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Is Gay the New Asian?: Marriage Equality and the Dawn of a New Model Minority

Stewart Chang†

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INTRODUCTION

Obergefell v. Hodges marks a decisive milestone in the United States in the recognition of same-sex couples as equal citizens with equal rights. In *Obergefell*, the United States Supreme Court held that state statutes restricting marriage rights from same-sex couples were unconstitutional as matters of due process and equal protection. Many hailed the decision as a victory for equality in the United States, comparing *Obergefell* to landmark decisions during the Civil Rights Era, including *Brown v. Board of Education* and *Loving v. Virginia*.[1] Indeed, Justice Kennedy cites *Loving* numerous times throughout the decision, and situates *Obergefell* within its tradi-

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1. *See, e.g.*, Akhil Reed Amar, *Anthony Kennedy and the Ghost of Earl Warren*, SLATE: OUTWARD (July 6, 2015, 4:17 PM), http://www.slate.com/blogs/outward/2015/07/06/obergefell_v_hodges_anthony_kennedy_continues_the_legacy_of_earl_warren.html.

tion. In *Loving*, Justice Warren affirms marriage as a fundamental civil right,[2] and in *Obergefell*, Justice Kennedy further elevates marriage to a foundational, organizing principle of civilization. Historically in the United States, equal citizenship has often been tied to access to marriage and family, which is more related to the penumbral right of privacy set in *Griswold v. Connecticut*. *Obergefell* continues this tradition. Thus, while *Obergefell* has generally been regarded as a victory for same-sex equality, some critics remain wary of the type of equality promoted by *Obergefell*, particularly due to the normative implications of Kennedy's promotion of marriage.[3]

In some respects, *Obergefell* is as much a defense of marriage as it is a civil rights case for gay and lesbian Americans. The decision also highlights the priority of marriage as a due process privacy right rather than an issue of equal protection. *Obergefell* emphasizes the centrality of marriage and family to American culture and citizenship, yet in doing so, also suggests that equal citizenship necessarily involves marriage and family. Indeed, in his closing statement, Justice Kennedy ties "equal dignity in the eyes of the law" to the hope of not being "condemned to live in loneliness, excluded from one of civilization's oldest institutions."[4] Kennedy defines access to family formation as access to equal citizenship, implying that anything less is incomplete and unequal. Thus, sexual minorities become inferior citizens when they are excluded from normative structures of marriage, and equality means creating inclusion through assimilation into the norm. The *Obergefell* decision, then, represents the opportunity for gay individuals to be "normal." By implication, however, once equal access to marriage has been granted, those who decline the opportunity remain incomplete by their own choice. With Kennedy's valorization of marriage and pejorative representation of alternative forms, *Obergefell* runs the risk of turning a certain segment of the gay community into a mechanism to discipline and marginalize nonconforming populations.

The path of initial rejection and regulation, followed by eventual acceptance and assimilation for the gay community, mirrors the trajectory of Asian Americans in the United States. Gay individuals were once ostracized as a threat to the American family and therefore required regulation. However, *Obergefell* now sets its plaintiffs as quintessential models of marriage and what it stands for in American society. Similarly, Asian

2. Loving v. Virginia, 388 U.S. 1, 12 (1967) (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) ("Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival.").

3. *See, e.g.*, Katherine Franke, *"Dignity" Could Be Dangerous at the Supreme Court*, SLATE: OUTWARD (June 25, 2015, 4:16 PM), http://www.slate.com/blogs/outward/2015/06/25/in_the_scotus_same_sex_marriage_case_a_dignity_rationale_could_be_dangerous.html; Nan D. Hunter, *The Undetermined Legacy of 'Obergefell v. Hodges,'* THE NATION (June 29, 2015), http://www.thenation.com/article/the-undetermined-legacy-of-obergefell-v-hodges/.

4. Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

Americans were once considered a sexually subversive threat to the American family, and were subsequently excluded for decades through racially discriminatory immigration laws. Eventually, however, they were reconstructed monolithically into a model minority whose success through strong family values and work ethic has validated the belief that America has progressed into a meritocracy where race no longer matters. The success of Asian American families in the United States is often evoked to demonstrate how equal citizenship is gained not through assistance and reparation for past harms, but through hard work and discipline that reflect strong family values. The model minority stereotype is thus deployed in order to suggest that racism is not the true cause of continuing inequities, but something else. Underperformance of other minority groups is blamed on the unwillingness to work hard, which is often associated with weak family values. Around the same time Asian Americans were being praised as a model minority for having strong families, the underperformance of African Americans was being blamed on their weak family structures.

Obergefell represents the culmination of an incrementalist approach towards gay rights that begins with decriminalization of anti-sodomy and terminates with the legalization of same-sex marriage.[5] In line with the incrementalist approach, the legal strategy for *Obergefell* focused on how gay families typify core American family values; like Asian Americans, gay Americans are praised as hard-working citizens who contribute to their communities. The casting of gay individuals as model Americans has promoted a growing sense of their normalcy and thus their equality with the rest of the American populace—that they are the same as other Americans and therefore deserve the same rights.[6] Thus, gay individuals become equal citizens through assimilation into American norms of family,[7] while their differences from the norm are underplayed. Victory on these terms, however, suggests a causal relationship between equal citizenship and homogeneity. By focusing so keenly on marriage, the incrementalist movement and the resulting decision in *Obergefell* narrowly defines how gay individuals can achieve equal protection in the United States to the exclusion of other choices besides marriage. Now that formal equality has been granted through access to marriage, those who remain excluded do so from their own fault or choice.

5. *See* Jeremiah A. Ho, *Weather Permitting: Incrementalism, Animus, and the Art of Forecasting Marriage Equality After* U.S. v. Windsor, 62 CLEV. ST. L. REV. 1, 7 (2014) ("By consensus, [William] Eskridge, [Yuval] Merin, and [Kees] Waaldijk all prescribe those steps in the following sequence: (1) the decriminalization of consensual same-sex intimacy occurs first; (2) then anti-discrimination against sexual minorities is furthered; and (3) lastly, the relationships of same-sex couples are then legally recognized. Once a state has crossed these three steps, the conditions for marriage equality will then be most evident.").

6. Mathew S. Nosanchuk, *Response: No Substitutions, Please*, 100 GEO. L.J. 1989, 1995 (2012).

7. *See* Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMP. L. REV. 709, 710–11 (2002).

This Article analyzes the historic role of family in the politics of exclusion in the United States, evaluates the ways in which the stereotyping of Asian Americans as a model minority has perpetuated these politics, and warns against the possibility of a similar fate for gay and lesbian Americans. As a model minority, Asian Americans have been set as a standard against which other minority groups, particularly African Americans, are measured. Around the same time Asians were being extolled for their hard work and family values,[8] Congress released the Moynihan report on the problem of broken families in the African American community. Whereas Asians were thought of as similar to the white mainstream in their family values, African Americans were deemed widely opposite.[9] This Article analyzes how *Obergefell* employs a similar rhetoric of comparison and considers the dangers of the gay community turning into a new model minority. As Chris Iijima notes, "the very notion of an 'honorary white' serves to further codify the notion of white supremacy since 'it promotes whiteness as an ideal.'"[10] This Article argues that the construction of Asian Americans, and now gay Americans, as sexual model minorities promotes the supremacy of normative family in American culture as a means of disciplining nonconforming minority groups.

Part I accounts and analyzes how cultural ideals of the American family played a central role in stereotypes that led to Asian American exclusion and inclusion across the nineteenth and twentieth centuries. Previously demonized as sexual deviants who required regulation and exclusion, Asian Americans were reconstructed into a model minority that epitomized American hard work and family values in comparison to other racial minority groups. Part II recounts and critiques how ideals of family previously deployed to justify the oppression of gay Americans were subsequently embraced in the successful legal strategies of incrementalist gay rights activists. Yet the emergence of committed gay couples as a new sexual model minority has come at the cost of marginalizing other forms of gay identity, which often involve racial dynamics. Part III evaluates and warns against the dangers of embracing the model minority stereotype, particularly in its implementation as a normalizing method of Foucauldian discipline and population control. Under the semblance of egalitarianism, marriage equality, like the model minority myth, reifies conservative institutions of

8. Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 225 (1995) ("The model minority myth of Asian Americans has been used since the Sixties to denigrate other nonwhites.").

9. *See* DANIEL PATRICK MOYNIHAN, U.S. DEP'T OF LABOR, OFFICE OF POLICY PLANNING & RESEARCH, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1–2) (1965), http://www.utexas.edu/cola/coretexts/_files/resources/texts/1965%20Moynihan%20Report.pdf.

10. Chris K. Iijima, *Political Accommodation and the Ideology of the "Model Minority": Building a Bridge to White Minority Rule in the 21st Century*, 7 S. CAL. INTERDISC. L.J. 1, 27 n.95 (1998) (citing Frank H. Wu, *From Black to White and Back Again*, 3 ASIAN L.J. 185, 207 (1996)).

family that promote a neoliberal status quo and enable continued inequality.

Both Asian Americans and gay Americans have historically been differentiated from normative families in order to justify their exclusion and marginalization, and yet they have now been assimilated into the norm to exclude and marginalize other minority groups. In the same way that the success of Asian American families has been used to perpetuate the myth of color-blindness, the success accorded to gay families through *Obergefell* holds the potential for promoting the myth of sexuality-blindness. These myths chill the need for further reform. Furthermore, by blending into the norm, model minorities acquire a degree of invisibility, so that they are no longer considered minorities who need protections against continuing inequities and discrimination.[11] Because the model minority stereotype is applied monolithically, it ignores the nuances and variances of subsets within these groups, which allow such subgroups to be further marginalized. In the same way that not all Asian American groups have access to educational and economic attainment, not all gay people may want or even have access to marriage for reasons outside of law.

I. ASIAN IMMIGRATION AND THE AMERICAN FAMILY: SHIFTING THE RHETORIC FROM EXCLUSION TO ASSIMILATION

The valorization of family is consistent with the history of civil rights in the United States. In 1967, the Supreme Court in *Loving v. Virginia* overturned Virginia's anti-miscegenation statute for violating both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.[12] In *Loving*, Chief Justice Warren recognized that "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[13] Although *Loving* did not venerate marriage as much as *Obergefell* did, and focused more on equal protection than right of privacy grounds, the sanctity of family nevertheless proved as important in the time of *Loving* as it does today. Even as the Civil Rights movement advanced racial equality, it simultaneously promoted a particular vision of marriage. While the Supreme Court was eliminating racial disparities in marriage laws and declaring family formation to be a fundamental constitutional right, Congress debated the elimination of the racist national origins quotas in immigration policy and promoting family reunification as the dominant method of immigration in the late twentieth century. Yet what began as a unified movement towards the elimination of discrimination for all racial minori-

11. Ruthann Robson, Beginning from (My) Experience: The Paradoxes of Lesbian/Queer Narratives, 48 HASTINGS L.J. 1387, 1419 (1997) ("Gay 'success stories' of achievement, especially economic achievement, are harnessed by conservatives to demonstrate their claim that sexual minorities do not suffer discrimination.").

12. Loving v. Virginia, 388 U.S. 1 (1967).

13. *Id.* at 12 (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

ties soon fractured across the issue of family unity and integrity.

The model minority stereotype of Asian Americans has been used to justify exclusion of African Americans by suggesting that the success of Asian Americans is attributable to conformity to American family values. Kevin Johnson has noted how "[h]istorically, an inverse relationship often has existed between the legal treatment of different racial minorities in the United States."[14] Roughly a century before *Loving*, as African Americans were first being granted equal citizenship rights during Reconstruction, discrimination turned towards another insular minority group, the Chinese.[15] Whereas African Americans were regarded as "native" Americans, the Chinese were regarded as "foreign" and unassimilable, particularly due to their cultural practices regarding family, such as arranged marriage and concubinage.[16] Not long later, however, the positions of Asian Americans and African Americans were reversed. Although the elimination of racist immigration quotas affecting Asians came hand in hand with racial equality reforms during the Civil Rights Era, Asians were soon thereafter constructed monolithically as a "model minority" to discipline other minority populations, especially African Americans.[17] The model minority myth is deployed not only to promote conformity to the norm, but also to justify a system of exclusion. The myth insinuates that Asian Americans, despite being a racial minority who were historically discriminated against, have quickly been able to access economic success and structural equality in the United States without special assistance, but through their own hard work and rugged individualism.[18] Their success in the United States is customari-

14. Kevin R. Johnson, *Immigration, Civil Rights, and Coalitions for Social Justice*, 1 HASTINGS RACE & POVERTY L.J. 181, 185 (2003).

