

Southern Methodist University

SMU Scholar

Faculty Journal Articles and Book Chapters

Faculty Scholarship

4-2023

Racial Myopia in [Family] Law

Jessica Dixon Weaver

This document is brought to you for free and open access by the Faculty Scholarship at SMU Scholar. It has been accepted for inclusion in Faculty Journal Articles and Book Chapters by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

Racial Myopia in [Family] Law

Jessica Dixon Weaver

ABSTRACT. *Racial Myopia in [Family] Law* presents a critique of *Family Law for the One-Hundred-Year Life*, an Article that claims that age myopia within family law fails older adults and prevents them from creating legal bonds with other adults outside the traditional marital model. This Response posits that racial myopia is a common yet complex phenomenon in almost every area of law, and it presents most often by centering whiteness as the default standard while failing to account for race and its impact on the law. Race—as well as the scholarship that incorporates race into normative family structure and identity—must be critically considered when proposing new ways of creating family units. This Response calls for active engagement with the racial history surrounding American family structures and the laws utilized to support them in order to achieve the goal of adapting family law to address the needs and interests of *all* older people.

INTRODUCTION

Family Law for the One-Hundred-Year Life sets forth a bold new structure that allows families to opt in or out of the rights and obligations provided by normative legal frameworks focused on traditional marriage and caretaking roles within families. The Article contends that a lack of insight related to aging—“age myopia”¹—within family law fails older adults, preventing them from legally arranging emotional and financial ties to other adults beyond their immediate family network. Professors Naomi Cahn, Clare Huntington, and Elizabeth Scott’s proposal focuses on customizing family relationships for the growing number of elders who will be living significantly longer lives with multiple life partners, adult relatives, and friends.² The Article posits that family law must reflect three core commitments: (1) centering the autonomy interests of older persons; (2) addressing structural inequities; and (3) ensuring that legal mechanisms are

1. Naomi Cahn, Clare Huntington & Elizabeth Scott, *Family Law for the One-Hundred-Year Life*, 132 YALE L.J. 1691, 1726 (2023).

2. *Id.* at 1700–02.

efficient and accessible.³ Undoubtedly, the broad goals of the Article are worthy, but this Response stresses that these goals must be more incisive and inclusive. Structural inequities within family law run deep, and the Article fails to meaningfully grapple with them. The project of *Family Law for the One-Hundred-Year Life* is fundamentally incomplete – and possibly misguided in the reforms it advocates – without a more comprehensive reckoning with racial myopia in family law.

Racial myopia in law is complex because it manifests in many ways. Unpeeling the layers requires a breakdown of the foundational touchstones of law, including pedagogy, scholarship, practice, state and federal legislation, and the judiciary.⁴ The scope of this Response will focus in particular on two combinations of the aforementioned touchstones – pedagogy and scholarship, and legal practice and the judiciary. The importance of recognizing how these four pillars of law influence policy reforms and individual behavior cannot be overstated. For family law, the stakes are high. These four pillars often dictate how state and federal family laws are developed, as well as on whom they focus. The family code and other “living-room laws” govern the mode of operation for where and how people live, who provides caregiving for family members, and who is fiscally responsible for dependents within a family.⁵ When academic teaching and scholarship are inclusive and diverse, the chances for meaningful reform are greater because those entering law practice, as well as those writing restatements and uniform codes, will be more likely to suggest changes that consider the legal history and interrelationship of the law with various citizens of different racial backgrounds. For practicing lawyers and judges who handle family law cases daily, inclusive and diverse training can help make their legal advocacy and decision-making better informed and more equitable. However, when the normative default is whiteness, change remains elusive because the purpose of the law is not properly designed to help provide equal access to justice or ensure due process for marginalized groups of people.⁶ Furthermore, racial inclusivity is a

3. *Id.* at 1701.

4. A further explication of this phenomenon is forthcoming in my article, *Uncovering Race in Family Law*. Jessica Dixon Weaver, *Uncovering Race in Family Law* (Dec. 2022) (unpublished manuscript) (on file with author). That Article argues that traditional analysis of family law is deepened by an expanded study of the regulation of family connections solidified by blood, social functioning, and extralegal ties. It further introduces new cases that illustrate the construction of race within the family law canon.

5. Jessica Dixon Weaver, *Grandma in the White House: Legal Support for Intergenerational Caregiving*, 43 SETON HALL L. REV. 1, 5 (2013) (noting that employment, tax, and housing laws form a core group of economic laws that affect the everyday lives of most citizens).

6. See Darren Lenard Hutchinson, *Preventing Balkanization or Facilitating Racial Domination: A Critique of the New Equal Protection*, 22 VA. J. SOC. POL'Y & L. 1, 3 (2015) (setting forth that “the Court’s equality doctrine mirrors the views regarding race relations held by most whites, while

culmination of both the recognition of systemic racial differences and the utilization of an informed lens to analyze current law and possible solutions to legal problems.

This Response proceeds in three parts. Part I addresses general racial myopia in law. Family law is only one example of the narrow focus of law in prescribing how the majority of American people live their lives. Racial myopia exists in fields ranging from tax law to property law. This Part sets forth the background regarding the creation and operation of law, particularly within the legal academy. Part II addresses structural inequities in family law specifically. It argues that *Family Law for the One-Hundred-Year Life* presents an opportunity to grapple with the persistence of racial myopia and the need to propose reforms that incorporate the lived experience of families of various racial backgrounds. It takes issue with the standard white family framework used to teach family law and emphasizes the need for inclusive scholarship among well-meaning scholars in the field. Part II also explores the practical aspects of considering race as it pertains to the legal representation of family law clients and their treatment in court. It provides examples of how research on the use of forms by pro se litigants in family law can assist legal scholars and legislators in expanding due process and access to courts for all families.

Part III considers how the Article's failure to deal with structural racial inequities in law results in the inability of its proposed changes to meet the authors' first and third core commitments. Centering the autonomy interests of all older persons requires consideration of the interests of a wide variety of older persons. While the Article proposes some federal legal changes that could provide better economic stability and caregiving support for older persons of different class and racial backgrounds, it acknowledges that most of these suggestions are unlikely to become law and take effect. The Article's proposed family registration system,⁷ which states may be more likely to adopt, does not consider the difficulties faced by some minorities and poor families when they use pro se forms in court, nor does it address how laws and government benefits that are contingent upon marriage should change. Because the proposed registration system does not

contradicting the perspectives of most persons of color" and arguing that "[t]he enforcement of white majoritarian viewpoints should not serve as the foundation for an equality doctrine"); *id.* at 63-64 ("By every statistical barometer of well-being, race impedes social and economic betterment . . . [and] equal opportunity remains elusive for many Americans due to race. To the extent that the Equal Protection Clause was intended to ameliorate racial oppression, the Court's doctrine does not facilitate the achievement of that goal.").

7. Cahn et al., *supra* note 1, at 1749 (setting forth a family group registration system as an alternative to traditional marriage for couples and groups to form and tailor legal relationships via forms where partners could "select the types of obligations to assume and benefits to confer on each other . . . ranging from health care surrogate decision-making to inheritance rights under state law").

consider the implications of other extant laws, working-class, poor, and minority families may be disincentivized from utilizing the family registration system. Part III concludes with suggestions for the legal academy to wrestle with racial myopia and the academy's role in shaping the law.

I. RACIAL MYOPIA IN LAW

Law as a discipline and profession has one distinct focus: to provide structure for society and the people who live within it. Metaphorically, the law often has blinkers or blinders on so that it stays on a straight path and does not veer off into other areas. One of the consequences of wearing legal blinkers is an overly narrow focus that obscures the larger picture. An overview of the persistence of racial myopia in law frames the critique of the Article by illustrating the common tradition of this phenomena, how it operates, and how the profession can develop a racially inclusive vision.

Scholars in almost every area of law, including critical race theory, have noted that law in the United States has been historically imbalanced on questions of race.⁸ Tax scholar Dorothy A. Brown was one of the first law professors to consider the absence of race in the pedagogy of standard first-year legal courses such as contracts, torts, property, civil procedure, and criminal law.⁹ In examining the relevancy of race in cases and the role that race plays in producing economic injustices, Brown provides a core understanding that places race as central to

-
8. See, e.g., Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1707 (1993) (exploring how whiteness is constructed as a form of racial identity that evolved into a form of property, which is historically acknowledged and protected in American law); DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 6 (1997) (arguing that the issue of Black women's control over their reproductive freedom is a central part of racial oppression in America, but is missing from the liberal interpretation of reproductive liberty that focuses on the interests of white, middle-class women); DAYNA BOWEN MATTHEW, *JUST MEDICINE: A CURE FOR RACIAL INEQUALITY IN AMERICAN HEALTH CARE* 2-3 (2015) (presenting historical and empirical evidence that health disparities are significantly caused by "unconscious racial and ethnic bias that infects our [health care] delivery system"); ANGELA J. DAVIS, *POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT*, at xvii-xx (2017) (exploring the "disproportionate mistreatment of [B]lack boys and men at every [stage] of the criminal process" and how white supremacy, racial profiling, and bias play a role in their disparate outcomes); DOROTHY A. BROWN, *THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT* 11-12 (2021) (noting that race affects how much people pay in taxes, and "most foundational tax laws were created at a time when racial bias . . . was the norm and quite legal"); Bennett Capers & Greg Day, *Race-ing Antitrust*, 121 MICH. L. REV. 523, 528 (2023) (arguing that "antitrust law gauges consumer welfare from a white perspective" and "subordinates the welfare of people of color to white majorities and the idealized white consumer").
9. See generally DOROTHY A. BROWN, *CRITICAL RACE THEORY: CASES, MATERIALS, AND PROBLEMS* (2003) (examining cases through the lens of critical race theory).

formulating remedies to past harms.¹⁰ Inclusion of race in the discussion and analysis of ordinary cases that do not deal with claims of discrimination or segregation is rare.¹¹ Scholar Peggy Cooper Davis demonstrated that the motivating stories of families struggling for liberation from slavery were ignored in the presentation of doctrinal stories that utilized the Fourteenth Amendment to establish family liberty and rights.¹² The denial of the legal right to create and maintain ties of affection and responsibility to spouses, children, parents, or extended kin had not been connected to the meaning of the Fourteenth Amendment because doctrinal cases mostly involved white parties. Davis was the first to draw out the latent connection and influence of race to seminal Supreme Court decisions regarding family liberty.

