-recognition for impoverished persons and the prospect of dismantling class-based hierarchies.

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96 Brito, Anderson & Wedgewood, *supra* note 94, at 242 (recounting that "[i]n 1974, in Milwaukee County alone, the county clerk refused to issue a marriage license to 660 applicants."). The Court noted that the legislation prevented any Wisconsin resident who came under its terms from marrying *in any state* without a court order, and a violation of this statute was punished criminally. *Zablocki*, 434 U.S. at 375.

97 Brito, Anderson & Wedgewood, *supra* note 94, at 233. "Roger Red Hail's last name is misspelled as Redhail in the *Zablocki v. Redhail* judicial opinion. He mentioned that after his mother learned the true spelling of the family name, she insisted that family members use the correct spelling and that others do so as well." *Id.* at 254.

98 *Id.* at 233.

99 *Id.* at 234.

100 *Id.* at 240.

101 *Id.* at 242–43, 249.

102 *Zablocki*, 434 U.S. at 387.

103 *Id.* at 395.

But when the ruling in *Zablocki v. Redhail* curtailed the ability of states to prohibit poor people from marrying, tactics instead merely shifted to *promoting* marriage for poor people. Like marriage prohibition before it, marriage promotion also functioned to maintain existing class-based hierarchies, continuing to denigrate the poor through the mechanism of marriage, though this time from the opposite direction. Marriage promotion provided a rationalization for denying poor persons the types of assistance that would actually lift them out of poverty and simultaneously blamed them for poverty itself, thereby ensuring that the latent potential hinted at in *Zablocki* towards equal dignity for members of low socio-economic status would remain unrealized.

Notably, Wisconsin was the first state to get the marriage promotion ball rolling.[104] In 1994, Wisconsin's governor Tommy Thompson initiated two pilot programs: the "Bridefare" program, which offered increased cash benefits to teenage welfare recipients who married, and another program which prohibited recipients from accessing welfare benefits beyond two years.[105] These two state programs formed the basis for the huge federal welfare overhaul that occurred two years later, in the form of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA").[106] This new federal welfare regime, which turned out to be "one of the most regressive social programs promulgated by a democratic government in the twentieth century," explicitly brought welfare and marriage together and was founded on the questionable notion that marriage promotion could reduce proverty.[107] PRWORA redirected funds from previous means-tested programs like job-training, putting them instead into

104 *See* Kaaryn Gustafson, *Breaking Vows: Marriage Promotion, the New Patriarchy, and the Retreat From Egalitarianism*, 5 STAN. J. C.R. & C.L. 269, 287 (2009) (noting that "[m]arriage promotion began as a welfare program in Wisconsin").

105 *Id.*

106 *Id.*; The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

107 LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY 79 (2009). "Conservatives began blaming the decline of lifelong heterosexual marriage for a vast array of social problems. They explicitly targeted women raising children outside of marriage, a group that is disproportionately populated by women of color, for the greatest disapproval. They posited marriage, rather than a shift in public priorities, as the solution to poverty, violence, homelessness, illiteracy, crime, and other problems." Nancy Polikoff, *Concord with Which Other Families?: Marriage Equality, Family Demographics, and Race*, U. PA. L. REV. ONLINE 99, 100 (2016). Currently, "[m]ore than 40 percent of American children are now born to unmarried mothers, double the percentage in 1980." Emily Bobrow, *The Pandemic Is Putting Marriage Even Further Out of Reach*, THE ATLANTIC (July 27, 2020), https://www.theatlantic.com/family/archive/2020/07/pandemic-marriage-out-of-reach-americans/614506/ [https://perma.cc/584U-S8MN].

experimental marriage promotion programs, and the program drastically limited welfare availability overall.[108]

Although marriage promotion for the poor manifested as public policy in Wisconsin in the 1990s, the origin of the *idea* of its use predated that implementation by decades. Its antecedent appeared in 1965, in the now notorious Moynihan Report, which suggested that poverty was caused by a lack of marriage. Initially tasked with studying the causes of "urban poverty," Senator Daniel Moynihan concluded in that report that such poverty was really the result of the "break down" and "pathology" of the black family.[109] Low marriage rates, in particular, were to blame: high rates of unmarried black women had "forced" the Black community "into a matriarchal structure" and gave rise to a "tangle of pathology"[110] which prevented "the progress of the group as a whole."[111]

Identifying a lack of marriage as the central cause of urban poverty both within Black communities and more broadly informed Wisconsin's experiment and spurred the implementation of PRWORA at the federal level.[112] PROWORA claimed that marriage, not employment, was the most important factor for "solving the problems of the urban underclass."[113] In fact, the opening words of PRWORA, a welfare statute, "focus exclusively on marriage as opposed to work," asserting that "marriage is the foundation of a successful society" and "marriage is an essential institution of a successful society which promotes the interests of children."[114] Many of its provisions were geared towards incentivizing marriage and encouraging poor persons to enter the halls of matrimony.

This movement from marriage prohibition to marriage promotion in the wake of *Zablocki v. Redhail* had important discursive effects. Essentially, marriage promotion allowed poverty to continue, while blaming that poverty

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108 WACQUANT, *supra* note 107 at 80, 84–86.

109 DANIEL P. MOYNIHAN, U.S. DEP'T OF LAB., THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION 12, 29 (1965).

110 *Id.* at 29.

111 *Id. But see* Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, THE ATLANTIC (Oct. 2015) (describing the complexities of the report and its reception). *See also* Joel Schwartz, *PRWORA and the Promotion of Virtue, in* WELFARE REFORM AND POLITICAL THEORY 223, 245 (2005) (noting that "Moynihan, ironically, was to fiercely oppose the passage of PRWORA").

112 Moynihan himself did not actually suggest marriage promotion as a recommended intervention, though marriage promotion supporters relied on the report. *See* R.A. Lenhardt, *Marriage as Black Citizenship?* 66 HASTINGS L. J. 1317 (2015) (finding harmful stereotypes used in support of marriage efforts since the publication of the Moynihan Report).

113 Schwartz, *supra* note 111, at 23.

114 *Id.* at 233 (quoting Pub. L. No. 104-193, § 101, 110 Stat. 2110 (1996)).

on the individual choice to not marry. From the earliest days of the marriage promotion movement, there was significant evidence that it would not, in fact, lift people out of poverty.[115] First of all, over half of the population of "low-income American households with children" already were married.[116] Moreover, before PRWORA was enacted, scholars had already identified that the high rates of joblessness and incarceration in urban centers (themselves the result of public policy decisions) were the likely major driving forces in the decline of marriage rates, not changes in individual decision-making.[117] PRWORA's marriage promotion programs did nothing to address these identified underlying causes of poverty and their resultant declines in marriage rates.[118] But what marriage promotion *did* do was reverse engineer the relationship between poverty and marriage,

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115 At the same time, many scholars assert that marriage can help impoverished people. *See* Katherine Boo, *The Marriage Cure*, THE NEW YORKER (Aug. 10, 2003), https://www.newyorker.com/magazine/2003/08/18/the-marriage-cure [https://perma.cc/2FBX-8XGA] ("While a considerable amount of social-science data suggest that two-parent families are good for children, marriage promoters also see matrimony as a means of decreasing crime and welfare dependence . . . .").

116 Emily Bobrow, *The Pandemic Is Putting Marriage Even Further Out Of Reach*, THE ATLANTIC (July 27, 2020), https://www.theatlantic.com/family/archive/2020/07/pandemic-marriage-out-of-reach-americans/614506/ [https://perma.cc/F2HC-MC22].

117 *See* BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 56 (2006) (noting that even before the rise of marriage promotion as official federal public policy, research had already suggested that the changes in marriage rates, particularly for low-income Black families, was closely tied to larger structural manifestations of discrimination, like a lack of employment opportunity for Black men and the rise of mass incarceration—issues that marriage promotion was never designed to help). In the 1980s, "[p]overty researchers closely followed the changing shape of American families. Growing numbers of female-headed families increased the risks of enduring poverty for women and children. Growing up poor also raised a child's risk of school failure, poor health, and delinquency." *Id.* at 132. The researchers ascribed these effects in the following way:

> [E]conomic and carceral conditions contributed to a decline in marriage rates during the past 45 years. Some of the remaining unexplained portion may be driven by unobserved economic or criminal justice factors. In addition, research on family changes has often invoked the decline in the "normative imperative to marry" and the rise in the acceptability of alternative family forms as explanations. It is possible that the changing normative climate played some role in the decline in first marriage rates during this period. The weight of the evidence seems to suggest that improved economic opportunities and a reduced reliance on incarceration in the United States would likely have a positive influence on entry to first marriage.

Daniel Schneider, Kristen Harknett & Matthew Stimpson, *What Explains the Decline in First Marriage in the United States? Evidence from the Panel Study of Income Dynamics, 1969 to 2013*, 80 J. MARRIAGE AND FAMILY 791, 807 (2018) (internal citation omitted) (citing Arland Thornton & Linda Young-DeMarco, *Four Decades of Trends in Attitudes Toward Family Issues in the United States: The 1960s Through the 1990s*, 63 J. MARRIAGE AND FAMILY 1009).

118 *See* 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, 1683 (2005) ("PRWORA . . . and other marriage promotion laws fail to address the real reasons people are unable to permanently escape poverty.").

communicating to poor people that their poverty was their own fault, and simultaneously signalling that the wealthy therefore owed no moral obligations or responsibilities in that regard.

Indeed, at the same time as PRWORA insisted it was promoting marriage, other policies that reflected marriage *prohibition* tendencies still circulated.[119] Many housing and financial aid policies, for example, actively impeded the possibility of marriage for poor couples. In the housing context, policies like the one-strike rule in public housing and crime-free ordinances in private housing created family fragmentation and discouraged the possibility of marriage for poor persons.[120] Under these policies, if one member of a household commits or is alleged to engage in drug activity or other wrongdoing, the entire household is evicted.[121] One sociologist strikingly described the impact of one-strike housing policies: when he visited a public housing building in North Carolina one morning, he noticed a group of Black men waiting on the sidewalk across from the building. Residents informed him that these men "routinely assemble each morning at a street corner to wait for their girlfriends or wives, who were residents of a nearby housing project, to leave their apartments and cross the street to visit them."[122] The men "had been accused, arrested, or convicted of various criminal infractions," and were thus barred under the one-strike policy from "stepping foot" on the premises.[123] If their romantic partners were to allow them in their homes, they could be evicted.[124]

Housing policies that make it difficult for couples to cohabitate extend all the way down to the unhoused, as well:[125] in general, "shelters do not allow

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119 *Id.*

120 *See* Sarah Swan, *Home Rules*, 64 DUKE L.J. 823, 829 (2015).

121 *Id.* at 826.

122 Christopher Mele & Teresa A. Miller, *Introduction*, *in* CIVIL PENALTIES, SOCIAL CONSEQUENCES 2 (Christopher Mele & Teresa Miller eds., 2005).