15. *Id*. ("With the harshest treatment generally reserved for African Americans formally declared unlawful, the nation transferred animosity to another discrete and insular racial minority whose immigration status, combined with race, made such treatment more legally defensible as well as socially acceptable. For example, in the congressional debates over ratification of the Fourteenth Amendment, a member of Congress declared that Chinese persons could be treated less favorably than African Americans because "[the Chinese] are foreigners and the Negro is a native.").

16. *Id*.; John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws*, 3 ASIAN L.J. 55, 79–80 (1996) (noting remarks by Representative William Higby of California during debates as to whether the Fourteenth Amendment should extend to the Chinese: "Sir, they do not propagate in our country. A generation is not growing up in the State, except an insignificant few in comparison with the great number among us. Judging from the daily exhibition in our streets, and the well-established repute among their females, virtue is an exception to the general rule. They buy and sell their women like cattle, and the trade is mostly for the purpose of prostitution. That is their character. You cannot make citizens of them.").

17. Paul Wong, Chienping Faith Lai, Richard Nagasawa, & Tieming Lin, *Asian Americans as a Model Minority: Self-Perceptions and Perceptions by Other Racial Groups*, 41 SOC. PERSP. 95, 96–97 (1998).

18. *See, e.g.*, Morrison G. Wong, *The Education of White, Chinese, Filipino, and Japanese Students: A Look at "High School and Beyond,"* 33 SOC. PERSP. 355, 370 (1990) ("One of the basic tenets of the American educational system is that it serves as the great equalizer; that regardless of social and economic background, anyone can 'make it' to the top, can go as high or as far as they wish. It is presumed that the educational system is a meritocratic system based strictly on ability, hard work, and rug-

ly attributed to their strong family values.[19] In this way, the normative family has been a primary crux upon which the legal fortunes of minority populations in the United States have historically shifted.

A. Family Ideation and Early Stereotypes of Asians as Sexualized Yellow Peril

Again, public attitudes toward Asian Americans had not always been favorable. For almost a century, Asians were regarded as the antithesis of the normative American family. The treatment of early Chinese Americans in the nineteenth century demonstrates the emblematic link between citizenship and family in the United States.[20] Even as African Americans' rights as equal citizens were promoted to provide access to familial rights previously put in flux by slavery,[21] Chinese were being denied the ability to form families.

Although Asian Americans have been present in the United States since at least the nineteenth century, they were not able to come to the United States in significant numbers until the middle of the twentieth century due to immigration restrictions that were based on negative stereotypes of Asians. Though immigration in the United States was generally unrestricted for the first century of the nation's existence, Asians were the first and only group to be excluded from immigration on account of race, beginning with the Chinese. Congress did not exercise federal immigration authority until the end of the nineteenth century in response to growing animosity towards Chinese immigrants. Although resistance against Chinese immigration began as an issue of labor competition, the rhetoric of public morality and family values became a rallying point for restrictive immigration legislation. Chinese were demonized as immoral, unassimilable, and threatening to the nation. They were specifically cast as a subversive threat to white nuclear families.

The sexual demonization of the Chinese was facilitated by the circumstances of their initial entry. During the nineteenth century, to accelerate the westward expansion of the nation, Congress passed the Pacific Railroad

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ged individualism.").

19. Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CALIF. L. REV. 1053, 1083 (1994) ("The model minority theory posits that, because Asian Americans value family, education, and hard work, they achieve economic success."); Frank H. Wu, *Neither Black nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 238 (1995) ("Asian Americans are intelligent, hard-working, family-oriented, law-abiding, and as a result, highly successful and upwardly-mobile. Thus, an entire racial group can be rendered the equivalent of a single successful white man.").

20. *See* Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 406–07 (2005) ("Marriage is often conceptualized as a ritual that both reflects and enacts citizenship. Indeed, it is precisely this positive relationship between marriage and citizenship that explains why marriage continues to be heterosexually policed.").

21. *See* Julie Novkov, *The Thirteenth Amendment and the Meaning of Familial Bonds*, 71 MD. L. REV. 203 (2011).

Acts of 1862 and 1864 that authorized and funded the construction of the transpacific railroad, which would connect the West coast to existing railroads in the Midwest.[22] Construction of the railroad would commence from both ends and meet in the middle at Promontory Summit, Utah.[23] Many of the laborers who built the railroads were recent immigrants. Whereas most of the immigrant laborers for the expansion westward from the East Coast originated from Europe, railroad companies heavily recruited the Chinese to meet labor demand for the expansion eastward from the West Coast.[24] Because this type of labor entailed hard and often dangerous physical labor, railroad companies initially focused on recruiting young, able-bodied men who could come without families, which resulted in a heavily disproportionate ratio of men to women among Chinese immigrants.

When the transcontinental railroad was completed in 1869, the supply of unskilled Chinese laborers without work suddenly spiked, bolstering public support for Chinese exclusion. Although initially welcomed as a ready source of cheap labor, public attitudes quickly shifted against the Chinese as they became competitors to white labor in the West.[25] However, because immigration regulation was a federal power, proponents of Chinese exclusion needed to expand the "Chinese problem" from a local labor issue in the West into a larger federal problem.[26] Thus, the "Chinese problem" was framed as a moral culture war that required national attention. Labor unions fomented general public sentiment against the Chinese by collectively stereotyping them as "thieves" and "prostitutes."[27] The Chinese were constructed as culturally unassimilable because of their moral and sexual differences,[28] which not only rendered them unworthy of full citi-

22. Pacific Railroad Act of 1862, ch. 120, 12 Stat. 489 (1862); Pacific Railroad Act of 1864, ch. 217, 13 Stat. 365 (1864).

23. Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33, 58 (2006).

24. Bill Ong Hing, *The Immigrant as Criminal: Punishing the Dreamer*, 9 HASTINGS WOMEN'S L.J. 79, 86 (1998); Patricia I. Folan Sebben, Note, *U.S. Immigration Law, Irish Immigration and Diversity: Cead Mile Failte (A Thousand Times Welcome*)?, 6 GEO. IMMIGR. L.J. 745, 750 (1992) ("the labor provided by Irish immigrants remained a needed commodity, especially after the Civil War when railroads were being laid.").

25. *See generally* ALEXANDER SAXTON, THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA (1971) (examining how the anti-Chinese movement on the Pacific Coast rationalized by the white majority primarily through the Democratic party and the labor movement of California).

26. ANDREW GYORY, CLOSING THE GATE: RACE, POLITICS AND THE CHINESE EXCLUSION ACT 75 (1998) ("Racial politics, which had proved effective in the past, would be resurrected. The politics would not be white versus black, however, but 'Caucasian' versus Chinese. The upcoming election would make 1876 the year that Chinese immigration became a presidential political issue for the first time.").

27. PETER KWONG & DUSANKA MISCEVIC, CHINESE AMERICA: THE UNTOLD STORY OF AMERICA'S OLDEST NEW COMMUNITY 92 (2005) ("An article published in their mouthpiece, the Journal of United Labor, maintained that the Chinese [were] "natural thieves" and referred to all Chinese women as 'prostitutes'.").

28. Keith Aoki, *"Foreign-ness" and Asian American Identities: Yellowface, World War II Prop-*

zenship rights,[29] but also demanded their eventual exclusion. Prostitution within the Chinese population, in particular, became an object of study and scrutiny,[30] and generated a public health and safety concern that demanded government intervention.[31]

The first immigration restriction against the Chinese capitalized on perceptions of them as sexual deviants and predators. Chinese culture was demonized as barbaric and backwards specifically for their treatment of women. Media reports suggested that Chinese women were bred for the purposes of prostitution, in contrast to American values.[32] In his 1874 annual address to the nation, President Ulysses Grant referenced the "Chinese problem" as stemming from a culture conditioned to condone slavery and sexual debasement.[33] He later signed into law the Page Act of 1875, the first immigration law ever in the United States.[34] The Page Act specifically targeted Chinese women for exclusion based on the assumption that they were entering for the purposes of prostitution.[35]

The Page Act further skewed the gender ratio of Chinese in America.[36] The immigration restriction that prohibited the entry of Chinese women, coupled with existing anti-miscegenation statutes,[37] ensured that Chinese

aganda, and Bifurcated Racial Stereotypes, 4 ASIAN PAC. AM. L.J. 1, 20 (1996).

29. Torok, *supra* note 16; Neil T. Gotanda, *Citizenship Nullification: The Impossibility of Asian American Politics, in* ASIAN AMERICANS AND POLITICS: PERSPECTIVES, EXPERIENCES, PROSPECTS 79, 82 (Gordon H. Chang ed., 2001) ("Citizenship remains one of the crucial legal and political categories around which the exercise or denial of democratic right turns.").

30. *See generally* NAYAN SHAH, CONTAGIOUS DIVIDES: EPIDEMICS AND RACE IN SAN FRANCISCO'S CHINATOWN (2001).

31. *See generally* MICHEL FOUCAULT, HISTORY OF SEXUALITY VOL. 1: AN INTRODUCTION 39–145 (Robert Hurley trans., Vintage Books 1990) (1978).

32. ELMER CLARENCE SANDMEYER, THE ANTI-CHINESE MOVEMENT IN CALIFORNIA 25 (1939) (describing how the Marin Journal characterized a typical Chinese woman as "a prostitute from instinct, religion, education, and interest, and is degrading to all around her.").

33. ROGER DANIELS, ASIAN AMERICA: CHINESE AND JAPANESE IN THE UNITED STATES SINCE 1850 44 (1988) (quoting President Grant's 1874 annual address: "I call the attention of Congress to a generally conceded fact—that the great proportion of the Chinese immigrants who come to our shores do not come voluntarily, to make their homes with us and their labor productive of general prosperity, but come under contracts with headmen, who own them absolutely. In a worse form does this apply to Chinese women. Hardly a perceptible percentage of them perform any honorable labor, but they are brought for shameful purposes, to the disgrace of communities where settled and to the great demoralization of the youth of those localities. If this evil practice can be legislated against, it will be my pleasure as well as me duty to enforce any regulation to secure so desirable an end."); *see also* Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 659 ("Chinese culture, then, was believed to condone a form of slavery that was antithetical to American notions of marriage and consent. This culture had almost biological roots in the Chinese race; their 'servile disposition' was 'inherited from ages of benumbing despotism.').

34. Page Act, ch. 141, 18 Stat. 477 (1875) (repealed 1974).

35. *See* Abrams, *supra* note 33.

36. Stewart Chang, *Immigration (Overview)*, in ASIAN AMERICAN SOCIETY: AN ENCYCLOPEDIA (Mary Yu Danico and J. Jeffery Golson, eds.) 490, 491 (2014); Kerry Abrams, *The Hidden Dimension of Nineteenth-Century Immigration Law*, 62 VAND. L. REV. 1353, 1387-88 (2009).

37. *See, e.g.*, Cal. Civ. Code **§** 60 (Deering Supp. 1905) (declaring "all marriages of white persons with negroes, Mongolians, or mulattoes are illegal and void.").

men had no access to marriage and remained single.[38] The unmarried status of the Chinese bachelor community became further evidence of their sexual deviance and abnormality in comparison to the white American family.[39] These sexualized stereotypes fueled the call for further exclusion of the Chinese. In Congressional debates regarding the Fifteen Passenger Bill in 1879, which sought to block any vessel carrying more than fifteen Chinese passengers, supporters of the bill argued that the "Chinese had no regard for family, did not recognize the relationship of husband and wife, [and] did not observe the tie of parent and child."[40] Anti-Chinese sentiment finally culminated in the passage of the Chinese Exclusion Act of 1882, which continued to deploy stereotypes of the Chinese as moral and sexual deviants.[41] The Chinese Exclusion Act was subsequently renewed and expanded in 1884, 1888, and 1892.[42]

The Chinese Exclusion Act was the first in a series of restrictive immigration laws that targeted Asian immigrants who came after the Chinese. Congress enacted the Immigration Act of 1917, which created an "Asiatic Barred Zone" that banned immigration from almost all parts of Asia.[43] Congress then passed the Immigration Act of 1924 that excluded all aliens

38. Todd Stevens, *Tender Ties: Husbands' Rights and Racial Exclusion in Chinese Marriage Cases, 1892–1924*, 27 LAW & SOC. INQUIRY 271, 272 (2002) ("The scarcity of women facilitated the rise of a bachelor culture, hindered the creation of Chinese American families in the United States, and led many men to return to China. The reasons that so few Chinese women immigrated to the United States had domestic as well as international roots: restrictive U.S. immigration laws, especially those concerning prostitution; the discriminatory climate for Chinese in the United States; and transnational family networks that required women to remain in China.").

