

PARENTING WHILE BLACK

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INTRODUCTION: PARENTING WHILE BLACK

As a child, I delighted in stories about my mother and her four sisters. In one of my favorite narratives from 1944, my mother's three oldest sisters, not one of them older than nine at the time, were determined to take my infant mother and her twin to get vaccinated. Because they appreciated that such an obligation was serious, the older girls each put on their one good woolen dress—even though it was summertime—and then did the same for my mother and her twin. By the time the five girls reached the free clinic in Harlem, where they lived, they were sweating profusely. And the older girls were more than a little bit tired from pushing the twins' carriage. But they had successfully completed their mission. The babies were vaccinated and, in their minds, both protected and safe.

My younger self was so impressed by what my aunts had managed to do at such a young age. But, as I grew older and had children of my own, I began to hear the story, repeated by my mother and her sisters over the years, in a different register. The bravery of the girls remained. Yet, each telling made it clear that the girls were also afraid. What concerned them was not the walk through their beloved Harlem. Rather, what concerned them was how they—five poor, little Black girls—would be received when they got to the clinic. They had no parent with them.

In the end, the medical staff at the clinic were impressed by my aunts and their determination to get medical care for their sisters. But, as a law professor who writes at the intersection of race and family, I know that the story could have had a very different outcome. My grandfather, to be generous, was an infrequent presence in the home, and my grandmother worked days and sometimes nights as a domestic for a wealthy white family uptown. So, it wasn't only that her daughters were brave and wanted to care for their younger sisters. The reality was that, in some ways, the oldest girls were the babies' best option to get the medical care they needed. And my

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aunts and my grandmother knew it. My grandmother was engaged in what I call “parenting while Black.”

This Symposium on *The Law of Parents and Parenting* could not be more important in this moment. Changes in law and policy—not to mention developments such as the COVID-19 pandemic and its devastating effects on families—raise important questions about how to define parental rights and how to best support parents and children during these challenging times. The Symposium also presented important questions about issues of race, gender, sexuality, and class in our modern context. Even more salient in this space are issues of race. Here, as in other contexts, Black families, like my grandmother’s and so many others, are the “canaries in the mine.” Their experiences provide us with important insight into the signs of danger facing Black and Brown families. To that extent, the concerns of families, like my grandmother’s, should be at the center of our discussion around families and the challenges they face in this moment.

This Essay intervenes in the conversation hosted by the *Fordham Law Review* by focusing on issues of race, which, as I have indicated elsewhere, remain underexplored in family law scholarship.¹ More specifically, it endeavors to give greater context to the term “parenting while Black,” which I utilized in the narrative that launched this iniquity. In the wake of George Floyd’s death at the hands of police in 2020,² people of all walks of life are all too familiar with the phrase “driving, or even walking, while Black.”³ These phrases reference the scores of Black and Brown people killed or badly injured at the hands of white law enforcement officers, often when the need for such action was plainly unwarranted.⁴ In deploying the term “parenting while Black,” I mean to invoke not only the criminal justice context, but also all the systems that inform the functioning and well-being of families of color. Enumerating such systems provides us with a deeper appreciation of the obstacles that parents of color must navigate in trying to provide for their children.

To that end, this Essay also points to the strategies and programs that might be utilized in trying to improve the well-being of Black and Brown families. This focus does not mean to suggest that there is no overlap between the challenges that Black and non-Black parents face in rearing their children. That cannot be squared with what we know about modern families.⁵ At the same time, if we are to ensure that all families and their members can flourish, we must begin to grapple in earnest with race and the race-based structural barriers that severely hinder Black families and their members. In other words, the lives of poor Black parents must be front and center in our discourse in this space.

1. See generally R.A. Lenhardt, *The Color of Kinship*, 102 IOWA L. REV. 2071 (2017).

2. See generally Jennifer M. Kinsley, *Black Speech Matters*, 59 U. LOUISVILLE L. REV. 1 (2020).

3. See R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 819–20, 863 n.304 (2004).

4. See *id.* at 923.

5. See Lenhardt, *supra* note 1.

Part I begins by examining Black parental rights during slavery and the Jim Crow era. Many will no doubt think even a short dive into history is not necessary to address current problems. But, as this part will make plain, that history provides essential context to the past and our current moment. Part II then considers the modern context and the plethora of systems that work to undermine the rights of parents of color. Next, Part III asks what it could mean to center the parental rights of Black parents in discussions of parental rights in a way that lifts, rather than overlooks, how differently situated Black and other families of color are from most families in our current system. Finally, the Essay ends with a few words on what an effort to reimagine parental rights would look like for parents of color and their children.