The work of these and many other scholars illustrates that when race is not considered as part of the story *and* as a relevant factor in legal analysis, racial myopia persists. This lack of accounting for race may not proceed from malignant intentions, but it is nonetheless a choice. For example, Professor Melissa Murray addresses the absence of illegitimacy in constitutional-law courses, even though it is a central part of constitutional jurisprudence and has been regarded

-
10. DOROTHY A. BROWN, *CRITICAL RACE THEORY: CASES, MATERIALS, AND PROBLEMS* 177-200 (4th ed. 2022) (noting the role of race in unconscionable contracts and the absence of discussion or analysis of race by the court in *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965)). This case involved a poor Black single mother on welfare who had signed an installment contract for several household appliances. Brown includes excerpts from various scholars who examined the court's opinion, the presumptions and stereotypes highlighted by the judges' statements regarding poor people being uneducated and incompetent, and how the court system fails poor people by not recognizing and penalizing predatory lending operations in segregated, racially exploitative communities. *Id.* at 185-94. Brown further provides a law-review excerpt regarding how law professors teach this case and the doctrine of unconscionability, raising concerns about whether exploring issues of race, gender, and class perpetuate assumptions and stereotypes. *Id.* at 195-200.
 11. *Cf. Moore v. City of East Cleveland*, 431 U.S. 494, 507-08 (1977) (Brennan, J., concurring) (noting "the cultural myopia of the arbitrary boundary drawn by the [city] ordinance" and how it "displays a depressing insensitivity towards the economic and emotional needs of a very large part of our society"). This concurrence is joined by Justice Thurgood Marshall, the first Black Supreme Court Justice. It further notes the difference between the "nuclear family" pattern common in white suburbia and the "extended" family pattern especially familiar among Black families, with Black elderly women caring for minor children who are not their offspring. *Id.* at 508-10. *But see Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 25-27 (1981) (holding in a termination of parental-rights case that there is no right to counsel in civil cases where an indigent litigant does not lose her liberty). While the respondent in *Lassiter* was an indigent Black woman with low education who was imprisoned for the murder of a man in her home, there was no mention of her race and how it may have impacted the criminal and civil cases brought by the state that resulted in the loss of her physical freedom and the termination of her parental rights to her infant son.
 12. PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 3-5 (1997).

as a quasi-suspect classification for equal-protection purposes.¹³ She argues that the casebook content sidelines this important topic because of “the liminal status of nonmarriage and nonmarital families in law and society more generally.”¹⁴ She highlights the ways that race and gender intersect with the recognition of illegitimacy discrimination and “the law’s liberalization of the legal impediments that traditionally have been associated with illegitimacy.”¹⁵ And she notes “that legal education can be a site” for inadvertently “reproducing and re-entrenching . . . various forms of inequality.”¹⁶

In addition to the racial imbalance that exists within legal pedagogy, inequities are often reiterated through the publication and recognition of scholarship. The topics researched and published in high-ranking journals often dictate which cases are viewed as seminal and included in casebooks, as well as which topics are considered significant in the discipline of law. The number of citations to a scholar’s publications is used as the basis for a method to rank law professors’ prominence in legal academia.¹⁷ The latest ranking only has two women among the top fifty scholars¹⁸ and only two men of color.¹⁹ Among the top-ranked family law scholars, which are comprised of mostly women, there is only one woman of color.²⁰ Legal scholars of color have noted how their scholarship that focuses on race or falls outside of the normative discourse has been excluded from certain areas of the law.²¹ Many female scholars of color write about race

13. Melissa Murray, *Legitimizing Illegitimacy in Constitutional Law*, 99 WASH. U. L. REV. 2063, 2067 (2022).

14. *Id.* at 2067-68.

15. *Id.* at 2070.

16. *Id.* at 2068.

17. Fred R. Shapiro, *The Most-Cited Legal Scholars Revisited*, 88 U. CHI. L. REV. 1595 (2021).

18. Karen Sloan, *New ‘Most-Cited’ Legal Scholars List Includes Big Names, Few Women*, REUTERS (Nov. 10, 2021, 5:21 PM EST), <https://www.reuters.com/legal/legalindustry/new-most-cited-legal-scholars-list-includes-big-names-few-women-2021-11-10> [https://perma.cc/QC8G-B5LA].

19. Shapiro, *supra* note 17, at 1602-03 (ranking Richard Delgado and Duncan Kennedy among the top fifty most-cited scholars).

20. Brian Leiter, *10 Most-Cited Family Law Faculty in the U.S., 2016-2020*, BRIAN LEITER’S L. SCH. REPS. (Oct. 4, 2021), <https://leiterlawschool.typepad.com/leiter/2021/10/10-most-cited-family-law-faculty-in-the-us-2016-2020.html> [https://perma.cc/TJ82-EFLB].

21. See Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 561-62 (1984) [hereinafter Delgado, *The Imperial Scholar*] (noting that Black, Hispanic, and Native American law professors’ civil-rights scholarship is often ignored by the top white male scholars in the field). Delgado also notes that a core group of top white male civil-rights scholars often cited each other and only infrequently cited minority scholars, despite the fact that there were over one hundred scholars of color in the legal academy, many of whom had published civil-rights scholarship at the time the article was written. *Id.* at 563; Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing*, *Ten*

and the law, along with other identity-related areas such as gender, sexual orientation, and socioeconomic status.²² Racial myopia in legal scholarship occurs when white scholars fail to include the voice *and* legal analysis of scholars of color regarding normative topics, like family law, where race and its attendant bias affect how laws are proposed, written, or interpreted. The failure to cite research by scholars of color means that many of the critiques of law and policies that negatively impact or exclude people of color are missing from the dialogue or analysis within “mainstream” scholarship.²³ Scholar Richard Delgado pointedly notes:

Despite the potential bias of mainstream scholarship, it might be argued that law review writing is basically harmless The game is not harmless. Courts do cite law review articles; judges, even when they do not rely on an article expressly, may still read and be informed by it. What courts do clearly matters in our society. Moreover, what law professors say in their elegant articles contributes to a legal climate, a culture. Their ideas are read and discussed by legislators, political scientists, and their own students. They affect what goes on in courts, law classrooms, and legislative chambers. Ideologies—perspectives, ways of looking at the world—are powerful. They limit discourse. They also enable the dominant class to maintain and justify its own ascendancy. Law professors at the top universities are part of this dominant class, and their writings contribute to the ideologies that class creates and subscribes to. These writings . . . have clout [T]here is a second scholarly tradition . . . that . . . consists of the exclusion of minority writing about key issues of race law, and . . . this exclusion does matter; the tradition causes

Years Later, 140 U. PA. L. REV. 1349, 1350-51 (1992) [hereinafter Delgado, *The Imperial Scholar Revisited*] (examining, ten years after beginning his initial article, whether insurgent critical race and radical feminist scholars who were teaching in top schools and publishing in top journals had been well-received by the inner circle of white male scholars and whether their work had been fully integrated into “legal-academic discourse on issues of race and equality”). Delgado concludes negatively on both questions, noting that the resistance to full integration of critical race and radical feminist scholars mostly “results from quite ordinary forces: preference for the familiar, discomfort with impending change, and a near-universal disdain for an account or ‘story’ that deviates too much from one upon which we have been relying to construct and order our social world.” Delgado, *The Imperial Scholar Revisited*, *supra*, at 1372; see also Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525, 547-52 (noting that the “‘imperial scholar’ phenomenon” thrives in immigration law).

22. MEERA E. DEO, UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA 89-90 (2019).
23. See Mark E. Steiner, *Inclusion and Exclusion in American Legal History*, 23 ASIAN AM. L.J. 69 (2016) (examining the lack of or limited inclusion of Asian American legal history within American legal history books and the rare citation to Asian American scholars).

bluntings, skewings, and omissions in the literature dealing with race, racism, and American law.²⁴

Racial myopia in legal scholarship results in a host of inequities, including but not limited to: failure to consider the racial implications of a proposed law or policy; incomplete presentation and analysis of past and current laws; exclusion of the legal situations and dilemmas faced by people of color that impact their case and life outcomes; and exclusionary laws and policies that prevent people of color from acquiring meaningful access to justice and tangible assets such as employment, property, and tax benefits.

Racial myopia can also apply to an area of law, such as elder law, where there has not been much research on how race impacts old age. The Article notes that family law has a blinkered focus on the dependency of minor children, obscuring the significant dependency needs of older adults.²⁵ Caregiving for both vulnerable groups must be addressed; in fact, children and elders are on different ends of the same spectrum of the universal vulnerable subject.²⁶ From a racial and cultural perspective, minor children and older adults, such as grandparents, are at the center of the family circle, each an integral member who teaches, nurtures, and gives life to the other.²⁷ In spite of their cultural significance, young and older family members of color experience the concept of “aged racism.”²⁸ Family law scholar Alexander A. Boni-Saenz coined this term to identify “a distinct species of systemic racism that is characterized by its intersection with age.”²⁹ More than just ageism and racism added together, aged racism “is the interaction of age, race, and their corresponding social structures that produces . . . unique forms of racial subordination . . . It can affect all ages, but it is most likely to manifest . . . chiefly but not exclusively at the earliest and latest life stages.”³⁰ It is a form of inequality that grows over the course of a lifetime, producing cumulative effects and race-based disadvantages as individuals age.³¹ The Article aptly

24. Delgado, *The Imperial Scholar*, *supra* note 21, at 572-73.

25. Cahn et al., *supra* note 1, at 1697-99.

26. Weaver, *supra* note 5, at 64; Jessica Dixon Weaver, *The Perfect Storm: Coronavirus and the Elder Catch*, 96 TULANE L. REV. 59, 90, 102-07 (2021).

27. Weaver, *supra* note 5, at 16-22.

28. Alexander A. Boni-Saenz, *The Age of Racism*, 100 WASH. U. L. REV. (forthcoming 2023) (manuscript at 6), <https://ssrn.com/abstract=4349511> [<https://perma.cc/AF7T-5PX8>].

