

The Afterlife of Racism and Homophobia

When I set out to write this book, over a decade ago, I began with the hypothesis that newly freed peoples' experience of the right to marry had a "be careful what you wish for" lesson for today's marriage equality movement. I expected that just as marriage revealed itself to be a supple and effective means by which racism could reproduce itself through the state licensure of intimate relationships, it would be equally up to the task of reproducing homophobic bias in the contemporary context. Despite significant victories in the courts and legislatures extending the right to marry to same-sex couples, homophobia, I conjectured, would have an afterlife that outlasted the exhilaration of the first fabulous gay weddings.

In some respects my hypothesis was correct. And in others I was wrong, as events on the ground outpaced my working hypothesis.

How was I right? There has indeed been a backlash against the overwhelming success of the marriage equality movement. While there have been great successes expanding marriage rights for same-sex couples in a number of jurisdictions, the voters in other states moved precipitously and preemptively to clarify different local norms by passing laws that limited marriage to one man and one woman. Explicitly undertaken in response to the success of the marriage equality effort, these clarifications or revisions of state marriage laws were undertaken either through the passage of amendments to the laws defining marriage or through state constitutional amendments. California's Proposition 8, which put a referendum to voters to reverse a victory for marriage equality won before the California Supreme Court, is perhaps the most prominent example of this sort of measure.¹ But this kind of legal backlash against marriage rights for same-

sex couples took place in thirty-one states. Twelve such measures barring marriage rights for same-sex couples were enacted in the November 2004 elections alone. A majority of these measures contain language to explicitly deny recognition not only to marriages between same-sex couples but also to civil unions, domestic partners, or any other legal status.² Their aim was twofold: to clarify the essential heterosexual nature of the institution of marriage, and to make sure that marriage didn't have to compete with any other legal status that was "marriage-like" or "marriage lite."

Advocates who supported these measures used them as an opportunity to express a wide range of hostility toward gay people generally, toward their fitness as parents, and toward the notion of legal marriage for same-sex couples. In the spring of 2013 the president of the Southern Baptist Convention along with a televangelist colleague speculated that threats to the U.S. from North Korean leader Kim Jong-un might be attributable to the rise in marriage rights for same-sex couples in the United States: "Could our slide into immorality be what is unleashing this mad man over here in Asia to punish us?"³ A pastor in New York City went on TV and claimed that if same-sex couples were allowed to marry they would "take a nine-year-old boy to an Arabic nation" and marry him, then come back to the U.S. and force the state to recognize the marriage.⁴ In response to President Obama's support of marriage rights for same-sex couples, Republican Mississippi state representative Andy Gipson posted a status update on Facebook citing a passage from Leviticus that calls for gay men to be "put to death," and then followed up with a response to a constituent's post:

[I]n addition to the basic principal that it is morally wrong, here are three social reasons it's horrific social policy: 1) Unnatural behavior which results in disease, not the least of which is its high association with the development and spread of HIV/AIDS; 2) Confusing behavior which is harmful to children who have a deep need to understand the proper role of men and women in society and the important differences between men and women, and fathers and mothers; and 3) Undermines the longstand-

ing definition of marriage as between one man and one woman, a definition which has been key to all aspects of social order and prosperity. Anytime that definition is weakened our culture is also weakened. And yes, that is also true for other conduct which weakens marriage's importance in society.⁵

Then, in early 2015, a Huntington Beach lawyer filed paperwork with the California attorney general's office to have an initiative, the "Sodomite Suppression Act," placed on the ballot that would recriminalize sodomy: "any person who willingly touches another person of the same gender for purposes of sexual gratification be put to death by bullets to the head or by any other convenient method."⁶

Latent and explicit hatred toward same-sex couples that have exercised a new legal right to marry has surfaced in another context created by the disarray that resulted from allowing each state to decide whether to allow same-sex couples to marry, before a single, national rule on the issue was set down. In states that limited marriage to one man and one woman a question arose as to whether the courts in those states would recognize the marriages of same-sex couples entered into in states that allowed them to marry. If, for instance, a lesbian couple living in South Carolina, a state that limited marriage to one man and one woman,⁷ traveled to New York to marry legally and then returned to South Carolina to continue with their lives, what should the South Carolina courts do when the couple later files for divorce? Recognize the marriage as valid under another state's law and proceed with the divorce (as they would for any other couple validly married in another state), or refuse to recognize the validity of the marriage and dismiss the divorce action as a legal impossibility (you can't get divorced if you were never legally married)? Tobias Wolff has argued that when courts refused to recognize the validity of same-sex couples' marriages entered into lawfully in states that allowed such marriages, the courts were essentially sending a message to those couples: you are unwelcome here. The hostility against same-sex couples in courts in some regions, he claims, is greater than it

was against inter-racial couples. Even in states with the most draconian anti-miscegenation laws, courts would sometimes recognize the validity of inter-racial marriages for at least some purposes, like inheritance. The categorical nature of the refusal to recognize same-sex marriages for any purposes is unprecedented, he insists. Rather than engendering respect for other states' laws, these cases set off a kind of "social alarm" that justified harsh condemnation of the underlying immorality upon which these relationships rested.⁸