39. *See* SHAH, *supra* note 30.

40. SHIH-SHAN HENRY TSAI, THE CHINESE EXPERIENCE IN AMERICA 59 (1986).

41. Kitty Calavita, *Collisions at the Intersection of Gender, Race, and Class: Enforcing the Chinese Exclusion Laws*, 40 LAW & SOC'Y REV. 249, 259–60 (2006) (describing Congressional debates over the Chinese Exclusion Act: "In the House of Representatives, it was proclaimed, 'There are from 1,200 to 2,000 [Chinese women] in the city [of San Francisco], and they are all prostitutes or concubines, or second wives' (Congressional Record 1882: 47th Cong., 1st sess., Vol. 13, pt. 4, 1903); 'Out of the four or five thousand Chinese females in California there are not six who pretend to be good women' (Congressional Record 1882: 47th Cong., 1st sess., Vol. 13, pt. 4, 1936); 'Few [Chinese women] come here except from Chinese brothels, or raised for prostitution in China, which is a business there' (Congressional Record 1882: 47th Cong., 1st sess., Vol. 13, pt. 4, 1903); and, 'Their women are imported as slaves and are brought here and held here as slaves' (Congressional Record 1882: 47th Cong., 1st sess., Vol. 13, pt. 4, 1903). Condemning Chinese men for not bringing their families with them as an indication of their moral depravity, one senator reported, '[H]is associations are with harlots of his own race' (Congressional Record 1882: 47th Cong., 1st sess., Vol. 13, pt. 4, 1545). Even Chinese wives were implicitly demoted to prostitutes: 'Who desires to see the American matron degraded to the position of the so-called Chinese wife?' (Congressional Record 1882: 47th Cong., 1st sess., Vol. 13, pt. 4, 1589)."); *see also* LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW (1995) (exploring the effect of stereotypes on immigration policies in the United States).

42. Act of July 5, 1884, ch. 220, 23 Stat. 115; Act of October 1, 1888 (Scott Act), 25 Stat. 504; Act of May 5, 1892 (Geary Act), ch. 60, 27 Stat. 25; *see also* H.R. Res. 282, 112th Cong. (2011) ("Expressing the regret of the House of Representatives for the passage of discriminatory laws against the Chinese in the United States, including the Chinese Exclusion Act.").

43. Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874.

ineligible for naturalization, which included all of Asia.[44] The racial restriction to naturalization was upheld in *Ozawa v. United States*, where Ozawa was classified as scientifically Mongolian and therefore not white,[45] and *United States v. Thind*, where Thind was deemed as not white based on "common understanding" despite being scientifically classified as Aryan and Caucasian.[46] The 1934 Tydings-McDuffie Act reclassified Filipinos from American nationals to foreign aliens subject to exclusion under the 1924 Act.[47] Anti-Asian legislation during this period often cited Asians' sexual difference as evidence of their unassimilability, which then justified their exclusion. Filipinos were marginalized as sexual Others because they, like the Chinese, were a bachelor community[48] that frequented taxi dance halls where white women degraded themselves by dancing with Filipinos for money.[49] Asian communities who were able to form families in the United States, like the Japanese, were still stereotyped as sexually deviant; indeed, initial efforts to exclude the Japanese suggested that their marriages were merely fronts for prostitution.[50] Absolute restrictions on Asian immigration would last until World War II.

B. Family Ideation and the Stereotyping of Asians as a Sexual Model Minority

As a gesture of goodwill to China as an allied nation during World War II, Congress passed the Magnuson Act of 1943, which repealed the Chinese Exclusion Act and granted the right of naturalization to Chinese living in the United States.[51] However, under the formula prescribed under the 1924 Immigration Act, the quota for Chinese immigration was still limited to a miniscule 105 entries per year, a virtual exclusion of the Chinese.

44. Immigration Act, ch. 190, 43 Stat. 153 (1924) (repealed 1952) (restricting immigration for all "alien[s] ineligible for citizenship" and setting an annual quota of 150,000 immigrant entries per year based on national origin, where immigration from each eligible nation was limited to 2% of the number of foreign-born persons of that nationality residing in the United States as of the 1890 census).

45. 260 U.S. 178, 198 (1922).

46. United States v. Thind, 261 U.S. 204, 210, 214–15 (1923).

47. Tydings-McDuffie Act, Pub. L. No. 73-127, 48 Stat. 456 (1934).

48. Kale Bantigue Fajardo, *Working Class Filipino Masculinities*, 59 AMER. Q. 451, 453 (2007) ("Filipino migrant communities were largely 'bachelor societies' and 'portable,' because agricultural business owners preferred single men to those who were married and had children, especially on the U.S. West Coast, which relied on a migratory system of labor. Additionally, antimiscegenation laws largely prevented Filipinos from marrying white women.").

49. *See* Rachel Salazar Parreñas, *"White Trash" Meets the "Little Brown Monkeys": The Taxi Dance Hall as a Site of Interracial and Gender Alliances Between White Working Class Women and Filipino Immigrant Men in the 1920s & 30s*, 24 AMERASIA J. 115, 115 (1998).

50. Kerry Abrams, *Peaceful Penetration: Proxy Marriage, Same-Sex Marriage, and Recognition*, 2011 MICH. ST. L. REV. 141, 146 (2011) ("Americans still found the picture bride practice deeply disturbing. The Asiatic Exclusion League accused the Japanese of using the picture bride system to import women 'for immoral purposes,' claiming that the Japanese brought in 'Jap women for sinister purposes, by so-called picture marriages under the guise of a marriage by proxy in Japan.'").

51. Magnuson Act, ch. 344, 57 Stat. 600 (1943).

At the close of World War II, Congress also passed the War Brides Act of 1945 that allowed spouses of American servicemen to come to the United States as non-quota immigrants. The War Brides Act created the first major avenue for legal immigration of Asians since exclusion, the majority of whom were wives of white servicemen.[52] The Act was passed not for the sake of foreign relations during the war, but primarily to recognize the right of servicemen to maintain the unity of their families.[53] Family reunification was linked to the interests of exemplary citizens who had faithfully served during the war. War bride marriages represented a significant number of interracial marriages in the post-exclusion era. The War Brides Act would continue to be instrumental in allowing Asian wives of servicemen to immigrate in subsequent American military campaigns in Asia during the Cold War. However, suspicions of the bona fides of their marriages persisted, and war brides were popularly believed to be former prostitutes.

Congress engaged in comprehensive immigration reform with the Immigration and Nationality Act of 1952; however, despite much debate, the 1952 Act retained the racist national quota system. Nonetheless, civil rights activists continued to pressure Congress towards removing the racist restrictions on immigration. Finally, the 1965 Immigration and Nationality Act Amendments eliminated the national origins quota, and set skilled labor and family reunification as the main avenues for immigration.[54] Under family reunification provisions, United States citizens and legal permanent residents were allowed to sponsor family members to join them in the United States. The provisions gave special preference to immediate relatives of United States citizens, who were allowed to immigrate without being limited by the annual numerical quotas. Additionally, non-immigrant visa holders were allowed to bring over accompanying spouses and children.

In order to garner wider support for the 1965 reforms, the strategy for change shifted away from racial equity and focused on maintaining the American virtues of family integrity and unity.[55] Catherine Lee suggests that American immigration policy, particularly in the post-exclusion reforms, reflected "family ideation,"[56] a romanticization of the nuclear family as an integral aspect of American moral culture. During the 1960 presidential election, both candidates identified family unity as a priority of immi-

52. Rose Cuison Villazor, *The Other Loving: Uncovering the Federal Government's Racial Regulation of Marriage*, 86 N.Y.U. L. REV. 1361, 1405 (2011).

53. *Id.* ("In the report accompanying the bill, Rep. Mason expressed that one of the reasons for the Act was to protect the right of 'service men and women' to have 'their families with them.'").

54. Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911.

55. *See* Shani M. King, *U.S. Immigration Law and the Traditional Nuclear Conception of Family: Toward a Functional Definition of Family That Protects Children's Fundamental Human Rights*, 41 COLUM. HUM. RTS. L. REV. 509, 525 (2010).

56. CATHERINE LEE, FICTIVE KINSHIP: FAMILY REUNIFICATION AND THE MEANING OF RACE AND NATION IN AMERICAN IMMIGRATION (2013).

gration reform.[57] In support of the bill, Representative Jacob Gilbert described the bill as "go[ing] far toward eliminating the cruelties of family separation which the United States has inadvertently been responsible for committing under the old law."[58] Senator Philip Hart similarly argued for "the urgent need to facilitate the reunion of families."[59] In *Fiallo v. Bell*, the Supreme Court recognized that a primary concern of the Immigration Act was "the problem of keeping families of United States citizens and immigrants united."[60]

Additional provisions in subsequent immigration law ensured that families would remain intact after immigration. In 1986, Congress passed the Immigration Marriage Fraud Amendments, which placed a two-year condition on the legal permanent resident status of immigrants who received their status through marriage to a United States citizen or legal permanent resident.[61] At the end of the two years, the couple must file a joint petition to remove the condition, to demonstrate that the marriage was entered into in good faith and not solely for the immigration benefit. Thus, the immigration law incentivizes immigrants who enter through marriage to remain married. Furthermore, the ability of dependent nonimmigrant visa recipients, such as H-4 and L-2 holders, to remain in the United States depends on their continuing immediate family relationship to the primary visa holder. Thus, there is also an incentive for dependent spouses on nonimmigrant visas to remain married to the primary visa holder.[62]

Immigration from Asia greatly proliferated following the 1965 reforms. With nearly 60% of the population being foreign born, the majority of Asian Americans have been immigrants. Family reunification accounts for approximately two-thirds of immigration,[63] meaning that a significant portion of the Asian American population immigrated through existing and continuing nuclear family relationships. Furthermore, the immigration provisions following the 1965 reforms encourage immigrant populations to retain those family relationships. There is little incentive for divorce when a

57. In response to a public question from Representative Alfred Santangelo of New York regarding the need for immigration reform, Vice President Richard Nixon responded, "Humanitarianism itself calls for action to bring about a reunion of immediate family members under preferential quotas" and Senator John F. Kennedy responded, "I believe that the most important immediate objective of immigration reform is the reuniting of families." *Letters to Representative Alfred E. Santangelo*, JFK LINK (Sept.–Oct. 1960), http://www.jfklink.com/speeches/joint/app15_santangelo.html.

58. 111 CONG. REC. 21770 (1965), https://ia600503.us.archive.org/16/items/congressionalrec111junit/congressionalrec111junit.pdf

59. 111 CONG. REC. 24239 (1965), https://ia802309.us.archive.org/16/items/congressionalrec111kunit/congressionalrec111kunit.pdf

60. Fiallo v. Bell, 430 U.S. 787, 795 n.6 (1977) (quoting H. R. REP. NO. 1199, at 7 (1957)).

61. Immigration Marriage Fraud Amendments, Pub. L. No. 99-639, 100 Stat. 3537 (1986).

62. *See* Stewart Chang, Dreams of My Father, Prison for My Mother: The H-4 Nonimmigrant Visa Dilemma and the Need for an "Immigration-Status Spousal Support," 19 UCLA ASIAN PAC. AM. L.J. 1, 1 (2014).

63. WILLIAM A. KANDEL, CONG. RESEARCH SERV. R43145, U.S. FAMILY-BASED IMMIGRATION POLICY 2 (2014).

person's immigration status may depend on continued marital status. Though cultural values play some part, the immigration laws play a more significant role in maintaining the integrity of Asian immigrant families after they have come to the United States. The idealization of Asian Americans having good family values because their families are intact rather than broken, then, is more a function of immigration law than of traditional cultural values that mirror American normative values.