29. *Id.* (manuscript at 2).

30. *Id.* (manuscript at 2-3).

31. *Id.* (manuscript at 3); *see also id.* (manuscript at 19-20, 23) (noting that adultification affects the perceptions of Black and Latino children, making them seem older than they are and more likely to be culpable of a crime). On the other end of the age spectrum, “there appear to be

recounts the statistical disparities of health, marriage, income, residential status, and life expectancy between older African Americans, Latinos, Asians, and whites.³² It further notes that these structural inequities “shape[] family formation in the last third of life.”³³ However, in order to effectively address the disparities caused by unequal opportunities across the span of a lifetime, there must be a more extensive analysis of the reforms to family formation and familial caregiving.

A wholesale realignment of family law requires that the blinders that have previously hampered scholars, practitioners, and judges from analyzing race within the canon and practice of law be removed. Four basic questions can address racial myopia in law. First, has there been an active inquiry regarding how race factors into the identification and structure of the legal problem or issue? Second, is there a racially inclusive legal history or background of the problem, rule, or issue? Third, does the analysis effectively unpack and investigate the problem or issue from a racially inclusive perspective? Finally, do the proposed solutions either negatively or positively impact persons of different racial backgrounds? These questions provide a framework that prevents race from being situated within legal scholarship as an add-on, or as a topic deemed “beyond the scope” of a piece. Dismantling structural inequities of race, class, and gender is a tall order. There are overlapping webs of racially discriminatory laws that have caused these inequities, and there will need to be overlapping legal reforms and policies to address them. These four questions prevent the default position of a case or scholarly inquiry from being centered on whiteness and effectively expand the lens with which laws and policies can be examined (and they also conveniently align with IRAC³⁴).

II. STRUCTURAL INEQUITIES IN FAMILY LAW

Family structure and identity are two core tenets of the family law canon, primarily because the definition of a legal family and the role a person plays within a family unit are what make families vital as social institutions. Across the spectrum of family law, the structure and identity of the American family are (still) based upon a middle-class, white, heterosexual unit, with the mother as

racial disparities in the granting of compassionate release to prisoners on the basis age or infirmity, with prisoners of color faring worse.” *Id.* (manuscript at 23).

32. Cahn et al., *supra* note 1, at 1704-05 nn.49-50, 1706 n.59, 1708 n.70, 1713-14 nn.97-101, 1720-21 nn.131-32, 136.

33. *Id.* at 1713.

34. IRAC is an acronym that stands for issue, rule, analysis, and conclusion, and it is commonly taught in law school as a method of organizing an answer to a legal question. Gabriel Peluso, *Impressions of a First Year Law Student*, 7 *STUDENT L.J.* 22, 23 (1961).

primary caregiver of the children and other family members in need of care. Racial myopia in family law exists as a result of the normative adherence to how families have been either historically recognized or ignored by court systems. This bias in viewing certain people as the standard group to whom the law applies is often implicit and “baked in” to how legislators, scholars, practitioners, and judges view family law. Stakeholders note the difference in how families operate and live by citing disparities between rates of marriage, types of parenting, health conditions, and accumulation of wealth. However, they do not broach deeper structural problems related to racial equity and justice. One reason is that the information and analysis necessary to proffer inclusive solutions are missing from the dialogue. This Response argues that the foundation of the American family structure should both encompass the full history of how families have existed and align with the current identity of family groups. Meaningful inclusion of race and its consequences within the U.S. legal system is critical to family law reform.

This Part is comprised of two Sections that offer both fundamental and more specific critiques regarding the second and third core commitments of *Family Law for the One-Hundred-Year Life*. It also addresses the first two proposed questions at the end of Part I regarding how to combat racial myopia in law. Structuring a family of choice centered on caregiving rather than marriage is not a new approach to family formation. It is very similar to the informal kinship network that African Americans have utilized since the time of slavery. Historically, this kinship network has struggled to obtain both legal recognition *and* passage of federal and state laws that support rather than penalize this type of family arrangement. The presentation of alternative family structures as novel fails to give credit to African American history and culture. The authors’ blinders prevent them from recognizing the African American kinship system as foundational to the concept of nonmarriage and opting in and out of family bonds and duties. This is both a scholarly and practical flaw. Without additional public-policy and legislative changes, the Article’s proposed reforms have a limited reach to address the disproportionate life measures that have afflicted African American and other minority families. Second, the Article fails to acknowledge the diverse and distinct socio-legal identities and family structures of different racial groups—African Americans, Latin Americans, Asian Americans, and Native Americans, as well as increasing numbers of multiracial Americans. Addressing this gap would help instantiate a distinct pivot in how family law is both taught and practiced. Racial identities and family structure are often missing from the normative presentation of the family, and if they are included, it is mostly via perfunctory statements that tend to highlight stereotypes about poor

communities of color.³⁵ Ultimately, this Part demonstrates that the Article falls short of achieving two of its three principles: autonomy and equity.

A. Kinship Networks: Legal Recognition and Structural Inequities

Family Law for the One-Hundred-Year Life asserts that there should be more flexibility in structuring family units to balance the needs of individuals who will grow old and live longer.³⁶ This suggested type of structure is not necessarily new. It is very similar to the African American kinship networks that have existed in the United States since the time of slavery. Domestic networks are, in fact, the subject of anthropologist Carol B. Stack's award-winning books, *All Our Kin* and *Call to Home*.³⁷ The kinship system, a West African tradition of communal care, endured in Black³⁸ communities to help their members survive financial and social hardships suffered in the wake of emancipation.³⁹ These types of families included friends, informally adopted children, fictive or quasi-kin, and influential community elders.⁴⁰ The obligations within kinship networks worked both forward and backward, meaning kin were responsible for the care and protection

35. J. HERBIE DIFONZO & RUTH C. STERN, *INTIMATE ASSOCIATIONS: THE LAW AND CULTURE OF AMERICAN FAMILIES* 9-23 (2013) (centering the idea of the American family around marriages in the 1950s among middle-class white families, with very little mention of race throughout the entire book); *FAMILY LAW REIMAGINED* 195-220 (2014) (mentioning race only a few times throughout the book, with the exception of one chapter on family law for the poor, which discusses four cases with particular significance for poor Black and Latino families but does not address race in the case descriptions or analyses); CYNTHIA GRANT BOWMAN, *LIVING APART TOGETHER: LEGAL PROTECTIONS FOR A NEW FORM OF FAMILY* 40-41 (2020) (noting statistical differences in the racial percentages of couples living together apart, but failing to explore these differences in depth, and acknowledging that “survey questions may not have seemed relevant to [Black study participants] at all”). *But see* RICHARD BANKS, *IS MARRIAGE FOR WHITE PEOPLE? HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE* 2-3 (2012) (noting how a shortage of eligible Black men, higher education, and less interracial dating among middle-class Black women has reduced their chances of marriage).

36. Cahn et al., *supra* note 1, at 1741-54.

37. CAROL B. STACK, *ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY* 90-105 (1974) (noting the residence patterns and cooperative organization of people linked in domestic networks that shared responsibility for providing food, care, clothing and shelter for one another); CAROL B. STACK, *CALL TO HOME: AFRICAN AMERICANS RECLAIM THE RURAL SOUTH* 79-106 (1996) (noting the story of “Miss Pearl’s Purse,” an idiom that reflected how all the many children an African American woman took in and cared for during her life contributed to financially supporting her in old age).

38. The terms “Black” and “African American” are used interchangeably throughout this Response.

39. HERBERT G. GUTMAN, *THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750-1925*, at 199-214 (1976).

40. *Id.* at 211-23.

of children and elders.⁴¹ Because of the forced separation of families during slavery and following emancipation, kinship networks remain a strong part of how African Americans navigate life, particularly in the South.⁴² One of the important functions of the kinship family system is the sense of identity and shared belonging among relatives that enhances social solidarity.⁴³

African American families have a lived experience of being denied family autonomy and freedom. However, they fought for liberty *to be together* and to have legal ties to one another.⁴⁴ The law that applied to African American families for over three centuries “inverted concepts of human dignity, citizenship, and natural law,”⁴⁵ and in so doing, forged a strong value of community over independence. In all likelihood, the majority of African American families value broadening their social circle and intimate ties.

Furthermore, the multigenerational family has been a buffer and foundation for the many strides of individual family members of minorities and immigrants in the United States.⁴⁶ Today, a higher number of young adults ages twenty-five to thirty-four are living with their parents.⁴⁷ As researcher Richard Fry has noted, “[m]ultigenerational living . . . is a safety valve . . . [since] if they were not in multigenerational families, [young adults’] poverty rate would be much higher.”⁴⁸ Young men comprise the majority of young adults living with their parents or grandparents.⁴⁹ An increase in the numbers of Hispanic and Asian families within the United States is another reason that multigenerational households are on the rise.⁵⁰ It is “a cultural norm for young adults to continue living with their parents or older family members” in these racial and ethnic

41. *Id.* at 210.

42. *Id.* at 212-13; Natalia Sarkisian & Naomi Gerstel, *Kin Support Among Blacks and Whites: Race and Family Organization*, 69 AM. SOCIO. REV. 812, 813 (2004).

43. Frank F. Furstenberg, *Kinship Reconsidered: Research on a Neglected Topic*, 82 J. MARRIAGE & FAM. 364, 365 (2020).

44. DAVIS, *supra* note 12, at 4, 9-10.

45. *Id.* at 10.

46. Weaver, *supra* note 5, at 15-29; see also D’Vera Cohn, Juliana Menasce Horowitz, Rachel Minkin, Richard Fry & Kiley Hurst, *Financial Issues Top the List of Reasons U.S. Adults Live in Multigenerational Homes*, PEW RSCH. CTR. (Mar. 24, 2022), <https://www.pewresearch.org/social-trends/2022/03/24/financial-issues-top-the-list-of-reasons-u-s-adults-live-in-multigenerational-homes> [<https://perma.cc/3P3M-VNK2>].

47. Aimee Picchi, *1 in 4 Young Adults Lives with a Parent or Other Older Family Member, Study Shows*, CBS NEWS: MONEYWATCH (July 20, 2022, 2:13 PM), <https://www.cbsnews.com/news/young-adults-living-with-parents-pew-research-2022> [<https://perma.cc/NZS2-NBBT>].