123 *Id.*

124 *Id.* This of course affects familial relationships on each access: fathers are unable to visit their children in those residences if he has been subject to such an order. A now slightly dated statistic from Dayton Municipal Housing Authority indicates that the housing authority there banned 2310 individuals in the first five years of its banning program, and 89% of those were male, and "most, if not all, were black." Kimberly E. O'Leary, *Dialogue, Perspective and Point of View as Lawyering Method: A New Approach to Evaluating Anti-Crime Measures in Subsidized Housing*, 49 J. URB. & CONTEMP. L. 133, 140 (1996). One resident noted ruefully: "It's just all the guys out here that I know . . . they all got [a notice of criminal trespass] . . . almost all of the guys that have kids out here have one." *Id.* at 145–46.

125 Zak Cowan, *Together in Homelessness: Couples Living on the Streets of San Francisco Struggle to Find Help*, BAY NEWS RISING (August 11, 2016), https://baynewsrising.org/2016/08/11/couples/ [https://perma.cc/P6SJ-ZGH7].

[couples] to stay together."[126] The typical shelter "can't accommodate couples, even same-sex couples, in the same sleeping quarters."[127] The choice, then "is stark: separate to find a bed, or stay together on the streets."[128]

Additionally, financial policies surrounding both PRWORA and the child support system imposed (and continue to impose) significant literal and metaphorical costs on poor couples contemplating marriage. PRWORA is structured such that single-parent households can more readily access welfare benefits than their married counterparts, and then, as now, "there is a sense, especially within low-income communities, that getting married means you lose 'stuff;' that "marriage, at least financially, is a bad deal."[129] The math bears this out: one study determined that "a single mother working full-time at a minimum-wage job who marries a man working full-time at $8 an hour stands to lose $8,060 in cash and noncash welfare benefits."[130] Tax implications work a similar disincentive: low-income married persons are penalized under the earned income tax credit rules. As one commentator opined, "Under such circumstances, the wonder is not that few low-income couples marry, but that any do."[131]

Indeed, the impact of Wisconsin's marriage promotion policies on Roger Red Hail himself is revealing. After his success at the Supreme Court in *Redhail v. Zablocki*, Roger Red Hail never did marry.[132] Instead, worries about financial policies surrounding child support collection kept him from marrying. He cohabited for decades with his fiancée in her home, but fears that the state would try to collect the child support arrears he owed in a way that would penalize her prevented their marriage.[133] Specifically, they worried that the state would place a lien on her home, as they had learned of other couples who experienced this kind of debt collection enforcement, and Red Hail continued to be concerned that he could be imprisoned for the outstanding amount of debt, despite making monthly payments. [134]

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126 *Id*.

127 *Will You Still Be Mine? Couples Experiencing Homelessness*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION (July 31, 2019), https://www.samhsa.gov/homelessness-programs-resources/hpr-resources/couples-experiencing-homelessness [https://perma.cc/F3QB-C9QY].

128 Cowan, *supra* note 125.

129 Wade E. Horn, *Wedding Bell Blues: Marriage and Welfare Reform*, BROOKINGS, (June 1, 2001).

130 *Id*.

131 *Id*.

132 Brito, Anderson & Wedgewood, *supra* note 94, at 252.

133 *Id*.

134 *Id.*

The case of *Zablocki v. Redhail*, then, relieved one legal burden when it eliminated the possibility of the state officially prohibiting marriage between poor persons. But in hindsight, the decision facilitated a transition into the opposing discriminatory practice of marriage *promotion*, while other policies subtly rooted in notions of marriage *prohibition* continued to circulate. Marriage promotion provided the state with a persuasive discursive cover for its failure to address the actual structural causes of poverty, and instead cast the blame for poverty on those who "chose" to not bring themselves into the institution of marriage.[135] Through the rise of marriage promotion and its interplay with remaining vestiges of marriage prohibition urges, the initial progressive potential of *Zablocki* to recognize and raise up the social status of low-income persons was neutralized.

B. Marriage Denial to Compulsory: Same-Sex Marriage

The case of *Obergefell v. Hodges* played a similar role in a movement from marriage prohibition to marriage promotion.[136] Prior to this landmark ruling in 2015, many states still engaged in the historical tradition of prohibiting same-sex marriage. Indeed, same-sex activity itself, let alone marriage, was criminalized in some jurisdictions until 2003, when the Supreme Court in *Lawrence v. Texas* found such statutes to be unconstitutional.[137] By 2015, however, a number of states had legalized same-sex marriage, as had many nations across the globe.

In *Obergefell v. Hodges*, the Court held that there was a fundamental constitutional right to same-sex marriage in the United States. The decision was a tremendous victory for those seeking equal rights. As the Court itself wrote:

> [b]ecause states attach such significance to the importance of marriage in stabilizing society, "exclusion from that status has the effect of teaching that gays and lesbians are unequal in important

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135 Marriage promotion and the "marriage cure" for poverty not only ignore the underlying structural bases of poverty and the many public policies that work against the possibility of marriage, they also ignore racial aspects of marriage and wealth: the reality is that the wealth effects of getting married vary dramatically by race. *See* Thomas Shapiro, Tatjana Meschede & Sam Osoro, *The Widening Racial Wealth Gap*, INST. ON ASSETS & SOC. POL'Y 1–6 (2013). Marriage may increase the wealth of white couples (usually by an average of approximately $75,000), but at least one study has shown that marriage has "no statistically significant impact" on Black couples. *Id.* at 6. This is because decades of structural discrimination have depressed Black wealth, so "marriage among African-Americans typically combines two comparatively low-level wealth portfolios," and it "does not significantly elevate the family's wealth." *Id.*

136 FRANKE, *supra* note 33, at 12–13.

137 Lawrence v. Texas, 539 U.S. 558, 578 (2003).

> respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society, [for they], too, may aspire to the transcendent purposes of marriage."[138]

And, mere "[m]oments after the decision was issued, President Barack Obama called plaintiff Jim Obergefell on live television and told him, '[n]ot only have you been a great example for people, but you're also going to bring about a lasting change in this country.'"[139]

Obergefell v. Hodges fundamentally shifted the legal landscape of same-sex marriage. However, as Yuvraj Joshi has argued, the decision itself was built upon a precarious notion of dignity.[140] The decision was more about providing a path for same-sex couples to achieve respectability and dignity *through* marriage, and less about recognizing the inherent dignity and sexual autonomy of individuals regardless of marital choices.[141] The decision indicated that same-sex couples should be granted the option of achieving respectability through marriage, but unlike a decision based on a more capacious notion of dignity, "[t]he onus" in *Obergefell* "is not on others to accept difference (as is the case with respect), but rather on oneself to cease to be unacceptably different."[142]

This differs from full equality. As one prominent scholar-activist wrote, justice for LBTQ+ persons "will be achieved only when we are accepted and supported in this society *despite* our differences from the dominant culture and the choices we make regarding our relationships,"[143] cautioning that "[t]he moment we argue . . . that we should be treated as equals because we are really just like married couples and hold the same values to be true, we undermine the very purpose of our movement and begin the dangerous process of silencing our different voices."[144] In *Obergefell*, however, this kind of assimilation is exactly what is required. The dignity it offers to same-sex couples "is not innate; it must be earned" by opting into the traditional

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138 JACK M. BALKIN, WHAT *OBERGEFELL V. HODGES* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S SAME-SEX MARRIAGE DECISION 43–44 (2020) (quoting Obergefell v. Hodges, 576 U.S. 644 (2015)).

139 Christopher R. Riano & William N. Eskridge, Jr., *The Unfinished Business of LGBTQ+ Equality: Five Years After Obergefell v. Hodges*, N.Y. STATE BAR ASS'N (June 3, 2020), https://nysba.org/the-unfinished-business-of-lgbtq-equality-five-years-after-obergefell-v-hodges/ [https://perma.cc/3BRG-CGZX].

140 Joshi, *supra* note 36, at 127.

141 *Id.* at 127.

142 *Id*. at 118.

143 *Id.* at 122 (quoting Paula L. Ettelbrick, *Since When is Marriage a Path to Liberation?*, *in* WE ARE EVERYWHERE: A HISTORICAL SOURCEBOOK OF GAY AND LESBIAN POLITICS 757, 758 (Mark Blasius & Shane Phelan eds., 1997) (emphasis in original)).

144 *Id.* at 123 (quoting Ettelbrick, *supra* note 143, at 758).

institution of marriage.[145] Marriage, not one's inherent intrinsic human worth and rights, becomes the path to dignity recognition.

Many states manifested this by essentially requiring same-sex couples to marry "in order to retain benefits they had gained in an era when marriage was not a legal option."[146] For example,

> [t]he 2010 legalization of same-sex marriage in Connecticut . . . required the automatic conversion of existing civil unions into marriages. In Massachusetts, which began recognizing same-sex marriages in 2004, public and private employers required domestic partners to marry in order to maintain their benefits. In many cases, the introduction of marriage equality has prompted the demise of alternative statutes and the possibility of a "menu" of diverse options for relationship recognition.[147]

Concerns about this only heightened in the post-Obergefell landscape.[148] Further, requirements that same-sex couples marry in order for a non-biological parent to attain the status of a legal parent of their children also became increasingly common.[149] In a majority of states, a same-sex non-biological parent, even the primary caregiver, will often have little to no claim to custody rights unless the parents are formally married.[150]

With the move from *marriage-denied* to *marriage-practically-required*, "[c]reative legal alternatives to marriage, such as domestic partnership benefits, disappear.[151] Individuals who remain uncoupled, and individuals who choose not to marry, are subjected to social and economic pressure and penalty."[152] And "[r]ather than binding a community together," this new marriage regime can "fragment . . . the forms of community and kinship"

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145 *Id*.

146 FRANKE, *supra* note 33, at 57–58.

147 Murray, *supra* note 23, at 60.

148 Matsumura, *supra* note 20 at 1512.

149 Susan Hazeldean, *Illegitimate Parents*, U.C. DAVIS L. REV. 1583 (2022).

150 *Id.*

151 A minority of states, however,

> are not only preserving but are expanding their domestic partnership laws. For example, in July 2019, California governor Gavin Newsom signed SB 30 into law, which eliminated the requirement that state domestic partnerships were only permissible when both parties "are members of the same sex or one or both is eligible for social security benefits and over the age of 62." One reason couples would opt for domestic partnership rather than marriage is that the IRS does not treat the former as marriages, which would trigger higher taxes for some two-income couples.

Riano & Eskridge, *supra* note 139 (citing S.B. 30, 2019–2020 Leg., Reg. Sess. (Cal. 2019)).