Asians were thus transformed from a sexual Other requiring exclusion to a new sexual model minority who had assimilated to normative models of family.[64] At the same time that family reunification was being set as the new avenue through which immigration from Asia would commence, Congress released the Moynihan Report, identifying abnormalities in the black family as a cause for national concern. The Moynihan report proposed a causal relationship between broken families and underachievement among African Americans.[65] The Moynihan report influenced a body of scholarship that perpetuated stereotypes of single parenthood and absent fathers in African American families.[66] The broken African American family became emblematic of wrong sexual choices of individual African Americans rather than larger structural problems.[67]

In contrast, Asian American achievement was linked to strong home environments and intact families.[68] Studies comparing the two groups have further entrenched stereotypes linking performance to family makeup, which was then related to race and culture.[69] The proliferation of studies and coverage in media regarding Asian American and African American achievement engages in the production of seemingly objective information

64. *See* Stewart Chang, *Feminism in Yellowface*, 38 HARV. J. L. & GENDER 235, 266 (2015).

65. MOYNIHAN, *supra* note 9.

66. *See* Robert D. Hess and Virginia C. Shipman, *Early Experience and the Socialization of Cognitive Modes in Children*, 36 CHILD DEV. 869, 870 (1965); Sciara, Frank J., and Richard K. Jantz, *Father Absence and Its Apparent Effect on the Reading Achievement of Black Children from Low Income Families*, 43.2 J. Negro Education 221 (1974); RALPH RICHARD BANKS, IS MARRIAGE FOR WHITE PEOPLE? HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE 2–3 (2011). *But see* CHARLES A. VALENTINE, CULTURE AND POVERTY: CRITIQUE AND COUNTER-PROPOSALS 32–33 (1968); Herbert Wasserman, *A Comparative Study of School Performance Among Boys from Broken and Intact Black Families*, 41 J. NEGRO EDUC. 137, 140 (1972); Scott Cummings, *Explaining Poor Academic Performance Among Black Children*, 41 EDUC. F. 335, 341 (1977).

67. R.A. Lenhardt, *Marriage as Black Citizenship*, 66 HASTINGS L. J. 1317, 1320 (2015) ("[U]nmarried family configurations . . . of Blacks, which are disproportionately poor and headed by females, continue to be both stigmatized and marginalized within the broader community. Even now, the struggles that nonmarital black families face are cast primarily as the result of unwise individual choices rather than as a function of the same structural inequalities that limit black opportunity in areas such as public education, housing, employment, and criminal justice.").

68. Elliott R. Mordkowitz and Herbert P. Ginsburg, *Early Academic Socialization of Successful Asian-American College Students*, 9 QUARTERLY NEWSLETTER OF THE LABORATORY OF COMPARATIVE HUMAN COGNITION 85 (1987).

69. Diana T. Slaughter-Defoe, Kathryn Nakagawa, Ruby Takanishi & Deborah J. Johnson, *Toward Cultural/Ecological Perspectives on Schooling and Achievement in African- and Asian-American Children*, 61 CHILD DEVELOPMENT 363, 368–72 (1990).

and knowledge that camouflages the history of racism from public memory. In the same way that studies and statistics regarding Asian sexuality and families were generated to justify formal legal regulation of Asians in the nineteenth century, similar studies were deployed in the twentieth century as extra-legal means of regulating African American sexuality. As Michel Foucault argues, the production of knowledge functions as a method of state discipline and control of individuals. For Foucault, power is no longer centralized through the raw force of the law, as it was in the past, but omnipresent and diffused through "the divisions, inequalities, and disequilibriums which occur" in social relationships.[70] According to Foucault, government control occurs through "constituting individuals as correlative elements of power and knowledge," where power is exercised through the production of knowledge, the "domains of objects and rituals of truth."[71]

Expert studies such as the Moynihan report, backed by the authority of statistical and empirical knowledge, lend the illusion of truth to normative standards that, in turn, affect the behavior of the population. As these representations of the norm are accepted as truth, the population begins to self-police in a manner that socially rewards compliance and homogeneity, and discourages and marginalizes variance. The development of the model minority, therefore, represents the twentieth century evolution of governmentality, which Foucault defines as a mode of social power to regulate the conduct of a population in the interest of national security and prosperity.[72] The model minority myth of economic attainment through hard work and good family values promotes normative behavior through a system of social reward and shame.

It is significant that the juxtaposition of Asian Americans and African Americans occurs at the historic moment of the Civil Rights Movement.[73] The construction of Asian Americans as a model minority advances an illusion of meritocracy and postracialism[74] that suppresses the felt need for further programs to address racial inequities, such as affirmative action.[75] The

70. FOUCAULT, *supra* note 31, at 94.

71. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 194 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1975).

72. *See* MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION 108 (Michel Senellart ed., Graham Burchell trans., 2007) (1978).

73. Neil Gotanda, *New Directions in Asian American Jurisprudence*, 17 ASIAN AM. L.J. 5, 42–43 (2010) ("The Model Minority arises in the midst of the Civil Rights Movement as a model to discipline both Asian Americans and Blacks and has a specific non-neutral place in our racial order. The Model Minority is a very specific stereotype or ascribed collective identity, crafted at a particularly historical moment in race relations.").

74. Janine Young Kim, *Postracialism: Race After Exclusion*, 17 LEWIS & CLARK L. REV. 1063, 1094, 1124 (2013) (citing Asian American access to educational and economic opportunities as a singularly visible example of racial inclusion which otherwise distracts from the larger inequities across racial groups overall).

75. Gautam Dutta, *Tokenism, 209, and the Politicization of Asian Americans*, 5 UCLA ASIAN PAC. AM. L.J. 45, 47–48 (1998) ("The myth holds that Asians do not need or benefit from affirmative action, for they already excel in both school and the workplace. Rather, affirmative action hurts Asians

argument goes that if Asian Americans are able to achieve success in such a short time through hard work and good values despite their race, then African Americans have only their own bad values to blame for their continued struggle.[76] The solution to inequality, then, is not through government action such as public aid and nondiscrimination legislation, but through private action within the individual nuclear family unit.

Privacy rights of the family also became a centerpiece in building towards an ideal of racial egalitarianism during the Civil Rights era, with *Loving v. Virginia*.[77] Indeed, interracial marriage and mixed-race children are considered signs that society is advancing towards postracialism.[78] In *Loving*, the fight against racial restrictions in marriage combined the issues of disparate racial treatment with penumbral privacy rights that had recently been recognized in *Griswold v. Connecticut*.[79] The Virginia anti-miscegenation statute not only contained racial animus, but also trespassed against privacy rights of family formation. Although decided primarily on equal protection grounds, *Loving* nevertheless contained implications of the due process right to marry.[80] Restrictions on marriage, like bans against contraceptive use, represented an improper government incursion against private choice, which would be further bolstered in *Eisenstadt v. Baird* and *Roe v. Wade*.[81] Thus, reforms in racial equality came in tandem with ad-

by forcing universities like U.C. Berkeley to admit in their place 'unqualified' minorities."); Nancy Chung Allred, *Asian Americans and Affirmative Action: From Yellow Peril to Model Minority and Back Again*, 14 ASIAN AM. L. J. 57, 58 (2007) ("Asian Americans have become used as mascots by the opponents of affirmative action. This mascotting is a negative force that, rather than creating any viable advantages for Asian Americans, reinforces the pervasive "white privilege" that affirmative action programs are designed to combat. While the manufactured political debate using Asian Americans as mascots reinforces the model minority myth, white privilege remains invisible. Meanwhile, Asians Americans are isolated and pitted against other minority groups. This balkanization serves to reintroduce a modern form of the 'yellow peril' that has plagued Asians since their first arrival in the Americas.").

76. Xiaofeng Stephanie Da, *Education and Labor Relations: Asian Americans and Blacks as Pawns in the Furtherance of White Hegemony*, 13 MICH. J. RACE & L. 309, 320 (2007) ("However, Asian Americans do not exist in a vacuum as the "model minority," and their "model" status is often contrasted with Blacks' status in society. The characterization of Asian Americans as the race that other minorities (including Blacks) should strive to model themselves after inherently suggests that Blacks are responsible for their own failures in different aspects of society.").

77. Loving v. Virginia, 388 U.S. 1 (1967).

78. Janine Young Kim, *Postracialism: Race After Exclusion*, 17 LEWIS & CLARK L. REV. 1063, 1094 (2013) ("in addition to the presidency of Barack Obama, many point to the rise in interracial marriages and of the multiracial population as indicators that postracialism has arrived.")

79. Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965).

80. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 384–86 (1978); *see also* Mark Strasser, *Loving in the New Millennium: On Equal Protection and the Right to Marry*, 7 U. CHI. L. SCH. ROUNDTABLE 61 (2000) (discussing the due process implications raised in *Loving* in the context of same-sex marriage); John DeWitt Gregory & Joanna L. Grossman, *The Legacy of Loving*, 51 HOW. L.J. 15 (2007).

81. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); Roe v. Wade, 410 U.S. 113, 152 (1973) ("[The cases] also make it clear that the right has some extension to activities relating to marriage.") (citing *Loving*, 388 U.S. at 12).

vances in personal autonomy in the domestic realm.

However, like the myth that the United States had advanced into a postracial meritocracy, the penumbras of privacy also advance a conservative laissez-faire view of government. Privacy holds that individual choices in the domestic sphere should be free from government regulation. Yet with government noninterference, private autonomy also comes with private accountability. Due process freedoms of the individual presume autonomy and self-sufficiency, where individual choice rather than the government determines the destiny of citizens. This system also presumes that prosperity comes from good individual choices and hardship comes from poor individual choices. In terms of understanding the model minority myth in relation to the penumbral privacy rights, Asian American success represents the fruits of strong family choices and responsible reproduction, while African American struggle represents poor family choices and irresponsible reproduction. As such, the simultaneous development of the model minority with sexual privacy rights advances neoliberal enterprise under the guise of personal choice.

With the move towards increased individual autonomy and less formal regulation, governmental control has shifted to a regime of self-regulation among the population that links the goals and motivation of the individual to civic and social duty.[82] Discriminatory laws that regulated minority populations, such as criminal anti-miscegenation statutes, were struck down and replaced with normalizing, disciplinary modes of power such as the model minority stereotype and the myth of a postracial meritocracy. The effects of the model minority myth also illustrate Foucault's principle of expulsion of law, where the force of law is replaced by private self-policing and norms disseminated through institutionalized knowledge produced in studies and surveys such as the Moynihan report.[83]

II. WHY GAY IS DEFINITELY NOT THE NEW BLACK: THE EVOLUTION OF THE BAD QUEER INTO THE GOOD GAY

Gay individuals were, like Asian Americans, once demonized as the antithesis of the normative American family. Gay individuals were stereotyped as "bad queers" who were sexually promiscuous and irresponsible.[84]

82. *See* Barbara Cruikshank, *Revolutions Within: Self-Government and Self-Esteem*, *in* FOUCAULT AND POLITICAL REASON: LIBERALISM, NEO-LIBERALISM AND RATIONALITIES OF GOVERNMENT 235 (Andrew Barry, Thomas Osborne & Nikolas Rose eds., 1996).

83. MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972–1977, at 102 (1980) ("[I]t is a question of orienting ourselves to a conception of power that replaces the privilege of the law with the viewpoint of the objective, the privilege of prohibition with the viewpoint of tactical efficacy, the privilege of sovereignty with the analysis of a multiple and mobile field of force relations, wherein far-reaching, but never completely stable, effects of domination are produced. The strategical model rather than the model based on law.").

84. *See* Yuvraj Joshi, *Respectable Queerness*, 43 COLUM. HUM. RTS. L. REV. 415, 458–459 (2012).