Particularly in jurisdictions that hadn't signed up for this new civil rights revolution, gay men and lesbians may find themselves suffering a kind of "price tag" for gay rights victories in other states. Gay people in Mississippi, Alabama, Georgia, Louisiana, Idaho, and Montana reported an increase in hostility in their communities that negatively tracked the success of the marriage equality movement nationwide. In their churches, workplaces, and at family dinners they often bore painful witness to religious conservatives' need to hold the line on marriage equality while the rest of the nation went to hell. This climate forced many gay and lesbian people, particularly people of color, even deeper into the closet. Advocates from Mississippi have told me that their low-income gay and lesbian clients are having more and more difficulty accessing social services delivered through churches (many state and local aid programs that provide food, housing, and other assistance contract with churches to provide these services). Rather than outing themselves to their fellow parishioners and enduring likely harassment or ostracism, many same-sex couples will lie about their relationships by telling people that they are cousins, not lovers. Or in small communities where this kind of lie would be impossible since everyone knows everyone else, they are forced to make a tragic choice between foregoing social services out of fear for the hostility they are likely to endure or closeting themselves so deeply that a normal relationship is impossible.

The story of how Tom Wojtowick and Paul Huff were kicked out of their Catholic church chillingly illustrates the kind of backlash some

couples are experiencing when they get married. After living together as a couple for over thirty years, Wojtowick and Huff, aged sixty-six and seventy-three respectively, decided to get married and traveled from their small town in Montana to Seattle, Washington, for their nuptials. When they returned home they expected to take up their lives as they had been before—living together, known in the community as gay, and active in their church, the Kiwanis Club, and other civic organizations. They had set an example to their community of how gay people are not all that different from everyone else. Yet a little over a year after their marriage, a new priest assumed the pulpit at their church and summoned them for a conference. He told them that they could no longer sing in the church choir or participate in any other church rituals or functions, including communion. He demanded that they get divorced, stop living together, and sign a statement affirming that marriage was a sacrament of one man and one woman.

This incident divided the parishioners at their church, roughly half opposing the priest's excommunication of the gay couple and half supporting it. Meanwhile the Episcopalians in town offered to take them in. What's remarkable about this incident is the fact that that church and half of its membership had no problem with Wojtowick and Huff, an openly gay couple, being part of the parish. It was their *marriage* that set them off. As Frank Bruni put it on the opinion page of the *New York Times*, "I do' means you're done."⁹

To be sure, the law can't fix all of the backlash against same-sex couples who marry and "enjoy private intimacy and . . . share a household in which they can hold themselves out to their community as participants in a committed relationship."¹⁰ Nevertheless, this condemnation of hostility toward gay people asserted in legal precedents has been met with a NIMBY-like response in more conservative parts of the country: you can have your marriage rights in San Francisco, New York, and other sinful cities, but not in our backyard and not in my church! In this sense, some communities approach the claims to marital legitimacy that same-sex couples present as a kind of public nuisance. And some churches,

while able to love the sinner, find the sin intolerable when same-sex couples marry.

This intolerance toward the very idea of same-sex couples marrying solidified quite quickly into a state-by-state strategy in the 2014–15 legislative session to enact new laws that would allow individuals and businesses to ignore same-sex couples' marriages, or to outright discriminate against them, all in the name of religious liberty. These Religious Freedom Restoration Acts (RFRA) granted public officials the right to refuse to issue a marriage license if doing so would conflict with their religious beliefs, and permitted individuals and businesses an exemption from compliance with an otherwise generally applicable law if compliance with that law would offend their religious beliefs. The timing of these proposals—in the legislative session just before the Supreme Court was to hear oral argument in the marriage equality cases—was no accident, as they were seen as a way of getting a jump on the Court, prophylactically “restoring” rights that were about to be threatened and setting in place a means by which opponents of marriage equality could house that opposition in a “restored” right to religious liberty.

This clear backlash against the growing inevitability of the Supreme Court recognizing a constitutional right to marriage for same-sex couples mirrored in uncanny ways the use of religious liberty as a tool to perpetuate forms of racial injustice at important junctures in U.S. history. In 1869 the Georgia Supreme Court turned to religious teaching when it upheld the criminal conviction of Charlotte Scott, a black woman, who had married a white man, Leopold Daniels, and thereby violated Georgia's 1788 law criminalizing interracial marriage, known legally as an anti-miscegenation law. The chief judge of the Georgia Supreme Court, Joseph E. Brown, wrote:

This, in my opinion, is one of the wisest provisions in the Constitution. . . . Before the laws, the Code of Georgia makes all citizens equal, without regard to race or color. But it does not create, nor does any law of the State attempt to enforce, moral or social equality between the dif-

ferent races or citizens of the State. Such equality does not in fact exist, and never can. The God of nature made it otherwise, and no human law can produce it, and no human tribunal can enforce it. There are gradations and classes throughout the universe. From the tallest arch angel in Heaven, down to the meanest reptile on earth, moral and social inequalities exist, and must continue to exist through all eternity.¹¹