152 Serena Mayeri, *Marriage (In)Equality and the Historical Legacies of Feminism*, 6 CALIF. L. REV. CIRCUIT 126, 134 (2015).

that came before it.[153] Importantly, for many same-sex couples, "domestic partnerships and civil unions [were not] a consolation prize made available to gay and lesbian couples" because formal marriage was not available. Rather, it was "an opportunity" for intimate ordering with "greater freedom than can be found in the one-size-fits-all of marriage."[154] The removal of that option forces all relationships into the template of marriage, where marriage becomes not just a source of formal equality, but also a source of disciplinary inclusion.[155]

Marriage often has an important disciplinary role. As many scholars have acknowledged, this disciplinary aspect makes the constitutionalization of same-sex marriage complicated. "Recognizing marriage as a vehicle of state-imposed discipline and regulation makes clear that expanding marriage to new constituencies does little to undermine its disciplinary force; it merely expands the state's disciplinary reach to include new subjects,"[156] yet at the same time achieving access to marriage is an important marker of equality.[157] Marriage is "*regulation through recognition*,"[158] and the recognition is seen by many as a necessary, if unfortunately not costless option, to achieving full equality within society. The price of that recognition is opting into an institution that is fundamentally a disciplinary and conservative one.[159] Indeed, as one conservative political commentator noted, conservative commentators began arguing that actually "same-sex unions promote the values conservatives prize,' including accountability, social stability, and economic partnership."[160] Expanding marriage to include same-sex couples then co-opts same-sex couples into this project.[161]

In fact, the litigation strategy in *Obergefell* was implicitly based on showing that same-sex marriage would actually "stabilize the norm of the white, middle-class, heterosexual family" as opposed to threaten it. The *Obergefell*

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153 Will Clark, *Love's Inequality.*, L.A. REV. OF BOOKS (Mar. 7, 2016), https://lareviewofbooks.org/article/loves-inequality/ [https://perma.cc/L6Y4-SR4F].

154 Katherine M. Franke, *Marriage is a Mixed Blessing*, N.Y. TIMES (June 23, 2011), https://www.nytimes.com/2011/06/24/opinion/24franke.html [https://perma.cc/CFZ9-9TNE].

155 And in fact, "thus far most cohabiting couples are taking advantage of the full benefits afforded by marriage equality, and few are opting for one of the other institutions still available for structuring their relationships." Riano & Eskridge, *supra* note 139.

156 Murray, *supra* note 23, at 7.

157 *Id.* at 3–4.

158 Melissa Murray, *Rights and Regulation: The Evolution of Sexual Regulation*, 116 COLUM. L. REV. 573, 576 (2016).

159 *Id*.

160 Murray, *supra* note 23.

161 *Id*. at 64.

case involved using carefully-selected "perfect plaintiffs" who embodied as many aspects of this "All-American family" as possible.[162] "Marriage equality lawyers played this game by presenting predominantly white, middle-class, and 'all-American' plaintiffs—people who were ultimately depicted by Justice Kennedy as 'needing' to assimilate into marital norms rather than desiring to change them."[163]

This participation in marriage valorization came at a critically important culture moment, too, occurring as marriage's allure as an institution in general was waning. Sociologists and demographers have long noticed that the decline in marriage was not limited to the low-income persons targeted in the welfare/marriage promotion context. Rather, "[t]he number of adults living outside of marriage is large and growing. In 1960, there were fewer than one million unmarried cohabitants. Today, there are over eighteen million. The rate of increase of nonmarital cohabitation shows no sign of stopping."[164] Same-sex couples offered marriage a public relations boost, reinvigorating the traditional institution.

But because of the contingent notion of dignity it relies on, the same-sex marriage right is arguably unstable, both for those within the LGBTQ community who do not marry and for straight non-marriers. "Marriage signals that [same-sex couples]—the sexual relations they have—are respectable, are valued, are worthy,"[165] but the reasoning of *Obergefell* is such that marriage is *necessar*y for this recognition. Ultimately, "*Obergefell* is likely to have negative repercussions for those, whether gay or straight, who, whether by choice or by circumstance, live their lives outside of marriage."[166]

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162 Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J.F. 136 (2015).

163 Russell K. Robinson, '*Playing it Safe' with Empirical Evidence: Selective Use of Social Science in Supreme Court Cases About Racial Justice and Marriage Equality*, 112 NW. U. L. REV. 1565, 1568 (2018). The authors further note that

> Angela Harris, who is a black woman, has offered a formidable critique of what she calls the LGBT movement's "neoliberal" foundation. In a piece written before *Obergefell*, she worried that the Supreme Court's eventual embrace of same-sex marriage would simply create a path "from Stonewall to the suburbs" for affluent gays and lesbians, leaving many sexual minorities behind.

Id. (quoting Angela P. Harris, *From Stonewall to the Suburbs?: Toward a Political Economy of Sexuality*, 14 WM. & MARY BILL RTS. J. 1539, 1582 (2006)).

164 Courtney G. Joslin, *Discrimination In and Out of Marriage*, 98 B.U. L. REV. 1, 3 (2018). This trend, however, is not consistent across all socioeconomic groups. Those living outside of marriage are disproportionately nonwhite and lower income. *Id*. at 3–4.

165 Anne Brice, *Podcast: Law Prof Melissa Murray on the Darker Side of Marriage,* BERKELEY NEWS (Nov. 10, 2015), https://news.berkeley.edu/2015/11/10/the-darker-side-of-marriage/ [https://perma.cc/TV7G-623S].

166 Melissa Murray, *One is the Loneliest Number: The Complicated Legacy of Obergefell v. Hodges*, 70 HASTINGS L.J. 1263, 1264 (2019).

"Getting more people into marriage actually highlighted that other people were outside of it and therefore, undisciplined, unregulated and problematic."[167] Thus, "under the semblance of egalitarianism, marriage equality, like the model minority myth, reifies conservative institutions of family that promote a neoliberal status quo and enable continued inequality."[168]

Indeed, following *Obergefell*, many scholars worried that the decision reached the correct result, but in a somewhat troubling way.[169] Melissa Murray, for example, acknowledged that while "there is certainly much to celebrate," there is "also cause for concern—even alarm."[170] In her view, the result is right, but the "rhetoric and rationale" are wrong.[171] In her view, *Obergefell* "preempts the possibility of relationship and family pluralism in favor of a constitutional landscape in which marriage exists alone as the constitutionally protected option for family and relationship formation."[172] Many other scholars agreed, enough to fill a published volume entitled *What Obergefell v. Hodges Should Have Said*, featuring nearly a dozen alternative revised opinions.[173] In essence,

> [d]iscrimination on the basis of race treats racial minorities as inferior and degraded. Discrimination on the basis of sex requires that women maintain their subordinate and complementary roles in public and in the family. Discrimination on the basis of sexual orientation pretends that sexual orientation minorities do not exist; when this is not possible, it requires that they closet, cover, or disguise their real selves; or it maintains that if gays, lesbians, and bisexuals assert their existence and identities, they be treated as abnormal, deviant, immoral, or shameful.[174]

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167 Brice, *supra* note 165.

168 Stewart Chang, *Is Gay the New Asian?: Marriage Equality and the Dawn of a New Model Minority*, 23 ASIAN AM. L.J. 5, 8–9 (2016).

169 *See, e.g.*, Anthony Infanti, *Victims of Our Own Success: The Perils of Obergefell and Windsor*, 76 OHIO ST. L.J. FURTHERMORE 79, 82 (2015) (arguing that "[t]he focus on the narrow goal of achieving marriage equality through this litigation has not only cost us an opportunity to push for more meaningful improvement in the law, but it has actually set back the movement for equal legal treatment of all regardless of relationship status").

170 Melissa Murray, *Obergefell v. Hodges and Nonmarriage Equality*, 104 CALIF. L. REV. 1207, 1209 (2016).

171 *Id*.

172 *Id*., at 1211.

173 *See generally* JACK M. BALKIN, WHAT OBERGEFELL V. HODGES SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S SAME-SEX MARRIAGE DECISION (2020). *See also* Leonore Carpenter & David S. Cohen, *A Union Unlike Any Other: Obergefell and the Doctrine of Marital Superiority*, 104 GEO. L.J. ONLINE 124, 126 (2015); Serena Mayeri, *Marriage (In)equality and the Historical Legacies of Feminism*, 126 CALIF. L. REV. CIR. 126, 134 (2015); Anthony C. Infanti, *Victims of Our Own Success: The Perils of Obergefell and Windsor*, 76 OHIO ST. L.J. 79, 82 (2015).

174 BALKIN, *supra* note 173, at 101.

Marriage promotion becomes one form of requiring such covering. This explains why, when queried about whether marriage equality was the best way to achieve LGBTQ equality, "[a]bout half of survey respondents (49%) responded that the best way to achieve equality is to become a part of mainstream culture and institutions such as marriage, but an equal share say LGBT adults should be able to achieve equality while still maintaining their own distinct culture and way of life."[175]

And at the same time as same-sex marriage is recognized as a constitutional right, that constitutionalization has not changed the hearts and minds of those who would prefer to see the same-sex marriage prohibition model rise again. "Official resistance to implementing [Obergefell] was sporadic,"[176] but polling suggested that same-sex marriage continued to lack support "among Republicans, people who for voted for Donald Trump in the 2016 election, people over sixty-five years of age, and people who attended church weekly."[177]

175 PEW RESEARCH CENTER, A SURVEY OF LGBT AMERICANS: ATTITUDES EXPERIENCES AND VALUES IN CHANGING TIMES 12–13 (2013), https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2013/06/SDT_LGBT-Americans_06-2013.pdf [https://perma.cc/Y7CN-3VAD].

176 BALKIN, *supra* note 173, at 48.

177 *Id.* at 49.

Some plaintiffs continue to challenge gay rights in the nation's courtrooms,[178] the Trump administration was "openly hostile" to LGBTQ rights,[179] and some state politicians remain hostile as well. For example in 2021, media articles acknowledged that "[m]ost Republicans legislators in Virginia still want to nullify same-sex marriages."[180] The oscillation from prohibition to promotion may reflect a precarious right in which promotion may be a temporary reprieve from the prohibitory tendencies that still linger in many state jurisdictions. The effect of the recent Supreme Court decision in *Dobbs v. Jackson Women's Health Organization* remains to be seen, but concerns that it has undermined all substantive due rights cases and may signal a swing back to the eventual demise of *Obergefell* and the return of constitutionally-permitted prohibition of same-sex marriage abound.

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178 There have been some disconcerting outcomes:

> Even after Obergefell, LGBTQ+ persons have faced obstacles to equal treatment on matters of matrimony. When a married woman gives birth, the law in most states requires that the name of the mother's spouse appear on the birth certificate, whatever the biological relationship to the child. However, Arkansas officials declined to include the names of both lesbian spouses. On the second anniversary of Obergefell, the Supreme Court in Pavan v. Smith ruled that Arkansas's practice violated Obergefell's commitment to give same-sex couples the same "constellation of benefits that the States have linked to marriage." This was an easy case, for Obergefell explicitly held that Ohio (one of the four states defending their discriminatory laws) had to include both male spouses on the birth certificate of the son they were adopting. That three justices (Thomas, Alito, and Gorsuch) dissented from a ruling in Pavan, a result required by the narrowest understanding of stare decisis, suggests that there were in 2017 already three votes to narrow, ignore, or overrule Obergefell.