48. *Id.*

49. *Id.*

50. *Id.*

groups.⁵¹ There is also a reverse-boomerang effect occurring where older “parents [are not] waiting for retirement or urgent healthcare needs to move in with adult children,” as “changing attitudes about family life, high housing costs and challenges in finding affordable child care” are motivating the move to pool resources and share bills and space.⁵² Another recent national study found that “[a] third of U.S. adults in multigenerational households say caregiving is a major reason for their living arrangements, including 25% who cite adult caregiving and 12% who cite child care.”⁵³ Other key findings include that the majority of adults in these types of households have a positive experience, and “[u]pper-income adults are less likely than those with lower or middle incomes to cite caregiving as a reason for living in a multigenerational household.”⁵⁴

The Article does acknowledge the higher numbers of Black women, as compared to white women, who are cared for by family members and people outside of their families, as well as those who are elder orphans.⁵⁵ It also notes higher rates of poverty, health disparities, and the need for long-term services and support among Black elders. A deeper analysis of African American family structure would further support the Article’s argument that there should be a conceptual shift in how laws govern family formation and family support. The multigenerational household persists in communities of color out of financial necessity as well as emotional support. However, state actors have maligned the domestic networks of Black families, often led by women. For example, Senator Daniel Moynihan mischaracterized the supportive kinship system as a “tangle of pathology.”⁵⁶ Moynihan raised an alarm regarding the number of single mothers on welfare with illegitimate children in the Black community during the mid-1960s, and set forth to establish a stable family structure for the Black family.⁵⁷ While Moynihan did squarely situate many of the issues faced by Black families as rooted in racism and the aftermath of slavery, he presented racial inequality in

51. *Id.*; see also Weaver, *supra* note 5, at 26-28.

52. Oyin Adedoyin, *More Parents Are Moving In with Adult Children – at Younger Ages*, WALL ST. J. (Feb. 22, 2023, 2:44 PM ET), <https://www.wsj.com/articles/more-parents-are-moving-in-with-adult-children-at-younger-ages-a931f3d7> [<https://perma.cc/946N-7FQM>].

53. Cohn et al., *supra* note 46.

54. *Id.*

55. Cahn et al., *supra* note 1, at 1714, 1747 n.247.

56. DANIEL PATRICK MOYNIHAN, U.S. DEP’T OF LAB., *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* 29 (1965) (commonly known as the Moynihan Report).

57. *Id.* at 5-14, 47-48. The blame was squarely placed on absent Black fathers and their inability to financially provide for their families. See Jessica Dixon Weaver, *The First Father: Perspectives on the President’s Fatherhood Initiative*, 50 FAM. CT. REV. 297, 300-02 (2012).

terms that blamed the Black family structure.⁵⁸ His analysis of the structure of Black families, along with the government’s complete failure to examine *why* Black families lived and operated this way, influenced the current iteration of punitive federal and state family-regulation laws for generations.⁵⁹ Public-school funding policies grounded in property taxes that resulted in poor, unequal schools in poor neighborhoods, neighborhood redlining by banks, and exclusionary zoning laws were some of the local practices that the Moynihan Report was used to support.⁶⁰ The cumulative effects of these policies and laws are among the reasons why Black elders are more likely to be poor and have fewer assets to pass down to family members than their white counterparts.⁶¹ Failure to acknowledge the importance of African American kinship networks as a precursor and exemplar for the Article’s family registration reforms does not acknowledge or credit how Black families have always lived. This failure also results in a missing analysis regarding the tension between freedom of choice for

-
58. *Id.* at 15-17, 29; see also Daniel Geary, *The Moynihan Report: An Annotated Edition*, ATLANTIC (Sept. 14, 2015), <https://www.theatlantic.com/politics/archive/2015/09/the-moynihan-report-an-annotated-edition/404632> [<https://perma.cc/Y72E-TCJQ>].
59. DOROTHY E. ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 60-67 (2002). These family regulation laws include efforts to limit state financial assistance for “welfare queens” and their children, jail absent fathers who fail to pay child support, and remove children from poor, “unfit” parents. *Id.*
60. DANIEL GEARY, BEYOND CIVIL RIGHTS: THE MOYNIHAN REPORT AND ITS LEGACY 207-10 (2015) (noting that conservative leaders embraced the Moynihan Report to abolish welfare, attack affirmative action, and cut taxes for the rich, and that Black family structures, rather than racism, were viewed as an “explanation for persistent socioeconomic disparities between whites and African Americans”); JAMES T. PATTERSON, FREEDOM IS NOT ENOUGH: THE MOYNIHAN REPORT AND AMERICA’S STRUGGLE OVER BLACK FAMILY LIFE FROM LBJ TO OBAMA 14-17 (2010) (noting that the Moynihan Report was used to support the War on Poverty that resulted in a reduction in funding for welfare); KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP 98-118 (2019) (setting forth how Moynihan headed the Urban Council, created by President Nixon to deal with the crisis in American cities after Martin Luther King, Jr.’s assassination, and how new zoning and housing policies coupled with public-private malfeasance and racism failed to produce sufficient low-income housing in urban communities or expand subsidized housing for Black Americans in white suburban areas); Matt Barnum, *The Racist Idea That Changed American Education*, VOX (Feb. 22, 2023, 6:07 AM EST), <https://www.vox.com/the-highlight/23584874/public-school-funding-supreme-court> [<https://perma.cc/65AX-A5U8>] (noting how the Moynihan Report – along with two debunked reports regarding the ranking of intelligence by race – influenced the U.S. Supreme Court’s decision in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), which held that there was no constitutional right to a public-school education and Texas’s school-finance system based on local property taxes did not violate the Equal Protection Clause of the Fourteenth Amendment).
61. Ellora Derenoncourt, Chi Hyun Kim, Moritz Kuhn & Moritz Schularick, *Wealth of Two Nations: The U.S. Racial Wealth Gap, 1860-2020*, at 20, 25-26 (Nat’l Bureau of Econ. Rsch., Working Paper No. 30101, 2022), https://www.nber.org/system/files/working_papers/w30101/w30101.pdf [<https://perma.cc/FKC8-K9X9>].

kinship families and the search for equality within the family law system.⁶² As Section II.B discusses, inclusion of how race influenced family structure and identity allows diverse minority groups to be seen in the law.

The Article also acknowledges the fact that in the post-Reconstruction era, some African American families suffered negative repercussions from being forced to marry.⁶³ While this example does show how law has historically failed to offer Black families autonomy in family formation, it only focuses on marriage. Many scholars have noted the various other ways by which Black families have been denied family integrity in forming and maintaining their social unit.⁶⁴ Applying a critical-race feminist perspective, the Article's argument would be strengthened by analyzing how African American families endured an extralegal existence while illustrating how family and friends lived together and supported one another. In light of how African American families established an informal structure for their families, some families might favor the proposed forms because they would enable them to legally solidify the social affections established between nonbiological dependents and close friends.

On the other hand, some African Americans may distrust the Article's proposed family law forms because of how laws have historically harmed African American families. The Article's lack of an analysis of race and family structure is not only problematic as a matter of legal scholarship, but also calls the practical value of its proposed family law forms into question. For example, comparisons have been made between apprenticeship laws that separated Black parents from

62. See Sacha M. Coupet, *What Price Liberty?: The Search for Equality for Kinship-Caregiving Families*, 2013 MICH. ST. L. REV. 1249, 1252, 1256-57 (noting that “kinship-caregiving families must submit to an entirely different system governed by different rules, rights, privileges, and protections than those available to married or quasi-married couples,” and that “[this] segregation makes it . . . harder to achieve genuine and meaningful equality”); Jenae Anderson, Zennell Brown & Viola King, *Black Families Overlooked, Misunderstood, and Underserved in the Family Courts*, 56 FAM. L.Q. 77 (2022) (noting implicit bias among the judiciary and administrators, racial disparities in access to family court, lack of racially inclusive training for mediators, lack of family mediators of color, and the resultant impact on Black families).

63. Cahn et al., *supra* note 1, at 1743 n.233 (citing R.A. Lenhardt, *Marriage as Black Citizenship?*, 66 HASTINGS L.J. 1317, 1325-28 (2015)).

64. See Sacha M. Coupet, *Ain't I a Parent: The Exclusion of Kinship Caregivers from the Debate over Expansions of Parenthood*, 34 N.Y.U. REV. L. & SOC. CHANGE 595, 620-24 (2010) (noting how the concept of parenthood remains tied to the concept of conjugality through legal marriage or other marital-like coupling); Shani King, *The Family Law Canon in a (Post?) Racial Era*, 72 OHIO ST. L.J. 575, 592-95 (2011) (noting that past- and present-day regulation of Black families has denied them autonomy in family formation); Margaret A. Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 MINN. J.L. & INEQ. 187, 197-202 (1987) (reviewing several pre- and post-Reconstruction cases that illustrated how enslaved women had no procreative control over their bodies or children); KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* 5 (2017) (noting how federal laws and policies set up to assist poor mothers violate their privacy rights and impact their parental rights).

their children after emancipation and modern child-welfare laws that remove disproportionate numbers of Black children from their parents and extended family.⁶⁵ Forms that could establish legal ties and rights with adult family members who were wrongfully taken from the care of their birth family might exacerbate, rather than heal, intimate wounds caused by state interventions. How would these nuances be addressed? If family law were to shift to a supportive paradigm for all adults rather than a punitive one for Black families, it could, in theory, address some of the structural inequities built into the current family law framework. As mentioned in the Article, other laws would be implicated by the use of the forms.⁶⁶ These complexities must be recognized because they reflect the realities that exist for a significant number of African American families today. Moreover, Black families may be more invested in reforming other laws they perceive to be more harmful to them than in securing legal recognition of their kinship network, a point I explore in greater detail in the next Part.⁶⁷

While the Article consistently notes the disparate statistics for aging persons of color and the fact that structural inequality exists,⁶⁸ its assertion that the new mechanisms it proposes allow for equitable family formation is not necessarily true. The Article fails to address the inequities that exist for Black families and how laws have been used as tools to inhibit and undermine their growth.⁶⁹ Getting to the root of structural inequality requires more than recognizing that disparities exist for Black people in caregiving, health, and wealth. The Article deftly notes the low rates of marriage, accumulation of assets, and individual well-being among Blacks,⁷⁰ but it does not analyze how the reasons for these inequities might influence the Article's proposed reforms. The primary reason the Article is unable to address the reason for the inequities is because it does not engage with the literature that breaks down the relationship between the law and the status of Blacks as family members within a larger group of disenfranchised people. Without unpacking the attendant issues to examine whether the solution

65. King, *supra* note 64, at 592-95; ROBERTS, *supra* note 59, at 234-36 (2001).

66. Cahn et al., *supra* note 1, at 1725.

67. See *infra* note 97 and accompanying text.

68. See *supra* note 32 and accompanying text.

69. 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, 1650 (2005); ROBERTS, *supra* note 59, at 74; Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 409-15 (2008); Coupet, *supra* note 64, at 598-99; King, *supra* note 64, at 591-92; Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 B.C. J.L. & SOC. JUST. 233, 235-36 (2014); R.A. Lenhardt, *Marriage as Black Citizenship?*, 66 HASTINGS L.J. 1317, 1324-25 (2015); R.A. Lenhardt, *The Color of Kinship*, 102 IOWA L. REV. 2071, 2097 (2020).

