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Marital Status and Privilege

Laura A. Rosenbury*

I. INTRODUCTION

Angela Onwuachi-Willig’s powerful new book, According to Our Hearts: Rhinelander v. Rhinelander and the Law of the Multiracial Family,\(^1\) delves deeply into the intersections between race and family that remain to this day, despite facially race-neutral family law. The book expertly examines the unearned privileges that have long attached to monoracial marriage to the detriment of couples who did not, and do not, meet that ideal. Starting with a detailed analysis of the transcript and press accounts of Rhinelander v. Rhinelander—a sensational New York trial from the 1920s in which a white man sought annulment of his marriage to a woman of “racially ambiguous heritage,”\(^2\) and moving to contemporary interviews of twenty-one “black-white couples,”\(^3\) Onwuachi-Willig illustrates how law and society posit monoracial marriage as the ideal marriage. Onwuachi-Willig then analyzes the consequences of that construction, revealing how the monoracial marital ideal produces race, maintains white privilege, and harms individuals who do not conform.

Onwuachi-Willig’s project is to bring all marriages into the privileged fold, regardless of the race of their participants. She calls on lawyers, lawmakers, and legal scholars to challenge the monoracial marital ideal in all its subtlety, including its operation in domains outside of the home. In doing so, Onwuachi-Willig seeks to transcend the limits of a legal regime rooted in formal equality, setting forth reforms designed to distribute the benefits and security of marriage to all spouses and their children regardless of race.

Onwuachi-Willig’s project is important in and of itself, as it strives to

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2. Id. at 3.

3. Id. at 8–11 (discussing demographics of interviewees and interview methodology).
make family law substantively equal for all. At the same time, Onwuachi-
Willig also lays the foundation for a different project, one that thoroughly
interrogates the ways that marital status itself maintains hierarchies of
privilege. This Article takes on that project, examining how Onwuachi-
Willig’s challenge to the monoracial marital ideal, without more, may limit
understandings of relationships and race. In contrast, a broader challenge to
the marital ideal provides fodder for new ways of imagining both. Part II
situates Onwuachi-Willig’s analysis within the general regulation of
marriage, both legal and extralegal. Part III examines the invisible privileges
attaching not just to monoracial marriage, but to marriage as a distinct form
of relationship. Part IV then builds upon Onwuachi-Willig’s novel insight
that monoracial marital privilege extends beyond the social sphere to the
workplace, arguing that Onwuachi-Willig’s account leads to consequential
new understandings of the relational nature of race.

II. THE POWER AND LIMITS OF MARITAL STATUS

States have long permitted some, but not others, to obtain the legal
status of spouse. As Onwuachi-Willig emphasizes, many of these
restrictions historically worked to the detriment of African Americans. Until
the passage of the Thirteenth and Fourteenth Amendments, slave states
generally did not permit slaves to marry legally. Many states—slave and
free—also mandated that white people marry other white people, and such
restrictions persisted well into the twentieth century. Indeed, at the time of
the Supreme Court’s 1967 decision in Loving v. Virginia, which held such
anti-miscegenation laws unconstitutional, sixteen states “prohibit[ed] and
punish[ed] marriages on the basis of racial classifications.”

In addition to anti-miscegenation laws, states limited access to legal
marriage in other ways that were also subsequently deemed unconstitutional.
Asian immigrants encountered numerous obstacles to marriage, imposed by
both state and federal law, even when they sought to marry other Asian

5. See Onwuachi-Willig, supra note 1, at 123–27.
6. One exception was in Maryland, which at one point permitted white women to marry
slaves, yet mandated that such women be slaves themselves for as long as their husbands lived. See
7. See id. at 216–28; Rachel F. Moran, Interracial Intimacy: The Regulation of Race & Romance 17–19 (2001). As Onwuachi-Willig points out, however, the category of “white”
was often expansive, including many or all races other than African Americans. See Onwuachi-
Willig, supra note 1, at 124 (citing Moran, supra, at 17).
immigrants. Some states required individuals paying child support, no matter their race or the race of their proposed spouses, to obtain judicial approval to marry. Some states prohibited prisoners from marrying.

Although states may no longer limit legal marriage in these ways, restrictions on marriage still remain. Most basically, all states limit marriage to couples. A sole individual may not obtain the legal status of spouse, groups of more than two individuals may not legally marry, and individuals already legally married may not enter into another legally valid marriage without first obtaining a divorce or annulment.