Anti-gay activists have historically evoked preservation of family as the moral imperative to forward restrictive legislation.[85] Opponents to gay rights were generally successful in passing anti-gay ballot initiatives by focusing on how gays and lesbians were especially harmful to children.[86] Early propaganda cast gay men as pedophilic predators.[87] Anti-gay activists also imagined a "gay agenda"[88] which proposed that gays desired to have homosexuality taught in schools to indoctrinate children.[89] It was premised on the belief that gays needed to recruit children to keep the community alive because they were unable to procreate, which was further used to generate anxiety over gay parentage that would allow potential role modeling of gay behavior.[90] Anti-gay organizers used these tactics to portray gays and lesbians as threatening to the moral fiber of the family unit.[91] Preservation of the family became a dominant trope for national security.[92] These arguments were eventually used by opponents of same-sex marriage in order to pass the Defense of Marriage Act.[93]

A. Incrementalism and the Narrowing of Dignity

Gay rights were framed as a culture war, and opponents set the integrity of the American family as the primary battleground. Gay rights activists met opponents on those terms and based their equal protection claim not on the right to be treated equally despite being different, but on the argument that gay and lesbian individuals should be treated the same because they are the same.[94] Many activists in the gay community advocated incrementalism, which proposes gay rights occur in incremental steps through increased public acceptance of gays and lesbians.[95] The incremental approach to gay rights engaged the culture war and sought change by winning public

85. Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 859 (2014); *see also* GEORGE CHAUNCEY, WHY MARRIAGE?: THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY 23 (2004) (discussing the history of campaigns against gay rights and the shifting attitudes of heterosexuals towards gay people in the United States).

86. Anthony Niedwiecki, *Save Our Children: Overcoming the Narrative that Gays and Lesbians are Harmful to Children*, 21 DUKE J. GENDER L. & POL'Y 125, 127 (2013).

87. *Id.*; *see also* WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 40 (2008) ("At the same time that Americans were growing obsessively concerned about protecting children from sexual abuse, they constructed the image of the (male) homosexual as a predator victimizing their sons and daughters.").

88. *See* Libby Adler, *The Gay Agenda*, 16 MICH. J. GENDER & L. 147, 147 (2009).

89. Clifford J. Rosky, *Fear of the Queer Child*, 61 BUFF. L. REV. 607, 663–64 (2012).

90. *Id.*

91. *See* Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 852–64 (1997).

92. Shad Naved, *Gayatri Spivak's Critique of Marxist Value(s)*, 35 SOC. SCIENTIST 76, 85 (2007) ("The notion of 'family values' takes care of the project of the preservation of the American nation.").

93. Franklin, *supra* note 85, at 845.

94. *Id*. at 860–61.

95. WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 115–118 (2002).

opinion through a strategy of assimilation.[96] This approach set elimination of antisodomy statutes as the first step towards gay rights, and marriage equality as the eventual goal.[97] Part of the incrementalist approach, therefore, sought to portray gay and lesbian persons in a positive light. Thus, in the battleground of public opinion, incrementalist activists showcased gay families and their similarities to other normative families, and avoided the negative stereotypes of gays as sensual and promiscuous.[98] Incrementalism presents a version of gay identity in mainstream heterosexual society that repudiates the bad queer stereotype.[99] However, the goal of marriage equality venerates marriage as an ideal to be emulated and achieved by gay couples,[100] which in turn promotes further homogeneity with normative family structures in America.

The attorneys litigating *Lawrence v. Texas* employed incrementalism as their strategy. In *Lawrence*, Justice Kennedy contextualizes the right to sexual privacy within a "personal bond that is more enduring."[101] However, the irony was that John Lawrence and Tyron Garner were not in a committed relationship, but were only acquaintances. If anything, theirs would have been an isolated sexual encounter, if there was a sexual encounter at all.[102] Lawrence and Garner, who were not connected to the gay activist community at all, were transformed into poster boys for committed gay couples everywhere through a strategy of normativity. Briefs on their behalf were written "to emphasize the "sameness" of same-sex couples."[103] The legal team for Lawrence and Garner "carefully focused on sex as normatively desirable in connection with stability, commitment, and family—

96. William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607, 631 (1994).

97. Erez Aloni, *Incrementalism, Civil Unions, and the Possibility of Predicting Legal Recognition of Same-Sex Marriage*, 18 DUKE J. GENDER L. & POL'Y 105, 107 (2010).

98. *See* Joshi, *supra* note 84, at 416.

99. *See* CARL STYCHIN, A NATION BY RIGHTS: NATIONAL CULTURES, SEXUAL IDENTITY POLITICS, AND THE DISCOURSE OF RIGHTS 200 (1998) ("[L]esbians and gays seeking rights may embrace the ideal of 'respectability,' a construction that then perpetuates a division between 'good gays' and (disreputable) 'bad queers.'"); Jade McGleughlin with Sue Hyde, *Can a Diamond Ever Be Gay?*, 9 STUD. GENDER & SEXUALITY 184, 192 (2008) ("We do not want to be the good gays cast against the ever more marginalized group that chooses (or has no choice about) other ways to live and love.").

100. Mary Becker, *Family Law in the Secular State and Restrictions on Same-Sex Marriage: Two are Better than One*, 2001 U. ILL. L. REV. 1, 48–49 (2001) ("Common sense also indicates that children living in gay and lesbian households would be better off were their parent(s) able to marry. Marriages are more stable than cohabitation relationships, and stability is good for children. Marriages are also likely to be happier relationships, and living with adults who are happy is good for children.").

101. 539 U.S. 558, 567 (2003); *see* Craig Willse & Dean Spade, *Freedom in a Regulatory State?: Lawrence, Marriage and Biopolitics*, 11 WIDENER L. REV. 309, 314 (2005) ("They do so by addressing homosexuality in terms of 'coupled' behavior, rather than specific acts of sodomy, thereby constructing a homosexual identity more parallel to incentivized heterosexual family norms.").

102. Dale Carpenter, *The Unknown Past of* Lawrence v. Texas, 102 MICH. L. REV. 1464, 1507 (2004).

103. Dahlia Lithwick, *Extreme Makeover: The Story Behind the Story of Lawrence v. Texas*, NEW YORKER (March 12, 2012), http://www.newyorker.com/magazine/2012/03/12/extreme-makeover-dahlia-lithwick.

not in connection with a broader sexual liberation."[104] Marriage is the archetype of the "more enduring bond" that Kennedy envisioned in *Lawrence*, and both *Windsor* and *Obergefell* continue that arc.[105]

The attorneys for Edith Windsor employed the same strategy and framed the story behind the lawsuit within mainstream conceptions of love and commitment.[106] In *Windsor*, Kennedy more explicitly ties the dignity of the individual to marriage, noting "until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage."[107] Kennedy repeats the word "dignity" ten times in the opinion, but generally in the context of relationships.[108] In *Windsor*, Kennedy begins to narrow the definition of dignity for gay and lesbian individuals from his use in *Lawrence*. In *Lawrence*, Kennedy cites *Planned Parenthood v. Casey* to tie the dignity of gay individuals to personal autonomy and choice.[109] Here, the state had overstepped by stripping gay individuals of dignity through stigma of criminality.[110] In *Windsor*, the dignity of gay individuals is more narrowly threatened when their relationships are not equally recognized by the state.[111] The narrowing of dignity in *Windsor* suggests that gay and lesbian individuals have dignity only when they resemble straight couples.[112]

104. DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* 193 (2012); *see also* Lithwick, *supra* note 103 ("The litigation strategy, as the case made its way up through the trial courts and appeals courts, was deliberately framed to highlight the need to decriminalize homosexual conduct as a means of recognizing and legitimatizing same-sex 'relationships' and 'families.' In short, the legal issue was not that free societies must let drunken gay Texans have sex; it was that gay families around the country, in the words of one of the lawyers in the case, 'are essentially just like everybody else.'").

105. Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015) ("The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality.").

106. Roberta A. Kaplan, *"It's All About Edie, Stupid": Lessons From Litigating* United States v. Windsor, 29 COLUM. J. GENDER & L. 85, 87 (2015) ("Our goal, however, wasn't to write a "Harlequin romance." Rather, what we hoped to do was to show that Edie and Thea, who spent forty-four years together in sickness and in health 'til death did them part, lived their lives with the same decency and dignity as anyone else. By showing that truth, we demonstrated that Edie and Thea had the kind of marriage that any single one of us—straight or gay—would be so lucky to have.").

107. United States v. Windsor, 133 S. Ct. 2675, 2689 (2013).

108. Kaplan, *supra* note 106, at 101 ("The Supreme Court uses this word 'dignity' ten times in its twenty-six-page opinion for the Court in Windsor.").

109. Lawrence v. Texas, 539 U.S. 558, 574 (2003).

110. *Id.* at 575 ("The stigma this criminal statute imposes, moreover, is not trivial. The offense, to be sure, is but a class C misdemeanor, a minor offense in the Texas legal system. Still, it remains a criminal offense with all that imports for the dignity of the persons charged.").

111. *See* 133 S. Ct. at 2693–94.

112. Aloni, supra note 97, at 158 ("[L]egalization of same-sex marriage may validate those couples who fit in best with straight culture and implicitly penalize those who are not married, thus privileging to an even greater extent already normative authorizations. Marriage wages an attack on sexual LGB culture in its failing attempt to create 'good gays' and reinforces the hierarchy of sexual shame by delegitimizing otherwise potentially fulfilling non-monogamous sexual lives.").

Obergefell continues to narrow dignity to the specific confines of marriage. From *Lawrence* to *Windsor* to *Obergefell*, dignity shifts from being attached to the autonomous individual to being attached to the committed couple. *Obergefell* does not so much confer dignity on gay and lesbian individuals or individuals generally, as much as dignity to the institution of marriage, regardless of whether it occurs between gay or heterosexual couples. Following the synopsis of the case, Justice Kennedy opens the decision with a celebratory history of marriage: "From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage."[113] Kennedy outlines marriage equality primarily as an issue of Due Process and personal choice, and secondarily as an issue of equal protection.[114] He bases his Due Process analysis on four principles and traditions that set marriage as fundamental under the Constitution: (1) it involves the right of choice that is inherent to individual autonomy; (2) it constitutes a fundamental means of expressing union between two committed individuals; (3) it involves rights of childrearing, procreation and education; and (4) it is a keystone to the social order of the country. The progression that Kennedy sets up presumes that individual autonomy is best expressed in choices related to family.[115]

By prioritizing Due Process, Kennedy strongly aligns *Obergefell* with the penumbral right to privacy cases, and he cites *Griswold* and *Eisenstadt* as the overarching foundational authorities.[116] He initially cites *Loving* to bolster the privacy argument that marriage is a fundamental right under the Constitution,[117] without mention of its relevance to equal protection until much later in the decision. He then sets choice as the overarching first principle in defining marriage as a fundamental right.[118] The right of sexual and reproductive privacy, which was concurrently being developed in the midst of racial equality reforms during the Civil Rights era, largely originated from the inviolate right of families to privacy of choice within their households, particularly in regards to childrearing. In many ways, the right to sexual privacy began with the right to educate children established in *Pierce v. Society of Sisters*.[119] *Pierce*, along with the earlier educational privacy case *Meyer v. Nebraska*,[120] is cited as foundational in developing

113. Obergefell v. Hodges, 135 S. Ct. 2584, 2593–94 (2015).

114. *Id*. at 2602–03.

115. *Id*. at 2599–601.

116. *Id*. at 2597–98.

117. *Id.* at 2598.

118. *Id.* at 2599 ("A first premise of this Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause.").

119. 268 U.S. 510, 534–36 (1925).

120. 262 U.S. 390, 400 (1923) ("His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the [14th] amendment.").

the penumbral right to privacy in *Griswold v. Connecticut*.[121] However, the privacy right of parents to educate their children operated separately from racial equality. In *Farrington v. Tokushige*,[122] the Supreme Court struck down a discriminatory law targeting Asian language schools in Hawaii by affirming the due process right of parents to educate their children even while recognizing the validity of the racial animus behind the law.[123] Neither *Pierce* nor *Griswold* are cited in *Loving*, which is not decided as a matter of sexual privacy, but of equal protection. In this respect, *Obergefell* continues the tradition of *Pierce* and *Griswold* more than *Loving*, by focusing on the integrity of the American family unit rather than on formal equality. Sexual privacy is fundamentally based in conservative principles with respect to autonomy and privacy of the family, and *Obergefell* represents a return to these conservative roots. Rather than question the privileged and dignified place marriage holds in society, *Obergefell* upholds the principle that the American family unit is inviolate and should not be transgressed by excessive state intervention.[124]

Kennedy venerates marriage in his conclusion to *Obergefell*, that "[n]o union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were."[125] Kennedy presumes that everyone, if given the opportunity, would exercise the choice to marry. In his closing statements, Kennedy equates marriage to complete personhood, with the implication that singleness is incomplete by calling it a condemnation to loneliness.[126] Thus, Kennedy implicitly marginalizes other alternatives to the marital family structure. As Nan Hunter suggests:

> [T]he opinion's final paragraph speaks of the plaintiffs' "hope . . . not to be condemned to live in loneliness." Imagine what it felt like for the never-married Kagan, the divorced Sotomayor, and the widowed Ginsburg to join that language. Now imagine how much sharper the edge is for a single-mom waitress or bus driver. And consider how disconnected that platitude is from the vibrancy of a community that has generated new forms of kinship in moments of love and grief, sickness and health.[127]

When equal status for gay Americans is defined through marriage

121. 381 U.S. 479, 482–83 (1965).