70. See Cahn et al., *supra* note 1, at 1699, 1703 n.46, 1714 & n.101, 1721 n.136.

offered meets the needs of those who have been excluded from and harmed by family law, the Article falls short on its goals for addressing its second principle of equity.

Unpacking the structural inequalities that exist for families requires a deeper inquiry into how families became so stratified by class in the first place. This varies among different racial, ethnic, and sovereign groups, as the law has operated in many ways to subvert the economic and political progress of the diverse people who comprise America.⁷¹ For example, the Article asserts that civil unions were the first family-registration systems in the United States. However, registration of family groups originated with the Freedmen's Bureau, a federal administrative organization comprised of Union military commissioners who performed and issued marriage certificates for thousands of formerly enslaved Black couples living in the South after the Civil War.⁷² The commissioners registered each couple they married throughout the South, sometimes recording personal information about the couple, including the color of the persons marrying and their parents, the time period they lived with a former partner, the reason for the separation with the prior partners, and the number of children they had with the previous partner.⁷³ This historical fact presents a dichotomy in how Black non-marital families were treated by the federal government.⁷⁴ On the one hand, Black people desired legal recognition of their marriages and parent-child relationships. On the other hand, there were some Black couples who did not wish to marry the person they were bound to at the time of emancipation, but instead wished to be single or seek out a prior partner who was sold or sent away by a slave owner. Marriages entered into during slavery were not recognized, nor

71. See generally Addie C. Rolnick, *Indigenous Subjects*, 131 YALE L.J. 2652 (2022) (setting forth how race jurisprudence threatens Indigenous rights and collective rights more broadly); DAYNA BOWEN MATTHEW, *JUST HEALTH: TREATING STRUCTURAL RACISM TO HEAL AMERICA* (2022) (examining how the law enables structural inequality in health care and health outcomes); BROWN, *supra* note 8 (describing the tax system's racially disparate effects on Black individuals); RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017) (detailing how federal, state, and local governments used housing policy to enforce de jure segregation); TAYLOR, *supra* note 60 (detailing the continued exploitation of Black homeowners in the real estate industry); KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* (2010) (arguing that the crisis of mass incarceration had its roots in northern cities, as well as the Jim Crow South, and finding that Northern white liberals and progressives played a key role in the history of racism in America's criminal justice system).

72. See Elaine C. Everly, *Marriage Registers of Freedmen*, PROLOGUE, Fall 1973, <https://www.archives.gov/publications/prologue/1973/fall/freedmens-marriage-registers.html> [<https://perma.cc/HF5X-BZYD>].

73. *Id.*

74. See TERA W. HUNTER, *BOUND IN WEDLOCK: SLAVE AND FREE BLACK MARRIAGE IN THE NINETEENTH CENTURY* 303 (2017).

were the children of those extralegal unions.⁷⁵ This effectively meant that children born during slavery could not inherit assets from their parents unless their parents married after emancipation and the state where they lived passed a retroactive law recognizing children from that marriage.⁷⁶ This denial of rights between parent and child by state courts drove a wedge between Black family members and prevented the passage of wealth from one generation to the next.

The takeaway here is that Black families have struggled and continue to struggle with maintaining legal family ties. Informal kinship ties have existed for centuries, albeit unrecognized by the law. What incentive would Black families with very few assets have to utilize the Article's proposed family forms? Research shows that "the racial wealth gap remains the largest of the economic gaps between Black and white Americans," with a white-to-Black per capita wealth ratio of six to one.⁷⁷ In addition, "Black households hold nearly two thirds of their wealth in housing and very little in equity."⁷⁸ While overall housing wealth has appreciated since 1950, "stock equity has appreciated by five times as much," which has "led to disproportionate capital gains for the wealthiest Americans, a group that is almost exclusively white."⁷⁹ The aspects of the Article's proposal that focus on greater financial flexibility would not be of help to citizens of color who do not have the type of assets that white citizens do. Opting in or out of financial rights could actually cause a rift within these citizens' informal kinship systems. While decentering marriage may be a welcome change in the law, the autonomy that the reforms assert as an advantage may be a feature that some families that value community will not appreciate.

B. American Family Identity: A Multiracial and Diverse Group

One of the Article's significant contributions is the way in which it calls attention to wide age diversity within the family and sheds light on the shortcomings of current family law in addressing the legal needs of an aging population. There are a few critical points of distinction among generations that could strengthen the argument for the Article's solution. In addition, more explicit consideration of poor families of all racial groups is necessary to meet the Article's goal of addressing equity and efficiency needs.

First, there are simultaneous seismic changes occurring within younger generations, specifically millennials, that have now eclipsed the baby-boomer

75. See *In re Campbell's Estate*, 108 P. 669 (Cal. Dist. Ct. App. 1910).

76. HUNTER, *supra* note 74, at 303.

77. Derenoncourt et al., *supra* note 61, at 2-3.

78. *Id.* at 3.

79. *Id.* at 3-4.

generation in number.⁸⁰ A recent study reveals that millennials are marrying less than the generation before (Generation X), but still having children outside of marriage.⁸¹ Among millennials, there are also “significant differences in the share living in a family of their own by race, ethnicity, and educational attainment.”⁸² “Black millennials are the least likely to live in a family,”⁸³ which coincides with the similar trend noted in the Article about Black older women.⁸⁴ Black millennials are also more likely than other racial and ethnic groups to live with a child and no spouse,⁸⁵ which also aligns with the likelihood of a Black grandmother raising a grandchild without a spouse. On the other hand, “[m]illennials with less than a high school diploma are more likely than those with more education to live in a family.”⁸⁶

A focus on current family-formation trends regarding aging must be reconciled with the racial inequities within family law and related areas of law. The racial myopia that family law struggles to confront often conflates race and poverty.⁸⁷ The two are not synonymous. Many middle- and upper-class Black families structure themselves around marriage and the normative ideals it promotes.⁸⁸ Although their education and income are more closely aligned with white middle-class families, their ability to transfer intergenerational wealth is still compromised by the effects of racial discrimination over time.⁸⁹

80. Amanda Barroso, Kim Parker & Jesse Bennett, *As Millennials Near 40, They’re Approaching Family Life Differently than Previous Generations*, PEW RSCH. CTR. 4 (May 27, 2020), https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2020/05/PDST_05.27.20_millennial.families_fullreport.pdf [<https://perma.cc/9P3K-V4QV>].

81. *Id.* at 5-7.

82. *Id.* at 5.

83. *Id.* at 5 (noting that 46% of Black millennials do not live in a family compared to 57% of white and Hispanic millennials and 54% of Asians).

84. See Cahn et al., *supra* note 1, at 1714.

85. Barroso et al., *supra* note 80, at 5-6 (“Black Millennials are more likely than other groups to live with a child and no spouse (22%, compared with 16% of Hispanic, 9% of white and 4% of Asian Millennials).”).

86. *Id.* at 6.

87. See Lisa R. Pruitt, *Welfare Queens and White Trash*, 25 S. CAL. INTERDISC. L.J. 289, 290, 303 (2016) (noting the conflation of poverty and race and how “[m]ainstream academic thinking about poverty—including the ‘culture of poverty’ associated with Daniel Patrick Moynihan’s early work—has also typically focused on African Americans”).

88. LaToya D. Council, *Marriage Matters for Black Middle-Class Women: A Review of Black American Marriages, Work, and Family Life*, SOCIO. COMPASS, Nov. 2021, at 1-3.

89. Ariel Gelrud Shiro, Christopher Pulliam, John Sabelhaus & Ember Smith, *Stuck on the Ladder: Intragenerational Wealth Mobility in the United States*, BROOKINGS INST. 4-5 (June 2022), https://www.brookings.edu/wp-content/uploads/2022/06/2022_FMCI_Intragenerational-WealthMobility_FINAL.pdf [<https://perma.cc/U8Q8-JMTF>].

One area of inequity highlighted in the Article but not addressed by its new approach to family formation is finances. For example, the gap between the wealth that many older whites have accumulated, which will help sustain them later in life, starkly contrasts with the wealth of older African Americans.⁹⁰ Many poor African American families and other minority families are often not arguing over estate issues after an elder dies; rather, they are struggling to pay for debt associated with caregiving that will not be extinguished by a life-insurance policy or retirement fund.⁹¹ While no one academic piece can cover everything, greater consideration of the issues poor families face in dealing with aging relatives is critical to creating legal reforms that meet families where they are. For example, a 2021 investigation by U.S. News & World Report profiled a retired Black woman living off social security benefits and taking care of her mother in her home, who found herself at the mercy of Medicaid estate recovery.⁹² When her mother died, the woman inherited the home she had been living in for decades. The only issue was that federal law mandates that the government seek reimbursement for the long-term care services from the estate of the decedent. In situations where Medicaid is the only way to pay for long-term care services, families who depend on Social Security and other government benefits can never take full control of their estate.