Riano & Eskridge, *supra* note 139 (citing Pavan v. Smith, 137 S. Ct. 2075, 2077, 2079 (2017). Equally troubling, "[i]n Pidgeon v. Turner, a state district judge ruled that Houston had to provide regular spousal benefits to its employees in valid same-sex marriages. In the wake of local GOP outrage, the state supreme court vacated the district court's ruling and remanded for a reconsideration of how seriously to read Obergefell. Notwithstanding Pavan, the court said that Obergefell 'did not hold that states must provide the same publicly funded benefits to all married persons.'" Riano & Eskridge, *supra* note 139 (quoting Pidgeon v. Turner, 538 S.W.3d 73, 87 (Tex. 2017), *overruled by* Hughes v. Tom Green Cnty., 573 S.W.3d 212 (Tex. 2019)). This was later overturned, but the contestation it represents is clear. Riano and Eskridge also offer an example at the federal level: "the immigration code provides that a child of a married couple is an American citizen if either spouse is a citizen and has resided for a period of time in the United States. Like Arkansas, the Trump Administration has rewritten the statute and denies citizenship to the child of a married same-sex couple where the citizen is not the biological parent. Like the Texas statute, this interpretation is being litigated —five years after Obergefell." Riano & Eskridge, *supra* note 139.

179 BALKIN, *supra* note 173, at 49–50.

180 *See* Elena Debre, *45 Republicans Voted to Keep Virginia's Same-Sex Marriage Ban. They Refuse to Say Why*, SLATE (April 23, 2021), https://slate.com/news-and-politics/2021/04/republicans-virginia-same-sex-marriages.html [https://perma.cc/44JT-NE8H].

C. Marriage Promotion and Prohibition for Incarcerated Persons

A constitutional backfire has also impacted prisoners and people convicted of crimes. They, too, have found themselves in the grinding maw of prohibition and promotion, though this time the trajectory has travelled from a historical position of marriage *promotion* to one of marriage *prohibition*, mediated by *Turner v. Safley*.[181] Historically, states encouraged wrongdoers and prisoners to marry, under the belief that marriage was a highly rehabilitative activity with the power to discipline someone into once again being a productive, good citizen. Britain, for example, encouraged the convicted persons it sent to penal colonies in Australia to marry, even if those individuals already had spouses in England.[182] Such encouragement was based on the idea that marriage was "vital to creating and maintaining social order" and "a way to tame felons."[183]

The idea that marriage could discipline and chasten wrongdoers, particularly men, informed certain historical punishment options. For instance, under the old seduction laws, "[i]f a man seduced an unmarried woman of 'chaste disposition' with the promise of marrying her, and then didn't follow through, the man could be charged and sent to prison for up to 20 years in some states."[184] But, he could escape such charges by simply marrying the woman in question, resulting in "amazing scenes where all of a sudden this site of a trial was transformed into a wedding."[185] Importantly "[n]o one thought the defendant was getting away with something by being married."[186] Rather, "[i]f he was married, he literally has a ball and chain. He had someone he had to support. He would likely have a family to support. He would have to be sober, enterprising, productive and if he was abiding by his marriage vows, sexually faithful."[187]

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181 482 U.S. 78 (1987).

182 *See* MCGRATH, *supra* note 76, at 10 (quoting Colonial Marriages Act 1865, 28 & 29 Vict. c. 64, https://www.legislation.gov.uk/ukpga/Vict/28-29/64 [https://perma.cc/5E6L-AK57]) ("In 1865 Britain's Colonial Marriages Act validated all marriages 'contracted in Her Majesty's Possessions abroad' provided that both parties were 'competent to contract the same.' In this strange imperial twist, the law of marriage effectively preempted the establishment of a state. It also meant that prior marriages that took place far away could be disregarded.").

183 *Id.*; see also *id.* at 15 ("The state did not discourage intermarriage between different categories of colonizers from different parts of Britain or Europe. Even the convicts serving time could marry the free.").

184 Brice, *supra* note 165.

185 *Id.*

186 *Id.*

187 *Id.*

Social science research in the 1980s confirmed these earlier intuitions. This research focused on the connections between "life course" and criminal offending, and found that "marriage offers a pathway out of crime for men with histories of delinquency . . . marriage in the context of a warm, stable, and constructive relationship, offers the antidote to crime."[188] Specifically, "[w]ives and family members in such relationships provide the web of obligations and responsibilities that restrains young men and reduces their contact with the male friends whose recreations veer into antisocial behavior."[189] Marriage offers important "normalizing effects," and along with things like steady jobs, can "build social bonds that keep would-be offenders in a daily routine. They enmesh men who are tempted by crime in a web of supportive social relationships."[190] This research helped support policies of conjugal visits for incarcerated individuals.[191]

These ideas of the importance of marriage as a disciplining force for wayward wrongdoers (usually men) likely undergirded the Supreme Court's decision in *Turner v. Safley*.[192] In *Turner v. Safley*, the Court considered whether prisoners had a fundamental right to marry. Leonard Safley, a male inmate in a penal institution that housed both men and women, met and fell in love with fellow inmate Pearl Jane Watson in 1977. After he was transferred, the pair communicated by mail, and eventually decided to marry. Pursuant to prison policy, they requested approval to marry from the prison superintendent, but were denied.[193] Safley then sued.[194]

The Supreme Court found that the prison's policy violated Safley's fundamental right to marry.[195] While the Court in *Turner* did not explicitly mention the line of scholarship "identifying the salutary benefits of marriage

188 Bruce Western & Christopher Wildeman, *Punishment, Inequality, and the Future of Mass Incarceration*, 57 U. KAN. L. REV. 851, 867 (2009).

189 *Id.*

190 *Id.* at 861.

191 Murray, *supra* note 23, at 49.

192 *Id.*

193 *Id.* at 47. A "compelling" reason was pregnancy or "birth of an illegitimate child." Turner v. Safley, 482 U.S. 78, 82 (1987). Mia Armstrong, *In Sickness, In Health – and In Prison*, THE MARSHALL PROJECT (Aug. 19, 2019), https://www.themarshallproject.org/2019/08/19/in-sickness-in-health-and-in-prison [https://perma.cc/Q33U-TSKH].

194 Safley also alleged that the mail policy was unconstitutional, but the court upheld this policy. *See* Turner v. Safley, 482 U.S. 78, 91 (1987).

195 *Id.* at 99 (noting that "[t]he District Court found that the Missouri prison system operated on the basis of excessive paternalism in that the proposed marriages of all female inmates were scrutinized carefully even before adoption of the current regulation—only one was approved at Renz in the period from 1979 to 1983—whereas the marriages of male inmates during the same period were routinely approved").

and family ties in reducing disciplinary problems and fostering an atmosphere conducive to prisoner rehabilitation during [and after] incarceration," the information was present in the briefs presented to the court.[196] The Court was thus made

> aware of the body of literature claiming marriage's benefits for prison administration and prisoner behavior, and accordingly, recognized that marriage could support, rather than detract from, penological goals. Moreover, the Court certainly understood the value of marriage upon release from prison. In addition to the emotional and spiritual benefits associated with marriage, the Court identified a litany of tangible public and private benefits that accrued to spouses, like Social Security and property rights.[197]

In *Turner v. Safley*, the Court appeared to adopt a rehabilitative attitude toward incarcerated individuals, tapping into marriage's disciplining powers when it held that the state could not prohibit marriage between prisoners as it had done.[198] But at the same time as the Court in *Turner v. Safley* indicated that policies like the one preventing Safley from marrying were unconstitutional, it did so by imposing a remarkably low standard of scrutiny.[199] Rather than relying on standard constitutional tools of analysis, the Court created was is "now known as the *Turner v. Safley* test: 'when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.'"[200] And, "to determine if a policy meets this threshold, the Supreme Court explained that courts should consider not just the state's asserted interest but also obvious policy alternatives, other means of exercising the right, and whether protecting the right would have a 'ripple effect' on prison budgets and the relationships between prisoners and guards."[201]

Thus, while *Safley* is mainly now "understood as a *vindication* of the fundamental right to marry,"[202] in fact it set in a motion a significant undermining of not only the right to marry for prisoners, but other rights as well. While seemingly a decision in *favor* of marriage for prisoners, the decision actually ushered in an era of marriage prohibition for prisoners. In fact, it ushered in an entire new era of limitations on prisoner rights. In the approximately thirty years since the decision, *Safley* has been used to "uphold

196 Murray, *supra* note 23, at 49.

197 *Id.* at 49–50.

198 Notably, "[t]he regulations challenged in the complaint were in effect at all prisons within the jurisdiction of the Missouri Division of Corrections." Turner v. Safley, 482 U.S. 78, 81 (1987).

199 Emma Kaufman & Justin Driver, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 536 (2021).

200 *Id.* (quoting *Safley*, 482 U.S. at 89).

201 *Id.* (quoting *Safley*, 482 U.S. at 89–90).

202 *Id.*

policies that radically restricted prison visits, denied reading materials to prisoners in solitary confinement, permitted involuntary administration of antipsychotic drugs, required an admission of guilt for participation in prison programs, and prevented Muslim prisoners" from engaging in particular religious practices. [203] Perhaps even more troubling, "those are only cases that made it to the Supreme Court. *Safley's* deeper legacy has been to render prison law so unfavorable to prisoners' civil rights claims that they are almost invariably extinguished by lower courts."[204]

And the low standard of scrutiny the Court applied in *Turner v. Safley* has also nurtured a burgeoning switch from marriage promotion to marriage *prohibition* for prisoners and other wrongdoers. Strands of marriage promotion do continue to persist, as seen in a 2015 instance when a Texas judge ordered a man charged with "assaulting his girlfriend's ex-boyfriend, to marry his girlfriend within thirty days as a condition of probation."[205] But the overall turn is decidedly one away from marriage promotion for criminally-involved people, and towards prohibition. This maps onto broader sociological trends in punishment: "[i]n the nineteenth and most of the twentieth century American prison and punishment system reforms were designed primarily to rehabilitate the prisoner as a protection against further crime,"[206] but "by 1990 rehabilitation was replaced by retribution as the dominant sentencing rationale in this country."[207] It is now generally understood that rehabilitation is not a primary goal of punishment in the

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203 *Id*. at 539.

204 *Id.*

205 Matsumura, *supra* note 20, at 1556-57 (noting that "[t]he existence of a right not to marry would suggest that such a condition is likely unconstitutional"). In the example,

> a Texas judge ordered Josten Bundy, who faced charges for assaulting his girlfriend's ex-boyfriend, to marry his girlfriend within thirty days as a condition of probation. The judge offered Bundy an alternative fifteen-day sentence which Bundy declined for fear of losing his job, even though he would otherwise have preferred jail time to marriage. This contemporary example brings to mind the historical practice of presenting marriage as a bar to prosecution for crimes like seduction or rape. Just as in those historical contexts, Bundy faced the choice of incarceration or marriage.

Id. at 1556–57.

206 United State v. Blarek, 7 F. Supp. 2d 192, 200 (E.D.N.Y. 1998) (citing ADAM J. HIRSCH, THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA 114 (1992)) (noting that at that time "[c]arceral ideology was conventional in that it remained focused on the goal of crime control [and] socially progressive, in that it sought to reduce offenses by enabling criminals to better themselves.").

207 ARTHUR W. CAMPBELL, LAW OF SENTENCING 33 (2d ed. 1991); *Blarek*, 7 F. Supp. 2d at 200 (noting that "[i]n more recent years there has been a perception by many that attempts at rehabilitation have failed; a movement towards theoretically-based, more severe, fixed punishments, based upon the nature of the crime gained momentum").

modern American criminal system, and the movement away from promoting marriage for convicted persons is consistent with the more punitive turn.