Moreover, these couples must meet certain requirements. Forty-one states continue to mandate that married couples be mixed-sex. All states mandate that members of couples be over a certain age and deny marriage to couples who are within a certain degree of consanguinity or legal relation. All states may refuse to recognize couples who are legally married in other jurisdictions on public policy grounds. Finally, once couples are deemed

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12. That legal marriage is reserved for couples is most obviously illustrated by concerns (or hopes) that recognition of same-sex marriage will open the door to legal polygamy. See, e.g., David L. Chambers, Polygamy and Same-Sex Marriage, 28 HOFSTRA L. REV. 53 passim (1997). For an argument refuting the analogy between same-sex marriage and polygamy, see Adrienne D. Davis, Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality, 110 COLUM. L. REV. 1955, 1987–95 (2010).

13. This requirement that only groups of two individuals, legally unattached to third parties, may be married was recently reinforced in Elia-Warnken v. Elia, 972 N.E.2d 17, 21–22 (Mass. 2012), in which the Supreme Judicial Court of Massachusetts held that an individual in a civil union recognized by Vermont was required to dissolve that union before he could legally marry a third individual in Massachusetts.


15. The specific age, as well as the degree of relationship, varies from state to state. See, e.g., Joanna L. Grossman, Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws, 84 OR. L. REV. 433, 437–46 (2005). In addition, some states’ restrictions apply only to so-called blood relationships, whereas other states’ restrictions extend to people related by adoption. See, e.g., In re Adoption of M., 722 A.2d 615 (N.J. Super. Ct. Ch. Div. 1998).

eligible for legal marriage, all states require those couples to obtain a license from the state and to solemnize it,\textsuperscript{17} or, in a few states, to demonstrate that they have met the requirements for common law marriage.\textsuperscript{18}

States thus continue to serve as the exclusive gatekeeper of legal marriage.\textsuperscript{19} A state, and only a state, may extend the legal status of marriage, whether by granting a license that is later solemnized, recognizing a common law marriage, or deciding to recognize a marriage that is valid in another jurisdiction. Benefits, obligations, and default rules then flow from state recognition.\textsuperscript{20} The federal government currently recognizes only a single subset of marriages deemed valid by states—those between mixed-sex couples\textsuperscript{21}—but the federal government recognizes no marriages that are not otherwise validated, or eligible for validation, by a state.\textsuperscript{22}

\textsuperscript{17} The policy favoring marriage validity generally means, however, that a violation of a formality requirement will not void a marriage unless the jurisdiction expressly makes a marriage invalid without a license or solemnization. See, e.g., VA. CODE ANN. § 20-31 (West 2007) (stating, with respect to defects in licensure or solemnization, that a marriage "shall [not] be deemed or adjudged to be void . . . if the marriage be in all other respects lawful, and be consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage").

\textsuperscript{18} Nine states (Alabama, Colorado, Iowa, Kansas, Montana, Rhode Island, South Carolina, Texas, and Utah) and the District of Columbia currently grant full marital status to those couples that meet the requirements for common law marriage, which generally involve two individuals living together, agreeing that they are married, and holding themselves out as husband and wife. \textit{Common-Law Marriage}, NAT'L CONF. ST. LEGISLATURES (Apr. 19, 2011), http://www.ncsl.org/issues-research/human-services/common-law-marriage.aspx. New Hampshire recognizes common law marriage only for purposes of distributing spousal assets at death. \textit{Id.} Five states (Georgia, Idaho, Ohio, Oklahoma, and Pennsylvania) recognize only those common-law marriages established before a certain date. \textit{Id.}

\textsuperscript{19} Cf. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 965 (Mass. 2003) (emphasizing that the plaintiffs seeking same-sex marriage recognition did "not attack the binary nature of marriage, the consanguinity provisions, or any of the other gate-keeping provisions of the marriage licensing law").


\textsuperscript{21} Two circuit courts recently held that this aspect of the Defense of Marriage Act was unconstitutional, and the Supreme Court has granted certiorari in one of them. See Gill v. Office of Pers. Mgmt., 682 F.3d 1 (1st Cir. 2012); Windsor v. United States, 699 F.3d 169 (2d Cir. 2012), cert. granted, No. 12–307, 2012 WL 4099654 (U.S. Dec. 7, 2012).