The Indiana and Alabama supreme courts similarly used god's plan as the justification for upholding their states' anti-miscegenation laws in 1871 and 1877 respectively.¹² In the 1960s, the trial court in *Loving v. Virginia* relied on similar reasoning when it upheld the conviction of Mildred and Richard Loving, an interracial couple who had married in violation of Virginia's criminal prohibition against miscegenation: "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."¹³

Assertions of religious liberty were used as a defense against compliance with newly enacted laws prohibiting racial discrimination in the mid-nineteenth century as well. In 1956 Senator Strom Thurmond drafted the "Southern Manifesto" defending the morality of racial segregation immediately after the Supreme Court's decision in *Brown v. Board of Education*. A central ploy was to set up private religious schools that were racially segregated. This worked for a while, until the Treasury Department withdrew the schools' non-profit status on account of their failure to comply with federal non-discrimination laws. In 1983 the Supreme Court upheld the Treasury regulations in *Bob Jones University v. United States*, wherein religious schools argued that the Bible instructed that "[c]ultural or biological mixing of the races [was] regarded as a violation of God's command." Thus, the Treasury rule could not constitutionally apply to schools engaging in racial segregation, the schools argued, because it conflicted with their sincerely held religious beliefs.

The Court rejected the schools' claims, holding that the government's interest in eradicating racial discrimination in education outweighed any burdens on their religious beliefs.¹⁴

The Civil Rights Act of 1964 met ample resistance in the name of religion as well. The owner of a barbecue chain who was sued for refusing to serve blacks defended himself by claiming that serving blacks violated his religious beliefs. A court rejected the restaurant owner's defense, holding that the owner

has a constitutional right to espouse the religious beliefs of his own choosing, however, he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens. This court refuses to lend credence or support to his position that he has a constitutional right to refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs.¹⁵

These decisions reflect an evolving national consensus that religion can't be used as a justification for discrimination on the basis of race. The recent wave of state RFRA's enacted in response to the surge of rights prohibiting discrimination against LGBT people and same-sex couples seeks to exploit the absence of a similar consensus around the primacy of laws prohibiting sexual orientation-based discrimination.

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Ironically, in a number of cases, married gay men and lesbians have taken advantage of enduring homophobic sentiment by seeking to exploit disdain for gay people when their marriages end. Just as people with spouses of a different sex have sought to have their divorces adjudicated in a state that would give them the most leverage in dividing up joint assets or would favor them as a parent, some gay people engaged in similar "forum shopping," seeking to have their marriages dissolved in states that were hostile to the very idea of same-sex couples marrying. A court

order annulling a marriage on the grounds of its illegality might be a highly favorable disposition for the more affluent person in the couple—it's like the marriage never happened and they can just walk away, owing their spouse/partner nothing. Or—as in the case of Lisa Miller and Janet Jenkins—where a married couple is raising a child, the biological parent could seek to have custody and visitation issues adjudicated in a jurisdiction that is hostile to the idea of lesbian or gay coparenting.¹⁶

All of these examples testify to the shared experience of a newly won right to marry for recently emancipated black people in the nineteenth century and same-sex couples today: the enduring potency of bigotry, a bigotry that justified a long-standing exclusion from civil marriage, survives the repeal of that exclusion and fuels a backlash against these new rights holders. In this sense, one of the lessons to be drawn for today's marriage equality movement from African Americans' early celebration of the ability to legally marry is that homophobia, like racism, will have an afterlife. Same-sex couples would be well counseled to prepare for the ways in which a marriage license inaugurates new forms of state discipline and regulation that can be easily deployed in the service of a durable and crushing homophobic itinerary. Just as the institution of marriage has been sufficiently supple to host both emancipatory and racist ends for African Americans, same-sex couples are likely to find marriage to be a worthy standard bearer for both new forms of citizenship and familiar forms of disgrace and exclusion.

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Surely some dots are amenable to connecting when we compare the afterlives of racism and homophobia and how these resilient social blights have been sustained by and through the institution of marriage. Yet the discontinuities between the experiences of African Americans and same-sex couples in marriage are striking and are worthy of careful consideration as well.

The examples I gave earlier in this chapter of a backlash against married same-sex couples might be best understood as the exceptions that