I. BLACK PARENTAL RIGHTS UNDER SLAVERY AND JIM CROW

For good reason, most of the submissions to this wonderful Symposium focus on what parental rights mean today as family forms and structures shift and change,⁶ and what they should mean as a normative matter, especially given the conversation launched by the Biden administration about what families need to function and even flourish in our current context.⁷ Where Black parents are too often concerned, however, the past is prologue. It informs our past, but more importantly for purposes here, our future; a lens trained solely on the present can only provide so much insight. Because the standing of Black parents in the United States has always been deeply fraught, we must look backward, as well as forward, to comprehend fully how they are situated in this context.

Slavery provides an obvious starting point. The parental rights enjoyed by the parents at the center of most of the papers in this Symposium were ones that, as a formal matter, had almost nothing to do with the everyday lives of the Africans forcibly removed to what is now the United States. Indeed, as I have explained in prior work, a critical dimension of the slave system was the lack of parental control and formalization of intimate relationships and bonds.⁸ Informal manifestations of intimate bonds, such as “jumping the broom,” were sometimes tolerated or even supported by slaveholders.⁹ But any efforts to legalize such connections during bondage were generally not permitted by law.

Likewise, even where an enslaved person was plainly the biological parent of a child, they were not formally recognized as such.¹⁰ The law of slavery accounted for much of this.¹¹ Under its dictates, bondsmen and bondswomen in any one of the slaveholding states or territories had no agency or control

6. *Id.*

7. *See, e.g.*, CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* (2014).

8. *See* R.A. Lenhardt, *Marriage as Black Citizenship?*, 66 *HASTINGS L.J.* 1317, 1341 (2015).

9. TERA W. HUNTER, *TO ‘JOY MY FREEDOM: SOUTHERN BLACK WOMEN’S LIVES AND LABORS AFTER THE CIVIL WAR* (1997).

10. *See* Lenhardt, *supra* note 3, at 856.

11. *See id.*

over their offspring, who could be sold away from them at any time.¹² Perhaps just as important in this realm was the psychologic impact of slavery on enslaved persons and the people whom they regarded—whether legal or not—as family.¹³ Slavery and the extent to which it served to separate bondspeople from their kin denied them a sense of “belong[ing].”¹⁴ As I explained in prior work, the “alienation from family” is “perhaps what most helped to commodify slaves stolen from Africa.”¹⁵

With the end of slavery and the Fourteenth Amendment’s inclusion of African Americans into the polity, some of the obstacles to intimate relationships and parenting diminished. For example, in the wake of emancipation, individuals previously never regarded as family became such under law.¹⁶ Similarly, couples not satisfied with informal ways of recognizing their relation, such as the use of jumping the broom, no longer had to do so. Instead, they could request to be formally married, with all the obligations and burdens it imposed under the law.¹⁷

However, the freedom and intimate choice available to some was certainly not enjoyed by all. Indeed, state and local officials and even the Freedman’s Bureau established by the federal government often coerced former slaves uninterested in legal marriage or who preferred polygamous associations into marriage, sometimes under threat of punishment or even incarceration.¹⁸ Retreat from other kinds of promises made to former slaves can be seen in other areas as well. For example, former slaves who abided by mandates to marry were led to believe that they would be free to operate their families and homes as they saw fit and without intervention from government officials. All too soon, however, it became clear the opposite was true.

Postbellum officials at all levels of government saw Black marriages and households as a way of internalizing the tremendous needs of former slaves in the wake of slavery.¹⁹ Not incidentally, the regulatory measures taken by those white officials, such as imprisonment, also helped to generate a new source of labor in slavery’s wake.²⁰ For example, impoverished Black husbands and fathers deemed not to have fulfilled their obligations as a partner or parent were frequently sentenced to hard labor camps as punishment for violations such as “bastardy, illegitimacy, and vagary,” among other things.²¹ Even more significantly, Black children were also

12. *See id.* at 866. *See generally* TONI MORRISON, *BELOVED* (1987) (illustrating the story of a former slave whose children were sold and separated from her).