\textsuperscript{22} Indeed, "[t]o the extent that there has ever been 'uniform' or 'consistent' rule in federal law concerning marriage, it is that marriage is 'a virtually exclusive province of the States.'" \textit{Windsor}, 699 F.3d at 186 (quoting Sosna v. Iowa, 419 U.S. 393, 404 (1975)). DOMA requires the federal government to first "ask whether a couple was married under the law of the state of domicile" before "adding 'an additional criterion, requiring the federal government to identify and exclude all same-sex marital unions from federal recognition.'" \textit{Id.} (quoting Pedersen v. Office of Pers. Mgmt., No. 3:10–cv–1750 (VLB), 2012 WL 3113883, at *48 (D. Conn. July 31, 2012)). A limited exception to this principle exists in the context of Social Security benefits, in which a marriage may be "deemed valid" even if it is not recognized under state law, provided that the individual seeking spousal benefits "in good faith . . . went through a marriage ceremony with the
Although states serve this gatekeeping role, states have largely stopped regulating what must occur within marriage. For much of our nation’s history, such regulation was robust. State-recognized marriage was the only site for legal sex, as states criminalized and punished nonmarital sex. 23 This intersection of marriage law and criminal law meant that states constructed marriage as a sexual relationship. 24 Indeed, state laws declared marriages voidable if not sexually consummated. 25 Moreover, states mandated that this sexual relationship be monogamous, as all states criminalized adultery and posited adultery as a fault-based ground for divorce. 26

Up until the 1970s, states also mandated distinct roles for husbands and wives within marriage. 27 By criminalizing sex outside of marriage, states attempted to confine sex to those situations in which men would be readily available to provide consistent financial support to any children conceived as a result of that sex and to the women who would bear and care for them. 28 Marriage law mandated that wives, in exchange for their husbands’ financial support, provide all other forms of daily care and support to their children and husbands. 29 States therefore mandated that husbands be breadwinners and wives be caregivers. 30 States required wives to take on that caregiving

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24. See, e.g., Zablocki v. Redhail, 434 U.S. 374, 386 (1977) (citation omitted) (describing marriage as “the only relationship in which the State of Wisconsin allows sexual relations legally to take place”).

25. See, e.g., Woods v. Woods, 638 S.W.2d 403, 405 (Tenn. Ct. App. 1982) (concluding that failure to consummate made marriage voidable, not void); see also Lawrence M. Friedman, A Dead Language: Divorce Law and Practice Before No-Fault, 86 VA. L. REV. 1497, 1509 (2000) (examining the relevance of consummation in divorce cases prior to no-fault divorce laws).


27. COTT, supra note 4, at 7 (“Marriage decisively differentiated the positions of husband and wife.”).

28. See Schneider, supra note 23, at 496–503.

29. See, e.g., Joan Williams, From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition, 76 CHI.-KENT L. REV. 1441, 1460–67 (2001) (discussing care and support required of wives).

30. Martha Albertson Fineman, Progress and Progression in Family Law, 2004 U. CHI. LEGAL F. 1, 2 (“[T]he sexes [traditionally] had distinct and well-defined gender roles: husbands were
role even when they also worked for wages, as was the case for many immigrant women, working class women, and women of color. Therefore, marriage was the exclusive site of legal sex as well as a site in which care, both financial and nonfinancial, was repeatedly exchanged.

Today, life-long sexual monogamy is no longer a defining characteristic of legal marriage, and states do not restrict family functions to one gender or another. All states permit a wide range of consensual sexual activity between adults outside of marriage, including adultery. In addition, specific fault grounds for divorce, such as adultery, have given way to no-fault divorce regimes in which one or both spouses may assess what types of activities, sexual and otherwise, are good for the marriage and which are not. States also no longer assume that women will be dependent on men, and thus no longer mandate gender role divisions within marriage. Instead, state statutes governing marriage now place husbands and wives in the same position, subject to the same obligations and receiving the same benefits. Thus, gender is now legally relevant to marriage only in the forty-one states that limit marriage to mixed-sex couples, and the laws of those states are

economic providers, disciplinarians, and the heads of families, while wives were nurturers, caretakers, and subservient to their husbands.”).


32. However, some restrictions on sexual activities remain. All states criminalize adult consensual incest, prostitution, and public and quasi-public sexual conduct, and several jurisdictions attach civil penalties to various sexual activities outside of marriage, including adultery. See Rosenbury & Rothman, supra note 23, at 816–17. In addition, a few states still recognize tort claims arising out of adultery. Lance McMillian, Adultery as Tort, 90 N.C. L. REV. 1987 passim (2012).