In fact, the retributive turn that prefers marriage *prohibition* for incarcerated persons reinvigorates a punitive strand that has long complicated the redemptive one. The Court in *Turner v. Safley* cites to a key Supreme Court decision connected to this position, *Butler v. Wilson*.[208] The Supreme Court in *Butler v. Wilson* held that marriage could be prohibited for inmates if they were sentenced to life imprisonment, and that the denial of this right was actually "part of the punishment of the crime."[209] This fits with the position that [f]or centuries, a criminal conviction in some countries led to "civil death," where the "ex-offender was treated as if already dead," and part of this death involved the dissolution of his marriage.[210] The United States "never fully adopted this civil death approach," but "until about fifty years ago, ex-offenders in the United States were subject to" certain aspects of civil death, including the 'automatic dissolution of marriage' or, if a marriage had not yet been entered into, the "'denial of licenses.'"[211] In fact, until the rise of no-fault divorce in the 1970s, it was common for states to include a felony conviction as a valid basis for divorce.[212]

The urge to separate persons convicted of crimes from the possibility of marriage might also be observed in the contemporary forum of online dating. While things vary slightly for each particular internet dating site, "the terms of service . . . tend to be lengthy and focus on complex legal requirements and expectations. Those who become members—*i.e.*, by providing "information to [the internet dating site] or [by] participat[ing]" in the site in any manner—"represent and warrant that [they] have never been convicted of a felony and that [they] are not required to register as a sex

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208 *Safley*, 482 U.S. at 96 (citing Butler v. Wilson, 415 U.S. 953, 1479 (1974) (affirming Johnson v. Rockefeller, 365 F. Supp. 377 (S.D.N.Y. 1973)).

209 *Id*.

210 Amy Tenney, *Looking for Love in the online Age – Convicted Felons Need Not Apply: Why Bans on Felons Using Internet Dating Sites Are Problematic and Could Lead to Violations of the Computer Fraud & Abuse Act*, 2 CRIM. L. PRAC. 89, 90 (2014), *quoting* Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 154 (1999)

211 *Id.* at 155.

212 *See, e.g.*, "Section 598.8(3) and 598.9 of the 1962 Code of Iowa provide that a divorce from the bonds of matrimony may be decreed against a spouse convicted of a felony after the marriage." James A. Stout, *Civil Consequences of Conviction for a Felony*, 12 DRAKE L. REV. 141, 146 (1962) (citing IOWA CODE § 598.8–598.9 (1962)). "This leaves the spouse with the obligation of seeking a divorce and asserting the conviction as a ground therefore rather than providing an immediate avoidance of the marriage bonds, which is the result in a few states having absolute civil death statutes." *Id*.

offender with any government entity.[213] Thus, any person convicted of a felony violates the terms of use by using the website."[214] On these websites, the idea that those convicted of felonies should not be on the marriage market has become common sense.[215]

Numerous policies related to incarcerated individuals indicate that in the wake of *Turner v. Safley*, the rehabilitation-through-marital-discipline model has receded, to be largely replaced with a model of penalization and isolation on every possible axis. Incarceration and marriage are not natural partners, and incarcerated persons have relatively low marriage rates when considered against a non-incarcerated population.[216] In fact, "[w]hite male inmates in their twenties are less than half as likely to be married as young white noninstitutional men of the same age."[217] For "black and Hispanic men," "only 11 percent of young black inmates are married, compared to marriage rate of 25 percent among young black men outside of prison and jail," and Hispanic inmates are "only half as likely to be married as their counterparts in the noninstitutional population."[218]

Numerous policies interact with the obvious difficulties of maintaining an intimate relationship with an incarcerated person to ensure that incarcerated people are symbolically excluded from intimate relationships in addition to society more broadly. For incarcerated men who were in relationships, those relationships often end due to the "stigma of incarceration."[219] If partners are willing to weather that social stigma, though, other policies, like the aforementioned crime free ordinances and one-strike policies also provide for eviction for those in intimate relationships with individuals convicted of crimes if those individuals attempt to reside or even visit their partners, making it exceedingly difficult to maintain such relationships.

The idea that marriage prohibition is part of punishment was presented in a more recent case as well, involving two inmates at separate penitentiaries. Niccole Wetherell, sentenced to life in prison for first-degree murder, and Paul Gillpatrick, sentenced to fifty-five to ninety years for second-degree murder, had become engaged in 2012. They wanted to

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213 Tenney, *supra* note 210, at 92 (quoting *Terms of Use Agreement*, MATCH.COM (last revised Feb. 28, 2022), http://www.match.com/registration/membagr.aspx [https://perma.cc/FBC3-R5T9].

214 *Id*.

215 *Id*.

216 Bruce Western & Christopher Wildeman, *The Black Family and Mass Incarceration*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 221, 235 (2009). WESTERN, *supra* note 117, at 97.

217 Western & Wildeman, *supra* note 216.

218 *Id*.

219 *Id*. at 238.

marry, but "the wardens at their prisons . . . denied their request to marry, calling it a security risk to transport them to a ceremony."[220] When the couple suggested a virtual wedding, prison officials denied that request as well. In 2019, U.S. District Judge Robert Rossiter found that this denial was invalid, largely on the basis of *Turner v. Safley*.[221] While the case was being appealed though, the plaintiff died, and the Eighth Circuit held that this rendered the case moot.[222] The controversy it generated, however, persists. As a mother of one of the victims noted, "'I live with my son's death every day, and don't think anyone that lives with a life sentence deserves [the right to marry]."[223] A media host shared a similar sentiment, stating: "'I don't think we need to spend a lot of money litigating this for these people . . . You lost your liberty. Deal with it. So did your victims, for a lot longer and more painfully."[224]

The competing strands of banning or encouraging marriage for persons with criminal convictions or incarcerated persons came to a head in *Turner v. Safley*, where it seemed as though the encouragers won the day. However, because the case created a new, low standard of scrutiny to serve as the test for future cases, *Turner v. Safley* actually facilitated the growth of marriage prohibition in this context, where it functions to continue to exclude both current and formerly incarcerated individuals from the broader political and social community, and thwart the possibility for greater social inclusion that *Turner v. Safley* initially represented.[225]

D. Coverture and a Form of Reverse Coverture for Wives

In addition to the toggling between marriage prohibition and promotion that occurs in the three foregoing contexts, an additional example of a

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220 Lori Pilger, *Ruling in favor of Nebraska inmates trying to marry is vacated after plaintiff's death*, OMAHA WORLD HERALD (July 5, 2021), https://omaha.com/news/state-and-regional/crime-and-courts/ruling-in-favor-of-nebraska-inmates-trying-to-marry-is-vacated-after-plaintiffs-death/article_a6a40fae-2511-5a20-a4fb-fbef37e14ce3.html [https://perma.cc/2MZP-PA8L].

221 *Id.*

222 *Id.*

223 Shelly Kulhanek, *Nebraska Couple's Lawsuit Recalls How Prisoners Won Marriage Rights*, LINCOLN JOURNAL STAR, (Sept. 29, 2019), https://journalstar.com/news/state-and-regional/govt-and-politics/nebraska-couple-s-lawsuit-recalls-how-prisoners-won-marriage-rights/article_00dc21f7-819b-57bd-96d6-8364bcca37cd.html [https://perma.cc/TX88-H72D].

224 *Id.*

225 Kaufman & Driver, *supra* note 199, at 53.

constitutional backfire occurs in the context of coverture.[226] For hundreds of years, Western marriages were governed by the law of coverture,[227] under which "marriage was a merger of husband and wife into one juridical unit, the husband."[228] This doctrine of marital unity stripped married women of individual legal personhood, prohibiting them from holding many forms of property, suing in tort, or entering into binding contracts.[229] Those legal acts instead became the domain of the marital unit's sole representative, the husband.

But marital unity also had another peculiar effect: it made husbands legally accountable for the petty crimes and torts of their wives.[230] So, "just as the husband held legal control over his wife's property and legacy, he was similarly held liable for her transgressions, including debts and certain crimes."[231] If a wife committed a tort in the presence of her husband, for instance, a "presumption of coercion" applied such that he alone was liable for her wrongful act.[232] Husbands were frequently hauled into court to account for their wives' wrongdoing.[233]

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226 *See* Sarah L. Swan, *Conjugal Liability*, 64 U.C.L.A. L. REV. 968, 974–75 (2017) ("Conjugal liability arguably infringes on the privacy and liberty interests of the constitutional right to freedom of intimate association"). Some portions of this section are drawn from this publication.

227 *Id*. at 978.

228 *Id*.

229 *Id*.

230 Swan, *supra* note 226, at 978.

231 Becky M. Nicolaides, *The State's "Sharp Line Between the Sexes": Women, Alcohol, and the Law in the United States, 1850–1980*, 91 ADDICTION 1211, 1214 (1996). As one commentator wrote: "Whatever its origin may have been, it is quite certain that the rule imposing liability on a husband for the actionable misconduct of his wife was most rigorously applied in England from the earliest times . . . ." S. E., Note, *Liability of a Husband for the Torts of His Wife*, 83 U. PA. L. REV. 66, 66 (1934).

232 In any other circumstance, she was joined in the action and both were technically liable for her wrong. *See, e.g.*, J. F. E. H, Note, *The Husband's Liability for His Wife's Torts as Affected by the Married Women's Property Acts*, 74 U. PA. L. REV. 305, 305 (1926) (citing Sargeant v. Fedor, 130 Atl. 207 (N.J. 1925)) ("Mrs. Fedor had called the plaintiff a thief, and the court held her husband jointly liable for the slander, even though it was the voluntary tort of the wife, and not uttered in her husband's presence nor at his command. The decision conforms to the common law rule, which the court held unchanged by the general property acts relating to married women."). *See also* Benjamin Paul, *The Doctrine of Marital Coercion*, 29 TEMP. L.Q. 190, 195 (1956) ("The doctrine of marital coercion is a common law defense arising out of coverture by which a wife is presumed to have acted pursuant to force exercised by her husband in the commission of a crime . . . [t]oday that doctrine is still the majority rule . . . ."); Cheryl Hanna, *Everything Old Is New Again: A Foreword to the Tenth Anniversary Edition of the Duke Journal of Gender Law & Policy*, 10 DUKE J. GENDER L. & POL'Y (2003) (noting that "marital coercion defense" gave married women an excuse, or gender-specific defense, in criminal cases).

233 J. F. E. H, Note, *The Husband's Liability for His Wife's Torts as Affected by the Married Women's Property Acts*, 74 U. PA. L. REV. 305, 305 (1926).