13. *See* Lenhardt, *supra* note 8, at 1353.

14. *See* Lenhardt, *supra* note 3, at 852–54.

15. *Id.* at 855. Notably, the mistreatment of families of color in the United States was not limited to African Americans. For example, Native Americans, Asian Americans, and Puerto Rican Americans were among those who also saw their family ties undermined by private or government actors. *See* Lenhardt, *supra* note 8, at 1328–35.

16. *See* Lenhardt, *supra* note 3, at 857.

17. *See* Lenhardt, *supra* note 8, at 1338–39.

18. *See id.* at 1328.

19. *See id.* at 1350 n.213.

20. *See id.* at 1341.

21. *Id.* at 1341–42.

sometimes sent to programs of this sort.²² The removal of children from their homes to farms that were essentially plantations very often happened without their parents' knowledge or permission.²³ Indeed, the government did not respect Black parental rights during this time. Government authorities frequently worked in concert with white farm owners in developing so-called apprenticeships or, more accurately, newly fashioned plantations.²⁴ The rights of Black parents were simply not mentioned or even acknowledged in far too many instances.²⁵

II. THE CHALLENGE OF BLACK PARENTING TODAY

A great deal has happened since my aunts took it upon themselves to seek medical care for their infant sisters, an effort that resonates so much in this moment. In the time since their trip to the clinic unfolded, our country witnessed a major Civil Rights Movement and the passage of major civil rights laws, including the Voting Rights Act of 1965²⁶ and the Civil Rights Act of 1964.²⁷ It also witnessed the election of both the first Black president of the United States, Barack Obama, as well as the first woman and person of color vice president, Kamala Harris.²⁸

Because of these and other developments—including the protests challenging police mistreatment of Black people recently sparked in places like Minneapolis, New York, Los Angeles, and Washington, D.C.—we have developed a different way to talk about the impact of race on families. This is true not only for Black people, but also for other groups. Even with the hostility of some to issues of race, one can still recognize that people of all racial backgrounds might find themselves watching a made-for-TV movie detailing the brutal lynching of Emmett Till.²⁹ Similarly, one might find that

22. *Id.*

23. *Id.*

24. See Richard Paul Fuke, *Planters, Apprenticeship, and Forced Labor: The Black Family Under Pressure in Post-Emancipation Maryland*, 62 AGRIC. HIST. 57, 59 (1988). In Maryland, planters apprenticed as many as 3000 children under the state's relevant Black Code provision. *Id.* at 58.

25. See *id.*

26. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

27. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

28. Lisa Lerer & Sydney Ember, *Kamala Harris Makes History as First Woman and Woman of Color as Vice President*, N.Y. TIMES (Aug. 26, 2021), <https://www.nytimes.com/2020/11/07/us/politics/kamala-harris.html> [<https://perma.cc/6DXL-6ERP>]; *Presidents: Barack Obama*, THE WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/presidents/barack-obama/> [<https://perma.cc/2PFT-JUX8>] (last visited Apr. 2, 2022). The first Black woman to be nominated to the U.S. Supreme Court, Judge Ketanji Brown Jackson, was recently confirmed by the U.S. Senate. *The Senate Confirms Ketanji Brown Jackson to Serve on the U.S. Supreme Court*, THE WHITE HOUSE, <https://www.whitehouse.gov/kbj/> [<https://perma.cc/R3LK-WLAJ>] (last visited Apr. 22, 2022).

29. See Caroline Framke, *ABC's 'Women of the Movement' Takes on the Emmett Till Case, and a Black Mother's Grief That Remains Too Familiar: TV Review*, VARIETY (Jan. 6, 2022, 8:00 AM), <https://variety.com/2022/tv/reviews/women-of-the-movement-review-emmett-till-1235146681/> [<https://perma.cc/7PDL-3HZB>].

Black parents are not the only parents who feel compelled to engage in “the talk,”³⁰ a conversation about racial bias among law enforcement and the steps even very young Black girls and boys should take to ensure their safety. White parents, if not engaging in the talk themselves, have increasingly become aware of this issue and its impact on others.