prove the rule. They are significantly less representative of the consequences of the rollout of marriage equality today than I had expected. Quite contrary to my predictions of a systemic homophobic recoil in response to the successes of the struggle for marriage equality (predictions that have earned me a reputation in the gay community as a kind of “turd in the punchbowl,” to borrow a less than flattering moniker I learned from my mother), the trend has been in favor of embracing the right to marry for same-sex couples, even in sectors where it seemed unlikely just a few years ago. Same-sex marriage rights have found support from prominent conservative political actors and celebrities such as David Blankenhorn, the star witness against marriage equality in the trial challenging Proposition 8; former Bush-era solicitor general Ted Olson; Ken Mehlman, former head of the Republican National Committee; Meg Whitman, who supported Proposition 8 when she ran for California governor; representatives Ileana Ros-Lehtinen of Florida and Richard Hanna of New York; Stephen J. Hadley, a Bush national security adviser; Carlos Gutierrez, a commerce secretary to Mr. Bush; James B. Comey, a top Bush Justice Department official; David A. Stockman, President Ronald Reagan’s first budget director; and actor Clint Eastwood.¹⁷ Their change of heart on this issue says something about their hearts, I suppose, but also about how the appeal for support has been framed. Many of these conservative leaders have seen a convergence of their deep *traditionalist* commitments with the arguments in favor of marriage equality. As they observed in a brief submitted to the Supreme Court in the Prop 8 case: “Many of the signatories to this brief previously did not support civil marriage for same-sex couples . . . [but] amici have concluded that marriage is strengthened, not undermined, and its benefits and importance to society as well as the support and stability it gives to children and families promoted, not undercut, by providing access to civil marriage for same-sex couples.”¹⁸ Like President Obama, their views on marriage rights for same-sex couples have evolved.¹⁹

Why, then, have gay men and lesbians been able to find a kind of redemption in marriage that has eluded African Americans? Why have

marriage rights been such a successful tool for gay people to achieve greater standing as full and equal citizens while marriage has remained a potent tool to shame, punish, and discipline African Americans? Why, in other words, have gay people been so successful at using marriage to redeem their good name, while marriage continues to be a site of failure and dysfunction for many African Americans?

I pose the questions in this manner not to ratify the premises that underlie them (for instance that marriage is redemptive for gay people and dysfunctional for African Americans) but to acknowledge the kind of social reputation that these two groups enjoy or suffer in relation to marriage. So too, I pose the questions this way not to ignore that these two social groups overlap with one another (there are plenty of African Americans who are lesbians or gay men) but rather to acknowledge the social reputation that the gay rights movement and its subsidiary, the marriage equality movement, enjoy as white, and the African American community enjoys as heterosexual. By design or not, the gay community has been able to leverage its social capital in whiteness to their advantage in the marriage equality movement, yet African Americans have received little benefit in any endowment they might enjoy from the stereotype that all or most black people are heterosexual.

The juxtaposition this book aims to take on, and particularly the discontinuities it illuminates, tells us something very important about the relative mark of inferiority soldered to blackness as compared with that of homosexuality.

Advocates advancing the cause of marriage equality for same-sex couples have drawn from this powerful metaphor, arguing that the injury they suffer inflicts a similar badge of inferiority on same-sex couples who cannot marry or who are discriminated against for having done so. Invoking a clear analogy to the history of racial inequality in the United States, Ted Olson and David Boies argued in their brief to the Supreme Court in the Prop 8 case:

Although opening to [same-sex couples] participation in the unique and immensely valuable institution of marriage will not diminish the value or status of marriage for heterosexuals, withholding it causes infinite and permanent stigma, pain, and isolation. It denies gay men and lesbians their identity and their dignity; it labels their families as second-rate. That outcome cannot be squared with the principle of equality and the unalienable right to liberty and the pursuit of happiness that is the bedrock promise of America from the Declaration of Independence to the Fourteenth Amendment, and the dream of all Americans. This badge of inferiority, separateness, and inequality must be extinguished. When it is, America will be closer to fulfilling the aspirations of all its citizens.²⁰

Similarly, a group of law professors urged the Illinois legislature to reject a religious exemption in the Illinois marriage equality bill and condemned such a license to discriminate in the name of religion on the ground that it “stamps a badge of inferiority on married same-sex couples that permits their exclusion wherever they go.”²¹

The invocation of the notion of a “badge of inferiority” as a way to denounce state policies that offend overarching principles of equality or liberty, whether on the grounds of racism or homophobia, suggests careful thought about the work that must be done to either resist that stamp or remove its mark once imprinted. What notions of the self in relation to larger societal stereotyping, violence, exclusion, and abjection are deployed in efforts to cleanse bodies marked with the moral stain of inferiority? Is there anything peculiar about a strategy that turns to law to remove a mark that is the remainder of law itself?

The badge of inferiority born by people of color is, to be sure, central to the logic that makes blackness intelligible and black bodies legible in a larger racist society. Testifying to the spectacular and violent way in which the signature of race becomes written on the body, Langston Hughes wrote in 1949, “They’ve hung a black man . . . For the world

to see.”²² The shooting of Michael Brown in Ferguson, Missouri, in the summer of 2014 is only one recent iteration of these acts of signing and signification. Frantz Fanon similarly suggested the spectacular way in which race is written on the body: “‘*Maman*, look, a Negro; I’m scared!’”²³ This signature is not one written by black people, but its mark is truly “theirs” in the sense of belonging to them, as being a property of their blackness. Yet Fanon, among so many others, provides the analysis necessary to understand how race is more a moral category than one biological in nature, more an indictment than a fact: “I am overdetermined from the outside,” Fanon observed.²⁴

When advocates for marriage equality today conjure a “badge of inferiority” in their arguments to courts, are they mobilizing a notion of injustice that works in ways similar to the writing of race on black bodies? Judge Vaughn Walker, ruling in the case challenging Proposition 8’s ban on same-sex marriage, credited expert testimony (from an economist, oddly enough) that the marriage ban “conveys a message of inferiority”²⁵ and an Iowa trial court found that:

Plaintiffs suffer great dignitary harm because the State’s denial to Plaintiffs of access to an institution, so woven into the fabric of daily life and so determinative of legal rights and status, amounts to a badge of inferiority imposed on them and Minor plaintiffs. Plaintiffs are continually reminded of their own and their family’s second-class status in daily interactions in their neighborhoods, workplaces, schools, and other arenas in which their relationships and families are poorly or unequally treated, or are not recognized at all.²⁶

Presumably, winning these cases, particularly after naming the injury of suffering as a “badge of inferiority,” results in the removal of that badge and the signature of disgust and perversion suffered by homosexuals in its name. Motivating these victories is the notion that gay couples don’t deserve such a degrading signature, or worse, that they have been wrongly mistaken for those who do.

This is what distinguishes the work done by the marriage equality cases for gay people that has not, and cannot, be accomplished for people bearing the signature of racial inferiority. In the marriage cases, lesbians and gay men have accomplished a kind of rebranding of what it means to be homosexual. They have been awarded a kind of “dignity of self-definition” that law and culture have never recognized in African Americans. In this sense, the dignity at stake in the marriage cases is not that conferred by the blessings of marriage but rather in a kind of self-possession that has allowed them to tell a counter narrative of “who gay people are.” If the marriage equality cases have been about anything, they’ve been about the demand that gay people have been misrecognized by law and society, and that the time has come to tell a more respectable, decent story that, if believed, justifies a city official’s signature on a marriage license. Marriage, it turns out, has been not only an end in itself for the gay community, but the container for a rebranding project as well.

The success of this political project is truly stunning, particularly when viewed in contrast to the challenges faced over time by the cause for racial equality. For two social movements organized around particular identity-based claims to justice and quality, both seeking to escape the subordinating consequences of a conception of difference anchored in a biological difference from the norm, gay people have enjoyed astonishing success revealing the irrelevance of biology and the injustice done in its name.

Hughes’ invocation of lynching when he wrote, “They’ve hung a black man . . . For the world to see,” might be contrasted with “They’ve held a wedding . . . For the world to see.” The difference between these two events and the subjects they spectacularly produce is to be found in the power, or dignity, of redefinition to be found in the gay wedding. It both reflects and then reproduces a new form of respectability so yearned for in many sectors of the gay community. It enunciates a new norm and a new normal. In an earlier era a same-sex commitment ceremony or “marriage” elicited disgust, incredulity, or even violence. It operated as a kind of pastiche that mimicked the original but where the joke, if there was

one, was on the couple doing the imitation insofar as the gap between the imitation and the original bore witness to the blasphemous nature of this inferior version of the sacred. Now, the marriages of same-sex couples are neither pastiche nor parody of the original, as they *are* the real deal.

In this sense, gay people have been able to reshape the response elicited by these spectacular performances, from disgust to empathy or even identification—something African Americans have never been allowed. Instead, for the most part marriage for African Americans has been a vehicle for reinforcing their inferiority and for eliciting familiar responses that assign a badge of inferiority. Made explicit in the Freedmen's Bureau records, in the rulings of postbellum Southern judges, and in the Moynihan Report, marriage has been and largely remains a kind of test that the African American community is seen as failing.

What the marriage equality movement has shown, and the historical comparisons I draw in this book aim to illustrate on a granular level, is how lesbian and gay people have been better able to use a form of legal pleading to redefine what it means to be gay than have African Americans to redefine what it means to be black. Blackness, we learn, is both a durable badge *and* a badge of inferiority. What it marks is the residue of racism that no legal victory has been able to dissolve. At best, legal victories for African Americans award restitutions for injury, reinscribing an inferior status at the same time as they compensate for it. By comparison, the gay marriage cases have pulled off something altogether different, by converting marriage into a badge of superiority. Of course, this badge is awarded or "enjoyed" only by those members of the gay community who are willing or able to present their relationships within a logic of respectability. The work that badge does in redeeming the social reputation of "good gays" depends on a contrast with "bad gays" who don't want to marry or discipline their sexual selves into a tidy couple form.

How has this been possible? How has the gay community been so successful in deploying marriage to remake its public reputation so convincingly?

First of all, the team for marriage equality has been enormously successful in shaping their struggle as essentially conservative in nature. They don't seek to destroy marriage or to radicalize it, they have insisted, but rather aim to fold same-sex couples into the institution on its own terms. The claim for marriage rights for same-sex couples offers a striking lesson in how a social justice movement has effectively and relatively swiftly transformed the perception of its agenda from radical and beyond the pale to essentially traditional in nature.