122. 273 U.S. 284 (1927).

123. *Id.* at 298–99 ("The Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue. . . . We, of course, appreciate the grave problems incident to the large alien population of the Hawaiian Islands. These should be given due weight whenever the validity of any governmental regulation of private schools is under consideration; but the limitations of the Constitution must not be transcended.").

124. Obergefell v. Hodges, 135 S. Ct. 2584, 2607–08 (2015).

125. *Id*. at 2608.

126. *Id*.

127. Hunter, *supra* note 3.

equality, the institution of marriage becomes a very narrow gate through which gay Americans are allowed to envision themselves as equal citizens.[128] When formal equality is tied to marriage, only those who subscribe to and have access to the institution of marriage are able to attain equality.[129] In this respect, *Obergefell* stifles heterogeneous sexualities.[130] Through *Obergefell*, what is gained is not so much a right to marry, but access to the rights that come with marriage.

Although Kennedy concedes the possibility of willful childlessness through the constitutional guarantees of sexual autonomy and privacy,[131] he does not afford the same possibility of willful nonmarriage or alternative sexualities outside of marriage. Thus, *Obergefell* marginalizes not only some segments of the gay community, but also some portions of the straight community who do not fit the mold of normative American conceptions of family. In this respect, Kennedy's version of egalitarianism in *Obergefell* shifts the line of differentiation from sexual orientation to marital status and places accountability for continued struggle on individual choice concerning marriage. Marriage equality functions like the model minority myth, which promotes the belief that laissez-faire race-neutrality allows individuals to thrive when free of government inhibition, and that individuals are therefore accountable for their own success and failures in life due to good and bad choices.[132] Marriage equality similarly advances the belief that sexuality-neutrality will allow gay individuals the ability to thrive, but contains those equal protections within the presumptively good choice of marriage.

B. Racial Implications of Incrementalism

Although *Lawrence*, *Windsor*, and *Obergefell* confer rights to gay and lesbian individuals, they tacitly differentiate between the types of gays that hold access to those rights. There will be those who choose to enter into normative marriages and are regarded as the sexual model minority, and those outside who will likely continue to be marginalized as sexual deviants. In this way, *Obergefell* venerates those gay couples who make right choices to commit to monogamous relationships as a repudiation against

128. *See, e.g.*, Dean Spade, *Under the Cover of Gay Rights*, 37 N.Y.U. REV. L. & SOC. CHANGE 79, 81 (2013) ("Living under a system where a marriage-based family structure is preferred and is granted over 1,000 federal legal rights and protections9 aimed at promoting the life of those who conform to that model, is it accurate to identify being permitted to register to occupy such a confined and narrow status a "freedom?").

129. *Id.*

130. FOUCAULT, *supra* note 31, at 61.

131. *Obergefell*, 135 S. Ct. at 2601 ("That is not to say the right to marry is less meaningful for those who do not or cannot have children.").

132. *See* Keith Osajima, *Asian Americans as the Model Minority: An Analysis of the Popular Press Image in the 1960s and 1980s*, *in* REFLECTIONS ON SHATTERED WINDOWS 165–68 (Gary Y. Okihiro et al. eds., 1988).

those who make poor and dangerous choices, which are often associated with promiscuity, venereal disease, HIV, and AIDS. Just weeks prior to the *Obergefell* decision, Michael Johnson, a gay African American man, was sentenced to 30.5 years for "recklessly infecting" his white sexual partners with HIV.[133] Even as marriage equality loomed, Johnson became the face of HIV-related crimes and the dangers of promiscuity.[134] However, his prosecution not only involved stereotypes of bad queers, but also illustrated continuing stereotypes that link race with deviant, predatory sexual behavior.[135] In fact, African Americans are more likely to be prosecuted for HIV-related crimes than other racial groups.[136] HIV-related crime statutes, like the Missouri statute under which Johnson was prosecuted,[137] capitalize up-

133. Jeffrey Q. McCune Jr., *Criminalizing Blackness and HIV*, ST. LOUIS AM. (July 22, 2015, 12:00 AM), http://www.stlamerican.com/news/columnists/guest_columnists/article_d300ce8e-30da-11e5-934a-571460fb29d8.html.

134. *Id.*

135. *Id.* ("[T]he prosecution was allowed to paint him as an animal terrorizing the bodies of his young, white, docile 'victims' who performed 'the traditional female role,' as one accuser stated. The prosecution posed Johnson as the only agent in sex, the 'Tiger Mandingo' who took advantage of these young, innocent men. Loud and clear came the echoes of the centuries-old horror story of innocent white women endangered by black men."); *see also* Russell K. Robinson, *Racing the Closet*, 61 STAN. L. REV. 1463 (2009) (discussing the racial implications of using criminal law to effect HIV-prevention).

136. Carol L. Galletly & Zita Lazzarini, *Charges for Criminal Exposure to HIV and Aggravated Prostitution Filed in the Nashville, Tennessee Prosecutorial Region 2000–2010*, AIDS BEHAV. (2013), http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/Charges%20for%20Criminal%20Exposure%20to%20HIV%20and%20Aggravated%20Prostitution%20Filed%20in%20the%20Nashville,%20TN%20Prosecutorial%20Region%202000-2010%20%28Galletly,%20et%20al.%29.pdf.

137. MO. REV. STAT. § 191.677.1 (2015) ("It shall be unlawful for any individual knowingly infected with HIV to:

> (1) Be or attempt to be a blood, blood products, organ, sperm or tissue donor except as deemed necessary for medical research;
>
> (2) Act in a reckless manner by exposing another person to HIV without the knowledge and consent of that person to be exposed to HIV, in one of the following manners:
>
> (a) Through contact with blood, semen or vaginal secretions in the course of oral, anal or vaginal sexual intercourse; or
>
> (b) By the sharing of needles; or
>
> (c) By biting another person or purposely acting in any other manner which causes the HIV-infected person's semen, vaginal secretions, or blood to come into contact with the mucous membranes or nonintact skin of another person. Evidence that a person has acted recklessly in creating a risk of infecting another individual with HIV shall include, but is not limited to, the following:
>
> a. The HIV-infected person knew of such infection before engaging in sexual activity with another person, sharing needles with another person, biting another person, or purposely causing his or her semen, vaginal secretions, or blood to come into contact with the mucous membranes or nonintact skin of another person, and such other person is unaware of the HIV-infected person's condition or does not consent to contact with blood, semen or vaginal fluid in the course of such activities;
>
> b. The HIV-infected person has subsequently been infected with and tested positive to primary and secondary syphilis, or gonorrhea, or chlamydia; or
>
> c. Another person provides evidence of sexual contact with the HIV-infected person after a diagnosis of an HIV status.
>
> 2. Violation of the provisions of subdivision (1) or (2) of subsection 1 of this section is a class B felony unless the victim contracts HIV from the contact in which case it is a class A felony.
>
> 3. The department of health and senior services or local law enforcement agency, victim or others may file a complaint with the prosecuting attorney or circuit attorney of a court of

on the stereotype of the bad queer as a means of disciplining the gay community. Even as marriage equality legitimates one segment of the gay community, HIV-related felonies criminalize another element, but now across racial lines.[138] In early years of the disease, the spread of HIV was blamed on the "gay lifestyle," based on stereotypes of promiscuity and recklessness in the gay community.[139] Gay recklessness became a public health concern, and thus states enacted statutes to regulate and punish gay behavior.[140] Michael Johnson represents a racialized representation of the dangers of bad gay behavior. His case illustrates continued associations of race with sexual deviance and criminality.[141]

HIV-related crimes specifically demonstrate a rising racialization of deviant gay sexuality. Racial minorities were made scapegoats early in the history of HIV and AIDS.[142] HIV and AIDS were commonly associated with deviant behavior such as promiscuity and drug use. Statistically, HIV disproportionately affects African Americans,[143] which further linked racial

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competent jurisdiction alleging that a person has violated a provision of subsection 1 of this section. The department of health and senior services shall assist the prosecutor or circuit attorney in preparing such case, and upon request, turn over to peace officers, police officers, the prosecuting attorney or circuit attorney, or the attorney general records concerning that person's HIV-infected status, testing information, counseling received, and the identity and available contact information for individuals with whom that person had sexual intercourse or deviate sexual intercourse and those individuals' test results.

4. The use of condoms is not a defense to a violation of paragraph (a) of subdivision (2) of subsection 1 of this section.").

138. *See* Joseph J. Fischel, *Transcendent Homosexuals and Dangerous Sex Offenders: Sexual Harm and Freedom in the Judicial Imaginary*, 17 DUKE J. GENDER L. & POL'Y 277, 283 (2010) (discussing how HIV-related crimes perpetuates the history of using racial and sexual lines to incite moral panic).

139. Robinson, *supra* note 135, at 1511–12 ("Relatedly, some media reports, following the CDC's lead, suggested that HIV/AIDS stemmed from engaging in a 'gay lifestyle.' Introducing NBC News's first story on AIDS, Tom Brokaw announced: 'scientists at the National Centers for Disease Control in Atlanta today received the results of a study that shows that the lifestyle of some male homosexuals has triggered an epidemic of a rare form of cancer.' This emphasis on a specific 'gay lifestyle' may have misled the many men of color who did not identify as gay, live in a gay enclave, or otherwise share a way of life with white gay men.").

140. *See* Niedwiecki, *supra* note 86, at 152–53 ("In the news throughout the 1980s and 1990s, parents and families were witnessing the perceived consequences of homosexuality—the possibility of a very painful death."); *see also* FRED FEJES, GAY RIGHTS AND MORAL PANIC: THE ORIGINS OF AMERICA'S DEBATE ON HOMOSEXUALITY 11-52 (2008) (providing a comprehensive analysis of the development of gay and lesbian civil rights laws).

141. *See generally* Steven Thrasher, *A Black Body on Trial: The Conviction of HIV-positive "Tiger Mandingo,"* BUZZFEED (November 30, 2015, 5:26 PM), http://www.buzzfeed.com/steventhrasher/a-black-body-on-trial-the-conviction-of-hiv-positive-tiger-m?utm_term=.uevwvww53#.pdOLMLLj7.

142. Angela Perone, *From Punitive to Proactive: An Alternative Approach for Responding to HIV Criminalization That Departs From Penalizing Marginalized Communities*, 24 HASTINGS WOMEN'S L.J. 363, 368 (2013) ("When the HIV epidemic first emerged in the United States, many people blamed members of marginalized communities for increasing the numbers in this country. Black men, particularly from Haiti, and gay and bisexual men were prime targets for attack."); *see also* PAUL FARMER, AIDS AND ACCUSATION: HAITI AND THE GEOGRAPHY OF BLAME (1993) (discussing the history of U.S.-Haitian relations and societal responses to the AIDS virus).

143. Perone, *supra* note 142, at 367 ("African Americans comprise only fourteen percent of the United States population but approximately forty-four percent of people living with HIV.").

stereotypes with reckless behavior.[144] The incrementalist strategy towards gay rights dissociated from this type of reckless behavior and developed an image of the good gay that represented a desire for inclusion in normative family life.[145] However, with this shift the face of gay rights also became increasingly whitewashed and underplayed intersectional identities.[146] The marriage equality movement emphasized stability traditionally associated with normative white families.[147] Accordingly, the idealized image of good gays presented in *Windsor* and *Obergefell*, and constructed in *Lawrence*, becomes the disciplinary mechanism that dictates a monolithic view of appropriate sexual expression that is often racialized.