In the end, however, even the very best of intentions will not—without more—be sufficient to scale the obstacles that impede access and full belonging for people like my grandmother. The main problem in this context is not discrimination per se, although it sometimes plays a role. Nor can it primarily be linked to implicit bias.³¹ Instead, structural racial inequality accounts for ongoing racialized systems that make people, like my grandmother, victims of “locked in segregation” and other barriers to full inclusion.³²

To see how complex this problem is and how quickly a person can become ensnared in this complex web, imagine an elderly grandmother who is raising two grandchildren, one a boy and the other a girl. The grandmother has worked for decades, but still has not been able to secure as much wealth as her peers, many of whom have been able to draw on family wealth that she, as a Black woman, has never been able to draw on. Things were better when her son, the father of the grandchildren she is now rearing, was able to help. But he is incarcerated and can no longer contribute to the household as he had done for years.

Through hard work and saving, this grandmother has been able to save enough to buy her own home. However, the home is in an all-Black neighborhood, where her house value is unlikely to generate wealth at a pace that a house in the nearby, predominantly white neighborhood would.³³ Most concerning for this grandmother, however, is the school system where her grandchildren attend school. It is better than some others in the area where she lives, but the resources are not nearly as good as the resources she knows that white children have access to in the broader area. To make matters worse, her sense is that the school has become increasingly surveilled. Instead of teachers monitoring the activities of children enrolled, she has become aware that police officers have become an increasing presence at the school. While her grandchildren have yet to have any problems, she has become aware of incidents where police officers have handcuffed children in the school and sent them to the police station. This “adultification” of young Black children reminds her of the kinds of troubles that her now incarcerated adult son became embroiled in as a younger person.

30. Gustavo Solis, *For Black Parents, the Talk Binds Generations and Reflects Changes in America*, USC NEWS (Mar. 10, 2021), <https://news.usc.edu/183102/the-talk-usc-black-parents-children-racism-america/> [<https://perma.cc/692P-PGV9>].

31. See generally MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* (2013).

32. Daria Roithmayr, *Locked in Segregation*, 12 VA. J. SOC. POL’Y & L. 197 (2004).

33. For more on the racialized wealth gap, see generally DOROTHY A. BROWN, *THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS AND HOW WE CAN FIX IT* (2021).

While fictional, this narrative provides a real-world sense of how systemic racism works. It involves not just one system of inequality, but numerous systems working in concert in ways that ultimately undermine parental decision-making, especially for poor parents of color.

Structural racism ensnares parents and other caregivers of color in a web of inequality that they cannot, without serious intervention, dismantle. In other words, structural racism undermines the decision-making authority and caregiving that parents and caregivers of color can provide to their children.

III. PARENTAL RIGHTS AS A NECESSARY BUT INSUFFICIENT GOAL

This Symposium has offered important insight into parental rights and the nature of modern-day families. In so doing, it has also emphasized the notion of rights in this realm and their importance to families. While I did not object to this framing, I think it is important to question this framing. As Part I's discussion of Black families and intimates during slavery and the Jim Crow era makes clear, rights alone will not secure meaningful standing and equality for families of color. Just as we see in areas such as criminal justice, employment, or education, rights—without more—will not be enough to ensure standing for Black people or other people of color.³⁴ Rights alone could not have guarded against the incident that led to George Floyd's death at the hands of police and could not have prevented so many of the race-involved events that have taken place in recent years. For real change to take root, we need to disrupt the systems that inform and circumscribe the lives of so many people of color. We need to think deeply about the practices and vectors that inform our current practices. In other words, we need real change.

CONCLUSION: BLACK PARENTS AS A WINDOW ON STRUCTURAL RACISM AND CHANGE

I started this Essay with a story about my family, so it only seems fit to end that way as well. No one then, or perhaps even now, would describe my grandmother or her amazing gaggle of girls as the “canary in the mine.” And yet, in so many ways, they showed themselves to be just that. Efforts big or small to disrupt barriers that make it possible for families of color to not merely survive, but to flourish, are exactly what we need in this moment. They provide us with critical insights into systems and practices that undermine family functioning, as well as those that lift them up.

34. For a discussion of rights in the criminal justice realm, see generally Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH. L. REV. 245 (2010).