When the conservatives sign up for marriage equality, they do so because it dawns on them that their interests in traditional family values, in the nuclear family, in privatizing dependency, and in bourgeois respectability are stronger than their homophobia. As marriage equality advocates make the plausible case that they share with conservatives the same basic values about marriage, conservatives come around to see same-sex couples who wanted to marry as “just like us,” or enough like us, to recognize a shared identity.²⁷ “My brother is gay and I know what he goes through and went through when he was younger. I don't see the problem with gay marriage. They are just like us but they like the opposite sex. That's no problem,” writes a straight ally of the gay community in an online debate on marriage rights for same-sex couples.²⁸ Country-western singer Dolly Parton took the comparison one step further when she quipped, “I think gay couples should be allowed to marry. They should suffer just like us heterosexuals.”²⁹

But if the “just like us” argument is what made a significant difference in turning the marriage equality argument into such a raging success, then why hasn't a similar argument worked for African Americans? They are just as able to deploy a narrative of traditional, family values as the gay community—perhaps even more so. In fact, the peculiar American commitment to a notion of racial equality grounded in the idea of “color-blindness” is, in significant respects, another version of the “just like us” claim made by gays and lesbians. It posits that skin color should be irrelevant in determining a person's worth and that we all share a

basic humanity and dignity that should not be inflected or diminished by considerations of race or color.

Yet the argument from color-blindness has never been effective in diminishing indelible notions of difference and inferiority for African Americans. It certainly hasn't worked to remove a badge of inferiority for people of color the way the appeal to a shared traditional notion of marriage and "just like us" arguments have functioned in the marriage equality cases.

The stories in this book, holding up side by side two experiences of newly won rights to marry, help us see how racial difference is a difference more indelible than that of sexual orientation. African Americans' relationship to marriage, particularly compared with that of same-sex couples, shows us how fixed the signature of racial inferiority is for black people in American culture. No appeal to decency, tradition, or respectability can overcome the logic of difference that structures racial identity in this country. The history of marriage helps us see how that difference is sutured to black bodies in ways that made being freed something less than being free, and marriage a tool of discipline and failure rather than security and full citizenship for African Americans.

Even more, it's worth noting that the successes of the marriage equality movement may have been won precisely because of the negative reputation African Americans suffer when it comes to marriage. The racial endowment as white from which the marriage equality movement has benefited (even if not grounded in reality, since many of the members of the LGBT community who sought marriage rights were people of color) surely helped conservative courts, legislators, and others come to see an affinity of interest with this cause.

When the lawyers and clients in the gay marriage cases stand on the steps of the Supreme Court after arguing their case for marriage equality, all, or nearly all, of them are white. When the *New York Times* published a piece in the fall of 2014 by Adam Liptak, the paper's chief Supreme Court reporter, speculating about which of the several competing same-sex marriage cases were likely to be taken up by the Court, the

Times ran a photo to capture this horserace in the gay community. It featured three photographs, one of Ted Olson and the two male plaintiffs in “his” case, Paul Katami and Jeff Zarrillo; one of Jeffrey L. Fisher, the lawyer in the Oklahoma marriage case; and one of Roberta Kaplan, the lawyer in the Utah case who also argued the case for Edie Windsor in the Supreme Court in 2013. All of these people are white.³⁰ The heads of the biggest gay rights organizations—Lambda Legal, the Human Rights Campaign, the ACLU Lesbian Gay Bisexual & Transgender Project, the National Gay and Lesbian Task Force, the National Center for Lesbian Rights—are all white,³¹ as are the attorneys most visibly identified with this issue. Organizations in the LGBT community that have elevated people of color into leadership roles tend to be more grassroots oriented, and have not prioritized marriage equality to the same degree, or at all, as compared with the “Big Gay” shops.

For this reason, it’s not surprising that “gay marriage” is publically perceived to be a white issue. As Kenyon Farrow writes, “in order to be mainstream in America, one has to be seen as white.”³² “Being seen as white” is a task the marriage equality movement could pull off, while African Americans, by definition, just can’t.

Rightly or wrongly, homosexuality in general and the marriage equality movement specifically enjoy a kind of racial privilege that has underwritten the plausibility of this positive transformation in the meaning of gay identity. Here, as elsewhere, the project of identifying with another group, of seeing a shared sameness, is accomplished not only on the level of acknowledging a shared identity, but of recognizing a shared sense of what you are not. As such, identities are constituted through, not outside, difference. When judges, policy makers, or the media are persuaded that same-sex couples are sufficiently similar to different-sex couples when it comes to marriage, that recognition of shared identity is premised upon the specter of a constitutive outsider that gay couples are *not* like. And what they are not like is African Americans (even though, of course, many lesbians and gay men *are* African American).

This is what we see at work when the marriage equality movement enjoyed unimagined success at the same time that the Family Leader's "Marriage Vow" gained support for the idea that black people were better able to maintain stable, two-parent households when they were enslaved than they are today.³³ A conservative agenda that has demonized unmarried African American mothers as "welfare queens" and disparaged African American fathers as deadbeats is not undermined, and indeed might be furthered, by supporting marriage rights for same-sex couples. At the same time, the claims of same-sex couples to marriage rights is enhanced to the degree that they can differentiate themselves from dysfunctional, "broken" families. Of course, none of the advocates for marriage equality have argued this dissimilarity by explicitly referring to African American families. But they don't need to, as that work is being done more than competently by groups such as the Family Leader and their ilk. But, in many ways, that work is already part of the historical framing and ongoing moral imagination of marriage in the United States. A conception of marriage as the pinnacle of mature personhood and mutual responsibility is so saturated with racial and gender stereotypes that some things do not even have to be said to convey the feeling of truth and obviousness.