Part of the rationale set forth for the Article's proposed reforms is to allow older citizens to establish intimate relationships without the simultaneous legal rights that come with marriage.⁹³ One example given is that an older adult who marries and does not wish to leave their estate to their spouse might be thwarted by inheritance laws that give each spouse an elective share in the other's estate.⁹⁴ This example reflects the economic position of a white middle- or upper-class person. Considering the statistics set forth earlier in the Article,⁹⁵ the dilemma of an older Black woman may very well not be to whom she wants to leave her estate. Rather, her concern may be whether she has enough money to pay for long-term services and support, and whether she is burdening her children or

90. See *id.* at 4 (noting that “[i]n 2019, the median white family had a net worth of about \$188,000, almost eight times the net worth of the median Black family (\$24,000”).

91. Sara True, *Debt After Death: The Painful Blow of Medicaid Estate Recovery*, U.S. NEWS & WORLD REP. (Oct. 14, 2021, 12:37 PM), <https://www.usnews.com/news/health-news/articles/2021-10-14/debt-after-death-the-painful-blow-of-medicaid-estate-recovery> [<https://perma.cc/4QUC-UWFD>].

92. *Id.*

93. Cahn et al., *supra* note 1, at 1700.

94. *Id.* at 1729.

95. *E.g., id.* at 1714 & n.100.

other relatives because of her daily needs.⁹⁶ The Article’s proposals, while novel, would not likely be of any help to many older Black adults.⁹⁷

By 2050, Hispanics will account for twenty percent of all Americans age sixty-five or older.⁹⁸ They tend to live longer, but they are not as “successful” as older white Americans as measured by “traditional metrics” like cognitive health and wealth.⁹⁹ A 2016 study that allowed older adults to select their own standards for life satisfaction and successful aging revealed that Hispanic older adults, “particularly immigrants, are more satisfied with their lives than any other group of older Americans, including Whites.”¹⁰⁰ Even though the older Hispanic immigrants in the study had “worse health, and fewer social and economic resources than White elders,” they tended to have better health outcomes later in life.¹⁰¹ As the study noted, one explanation for this seeming “paradox” may be “[s]trong family support,” since Hispanic elders lived with their adult children more than any other group in the study. Living with children prompted higher

96. *Id.* Pension entitlements and real-estate holdings are the top two assets of most Black families. Yun Li, *Black Families Net Worth Has Grown More than Any Other Racial Groups Since Covid, but Wealth Gap Remains Wide*, CNBC (Feb. 23, 2023, 1:39 PM EST), <https://www.cnbc.com/2023/02/23/black-families-net-worth-has-grown-since-covid-but-wealth-gap-remains-wide.html> [<https://perma.cc/MH7H-EJ9P>].

97. The reforms for supporting family caregiving, such as tax reforms, changes to the Family and Medical Leave Act and Social Security, and expanding Medicaid coverage have been addressed by other scholars and all require federal congressional action, which the Article admits is unlikely to occur in the present political climate. Cahn et al., *supra* note 1, at 1758; *see also, e.g.*, Richard L. Kaplan, *Family Caregiving and Intergenerational Transmission of Poverty*, 46 J. LAW, MED. & ETHICS 629, 631-33 (2018) (noting that family caregivers of older relatives can be compensated for long-term care directly through Medicaid and other community-based service waiver programs, as well as through social security benefits and tax credits); Adam Hofri-Winogradow & Richard L. Kaplan, *Property Transfers to Caregivers: A Comparative Analysis*, 103 IOWA L. REV. 1997, 2017-23 (2018) (analyzing federal public benefit program for family caregivers, tax credits, and family caregiver agreements); Peggie R. Smith, *Elder Care, Gender, and Work: The Work-Family Issue of the 21st Century*, 25 BERKELEY J. EMP. & LAB. L. 351, 385-86 & n.209-11, 393-97 (2004) (noting that many employers do not offer sick leave, those that do limit the policy to employees, and that further limitations on employer sick leave policies include insufficient time to care for elder individuals with degenerative, long-term conditions). This Article also addresses the narrow view of family assumed by family leave policies and how failing to include the extended kin network disadvantages African Americans and other people of color who rely on caregivers outside the nuclear family. *Id.* at 393-97.

98. Rocío Calvo, *Rethinking Successful Aging: The Happiness of Older Hispanics*, PUB. HEALTH POST (July 2, 2018), <https://www.publichealthpost.org/research/rethinking-successful-aging-the-happiness-of-older-hispanics> [<https://perma.cc/9W9M-V8VL>].

99. *Id.*

100. *Id.*

101. *Id.*

life satisfaction for older Hispanics, but lower satisfaction for elder whites.¹⁰² The cultural value of living with and caring for extended family persists in many Latino cultures.¹⁰³ It is questionable whether older Hispanic individuals will find the Article's proposed reforms useful since they are more likely to maintain existing household relationships with their family rather than create new relationships later in life.

Asian American elders are not doing as well as elders of other races as they age.¹⁰⁴ A study revealed that they have “significantly lower life satisfaction and receive less emotional support than their peers of other races.”¹⁰⁵ Social and cultural factors impact aging for people from marginalized communities. Health-care facilities are not adequate to meet the needs of the Asian community because not “many mental health providers . . . can accommodate the language needs of Asian American elders, more than half of whom have limited English proficiency.”¹⁰⁶ There is also fear of anti-Asian violence that results in Asian older adults not leaving their homes.¹⁰⁷ Though they are the least likely to live alone out of Americans age fifty and older, their poverty rates are much higher than other elders.¹⁰⁸ It will be difficult to determine if the Article's proposal will meet the needs of the elder Asian American community. For example, will the forms be translated into the most common Asian languages, particularly for Asian Pacific Islanders and southeast Asians? Will Asian American elders try to use the forms to secure family caretakers as they age or band together with similarly situated peer to help share housing expenses and caregiving? For those without children to care for them and limited resources, their basic needs may be more important than the proposed family registration system.

102. *Id.*

103. See Weaver, *supra* note 5, at 26-27.

104. Claire Wang, *Asian Elders Are Less Happy, Get Less Support than Elders of Other Races*, *Study Shows*, NBC NEWS (Mar. 28, 2022), <https://www.nbcnews.com/news/asian-america/asian-elders-are-less-happy-get-less-support-elders-races-study-shows-rcna21243> [<https://perma.cc/R9MV-KLMH>].

105. *Id.*

106. *Id.*

107. *Id.*

108. Aili Liu, *Asian American Elderly: Facing Poverty and Loneliness*, SAMPAN (Dec. 15, 2022), <https://sampan.org/2022/frontpage/asian-american-elderly-facing-poverty-and-loneliness> [<https://perma.cc/F8EP-Y957>] (“Asian Americans are the least likely race to be living alone for people 50 and over. . . . In 2015, the poverty rates for Asian elders 65 and over was 12.7% whereas the rate for all of Americans in this demographic was 9%.”).

III. FAMILY LAW AUTONOMY, THE COST OF EFFICIENCY & RECKONING WITH RACE

In addition to the proposed family registration system, the Article supports a reform agenda for family caregiving, with a focus on alleviating the burden on family members who provide unpaid care for older adults. The suggested reforms cover revisions to federal law, including Social Security, the Family and Medical Leave Act, expansion of Medicaid and Medicare coverage, and tax credits, as well as specific state reforms such as facilitating intrafamily care contracts and “changes to zoning laws that prohibit ‘in-law’ apartments.”¹⁰⁹ Most of these reforms would benefit elders of color and are the subjects of prior scholarly publications.¹¹⁰ These proposed reforms are acknowledged by the Article to be politically unlikely but are mentioned nevertheless as potential solutions without a distinct pathway forward for government reform.

Part III considers how the Article’s failure to deal with the way that structural racial inequities in law result in the inability of the proposed changes to meet the first and third core commitments. The Article’s proposed family registration system does not consider the difficulties faced by some minorities and poor families when they use pro se forms in court, nor does it address how laws and government benefits that are contingent upon marriage should change. The creation of forms for individuals to opt in or out of the normative family structure furthers the reach of “paper courts,” thus raising the alarm for due-process and equity concerns for low-income and minority families. Furthermore, the proposed registration system does not consider the implications of other existing laws, such as federal immigration laws and the Family Medical Leave Act, which are contingent on a specific form of family: marriage. Many poor and minority families may be unsure of how the new form of family will operate alongside other laws, and dealing with an unknown will disincentivize them from utilizing the family registration system. Part III illustrates how the Article does not hit the mark on its first and third principles: autonomy and efficiency. It concludes with suggestions for the legal academy to wrestle with racial myopia and the academy’s role in shaping the law.

^{109.} Cahn et al., *supra* note 1, at 1763.

^{110.} See Weaver, *supra* note 5, at 33-63 (setting forth reforms for the Family and Medical Leave Act, federal taxes, and zoning laws for the financial benefit of elder adults who sacrifice employment, income and future-retirement assets, and aging in their own home to care for grandchildren); sources cited *supra* note 97. Some of the proposed changes are in fact very similar to proposed solutions for grandparents who provide unpaid caregiving.

A. *Family Law Forms: Utility and True Access to Justice*

The Article provides a prescriptive solution for couples and family groups to form legal relationships through family-group registration with the state.¹¹¹ A marital menu will be available for couples who desire marriage and want to customize their commitments, and persons who do not wish to enter marriage will have the option of entering family commitments by choosing from a list of rights and duties. Effectively, the forms will serve as a type of prenuptial agreement whereby engaged couples can opt out of the rights and obligations that normally accompany marriage. On the flip side, persons who do not typically have the financial means to hire attorneys would have access to courts via premade forms that allow for family formation outside of a marital dyad.

The use of forms in family law cases is already quite common because of the number of pro se litigants. At least one party in family court appears pro se almost eighty percent of the time.¹¹² Typically, most pro se litigants are indigent and cannot afford to hire an attorney.¹¹³ Forms are touted as a way of improving access to justice.¹¹⁴ However, there are several reasons to question whether the Article's envisioned forms will accomplish the authors' stated goals.