In the mid to late 1800s, states began passing Married Women's Property Acts,[234] which broke coverture's unity of husband and wife and gave married women various independent legal capacities. Married Women's Property Acts "allowed some women—mostly White, middle and upper class—to own property, keep income that they earned outside the home, engage in business, sue or be sued, and (after the Civil War) write wills. But men remained heads of households with conjugal rights."[235] The Acts thus formally eliminated many of the legal consequences of coverture, including the practice of holding husbands vicariously liable for the wrongful acts of their wives.[236] Yet remnants of coverture remained even in these states, and in others, coverture persisted even more formally until around the 1960s.[237] At that point, "[b]y 1965, the court was growing uncomfortable with coverture as 'peculiar and obsolete,'" and "[i]n 1976, the Court rejected a husband's right to veto his wife's abortion, given the law's reliance on coverture."[238] "Still, it took the first female Supreme Court justice, Sandra Day O'Connor, to pen the most graphic and forceful rejection" of coverture.[239] In 1992's *Planned Parenthood v. Casey*, she "rejected a law requiring women to obtain their husbands' permission for an abortion, denouncing coverture as inconsistent with modern legal norms."[240]

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234 Elizabeth R. Carter, *The Illusion of Equality: The Failure of the Community Property Reform to Achieve Management Equality*, 48 IND. L. REV. 853, 861 (2015). "In one of the greatest ironies in the history of civil citizenship, the first U.S. Married Women's Property Act, passed in Mississippi in 1839, was aimed at securing slaveholders' wives rights over slaves." Nancy Fraser & Lisa Gordon, *Contract versus Charity: Why Is There No Social Citizenship in the United States?*, 22 SOCIALIST REV. 45, 55 (1992).

235 Liebell, *supra* note 26.

236 Elizabeth R. Carter, *The Illusion of Equality: The Failure of the Community Property Reform to Achieve Management Equality*, 48 IND. L. REV. 853, 861 (2015). But despite this legislation, following the Married Women's Property Acts, a few courts still held that husbands were liable for their wives' torts, as a "natural consequence of his marital right and responsibility." Marie T. Reilly, *In Good Times and in Debt: The Evolution of Marital Agency and the Meaning of Marriage*, 87 NEB. L. REV. 373, 385 (2008). California courts, for example, continued to impose such liability until 1913, when the legislature passed an act explicitly insisting married women, not their husbands, must be liable for their own torts. *Id.* Texas courts also continued well into the post-Married Women's Property Acts era to impose liability on husbands for the acts of their wives. *Id.* Courts in Texas held that "[b]ecause the husband dominated the marital relationship, 'it would be difficult, if not impossible, for the courts to determine when [a wife] had acted at her own instance, and when she was guided by his dictation.'" *Id.* (quoting McQueen v. Fulgham, 27 Tex. 463, 467 (1864)). Therefore, until a 1921 amendment, Texas courts allowed a wife's tort creditor to recover from her husband's property. *Id.*

237 *Id.* at 854.

238 Liebell, *supra* note 26 (quoting United States v. Yazell, 382 U.S. 341, 351 (1966)).

239 *Id.*

240 *Id.* (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)).

Consistent with coverture's gradual dissolve pre-*Planned Parenthood v. Casey*, in the few decades before that decision it had been "rare to see one spouse held tortiously liable for the actions of the other."[241] Instead, the common law rule that there is no general duty to control the conduct of others governed.[242] In the 1960s through 80s, courts largely held that without the husband's former right under coverture to resort to physical discipline, holding one spouse liable for the actions of the other was fundamentally unfair since "neither spouse has an ability to control the other's conduct."[243]

Along with *Planned Parenthood v. Casey*, though, came a sea change in spousal liability. Instead of the historical situation of coverture holding husbands responsible for their wives' torts, following *Casey, wives* found themselves increasingly held liable for their *husbands'* torts and crimes, as the 1990s ushered in a "dramatic expansion" in holding wives liable for the wrongful acts of their male partners.[244] Moreover, whereas as coverture had been limited to only formal marriages, this form of reverse coverture expanded and began to encompass not just married couples, but often cohabitating couples as well.[245]

The body of case law arising in this landscape, in which courts hold wives and other women in intimate partnerships responsible for a male partner's wrongdoing, purports to not rely on vicarious liability. Yet these cases skate remarkably close to it.[246] For example, in one notable case, a woman in a marriage-like relationship was held civilly liable for aiding and abetting a homicide after her romantic partner killed an occupant of a home he was burgling, even though she lacked the basic knowledge that a burglary was even occurring.[247] Courts have also held that omissions like "passively permitting contact between the children and perpetrator" or merely "allowing" a partner to act are sufficient to impose civil liability on wives

241 Swan, *supra* note 226, at 979.

242 *See* RESTATEMENT (THIRD) OF TORTS: Liability for Physical and Emotional Harm § 37 cmt. a (Am. L. Inst. 2012) (noting that the Restatement (Second) explicitly stated this rule, and the Restatement (Third) has revised it to clarify that this "no-duty rule was conditioned on the actor having played no role in facilitating the third party's conduct").

243 Beh, *supra* note 27, at 14.

244 *Id.*, at 13.

245 Swan, *supra* note 226, at 971.

246 *Id.*

247 *See* Halberstam v. Welch, 705 F.2d 472, 488–89 (1983).

when their husbands sexually abuse children.[248] And in the context of the war on drugs, convicting the female partners of drug-involved men for engaging in common benign behaviors like answering the telephone in a shared home, renting a house together, or driving one's partner to a destination[249] has become so commonplace it has earned its own moniker: "the girlfriend problem."[250]

These latter cases typically involve low-income, Black women in romantic relationships with drug-involved partners.[251] Often merely an "intimate relationship with a principal male dealer [and her cohabitation with him] may result in her constructive possession of her boyfriend's drugs."[252] Indeed, a women's "mere presence in the home" may be seen as "tantamount to membership in a conspiracy," and as "circumstantial evidence" of complicity.[253] As one appellate court concluded when overturning a conviction: "In the end, the only evidence that connects Leticia to the predicate offenses appears to be her marriage to [her husband]," and "finding her guilty based solely upon her marital relationship with [her husband] is impermissible."[254]

Essentially, then the historical problem of *under*-ascribing wrongdoing to wives under coverture morphed into the problem of *over*-ascription, with *Planned Parenthood v. Casey* functioning as a pivot point. As with the other instances of constitutional backfires, even under original coverture strands of this form of reverse coverture were evident: under the historical coverture

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248 Hazel Glenn Beh, *The Duty to Warn: Invading the Marital Bedroom and the Therapist's Couch*, 8 J.L. & SOC. WORK 63, 74 (1998). Courts have also found such culpable omissions in cases involving violent partners or ex-partners who attack others. *Id* at 76.

249 *See* Haneefah A. Jackson, Note, *When Love is a Crime: Why the Drug Prosecutions and Punishments of Female Non-Conspirators Cannot Be Justified by Retributive Principles*, 46 HOW. L.J. 517, 531 (2003) ("In a case where a woman's interaction with her drug-dealing boyfriend consists of nothing more than everyday interactions between intimate partners, the government can . . . draw her into narcotics prosecution"); *see also* Phyillis Goldfarb, *Counting the Drug War's Female Casualties*, 6 J. GENDER RACE & JUST. 277, 281-91 (2002) (describing twelve cases in which women were convicted of conspiracy or aiding or abetting crimes based on the wrongs of their intimate partners).

250 *See* Swan, *supra* note 226, at 994 (quoting Nemika Levy-Pounds, *Beaten By the System and Down for the Count: Why Poor Women of Color and Their Children Don't Stand a Chance Against U.S. Drug Sentencing Policy*, 3 U. ST. THOMAS L.J. 462, 531 (2006)).

251 *See* Goldfarb, *supra* note 249, at 281–91 (presenting numerous cases involving black women convicted in relation to their intimate partners drug related crimes).

252 *See* Swan, *supra* note 226, at 997 (quoting Jackson, *supra* note 249, at 531).

253 *Id.* (first quoting Shimica Gaskins, Note, *"Women of Circumstance"—The Effects of Mandatory Minimum Sentencing on Women Minimally Involved in Drug Crimes*, 41 AM. CRIM. L. REV. 1533, 1533 (2003); and then quoting Myrna S. Raeder, *Gender Issues in the Federal Sentencing Guidelines and Mandatory Minimum Sentences*, 8 CRIM. JUST. 20, 60 (1993)).

254 United States v. Castanada, 9 F.3d 761, 768 (1993).

regime, wives still paid a price when their husbands engaged in wrongdoing. At the same time as married women had "diminished responsibility for their own criminal misdeeds" under coverture,[255] they were also often "subject to punishment for their husbands' more frequent criminal acts"[256] in that they were "stripped of much, if not all, of the familial property" through doctrines of forfeiture.[257] Forfeiture occurred as a punishment for felonies, and "most convicted felons were men,"[258] and "a good many of them were married."[259] Initially, these married women were "at least discursively imagined as innocent" when they "suffered for their transgressions of their husbands," but over time, wives became discursively understood as in fact blameworthy for their husband's transgressions.[260] Further, the "impoverishment of the wife and family" came to be seen "as a valuable deterrent" for potentially wayward men.[261]

Both coverture and this form of reverse coverture are deeply concerned with maintaining systems of gender subordination and with disciplining husbands and wives. Coverture was more than just a doctrine: it "was a

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255 Krista Kesselring, *Coverture and Criminal Forfeiture in English Law*, *in* FEMALE TRANSGRESSION IN EARLY MODERN BRITAIN 207 (Richard Hillman & Pauline Ruberry-Blanc eds., 2014).

256 *Id.* Interestingly,

> in the nineteenth-century debates that surrounded married women's property law, reformers frequently drew comparisons between the legal effects of crime and those of marriage. At common law, a convicted felon forfeited all possessions real and personal. All too similarly, these reformers pointed out, a woman who married lost ownership or at least control of all her possessions because of the common law fiction that a husband's legal identity "covered" that of his wife.

Id. at 191.

257 *Id.* at 192.

258 *Id.* Historically,

> [a]n unmarried woman who committed a felony was treated the same as a man: all possessions both real and personal were forfeit. A married female felon had already lost most of her property to her husband, and thus had less to lose. The personal property and chattels real she had owned before marriage were then her husband's and thus safe from seizure for her own offence; her real property was forfeit, but by the custom known as 'the curtesy of England' her husband could continue to use it until his own death if the couple had had children. In contrast, if a woman's husband committed felony, only whatever separate property she may have had remained safe from forfeiture; if she had had real property, it reverted to her upon her husband's execution. If she had had a jointure prepared for her upon marriage, it remained immune from seizure. Until the mid-sixteenth century, however, everything else was forfeit.

Id. at 195.

259 *Id.* at 192.

260 *Id.*

261 *Id.* at 192, 207.

legal institution whose scope was 'a tool of ideology at least as much as law.'[262] It taught women that they were inferior by mandating their complete subordination to men through legal disability, denying them dignity and independence."[263] This form of reverse coverture involves the opposite form of responsibility to coverture, but because both occur within the same context of gender hierarchy, it also upholds that hierarchy in a way similar to its original form. Both husbands and wives are used in different times and ways to discipline the other, but when that exists within a system of gender hierarchy, the actual directionality of the liability does not change the direction of the subordination.