One of the challenges for the supporters of the marriage equality movement is to appreciate the costs to others of same-sex couples gaining rights in this context. This entails careful consideration of the negative externalities of certain arguments being made in the gay marriage cases, and attention to minimizing those externalized costs. Appeals to dignity, respectability, and the virtues of marriage ought to figure prominently in the inventory of arguments that are likely to offload stigma from gay couples to their constitutive outside, African American families most prominently.

- 42 Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* (New York: Basic Civitas Books, 2002), p. 25; Susan L. Brooks and Dorothy E. Roberts, "Social Justice and Family Court Reform," *Family Court Review* 40 (2002), p. 453.
- 43 *Baskin v. Bogan*, 766 F.3d 648, 663 (7th Cir. 2014), *cert. den.*, 135 S.Ct. 316 (2014), citing Gary Gates, "Same-Sex Couples in Wisconsin: A Demo-graphic Survey" (Williams Institute, UCLA School of Law, Aug. 2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/WI-same-sex-couples-demo-aug-2014.pdf>; Gary Gates, "Same-Sex Couples in Indiana: A Demographic Summary" (Williams Institute, UCLA School of Law, 2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/IN-same-sex-couples-demo-aug-2014.pdf>.
- 44 *Baskin v. Bogan*, 766 F.3d 648, 662 (7th Cir. 2014), *cert. den.*, 135 S.Ct. 316 (2014).
- 45 *Baskin v. Bogan*, at 663.
- 46 Rachel H. Farr and Charlotte J. Patterson, "Transracial Adoption by Lesbian, Gay, and Heterosexual Couples: Who Completes Transracial Adoptions and With What Results?," *Adoption Quarterly* 12 (2009), p. 195.

CHAPTER 5. THE AFTERLIFE OF RACISM AND HOMOPHOBIA

- 1 While Prop 8 was found by a federal judge in 2010 to violate the constitutional rights of gay people (*Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D.Cal. 2010)), its passage via popular vote in 2008 illustrates a troubling fact surrounding many of the victories for marriage equality: in many cases the courts (both state and federal) were out ahead of the majority of the people on the question of same-sex couples' entitlement to marriage rights. As such, the case for same-sex marriage illustrates well the "counter-majoritarian difficulty" inherent in a social movement that relies heavily on courts to bring about change that the majority of the people have not yet embraced. Alexander Bickel, *The Least Dangerous Branch: The Supreme Court and the Bar of Politics* (New Haven, CT: Yale University Press, 1986), pp. 16–22.
- 2 "Defining Marriage: State Defense of Marriage Laws and Same-Sex Marriage," *National Conference of State Legislatures*, <http://www.ncsl.org/research/human-services/same-sex-marriage-overview.aspx>; Moritz College of Law, "Research Guides: Same-Sex Marriage Laws," <http://moritzlaw.osu.edu/library/samesexmarriagelaws.php>.
- 3 "Southern Baptist President Fred Luter Links Gay Marriage to North Korean Threats," *On Top Magazine*, Apr. 1, 2013, <http://www.ontopmag.com/article.aspx?id=14839&MediaType=1&Category=26#>.
- 4 "Anti-Gay Pastor Claims Michael Sam May Marry 9-Year-Old Boy," *Richard Fowler Show* (YouTube), <http://www.youtube.com/watch?v=U-ET9p-haBs>.
- 5 Andy Towle, "MS Lawmaker Andy Gipson Says Gays Spread Disease, Suggest They Should Be Put to Death," *Towleroad* (blog), May 18, 2012, <http://www.towleroad.com/2012/05/ms-lawmaker-andy-gipson-says-gays-spread-disease-suggest-they-should-be-put-to-death.html>.