The Article asserts that its proposed registration system risks replicating inequity because low-income couples are already less likely to formalize their relationships.¹¹⁵ It emphasizes that the list of options for family relationships should be clear and straightforward so that the forms can be executed without consulting an attorney. The proposed family law registration provides that states could restrict the forms for use by older adults only due to possible concerns about how these types of relationship options might yield unintended consequences for younger adults.¹¹⁶ This could result in another instance of aged racism because if older adults are the only group that can take advantage of the family registration system, and most of the people who could benefit from the options

111. Cahn et al., *supra* note 1, at 1746-52.

112. Marsha M. Mansfield, *Litigants Without Lawyers: Measuring Success in Family Court*, 67 *HASTINGS L.J.* 1389, 1391 (2016); see also Jessica Weaver, *Overstepping Ethical Boundaries? Limitations on State Efforts to Provide Access to Justice in Family Courts*, 82 *FORDHAM L. REV.* 2705, 2708 (2014) ("Family court has the highest number of litigants without legal representation.").

113. Hon. Tori R. A. Kricken, *The Justice Gap: The Impact of Self-Representation on the Legal System and Judicial System (and Beyond)*, *WYO. LAW.* 19 (Oct. 2018), <https://digitaleditions.walworth.com/publication/?m=10085&i=534349&p=16&ver=html5> [https://perma.cc/Y8KR-UWXU].

114. See Milan Markovic, *Juking Access to Justice to Deregulate the Legal Market*, 29 *GEO. J. LEGAL ETHICS* 63, 94-96 (2016).

115. Cahn et al., *supra* note 1, at 1737.

116. *Id.* at 1751-52.

are persons with accumulated wealth, this reform will disproportionately benefit whites.

Scholars disagree with the widespread use of forms in court.¹¹⁷ Forms are appealing at face value for granting “access” to poor people, but pro se litigants still encounter problems in court without further assistance. There are also several major issues with the use of forms to register a unique family marital unit separate from the marital dyad. First, empirical studies show that the average American is underinformed as to the contours of family law.¹¹⁸ One study concluded that “people do not fully understand the consequences of marriage on their assets and debts.”¹¹⁹ There is also great misunderstanding about creditors’ rights during marriage and after divorce.¹²⁰ This study found that “the difference between what people *think* is the law and what it *actually* is has important implications,” since “people cannot plan their family life effectively if they do not understand the legal defaults . . . [and] [w]ithout knowing their rights, people cannot stand up for them.”¹²¹

Further, forms require detailed explanation to be effective. Often laypersons cannot understand them because of discrepancies in literacy rates and the often-complex terminology they use.¹²² Fifty-four percent of U.S. adults have a literacy below sixth-grade level, and twenty-one percent of adults are illiterate.¹²³ Taken

117. See Paul R. Tremblay, *Surrogate Lawyering: Legal Guidance, sans Lawyers*, 31 GEO. J. LEGAL ETHICS 377, 381-86 (2018) (promoting nonlawyer services by lawyer-trained community members, using technological aids developed by “access-to-justice” corporations like LegalZoom); Cynthia Gray, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants*, 27 J. NAT’L ASS’N ADMIN. L. JUDICIARY 97, 110-12 (2007) (noting best practices for judges in accommodating pro se litigants in court, including providing them with appropriate forms and allowing court clerks to assist with filling out forms); Weaver, *supra* note 112, at 2721-22 (noting the pros and cons of state-sponsored self-help legal forms including empowerment of “the public to handle their own legal affairs,” difficulty using standardized forms, and potential harm to litigants if forms are incorrectly filled out).

118. See Helen Colby & Margaret Ryznar, *An Empirical Study of Family Law Understanding*, 58 U. LOUISVILLE L. REV. 79, 81-82 (2019).

119. *Id.* at 96.

120. *Id.* at 97.

121. *Id.* at 79-80.

122. See Charles R. Dyer, Joan E. Fairbanks, M. Lynn Greiner, Kirsten Barron, Janet L. Skreen, Josefina Cerrillo-Ramirez, Andrew Lee & Bill Hinsee, *Improving Access to Justice: Plain Language Family Law Court Forms in Washington State*, 11 SEATTLE J. SOC. JUST. 1065, 1083-86 (2013). See generally Amy Salyzyn, Jacquelyn Burkell, Emma Costain & Brandon Piva, *What Makes Court Forms Complex? Studying Empirical Support for a Functional Literacy Approach*, 15 J.L. & EQUAL. 31 (2019) (studying court-form complexity in Canada and concluding and recommending changes to simplify forms for laypeople).

123. *Literacy Statistics*, THINK IMPACT (2023), <https://www.thinkimpact.com/literacy-statistics> [<https://perma.cc/U6WW-W6GT>].

together, a large percentage of adults would not be able to truly understand what they are reading on most family law forms. Given these literacy levels and the high incidence of pro se litigants in family court, it is clear that a significant percentage of the public does not understand how their family law rights and benefits operate.

Legal clinicians who observe the impact of legal forms in family law firsthand have raised another issue: due process for those who cannot afford to hire an attorney to explain the forms.¹²⁴ The term “paper courts” refers to types of forms that effectively take the place of a court order and eliminate the judge’s duty to adjudicate a matter.¹²⁵ For example, the voluntary acknowledgment of paternity (VAP or AOP) is such a form because it establishes parenthood for nonmarital fathers without requiring the parties to go to an actual court.¹²⁶ These forms are easy to sign (and have legal effect), but they are difficult to rescind or dissolve.¹²⁷ Professor Tianna N. Gibbs highlights several causes for concern regarding the use of paper courts.¹²⁸ Among these are the forms’ frequent failure to “ensure that participants understand the legal consequences,” the risk that they are executed without informed consent, and the lack of sufficient procedural due process.¹²⁹ These are all critical issues that have not been reconciled by the family court system. Yet AOPs are lauded nonetheless as efficient tools for nonmarital families to establish parenthood.¹³⁰ It has also been noted that there are ethical concerns regarding state supreme court promulgation of family law forms, which pushes the boundaries of the judge’s role and raises the potential for conflicts of interest.¹³¹

The AOP is typically accompanied by a short brochure and read out loud by a certified hospital employee after a child is born.¹³² Nonlawyers are relied upon to deliver critical information about complex legal issues regarding custody, child support, and government benefits, even though they are unable to answer legal questions.¹³³ There are other tradeoffs for the persons considering whether to sign the form as well—lack of genetic testing, family expectations and pressure,

124. Tianna N. Gibbs, *Paper Courts and Parental Rights: Balancing Access, Agency, and Due Process*, 54 HARV. C.R.-C.L. L. REV. 549, 599 (2019).

125. *Id.* at 551.

126. *Id.* 553-54.

127. Weaver, *supra* note 112, at 2737.

128. Gibbs, *supra* note 124, at 555-57.

129. *Id.* at 556.

130. *See* Weaver, *supra* note 112, at 2719-36.

131. *Id.* at 2725-34.

132. *Id.* at 2720, 2735.

133. Gibbs, *supra* note 102, at 594-95.

and a short window to rescind the decision, to name a few. While the family court system does not track the number of fathers who seek to rescind or dispute their execution of a voluntary AOP, it is estimated that as many as around thirty percent are not the child's biological father.¹³⁴ Some of these same issues will likely arise for persons seeking to utilize the Article's proposed family law forms, but the Article does not adequately address whether states should require an official court staff person or attorney to explain how the forms work, what familial rights are at stake, or what process families would use to dissolve any nonmarital obligations. These details are important because they make a difference regarding notice to family members, comprehension of the legal effect of the forms, and unintended consequences that cannot be undone after a person becomes incapacitated or dies.

The analysis of how forms would be interpreted and possibly utilized would be strengthened by the analysis of how other forms used in family court have impacted Black families. Unfortunately, there are not many studies that could assist lawmakers or scholars in definitively determining the forms' rates of use by Black families and the subsequent outcome of the cases.¹³⁵ A study of limited legal assistance conducted by Alaska Legal Services Corporation revealed that all African American respondents reported negative outcomes.¹³⁶ However, there was such a small number among the group that further research would be necessary to clarify the issue. The study did reveal, though, that "the aid that respondents found most useful was hands-on[]help in filling out the forms."¹³⁷ By contrast, "[f]or many respondents, general legal advice about what to do and what forms to fill out was only minimally helpful."¹³⁸ Respondents noted that the forms "were complicated and involved legal jargon that they could not understand."¹³⁹ The results of this study reinforce the problems encountered by most people faced with using forms to access the court system.

Another study that could inform whether the Article's proposed reforms meet the mark for equity is a 2018 piece of socio-legal scholarship by Professors Tonya L. Brito, David H. Pate, Jr., and Jia-Hui Stephanie Wong investigating "how attorney representation and other more limited forms of legal assistance

¹³⁴. Weaver, *supra* note 112, at 2724.

¹³⁵. Cf. Deborah L. Rhode & Scott L. Cummings, *Access to Justice: Looking Back, Thinking Ahead*, 30 GEO. J. LEGAL ETHICS 485, 486-87 (2017) (noting more generally that there is limited data available to determine the volume of unmet legal need, and a lack of methodologically sound data on the circumstances in which lawyers' assistance improves outcomes).

¹³⁶. Deborah L. Rhode, Kevin Eaton & Anna Porto, *Access to Justice Through Limited Legal Assistance*, 16 NW. U. J. INT'L HUM. RTS. 1, 16 (2018).

¹³⁷. *Id.* at 12.

¹³⁸. *Id.* at 13.

¹³⁹. *Id.*

affect civil court proceedings for low-income litigants.”¹⁴⁰ This study examined the experiences of low-income fathers in the child support system in two states.¹⁴¹ While it did not assess elders’ relationships or caregiving needs, it is still instructive for its findings on how lawyers and the judiciary treated unrepresented noncustodial parents. Fathers of color, predominately Black fathers, comprise a large percent of this group. While the study did not explicitly set out to “examine questions of race within the context of studying access to civil justice, the importance of race and racial inequality . . . [nevertheless] became apparent.”¹⁴² The study found that “race is and is not present” in court hearings, as legal actors’ purportedly race-neutral approaches did not mask the racialized consequences of their actions.¹⁴³

Many unemployed and underemployed Black fathers testified about barriers to obtaining jobs, including discriminatory hiring and criminal records or liens.¹⁴⁴ Research conducted across the United States substantiated their stories, showing marked differences between treatment of Black applicants and white applicants in the job market.¹⁴⁵ Included among “intersecting practices that undermine [Black fathers’] efforts to secure long-term, stable employment” were “outright racial exclusion,” preference for migrant farm workers over Black applicants, exploitative practices of temporary agencies, and employer relocation to the suburbs for those fathers without transportation.¹⁴⁶ The legal actors involved in these hearings, most of whom were white, dismissed the racial disparities facing poor Black fathers, rendering their plight invisible.¹⁴⁷ The colorblind approach in these cases highlighted “how assumptions about job availability for low-income fathers are premised on a” white normative standard.¹⁴⁸ The study critiqued the adjudication of child-support cases, noting that they showed a

140. Tonya L. Brito, Dave J. Pate, Jr. & Jia-Hui Stefanie Wong, “*I Do for My Kids*”: *Negotiating Race and Racial Inequality in Family Court*, 83 *FORDHAM L. REV.* 3027, 3029 (2015).