The racialization of deviant gay sexuality that emerged in the aftermath of *Lawrence*, *Windsor*, and *Obergefell* reflects state exercise of what Foucault calls "biopower." Foucault defines "biopower" as the "right to make live and let die,"[148] which is the instrument of population control in the modern democracy. Foucault describes how "[t]he old power of death that symbolized sovereign power was now carefully supplanted by the administration of bodies and the calculated management of life," now specifically "in the field of political practices and economic observation, of the problems of birthrate, longevity, public health, housing, and migration.[149] Whereas previously, the state exercised the power of life and death by physically eliminating aberrant elements from the population,[150] the modern state exercises biopower through the granting and denying of civil rights. Marriage equality narrows rights, and thus access to "life" in the biopolitical sense, to those individuals who embrace conventional norms of acceptable sexuality. Those outside the normative structures are excluded, punished, and consigned to civic "death." *Obergefell* holds that those who subscribe to marriage are presumed to have dignity and rights that must be protected. Seemingly egalitarian protections therefore serve normalizing function.[151]

144. *Id.* at 371 ("Further media reports suggesting that Black men 'on the down low' were transmitting HIV to Black women by secretly sleeping with male partners only heightened misinformation, bias, and animosity toward Black men—regardless of sexual orientation—living with HIV.").

145. *See* Stewart L. Chang, *Gay Liberation in the Illiberal State*, 24 WASH. INT'L L.J. 1, 32–37 (2014).

146. Anthony Michael Kreis, *Gay Gentrification: Whitewashed Fictions of LGBT Privilege and the New Interest-Convergence Dilemma*, 31 LAW & INEQ. 117, 143 (2012).

147. *Id.* at 139.

148. MICHEL FOUCAULT, SOCIETY MUST BE DEFENDED 241 (Mauro Bertani & Alessandro Fontana eds, David Macey trans., Picador 2003) (1997).

149. FOUCAULT, *supra* note 31, at 139–40.

150. *See generally* Barrak Alzaid, *Fatwas and Fags: Violence and the Discursive Production of Abject Bodies*, 19 COLUM. J. GENDER & L. 617, 619 (2010) (discussing "the way discourses of knowledge can render certain bodies killable within a democratic state").

151. FOUCAULT, *supra* note 71, at 222 ("The general juridical form that guaranteed a system of rights that were egalitarian in principle was supported by these tiny, everyday, physical mechanisms, by all those systems of micro-power that are essentially non-egalitarian and asymmetrical that we call the disciplines.").

Through his opinions, Justice Kennedy has progressively valorized marriage as a norm to be aspired towards. In *Lawrence*, Justice Kennedy presents sex as a natural expression of love and commitment.[152] In *Obergefell*, Kennedy further presents marriage as a natural choice for those who desire to publicly affirm their love and commitment. Marriage becomes the right choice for gay Americans. By implication, this means that those who make alternative decisions in their sexual lives are making wrong choices. *Obergefell*, when considered together with the Michael Johnson case, reveals the tacit assumptions in American culture regarding promiscuity and sexual pathology, which are often racialized. Read in this light, *Obergefell*'s valorization of marriage functions as a new normative counterpoint to the Moynihan report, which identifies nonmarriage in the African American community as a national crisis.[153]

In *Obergefell*, Kennedy identifies marriage and family as the "keystone of our social order" thereby implicitly disapproving of relationships outside of them.[154] This recalls the use of the normative family to demonize minority groups in the past. For example, the Moynihan report presents family as a foundational principle, where "[t]he role of the family in shaping character and ability is so pervasive as to be easily overlooked. The family is the basic social unit of American life; it is the basic socializing unit."[155] Although the Moynihan report criticized matriarchy in African American families,[156] it was not so much a condemnation of matriarchal family life entirely, as much as a condemnation of a particular form of matriarchal family life, the single mother. While the Moynihan report counts the reversal of gender roles as a concern,[157] the report identifies broken homes and illegitimacy as the overarching causes for the issue.[158] The Moynihan report condemned promiscuity and lack of commitment in the African American community, which led to dysfunctional family models. Kennedy tacitly draws this comparison when he suggests, "Without the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life. The marriage laws at issue thus harm and humiliate the children of same-sex couples."[159]

Kennedy's ideal for parentage exists within the marital structure, and he asserts that "[m]arriage also affords the permanency and stability im-

152. Lawrence v. Texas, 539 U.S. 558, 567 (2003).
153. MOYNIHAN, *supra* note 9, at 8.
154. Obergefell v. Hodges, 135 S. Ct. 2584, 2601 (2015).
155. MOYNIHAN, *supra* note 9, at 7.
156. *Id*. at 19–22.
157. *Id.*
158. *Id*. at 24–27.
159. *Obergefell*, 135 S. Ct. at 2590.

portant to children's best interests."[160] Previously, gay couples had been excluded based on the "responsible procreation" rationale,[161] which presumes that a central goal of marriage is to afford protections to children by legitimating unintended pregnancies within marriage.[162] However, rather than challenge the responsible procreation rationale, Kennedy envelops gay couples in the rationale. Indeed, the marriage equality movement was framed as the pursuit of the stable lifestyle and the ability to raise families like any other American couple.[163] Yet Kennedy's valorization of gay couples within the model of responsible procreation nevertheless invokes, by comparison, the stigma of irresponsible procreators and single-parent households, which he views as inferior.[164] Illegitimacy and irresponsible procreation continue to be associated with African American women,[165] even fifty years after the Moynihan report.[166] In contrast to Kennedy's language regarding the stability of gay families, the Moynihan report posits that African American families are characterized by instability.[167] However, despite the differences in language between the Moynihan report and the *Obergefell* decision, both ultimately stigmatize groups that do not resemble idealized models of marriage.

160. *Id.* at 2600.

161. Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461, 495 (2007); *see also* Kerry Abrams & Peter Brooks, *Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 YALE J.L. & HUMAN. 1 (2009) (providing a comprehensive discussion of the "responsible procreation" rationale).

162. Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387, 418 (2012) ("Scholars have interpreted Cordy's defense of opposite-sex marriage as conveying the state's interest in a particular vision of marriage—one that is about transforming irresponsible procreators into responsible sexual citizens").

163. Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM. L. REV. 293, 354 (2015) ("The clear message was that if gays and lesbians were actually allowed to marry, couples that chose this option could be expected to conform to stabilizing family norms embraced by the larger community. Media reports confirmed that the desire of gay and lesbian partners to undertake formal commitment through marriage was motivated by the same sentiments and goals as those of straight couples.").

164. *Obergefell*, 135 S. Ct. at 2600 ("Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life.").

165. Murray, *supra* note 162, at 428; Kim H. Pearson, *Displaced Mothers, Absent and Unnatural Fathers: LGBT Transracial Adoption*, 19 MICH. J. GENDER & L. 149, 195 (2012) ("Black women are always already failed mothers; in some cases they are given no consideration at all, and in others they are referred to as tragic victims of poverty, drug use, or violence. Both parenting equality advocates and Black conservative groups play a part in displacing Black women as mothers. Black conservative groups condemn Black women for high abortion rates and single, female-headed households.").

166. Ron Haskins, *Moynihan Was Right: Now What?*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 281, 283–84 (2009).

167. MOYNIHAN, *supra* note 9, at 8–10 (supporting his findings with statistical data that "[n]early a [q]uarter of [u]rban Negro [m]arriages are [d]issolved," "[n]early [o]ne-[q]uarter of Negro [b]irths are now [i]llegitimate," and "[a]lmost [o]ne-[f]ourth of Negro [f]amilies are [h]eaded by [f]emales").

III. FROM WHITEWASHING TO PINKWASHING: MODEL MINORITIES AND THE ENTERPRISE OF AMERICAN EXCEPTIONALISM

Marriage equality, when regarded primarily as a matter of due process and the penumbral right of privacy, centrally involves the right to make good choices with respect to marriage and procreation. In *Obergefell*, Kennedy defines individual choice in marriage as a foundational tenet of American culture.[168] Kennedy distinguishes the American model of marriage from an outdated tradition in his account of how "marriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding it was understood to be a voluntary contract between a man and a woman."[169] Thus, Kennedy indicates arranged marriages are a relic of the past, and suggests that Western civilization has advanced beyond that view of marriage. In fact, Kennedy traces the American model of marriage to the founding of the nation, premised on contract and consent.[170]

Kennedy furthermore suggests that marriage has evolved into a fully egalitarian institution in America and that American culture has moved past "the centuries-old doctrine of coverture, [where] a married man and woman were treated by the State as a single, male-dominated legal entity,"[171] so that "women have their own equal dignity."[172] He considers how, "[r]esponding to a new awareness, the Court invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage."[173] However, Kennedy's condemnation of patriarchy and account of egalitarianism in marriage possibly presents the United States as more advanced in the realm of women's rights than it actually is.

Though he does not explicitly do so, Kennedy's emphasis on egalitarianism in marriage as a symbol of American progress invites comparisons to other cultures. Even as Asians were stereotyped positively as a model minority who were successfully accessing the American dream through academic and economic attainment, they were still regarded as foreign and unassimilable on other fronts.[174] The perpetual foreigner stereotype in more recent times has often pertained to the treatment of women in Asian cultures, particularly in the context of marriage.[175] Asian culture has been judged as backwards in comparison to American culture.[176] Asian culture

168. *Obergefell*, 135 S. Ct. at 2589.
169. *Id*. at 2595
170. *Id*.
171. *Id*.
172. *Id.*
173. *Id.* at 2604.
174. Da, *supra* note 76, at 315–16.
175. *Id.*
176. Leti Volpp, *The Excesses of Culture: On Asian American Citizenship and Identity*, 17 ASIAN AM. L.J. 63, 65 (2010) ("There is an imputing of cultural difference to Asians and Asian immigrants, which reflects a particular legacy, that of Orientalism, which constructs the West as rational, democrat-

has been deemed overly traditional for patriarchal practices such as bride capture[177] and domestic violence.[178] Through such comparisons, the United States can construct itself as a leader in international human rights that protect autonomy and choice in marriage.[179] The United States assumes the mantle of rescuer, where Asian women can flee to exercise the freedom of choice denied to them in Asia.[180] Yet these new protections raise the specters of old stereotypes of Asian women that justified their exclusion a century earlier.[181] Asian Americans, then, are caught in a double bind where traditional values are portrayed as responsible for strong family structures that make them a model minority, but also mark them as perpetually foreign and backwards.

The right of privacy and choice creates the illusion that the United States is advanced in comparison to constructed stereotypes of Asian patriarchy. This comparison allows for American exceptionalism, which Natsu Taylor Saito succinctly summarizes as "the United States' practice of unilaterally exempting itself from participation in international organizations and human rights treaties while simultaneously insisting that the rest of the

ic, modern and progressive, against the idea of the East as despotic, primitive, traditional and barbaric. This distinction making the East the negative counter to the West continues to circulate today in ideas about Asian Americans, and specifically, here, in ideas about women and Asian American culture.").

177. Loriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093, 1105–07 (1996); Deirde Evans-Pritchard & Alison Dundes Renteln, *The Interpretation and Distortion of Culture: A Hmong "Marriage by Capture" Case in Fresno, California*, 4 S. CAL. INTERDISC. L.J. 1, 8 (1994). *But see* Leti Volpp, *Talking "Culture": Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573 (1996).

178. Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57, 60 fn.13 (1994); s*ee also* People v. Wu, 286 Cal. Rptr. 868, 887 (Ct. App. 1991) (employing cultural defense in a case where a man killed his wife because she committed adultery).

179. Convention on the Elimination of All Forms of Discrimination Against Women art. 16(1)(b), Dec. 18, 1979, 1249 U.N.T.S. 13 (recognizing the right of women to "enter into marriage only with free and full consent"); International Covenant on Civil and Political Rights art. 23, Dec. 19, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights art. 10, Dec. 16, 1966, 993 U.N.T.S. 3.

180. Gao v. Gonzales, 440 F.3d 62, 66, 70–71 (2d Cir. 2006), *cert. granted, vacated on procedural grounds sub nom.* Kiesler v. Gao, 552 U.S. 801 (2007) (recognizing forced marriage as a form of persecution); *see also* Cara Goeller, Note, *Forced Marriage and the Granting of Asylum: A Reason to Hope After* Gao v. Gonzales, 14 WM. & MARY J. WOMEN & L. 173, 191 (2007) (describing how forced marriage is becoming increasingly recognized as a form of gender-based persecution in the United States); Alicia Lobeiras, *The Right to Say I Don't: Forced Marriage as Persecution in the United Kingdom, Spain, and France*, 52 COLUM. J. TRANSNAT'L L. 896, 915–24 (2014) (describing how forced marriage is treated as matters of asylum law in England, France, and Spain).