Coverture was crucial to establishing women's public and private roles. It "imposed on women the obligations and responsibilities of wifehood. Married women were expected to run the household and care for husbands and children. These domestic duties required women to abandon the frivolities of girlhood and devote themselves single-mindedly to their husbands and families."[264] Over time, additional aspects of good wifery came to be emphasized, and wives became "tasked with educating virtuous male citizens" and with orchestrating "all moral and family life, though always subordinated to the power of the husband."[265]

Reverse coverture gives enhanced legal bite to this prescribed role of 'true womanhood.' It is meant to elicit a serious of behaviors from wives, on pain of legal sanction. Like its predecessor, this form of reverse coverture "does the normative work of establishing good wifely behavior—namely, that good wives should control their husbands and prevent their wrongdoing—through penalizing women, financially, socially, and psychologically, for the actions of their wrongdoing partners."[266] This taps into the "long-running cultural tradition of assigning to wives and women the role of 'moral compass' for potentially wayward men."[267] As original coverture first started eroding in the nineteenth century, writings evidenced the belief that "female virtue buttressed by piety [could] keep the dangerous actions of men in check," and "the influence of the virtuous female is needed to counteract . . . the sexual

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262 TRACY A. THOMAS, ELIZABETH CADY STANTON AND THE FEMINIST FOUNDATIONS OF FAMILY LAW 31 (2016) (quoting Charles J. Reid, *The Journey to Seneca Falls: Mary Wollstonecraft, Elizabeth Cady Stanton and the Legal Emancipation of Women*, 10 UNIV. OF ST. THOMAS L.J. 1123, 1126–27 (2013)).

263 THOMAS, *supra* note 262, at 31.

264 Murray, *supra* note 23, at 34.

265 THOMAS, supra note 262, at 32.

266 Swan, *supra* note 226, at 1023.

267 *Id.*

licentiousness and viciousness of men, a clear threat to the fortunes of social order."[268]

> Along with the gender stereotypes evident in these writings, legal history contains many examples of blaming women for men's criminality, most notably in regards to the wrongs that men do directly to them. This is most obvious in the context of sexual assault, where "to some extent criminal justice officials (and others) have always considered female victims of sexual assault and rape as responsible for failing to minimize the opportunities for the offense."[269]

At the same time as this form of liability reverse coverture has arisen post *Planned Parenthood v. Casey*, vestiges of original coverture still float around as well.[270] Remnants of coverture are visible in many contemporary laws and policies, including "the marital rape exemption, interspousal tort immunity, the prohibition on interspousal contracts for domestic services, and the doctrine of necessaries."[271] And, ascribing responsibility to husbands continues on in certain contexts. For example, in numerous states, a recent trend of family law cases terminates the parental rights of fatherson the basis that they failed to stop their pregnant partners from using drugs.[272] In one case, *In re BH,* the court terminated a father's parental rights when it was discovered that the mother had opiates in her system while giving birth.[273] The court noted that the father had sent the mother to "in-patient rehabilitation centers to detox and spent a lot of money trying to help mother maintain a drug free lifestyle."[274] Nevertheless, the court held that the "father knew or should have known it was highly likely that mother would relapse during the pregnancy, and therefore he should have taken steps to

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268 *Id*. (quoting Jane E. Rose, *Conduct Books for Women, 1830-1860: A Rationale for Women's Conduct and Domestic Role in America*, *in* NINETEETH-CENTURY WOMEN LEARN TO WRITE 37, 46, 50 (Catherine Hobbs ed., 1995)).

269 *Id*. (citing Sharyn L. Roach Anleu, *The Role of Civil Sanctions in Social Control: A Socio-Legal Examination, in* CIVIL REMEDIES AND CRIME PREVENTION 21, 21 (Lorraine Mazerolle & Jan Roehl eds., 1998).

270 *Id*.

271 Jill E. Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 837 (2004).

272 *See, e.g.*, *In re* Camden J., 167 A.D.3d 1346, 1350 (N.Y. App. Div. 2018) ("[T]he record as a whole supports the finding that the father, aware of the mother's drug addiction, neglected the child by failing to exercise the minimum degree of care to ensure that the mother did not abuse drugs during her pregnancy."); *In re* Ashante M., 19 A.D.3d 249, 249 (N.Y. App. Div. 2005) ("[A]ppellant exposed these children to actual harm . . . by his failure to ensure that respondent mother successfully completed a court-ordered drug treatment program . . . ."); *In re* Niviya K., 89 A.D.3d 1027, 1028 (N.Y. App. Div. 2011) ("[T]he father . . . failed to exercise a minimum degree of care to ensure that the mother did not abuse drugs during her pregnancy . . . .").

273 *In re* B.H., No. B285600, 2018 WL 2213415, at *1 (Cal. Ct. App. May 15, 2018).

274 *Id*. The court noted that "[w]hen asked about the petition allegation that he failed to protect [the child], father said 'How am I supposed to force her to stop I have been supportive and sent her to get help. I don't own her, she is not a pet. I cannot force her . . . ." *Id.*

protect his unborn child."[275] These cases bear a clear lineage to the original logics of coverture.

Coverture and its reverse manifestation continue to discipline the behavior of couples in marriage and continue to uphold rigid gender roles.[276] Although under *Planned Parenthood v. Casey*, formal applications of coverture principles are no longer permissible, the case corresponded with a switch over to a form of reverse coverture for spousal liability, which accomplishes many of the same goals and status quo preservation.

IV. RECRAFTING EQUALITY RIGHTS

Constitutional backfires demonstrate the difficulty of achieving significant social change through constitutional litigation.[277] Specifically, constitutional decisions which target one discriminatory practice as unconstitutional often correspond with the rise of an opposing discriminatory process, and this process works to stymie the possibility of lasting social change. The constitutional decision usually does achieve the goal of reducing the challenged practice, and it usually does have tremendous expressive significance, particularly for the marginalized groups that were most impacted.[278] But "[e]ven when LGBT people win in cases like *Obergefell*, or underrepresented racial minorities win in affirmative action cases like *Fisher v. University of Texas*, the Court carefully cabins its opinions to preserve the social hierarchy with only incremental changes,"[279] and this cabining often assists a switch into the opposing mode of discriminatory practice. Constitutional backfires thus highlight the space between "a judicial pronouncement of rights" and the actual "attainment of those rights."[280]

The rise of the opposing practice which occurs with constitutional backfires sullies the constitutional affirmation of the relevant right, and

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275 *Id.* at *3. The court also noted that the "[f]ather demonstrated a desire to educate himself on how to deal with relatives who have substance abuse issues by attending Al Anon daily for five years. Nonetheless, the court could reasonably find on this record that, despite his exposure to substance abuse counseling, father turned a blind eye to mother's condition during her pregnancy." *Id.*

276 *See generally* Murray, *supra* note 158, at 576 (exploring "a series of cases in which the state regulates and civilly sanctions . . . private sexual conduct").

277 See *infra* Part II.

278 *Id.*

279 Robinson, *supra* note 163, at 1568. "[A] 'fear of too much justice,' particularly law reform efforts that would require the courts to restructure inequitable institutions, animates several leading civil rights cases." *Id.* at 1570. Russell also notes that "[e]ver since *Brown's* unsuccessful attempt to reform the public school system, the Court tends to shrink from extensive engagement with systems that consistently disadvantage minorities." *Id.* at 1575.

280 Rosenberg, *supra* note 39, at 813.

stymies the possibility of social change. Moreover, different manifestations of the now unconstitutional practice tend to quietly circulate, in various stages of latency, under the surface of the newly dominant opposing practice, where they quietly simmer and perhaps eventually reemerge as the dominant form of discrimination when political winds shift.[281] The opposing practice renders the recently-affirmed underlying right continually vulnerable: if and when the newly-acquired constitutional shield comes off, the right is deeply precarious because the opposing practice prevented it from taking full root.

For example, despite optimism from same-sex marriage advocates regarding the security of the same-sex marriage right following *Obergefell*, new signs suggest a growing precariousness of the same-sex marriage right. When *Obergefell* first came down, some scholars anticipated a potential backlash of attempts to roll-back the right, but writing before the Trump Presidency, they concluded that *Obergefell* had a "largely peaceful aftermath."[282] Other scholars, like Michael Klarman, "expressed doubt that there would be any serious backlash" to the decision at all.[283] In Klarman's view, four factors would mitigate against any potential backlash: (1) same-sex marriage equality "is congruent with public opinion toward marriage equality, (2) it does not directly impact the lives of opponents, (3) the national Republican party has grown less likely to endorse isolated resistance to same-sex marriage, and (4) circumventing implementation will be difficult."[284]

But on the heels of the Trump presidency and the rise of the current ultra-conservative Supreme Court, the future of same-sex marriage is less certain[285] Indeed, in the recent decision in *Dobbs*, Justice Thomas specifically mentioned *Obergefell* as a precedent that was "demonstrably erroneous" and ready for overruling.[286] One of the earliest actions of the Trump Administration, when it rose to power in 2017, was to enact legislation targeting gay rights and "nearly 40% of judges [former] President Donald

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281 The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* is a stark example of such a change. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (deciding that the right to abortion is not protected under the constitution).

282 Adam Deming, *Backlash Blunders: Obergefell and the Efficacy of Litigation to Achieve Social Change*, 19 U. PA. J. CONST. L. 271, 298 (2016).

283 *Id*. at 287.

284 *Id*.

285 *See* Maia Spoto, *Same-Sex Marriage Victors Ready to Refight Battle Already Won*, BLOOMBERG L. (Aug. 16, 2022, 4:45 AM), https://news.bloomberglaw.com/us-law-week/same-sex-marriage-lawyers-say-battle-has-already-begun [https://perma.cc/K957-6QAA] (noting that *Obergefell* rested, in part, on the same grounds as *Roe*).

286 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring) (stating that any substantive due process decision is demonstrably erroneous and listing *Obergefell*).

Trump appointed to federal appeals courts have a history of hostility towards LGBTQ rights."[287] And some state legislatures still refuse to amend their state statutes and constitutions to accord with the federal constitutional requirement, though they generally decline to articulate a viable reason for such refusal.[288] This reluctance to remove same-sex marriage prohibitions from state statutes and constitutions is perhaps the clearest expression of a continuing resistance waiting to rise.[289]

Even federal constitutional recognition, then, does not stop rights contestation. Subversions still occur, even with such a formidable legal shield in place. This reality, while somewhat disheartening, may also offer some comfort in this current constitutional moment, when intimate rights are increasingly precarious. With the fall of *Roe v. Wade* via the recent decision of *Dobbs v. Jackson Women's Health Organization*, the whole edifice of substantive due process, which is the constitutional grounding for marriage and other intimate rights, may come down as well.[290] Without the stable foundation that substantive due process once offered, the whole cadre of intimate rights built upon that basis—including all the marriage rights described above—may fall.[291] So, "[b]eyond invalidating *Roe*," *Dobbs v. Jackson Women's Health Organization* could "transform decades of jurisprudence about fundamental rights conferred by the Fourteenth Amendment's inferred right to privacy and liberty interest doctrine."[292] This doctrinal grounding has been the basis for many claims beyond the abortion context, and since that is now rendered

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287 Kristine Phillips, *Trump's Judicial Appointments Will Impact LGBTQ Rights Far Beyond Presidency, Group Says*, USA TODAY (Jan. 5, 2021), https://www.usatoday.com/story/news/politics/2021/01/05/trump-judges-impact-lgbtq-rights-years-lambda-legal-says/4099483001/ [https://perma.cc/HH5X-6BTV].