141. *Id.* at 3028-29.

142. *Id.* at 3029.

143. *Id.* at 3030.

144. *Id.* at 3037.

145. *Id.* at 3037-38 (noting “that Black applicants are treated less favorably than white applicants” in several ways, including being “less frequently called back or offered jobs,” being “offered lower starting wages than White employees,” being “more heavily penalized in the job application process,” and—for those with criminal records—being treated less favorably than whites with criminal records).

146. *Id.* at 3038-39.

147. *See id.* at 3040-41, 3036-37.

148. *Id.* at 3043.

“judicial myopia with respect to racial context that presumes a level present-day social and economic playing field.”¹⁴⁹

This study illustrates the pervasiveness of racial myopia in family law. As part of the study, judges, family court commissioners, and lawyers were asked “to identify the impediments that kept fathers from finding jobs,” and “[i]n response, they “pointed to other contributing factors and consistently recite[d] a series of well-known and documented barriers to employment experienced by low-income men without acknowledging their links to race.”¹⁵⁰ The study critiqued how there was no discussion about how the barriers were “connected to systems that disadvantage Blacks.”¹⁵¹ This is similar to how the Article did not sufficiently analyze potential barriers for elders of color to its proposed family registration system. The disparities highlighted in the background section of the Article must be connected to how structural racism may exclude Black families from the benefits of the new system. For example, the Article refers to the structure of other proposed registration systems and the economic and healthcare benefits that nonmarriage will confer to elder individuals and their chosen family members.¹⁵² The tax and social security benefits of the opt-in/opt-out would need to be clearly explained, and the benefits for property distribution and inheritance may be irrelevant for poor elders and elders of color who have few assets to distribute to their family.

Finally, the voluntary opt-in and opt-out mechanisms set forth in the Article do not account for the ways in which state legal systems have engineered generational poverty and distrust for certain families. Take some findings from a recent report: “Only 28% of low-income Americans believe that people like them are treated fairly in the U.S. civil legal system.”¹⁵³ Further, only 35% of low-income Americans sought legal help from lawyers to help fill out legal forms and documents, although 74% of this same group experienced one or more civil legal

149. *Id.* 3043.

150. *Id.* at 3040 (“They reported that the men lack adequate and marketable job skills, have limited education and/or lack a high school degree, possess limited work histories, and have been previously incarcerated.”).

151. *Id.* at 3041.

152. See Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 606-10 (2013) (setting forth a menu of nonmarital options for registering family with the state); see also Richard L. Kaplan, *Preferencing Nonmarriage in Later Years*, 99 WASH. U. L. REV. 1957, 1958-59 (2022) (examining how the economic and legal rights of older cohabitants who have assets are better protected by nonmarriage).

153. Mary C. Slosar, *The Justice Gap: The Unmet Civil Legal Needs of Low-Income Americans*, LEGAL SERVS. CORP. 51 (Apr. 2022), <https://lsc-live.app.box.com/s/xl2v2uraitotbbzrhujtjgioemp3myz1> [<https://perma.cc/4T7N-5BY4>].

problems in the past year.¹⁵⁴ This same group “did not receive any or enough legal help in the past year” for 92% of problems that have had a substantial impact on them.¹⁵⁵ Over one quarter had experienced at least one problem related to family matters or personal safety, particularly in households with children under twelve years old.¹⁵⁶ These statistics are vital in analyzing the likelihood that the authors’ proposed forms will be used by Americans of all income levels. Equity cannot be achieved if low-income Americans think legal representation is inaccessible.

B. Clarion Call

This clarion call aligns with the core commitments of the Article, seeking to rally scholars who have an understanding of the role of structural racism in law. Many are aware of how race operates to disadvantage various groups, but research and scholarship are often conducted using whiteness as the default standard. Awareness is the first step, but there must be more collective brainstorming to activate the concept of justice and liberty for all. On behalf of many scholars of color who have toiled despite a myriad of obstacles to secure a place in academia, this clarion call challenges the legal academy to use the law to transform lives.

Scholars of color have written about the intersection of race and every area of law, from corporate to patent to family law. Much of their scholarship has been personal in that they have observed or lived the very bias about which they write, and even if it has not impacted them personally, it has impacted their race in ways that are deeper than just skin color or DNA. It is soul work. Their research and much of their scholarship could help move society closer to achieving equity for different racial groups. Meaningful legal dialogue that wrestles to find solutions that address structural inequities requires including the nuanced and distinct voices of many different scholars of color who have made vital evaluations regarding how law is made, interpreted, and practiced, as well as the negative or positive implications of legal policies on people of color. In order for law to reach its highest calling, we simply must do more to recognize and include scholars of color at the proverbial table and listen and discuss their ideas within mainstream scholarship.

First, use the framework provided in Part I to develop a new lens to incorporate race into your query. Realigning your perspective to address racial myopia in law requires four basic explorations. First, has there been an active inquiry

^{154.} *Id.* at 8, 46.

^{155.} *Id.* at 60.

^{156.} *Id.*

regarding how race factors into the identification and structure of the legal problem or issue? Second, is there a racially inclusive legal history or background of the problem, rule, or issue? Third, does the analysis effectively unpack and investigate the problem or issue from a racially inclusive perspective? Finally, do the proposed solutions either negatively or positively impact persons of different racial backgrounds?

Second, conduct a due-diligence search of the scholars of color in your field and seek to collaborate with them on a research project. Centering the needs of the most marginalized will require adopting a lens or perspective that some white scholars lack that scholars of color can add. It is likely that there are more than a few law-review articles that relate to your thesis or premise that should be cited in your work. Invite scholars of color to cowrite articles, essays, or books about prominent issues in your field and be intentional about deliberations to address fundamental inequities within the law. While there are no silver bullets, raising questions and debating the merits or feasibility of local, state, and federal possibilities for legal change is vital to moving the law forward. One example of such a duo is top-cited dean and scholar Erwin Chemerinsky and leading health law scholar Michele Goodwin, who have cowritten four articles and two book reviews on abortion, compulsory-vaccination laws, immigration and racism, and civil liberties affected by the pandemic.¹⁵⁷ Other pairs include Katie Eyer and Karen Tani, Olati Johnson and Kristen Underhill, David Horton and Andrea Cann Chandrasekher, and Solangel Maldonado and Jane Murphy.¹⁵⁸

Third, remember that representation matters. African American family history, identity, and structure are an integral part of the American legal system, even though much of it is not taught in secondary schools or higher education. In considering how to reform the law, we need to consider how the law impacts diverse groups of people. Just as critical-race scholars Richard Delgado, Derrick Bell, and Mari Matsuda argued over thirty years ago, scholars of color possess a

157. Erwin Chemerinsky & Michele Goodwin, *Compulsory Vaccination Laws Are Constitutional*, 110 NW. U. L. REV. 589 (2016); Michele Goodwin & Erwin Chemerinsky, *No Immunity: Race, Class, and Civil Liberties in Times of Health Crisis*, 129 HARV. L. REV. 956 (2016); Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman's Private Choice*, 95 TEX. L. REV. 1189 (2017); Michele Goodwin & Erwin Chemerinsky, *Pregnancy, Poverty, and the State*, 127 YALE L.J. 1270 (2017); Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering Against Abortion Rights: NIFLA v. Becerra*, 94 N.Y.U. L. REV. 61 (2019); Michele Goodwin & Erwin Chemerinsky, *The Trump Administration: Immigration, Racism, and COVID-19*, 169 U. PA. L. REV. 313 (2021).

158. Karen Tani & Katie Eyer, *Disability and the Ongoing Federalism Revolution*, 133 YALE L.J. (forthcoming 2023); Kristen Underhill & Olatunde C. Johnson, *Vaccination Equity by Design*, 131 YALE L.J.F. (2021); David Horton & Andrea Cann Chandrasekher, *Probate Lending*, 126 YALE L.J. 102 (2016); Jane Murphy & Solangel Maldonado, *Reproducing Gender and Race Inequality in the Blawgosphere*, 41 HARV. J.L. & GENDER 239 (2018).

unique voice not found in traditional legal scholarship.¹⁵⁹ Including the views and scholarship of diverse scholars forces deeper thought about the consequences of proposed laws and reforms, and can help yield different, more equitable solutions.

CONCLUSION

This Response challenges whether *Family Law for the New Old Age* actually addresses the structural inequities it claims as a core commitment. Racial myopia in family law is at the center of the critique. Structural inequities cannot be addressed by using white families as the normative identity for analyzing legal reforms of the aging population. The practical reforms set forth in the Article could have unintended consequences for the families that already face obstacles in family court and within the wider legal system. Race – as well as the scholarship that incorporates race into normative family structure and identity – must be critically considered as we propose new ways of creating family units. This Response calls for active engagement with the racial history surrounding American family structure and the laws utilized to support them in order to achieve the goal of adapting family law to address the needs and interests of older people.

Associate Dean for Research and Professor, SMU Dedman School of Law. Thank you to Melissa Murray, Lolita Buckner Inniss, Rose Cuison-Villazor, Sacha Coupet, Monika Erhman, and Carla Reyes for helpful comments and feedback.

159. See Richard Delgado, *When a Story Is Just a Story, Does Voice Really Matter?*, 76 VA. L. REV. 95 (1990); Derrick A. Bell, *Who's Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893 (1995); Mari Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1 (1988).