181. Noga Firstenberg, *Marriage and Morality: Examining the International Marriage Broker Regulation Act*, 18 ASIAN AM. L.J. 83, 85 (2011) ("The particular ways in which IMBRA regulates American citizens and their noncitizen spouses can be attributed to the historical perception of Asian women, who make up a large portion of women advertised through IMBs, as sexualized and servile; the perception of prostitutes as a corrupting force and threat to monogamous Christian marriage; the historical discomfort with marriages to noncitizens; the move from seeing foreign women as a threat to American citizens to now viewing them as threatened by our country's citizens; the shift toward family-based immigration as a means of attaining citizenship; and Western notions of marriage based on free choice and consent.").

world comply with international norms."[182] For example, even though the United States touts itself as a liberator of women abroad,[183] it still has not ratified the Convention on the Elimination of All Forms of Discrimination Against Women, which was adopted in 1979 by the United Nations General Assembly.[184] The United States imagines itself as the leader of the free world with respect to the rights of women, even though the status of women and other sexual minorities in the country remains far from equal. Despite the egalitarian advances in marriage that Kennedy celebrates in *Obergefell*, violence against women, inequalities in the workplace, and decreasing access to healthcare remain barriers for women in the United States. Furthermore, despite Kennedy's veneration, marriage is itself an inherently patriarchal institution, and subsequently, marriage equality masks and perpetuates patriarchy in the guise of progressivism.[185]

Kennedy places marriage equality within the same trajectory as advances in egalitarian women's rights within marriage. In this respect, *Obergefell* supplies a new framework for "pinkwashing," where gay rights are used as a measure of whether a country is considered by the international community as progressive or backwards.[186] The accomplishment of marriage equality suggests that gay rights have reached a completion in the United States, at least as defined by incrementalists who mark legalization of sexual relations as the beginning of gay rights and marriage as the end.[187] The incrementalist model enables American exceptionalism by casting the

182. Natsu Taylor Saito, *Human Rights, American Exceptionalism, and the Stories We Tell*, 23 EMORY INT'L L. REV. 41, 42 (2009).

183. *See, e.g.*, *id.* at 59 ("A year after the United States invaded Afghanistan, Sonali Kolhatkar, vice president of the Afghan Women's Mission, contrasted George W. Bush's self-congratulatory statements about having freed Afghan mothers and daughters from the veil with the harsh realities of their daily lives: 'What good is an uncovered face if it is starving to death?' Noting that their most significant problems were starvation, lack of shelter and health care, civil disorder, and so-called ethnic cleansing, Kolhatkar emphasized that what women in Afghanistan needed was not to be freed from the burqa, but 'for the U.S. to stop imposing freedom through bombs, stop backing human rights violators and warlords, and stop hindering the security forces from expanding to the rest of the country.'").

184. Mary Pat Treuthart, *"No Woman, No Cry" – Ending the War on Women Worldwide and the International Violence Against Women's Act (I-VAWA)*, 33 B.U. INT'L L.J. 73, 118 (2015).

185. GEORGE CHAUNCEY, WHY MARRIAGE?: THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY 93 (2004).

186. *See* Katherine Franke, *Dating the State: The Moral Hazards of Winning Gay Rights*, 44 COLUM. HUM. RTS. L. REV. 1, 5 (2012) ("*Modern* states are expected to recognize a sexual minority within the national body and grant that minority rights-based protections. *Pre-modern* states do not. Once recognized as modern, the state's treatment of homosexuals offers cover for other sorts of human rights shortcomings."); Aeyal Gross, *The Politics of LGBT Rights in Israel and Beyond: Nationality, Normativity, and Queer Politics*, 46 COLUM. HUM. RTS. L. REV. 81 (2015).

187. Jeremiah A. Ho, *Weather Permitting: Incrementalism, Animus, and the Art of Forecasting Marriage Equality After* U.S. v. Windsor, 62 CLEV. ST. L. REV. 1, 7 (2014) ("By consensus, [William] Eskridge, [Yuval] Merin, and [Kees] Waaldijk all prescribe those steps in the following sequence: (1) the decriminalization of consensual same-sex intimacy occurs first; (2) then anti-discrimination against sexual minorities is furthered; and (3) lastly, the relationships of same-sex couples are then legally recognized. Once a state has crossed these three steps, the conditions for marriage equality will then be most evident.").

United States as complete in comparison to countries like India and Singapore where gay rights, according to their definition, have not yet begun due to the persistence of anti-sodomy statutes.[188] The myth of completion allows the United States to promote itself as much more advanced in the area of gay rights than it actually is.

Marriage equality, as an instrument of American exceptionalism, allows the invisibility of continued discrimination and oppression, in the same way that the myth of colorblindness does for racial minorities. The model minority stereotype for Asian Americans, for instance, perpetuates the belief that Asian Americans are monolithically accomplished, both economically and academically. However, certain pockets of the Asian American community, such as the Hmong, Bangladeshi, Laotian, and Cambodian populations are among the poorest demographics in the United States.[189] The per capita incomes of all four groups fall below that of African Americans, and Hmong Americans have a per capita income lower than any racial group nationwide.[190] The educational attainment of Hmong, Cambodian, Laotian, and Vietnamese Americans is low and comparable to other disadvantaged minority groups.[191] Despite stereotypes that Asians do not need welfare assistance, Hmong, Cambodian, and Laotian Americans are more likely than any racial group to access public assistance.[192] Also, Laotian, Guamanian, Cambodian, and Thai populations have high rates of teen pregnancy in the United States.[193] Acceptance of gay couples into the normative family mainstream of the United States causes similar blindness to continuing issues in the gay community. A glaring blind spot in the wake of *Obergefell*, for instance, is the continued lack of anti-discrimination protection for gay individuals in several states. Even in the immediate wake of *Obergefell*, there were news reports of gay individuals who, following the

188. *See, e.g.*, Singapore Penal Code 2008, c. 16, § 377A; Naz Foundation v. Govt. of NCT of Delhi, (2009) 160 Delhi Law Times 277.

189. ASIAN AMERICAN CENTER FOR ADVANCING JUSTICE, A COMMUNITY OF CONTRASTS: ASIAN AMERICANS IN THE UNITED STATES 62 (2011).

190. *Id.* at 34.

191. *Id.* at 31 ("The educational attainment of Hmong, Cambodian, Laotian, and Vietnamese Americans is lowest among Asian American ethnic groups and similar to those of Latinos and African Americans. Only 61% of Hmong Americans hold a high school diploma, while only 12% of Laotian Americans have graduated from college.").

192. *Id.* at 38 ("Hmong, Cambodian, and Laotian Americans are more likely than any racial group to access cash public assistance. In 2007–2009, approximately 13% of Hmong, 8% of Cambodian, and 6% of Laotian American households accessed cash public assistance, compared to 5% of African American and 4% of Latino households.").

193. TRACY A. WEITZ, CYNTHIA HARPER & ANSHU P. MOHLLAJEE, Teen Pregnancy among Asians and Pacific Islanders in California: Final Report 2 (2001) ("As an aggregate, fewer than 6% of births to APIs in California are teen births, whereas the proportion for whites is double that figure at 12%, for Hispanics 16%, and for African-Americans 18%. This aggregate figure, however, masks the very high proportion of teen births among certain API subpopulations. The Laotian community, for example, has 19% of its births to teen mothers and the Guamanian has approximately 17%. Among Cambodians and Thais, 11% of births are to teen mothers.").

decision, got married and were subsequently fired when they returned to work.[194]

In addition, marriage equality does not address how a large segment of the gay population is forcibly expelled and excluded from normative family life. Recent academic studies have found that a significant portion – up to 39% – of the homeless youth population in the United States is LGBT.[195] In larger urban centers such as New York, San Francisco, and Chicago, up to half of the homeless youth population identifies as LGBT.[196] The leading causes of LGBT homelessness are family rejection on the basis of sexual orientation and gender identity, or being forced out of the family home as a result of coming out as lesbian, gay, bisexual, or transgender.[197] Twenty-six percent of gay teenagers are kicked out of their homes for being gay.[198] These statistics demonstrate that the gay community is heterogeneous, and many segments of the gay community are far from occupying model minority status. Thus, they should not be treated monolithically as a model minority. Marriage equality may represent the culmination of rights for some pockets of the gay population, but is by no means comprehensive, and runs the risk of obscuring continuing inequalities that gay and lesbian individuals experience.

IV. CONCLUSION

Prior to the release of the decision, Katie Eyer warned that *Obergefell* might portend the myth of progress even while true equality for gay Americans continues to be elusive.[199] Even though gays and lesbians may now seem to be a new model minority who have attained equal standing with the mainstream in the United States, they have not. This Article continues Eyer's sentiment, with the hope that gay does not become the "new" Asian in the United States. The Asian American model minority myth demon-

194. Katherine Franke, *Giving Obergefell the "Roe-Treatment,"* COLUMB. L. SCH.: PUBLIC RIGHTS/PRIVATE CONSCIENCE PROJECT (July 13, 2015), http://blogs.law.columbia.edu/publicrightsprivateconscience/2015/07/13/giving-obergefell-the-roe-treatment/.

195. CHRISTY MALLORY, BRAD SEARS, AMIRA HASENBUSH & ALEXANDRA SUSMAN, LGBTQ YOUTH FACE UNIQUE BARRIERS TO ACCESSING YOUTH MENTORING PROGRAMS 8 (2014), http://escholarship.org/uc/item/6gk8p7nz#page-2.

196. Joseph J. Wardenski, *A Minor Exception?: The Impact of* Lawrence v. Texas *on LGBT Youth*, 95 J. CRIM. L. & CRIMINOLOGY 1363, 1363 (2005).

197. LAURA E. DURSO & GARY J. GATES, SERVING OUR YOUTH: FINDINGS FROM A NATIONAL SURVEY OF SERVICE PROVIDERS WORKING WITH LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH WHO ARE HOMELESS OR AT RISK OF BECOMING HOMELESS 4 (2012), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Durso-Gates-LGBT-Homeless-Youth-Survey-July-2012.pdf.

198. Deborah Lolai, *"You're Going to Be Straight or You're Not Going To Live Here": Child Support for LGBT Homeless Youth*, 24 TUL. J.L. & SEXUALITY 35, 42 (2015).

199. Katie Eyer, Brown, *Not* Loving*:* Obergefell *and the Unfinished Business of Formal Equality*, 125 YALE L. J. F. 1, 2 (2015).

strates the dangers of perceived assimilation to the norm.[200] It also breeds forgetfulness of past struggle and a blindness to present struggle. The belief that Asian Americans have achieved equality allows not only mainstream society, but also Asian Americans themselves, to downplay and ignore the discrimination and inequalities they continue to experience.[201] At the same time, Asian American achievement and the myth of postracialism have been used to undermine and downplay the continued struggles of others. In this regard, the model minority myth has traditionally been used to divide the interests of oppressed minority groups, and the same potential exists in respect to the gay community.[202] Like Asian Americans, gay Americans are also heterogeneous as to their levels of social and economic security, and treating them monolithically will allow vulnerable groups to fall through the cracks. Marriage equality does not address, and has the potential to mask, continuing inequities against gay individuals, such as hate crimes, bullying of gay youth, and depression and anxiety among gay teens and adults who are forced out of normative family units. For these individuals, access to marriage is not a panacea. Thus, this Article encourages memory and awareness from both the Asian American and the gay communities. Economic and educational attainment in certain sectors of the Asian community does not mean that discrimination and inequality do not still exist. Similarly, just because it is no longer illegal to be gay and gay couples have the right to marry, does not mean their rights are complete.

200. *See, e.g.*, Vinay Harpalani, *DesiCrit: Theorizing the Racial Ambiguity of South Asian Americans*, 69 N.Y.U. ANN. SURV. AM. L. 77, 118 (2013) ("Groups such as South Asian Americans are usually racially invisible when treated as honorary whites . . . .").

201. Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241, 1258–61 (1993); Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of "Foreignness" in the Construction of Asian American Legal Identity*, 4 ASIAN L.J. 71, 90 (1997) ("One effect of the model minority image is the popular perception that racism has an insignificant effect on Asian Americans.").

202. *See* Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467, 1469 (2000).