288 Elana Debre, *45 Republicans Voted to Keep Virginia's Same-Sex Marriage Ban. They Refuse to Say Why.*, SLATE (Apr. 23, 2021, 3:33 PM), https://slate.com/news-and-politics/2021/04/republicans-virginia-same-sex-marriages.html [https://perma.cc/CB7B-YX7K].

289 In July 2022, the House of Representative, anticipating the possible overturning of *Obergefell*, voted in favor of a bill to "enshrine protections for same-sex marriage into federal law." *See* Clare Foran & Kristin Wilson, *House Passes Bill to Protect Same-Sex Marriage in Effort to Counter Supreme Court*, CNN POL. (July 19, 2022), https://www.cnn.com/2022/07/19/politics/house-vote-same-sex-marriage-protections-supreme-court/index.html [https://perma.cc/7Y7T-UHZU] ("The bill—called the Respect for Marriage Act . . . [i]n addition to safeguarding the right to same-sex marriage nationwide . . . also includes federal protections for interracial marriages.").

290 *See* Christina Coleburn, *Roe May Be the First Domino to Fall in the Series of Fundamental Rights*, HARV. C.R.–C.L. L. REV. (Dec. 2, 2021), https://harvardcrcl.org/roe-may-be-the-first-domino-to-fall-in-the-series-of-fundamental-rights/ [https://perma.cc/GW5F-3R52] (discussing the possible ramifications overturning *Roe* would have on other established constitutional rights).

291 *Id.* ("Threats to substantive due process rulings are real—the question is whether they become *reality*.").

292 *Id.*

precarious through the *Dobbs* decision, "[p]recedents regarding the rights to marriage, parenting, childrearing, individual control of medical decisions, contraception, and sexual intimacy may also be at risk."[293]

But, since even constitutionally protected rights were still subverted and contested, and did not do the on-the-ground work to spur social change that was initially hoped, losing federal constitutional protection may seem slightly less catastrophic. Then "[r]ather than experiencing a disabling disenchantment with the legal system, we can learn from both the successes and failures of past models, with the aim of constantly redefining the boundaries of legal reform and making visible law's broad reach."[294] Federal constitutional recognition has powerful expressive benefits, and recognition of rights does impact the specific state practices that give rise to the litigation, but the emancipatory potential of such recognition was always compromised, and the precarity of even federal constitutionally protected rights suggests that we should look to other forums to accomplish durable social change.

One place to begin shoring up intimate rights is through state constitutions and other statutory tools.[295] "Ordinary statutes and regulatory action function to protect constitutionally infused values" in important ways, and even if that constitutional protection were to disappear, that supporting structure could still offer significant protection.[296] For example, Genevieve Lakier recently described how a "non-First Amendment law of freedom of speech" actually "provides practical protection for speech rights far outstripping that provided by the Constitution's Free Speech Clause," and a "small c" "corpus of scholarship recognizing the constitutional significance of legal arrangements outside the 'big-C Constitution'" further supports and grounds that notion.[297]

Intimate rights protection could follow a similar model. However, it may also be necessary to go beyond these kinds of legal changes, as "[t]o critique the ability of law to produce social change is inevitably to raise the question of alternatives."[298] One such alternative is to "identify new methods and new

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293 *Id.*

294 Lobel, *supra* note 44, at 988.

295 David S. Cohen, Greer Donley, & Rachel Rebouche, *Rethinking Strategy After* Dobbs, 75 STAN. L. REV. ONLINE 1, 2 (2022).

296 Jacob D. Charles, *Securing Gun Rights by Statute: The Right to Keep and Bear Arms Outside the Constitution*, 120 MICH. L. REV. 581, 587 (2022).

297 *Id.* at 587-88 (quoting Genevieve Lakier, *The Non–First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2302 (2021); Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1082 (2013)).

298 Lobel, *supra* note 44, at 987.

tools, moving beyond courts," to instead begin "launching a much deeper inquiry into the multiple forms of law used in the service of social change."[299]

Under close examination, marriage "emerges as a fundamentally raced, classed, and gendered project: there is no neutral *a priori* in which to return."[300] So the project must instead be to look ahead, and ask "[w]hat if law reform was not targeted toward seeing what kind of improvements we can make to the current system, but was instead geared toward building a state governed by different logics?"[301] "For radical racial justice movements," for instance,

> the primary commitment is not to law, its legitimacy, rationality, or stability: It is to people. The motivations are to protest an enduring set of social structures rooted in European and settler colonialism and the Atlantic slave trade; to fight for transformative change, justice, and liberation; and to invest in a redistributive and transformative project, one demanding a more equal distribution of resources and life chances, with a focus on the most intersectionally marginalized people.[302]

The vision here is for "[f]undamental, structural reform that moves beyond constitutional rights, reconceiving the proper relationship between state, market, and society."[303] Perhaps what is required is to "contest the whole shape of statecraft and governance and, therefore, seek the wholesale transformation of laws."[304]

This transformation would include rethinking the role of marriage entirely. Being stuck in a commitment to the idea of "[t]raditional marriage" has "placed an upper bound on our thinking and imagination," constantly setting marriage as the only lodestar by which to measure all other relationships and intimate rights, and equating entrance into this disciplining and historically laden institution as equivalent to social equality.[305] But, for example, "[e]ven as it secures rights for LGBT Americans, *Obergefell* crafts a whitewashed version of marriage and dignity" that is "inconsistent with the actual experience of [racial and other minorities] with marriage. The relevant history demonstrates that legal marriage in this country has, in fact, too often not enhanced dignity for African Americans and other minority

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299 Dick Dahl, *Scholars Analyze the Evolution of Anti-Discrimination Law*, HARV. L. TODAY (June 3, 2011), https://hls.harvard.edu/today/scholars-analyze-the-evolution-of-anti-discrimination-law/ [https://perma.cc/N6XC-NLP4].

300 Akbar, *supra* note 6, at 460 (describing radical racial justice movement in context of policing).

301 *Id.* at 479.

302 *Id.* at 413.

303 *Id.* at 415.

304 *Id.* at 476.

305 R.A. Lenhardt, *Marriage as Black Citizenship*, 66 HASTINGS L.J. 1317, 1354 (2015).

groups."[306] Indeed, through policies like marriage promotion and PRWORA, marriage has very often participated in oppression and subordination of marginalized groups.[307] Rather than playing at the margins of marriage, then, "[r]eal change" might "require[] flipping old scripts and considering new paradigms."[308]

Numerous compelling critiques have been levelled against the institution of marriage,[309] and some scholars have argued against the state's primary role in regulating romantic relationships. These scholars note that the state need not necessarily be involved in sanctioning intimate coupling, and it might be best if the state simply got out of the business of licencing and regulating marriage in general.[310] Indeed, the institution may be so marred by its links to inequality as to be incapable of worthwhile reform, and goals of equality might be better achieved through different kinds of state supports.[311] Such supports could be centered around caregiving as a primary relationship, and might include arrangements like civil unions. These scholars have highlighted how "the institution of state-sanctioned marriage is nothing if not unstable," and noted that "state-licensing of marriages did not actually develop until the need to determine eligibility for government benefits became apparent."[312]

Scholars have also proposed ideas for how to reorganize beyond a marital frame. For instance, Martha Fineman uses vulnerability as a central lens around which to structure family regulation. She argues that "nuclear families are neither natural, nor private, nor economically independent, but are instead constructed and heavily subsidized by the state," and "a more just system, one that protects the most vulnerable members of society rather than privileging heterosexual adults in intimate relationships, would recognize families as relationships between a caretaker and a dependent."[313] In this model, "[g]overnment programs would then direct resources to promoting

306 R.A. Lenhardt, *Race, Dignity, and the Right to Marry*, 84 FORDHAM L. REV. 53, 53–54 (2015).

307 *See id.* at 58 (discussing how "marriage regulation . . . has been instrumental in structuring race and disadvantage in this country").

308 Lenhardt, *supra* note 305, at 1355.

309 *See generally* MARY LYNDON SHANLEY, JUST MARRIAGE (2004) (detailing different arguments for marriage reform).

310 Gustafson, *supra* note 104 at 301 (*citing* scholarship by Tamara Metz, Dorothy Roberts, & Tucker Culbertson).

311 *Id.* (citing Tucker Culbertson, *Arguments Against Marriage Equality, Commemorating & Reconstructing* Loving v. Virginia, 85 WASH U. L. REV. 575, 589 (2007)).

312 *Id.* at 302.

313 *Id.*

secure families rather than stable marriages.[314] Clare Huntington, too, "has advocated the development of a 'postmarital family law' with new norms and rules,"[315] and other scholars have advocated for focusing on kinship networks, rather than romantic couples, as an organizing structure.[316] These scholars all note that marriage has enormous "symbolic power" and is a centrifugal force in "shaping discussions of public policy," but that it may be "time for those of us in the United States to release ourselves from the distracting and suffocating embrace of marriage," and move toward a new relational structure between citizens, intimacy, and the state.[317] Constitutional backfires in this context may "trigger a radical reconceptualization of whether continued reliance" on an institution that is constantly susceptible to such oppressive turns is warranted.[318]

V. CONCLUSION

Constitutional backfires reveal some of the continuities of discrimination that exist despite what "dominant [and overly optimistic] narratives" have signalled as "key historical breaks."[319] *Planned Parenthood v. Casey* formally stopped coverture but did not stop its associated discriminatory practices and the rise of reverse coverture; *Turner v. Safley* appeared to advance marriage promotion and eschew marriage prohibition for incarcerated individuals but marriage prohibition went on to rise nevertheless; *Zablocki v. Redhail* stopped marriage prohibition for impoverished people but marriage promotion continued to perpetuate similar inequalities; and *Obergefell v. Hodges* stopped states from banning same-sex marriage, but ushered in an era where same-sex marriage at first became increasingly obligatory and now seems increasingly precarious.

Constitutional backfires illustrate the principle that "[t[he law and the state are deeply implicated in, and significantly responsible for, historic and present violence and inequality. Wins have been hard fought, incremental, and curtailed, while the underlying systems have remained intact."[320]

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314 *Id.*

315 Lenhardt, *supra* note 306, at 65 (quoting Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 174 (2015)).

316 *Id.*

317 Gustafson, *supra* note 104, at 302.

318 Swan, *supra* note 7, at 918.

319 Dean Spade, *Intersection Resistance and Law Reform*, 38 SIGNS: J. WOMEN CULTURE & SOC'Y 1, 13 (2013).

320 Akbar, *supra* note 6, at 435.

Constitutional backfires expose the deep structures underlying discriminatory practices like marriage promotion and prohibition, and the difficulty in excavating these foundational biases. Ultimately, constitutional backfires suggest that we must begin to fundamentally reimagine new relationships between equality, intimacy, individuals, and the state if lasting social change is ever to result.