- 6 See Adam Nagourney, “Gays Targeted in a California Initiative,” *New York Times*, Mar. 24, 2015.
- 7 S.C. Code Ann. §§ 20–1–10 & 15 (Law. Co-op. Supp. 2004).
- 8 Tobias Barrington Wolff, “Interest Analysis in Interjurisdictional Marriage Disputes,” *University of Pennsylvania Law Review* 153 (2005), p. 2215.
- 9 David Murray, “Church Discusses Gay Parishoners,” *Great Falls Tribune*, Sept. 21, 2014; David Murray, “Gay Montana Couple Responds to Controversy,” *Great Falls Tribune*, Sept. 25, 2014; Frank Bruni, “‘I Do’ Means You’re Done,” *New York Times*, Sept. 23, 2014.
- 10 Wolff, “Interest Analysis,” p. 2227.
- 11 *Scott v. State*, 39 Ga. 321, 326 (1869).
- 12 *State v. Gibson*, 36 Ind. 389, 405 (Ind. 1871) (declaring right “to follow the law of races established by the Creator himself” to uphold constitutionality of conviction of a black man who married a white woman); *Green v. State*, 58 Ala. 190, 195 (Ala. 1877) (upholding conviction for interracial marriage, reasoning god “has made the two races distinct”).
- 13 *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (quoting trial court).
- 14 Rev. Rul. 71–447, 1971–2 C.B. 230; *Bob Jones University v. United States*, 461 U.S. 574 (1983).
- 15 *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 945 (D.S.C. 1966), aff’d in relevant part and rev’d in part on other grounds, 377 F.2d 433 (4th Cir. 1967), aff’d and modified on other grounds, 390 U.S. 400 (1968).
- 16 *Miller v. Jenkins*, 912 A.2d 951 (2006), 637 S.E.2d 330 (2006), 661 S.E.2d 822 (2008), 78 S.E.2d 268 (2009) 12 A.3d 768 (2010), 131 S.Ct. 568 (2010).
- 17 Sheryl Gay Stolberg, “Republicans Sign Brief in Support of Gay Marriage,” *New York Times*, Feb. 26, 2013; Cary Franklin, “Marrying Liberty and Equality: The New Jurisprudence of Gay Rights,” *Virginia Law Review* 100 (2014), pp. 820–23.
- 18 Brief for Kenneth B. Mehlman et al. as Amici Curiae Supporting Respondents at 2–3, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12–144).
- 19 Sheryl Gay Stolberg, “Obama’s Views on Gay Marriage ‘Evolving,’” *New York Times*, June 18, 2011.
- 20 *Hollingsworth v. Perry*, Brief for Respondents on Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, available at <http://www.afer.org/wp-content/uploads/2013/02/2013-02-21-Plaintiffs-Brief.pdf>. The ACLU attorney challenging Oregon’s ban on same-sex marriage similarly invoked “a badge of inferiority” as the injury of exclusion from marriage. “Oregon’s Marriage Equality Lawsuit: Attorneys Argue Marriage Ban Is Unconstitutional,” *Love: Oregon United for Marriage*, Apr. 23, 2014, <http://www.oregonunitedformarriage.org/oregons-marriage-equality-lawsuit-attorneys-argue-marriage-ban-is-unconstitutional/>.

- 21 Letter from Dale Carpenter et al. to Illinois Legislature on Same-Sex Marriage, Oct. 23, 2013, available at <http://blogs.chicagotribune.com/files/five-law-professors-against-changing-sb-10.pdf>.
- 22 Langston Hughes, "Silhouette," in *Selected Poems of Langston Hughes* (New York: Vintage, 1990), p. 171.
- 23 Frantz Fanon, *Black Skin, White Masks* (London: Pluto Press, 1986), p. 91.
- 24 *Ibid.*, p. 95.
- 25 *Perry v. Schwarzenegger*, Pretrial Proceedings and Trial Evidence Credibility Determinations Findings of Fact Conclusions of Law Order, 704 F.Supp.2d 921, 974, 980 (N.D.Cal. 2010).
- 26 *Varnum v. Brien*, Ruling on Plaintiffs' and Defendant's Motions for Summary Judgment, 2007 WL 2468667 (Iowa Dist.) (Trial Order)(2007).
- 27 Devon Carbado similarly argues that "the gay rights advocates' representative gay man, the person they presented as the icon of gay victimization, was white." The strategy was to present a "but for" gay man—"a man, who, but for his sexual orientation, was just like everybody else, that is, just like every other white heterosexual person." "Black Rights, Gay Rights, Civil Rights," *UCLA Law Review* 47 (2000), pp. 1467, 1472.
- 28 "Should Gay Marriage Be Legalized?," *Debate.org*, <http://www.debate.org/opinions/should-gay-marriage-be-legalized>.
- 29 Sarah Muller, "Dolly Parton: Gays 'Should Suffer Just Like Us Heterosexuals,'" *MSNBC.com*, May 1, 2014, <http://www.msnbc.com/the-last-word/dolly-parton-gay-marriage-support>.
- 30 Adam Liptak, "Seeking a Same-Sex Marriage Case Fit for History," *New York Times*, Sept. 22, 2014, p. A19.
- 31 A notable exception is the Gay and Lesbian Advocates and Defenders, whose executive director is a man of color, Janson Wu.
- 32 Kenyon Farrow, "Is Gay Marriage Anti-Black?," June 14, 2005, <http://kenyonfarrow.com/2005/06/14/is-gay-marriage-anti-black/>.
- 33 "Slavery had a disastrous effect upon African-American families, yet sadly a child born into slavery in 1860 was more likely to be raised by his mother and father in a two-parent household than was an African-American baby born after the election of the USA's first African-American president" ("Marriage Vow").

CHAPTER 6. WHAT MARRIAGE EQUALITY TEACHES US ABOUT GENDER AND SEX

- 1 Catherine Hall, *Civilising Subjects: Metropole and Colony in the English Imagination 1830–1867* (Chicago: University of Chicago Press, 2002), p. 189.
- 2 Patricia Dixon, "Marriage among African Americans: What Does the Research Reveal?," *Journal of African American Studies* 13 (2009), p. 29.
- 3 Banks, *Is Marriage for White People?*