33. See, e.g., BRENDAL. COSMAN, SEXUAL CITIZENS: THE LEGAL AND CULTURAL REGULATION OF SEX AND BELONGING 107–14 (2007) (discussing the ways that monogamy within marriage has become a project, not a mandate, since the advent of no-fault divorce laws).

34. This change is most obviously reflected in states’ move away from awarding robust alimony payments upon divorce, in favor of equitable distribution of property. Laura A. Rosenbury, Two Ways to End a Marriage: Divorce or Death, 2005 UTAH L. REV. 1227, 1234–43 [hereinafter Rosenbury, Two Ways to End a Marriage]. In addition, increased employment opportunities have given women the means to support themselves. 42 U.S.C. § 2000e (2006) (codifying Title VII of the Civil Rights Act of 1964). States have also extended child support obligations to all biological fathers (unless they are explicitly sperm donors), whether married to their children’s biological mothers or not. See Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104–193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 42 U.S.C.) (providing states with federal block grants only when they have programs in place to establish paternity to enforce child support payments, regardless of the putative father’s marital relationship with the child’s biological mother). As such, states have developed ways to privatize the dependency of children outside of marriage.


gender-specific only at the point of access to marriage.  

Given that states no longer regulate the substance of marriage, marriages have become increasingly diverse. Although the terms husband and wife remain in regular use, some married individuals prefer the terms spouse or partner. Some mixed-sex spouses adopt traditional gender roles, others reverse those roles, still others embrace various conceptions of equalitarian marriage or otherwise attempt to eschew gender roles, and some claim such roles were irrelevant in the first place. Some same-sex spouses may attempt to replicate the roles found in traditional marriage, others may seek to transcend those roles, and still others may perform gender in ways that do not map onto traditional understandings of male and female. And all spouses may choose to live together or not, have sex or not, raise children or not, love each other or not, care for each other or not, be monogamous or not, and so on.

In light of this diversity, “marriage” today could be unintelligible, carrying no stable meaning beyond a coupled relationship recognized by the state with the benefits, obligations, and default rules that flow from such recognition. Yet “marriage” generally connotes more than state recognition. Most people accept that couples are married when they say they are married, without inspecting their marriage licenses or otherwise confirming the legal validity of their marriages. Being in a couple and

37. See NICOLAS & STRONG, supra note 14, at 2, 10-11 (listing states that currently recognize same-sex marriage and providing citations to relevant state statutes or judicial decisions). See also Mary Anne Case, What Feminists Have to Lose in Same-Sex Marriage Litigation, 57 UCLA L. REV. 1199, 1202 (2010) [hereinafter Case, Feminists] (“To grant civil marriage licenses to couples regardless of their sex would be to eliminate the last vestige of sex stereotyping from the law of marriage in the United States. It would complete the evolution away from sex-role differentiated, inequitable marriage law that began with nineteenth-century efforts to ameliorate the effects of coverture and continued in legislative reform and constitutional adjudication through the last third of the twentieth century.”).


42. For an argument in favor of such a “thin” view of marriage, see Case, Feminists, supra note 37, at 1203-06.
invoking the term is enough. A marriage is thus performed through the use of the terms “married,” “husband,” “wife,” and “spouse.” Social assumptions about the nature of the relationship then flow from those terms, even as the state no longer mandates that marriages be performed in certain ways. In this way, “normative definitions of family” are about much more than law. According to Our Hearts targets these extralegal aspects of marriage. At the time of Rhinelander, the State of New York did not mandate that people marry within their race or class, or that the parents of both spouses approve of the marriage; indeed, the state extended the legal status of marriage to Leonard, a white man from a wealthy family, and Alice, a woman from a working-class family who at trial conceded she was not white. Leonard and Alice were married in the eyes of the law, and they could have maintained that status “till death do [they] part.” The social expectations attached to that status, not the state, imperiled their marital future.

If they had so desired, Leonard and Alice could have responded to this mismatch between legal status and social expectations by doing more to perform their marriage. Even as portions of society assumed marriage was and should be monoracial, Leonard and Alice could have confronted that assumption by proudly declaring that they were husband and wife. In a similar way, Leonard and Alice could have confronted the assumption that wealthy people did not marry poorer people. And Leonard could have confronted the assumption of parental approval by forgoing that approval.

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43. This is likely why same-sex marriage advocates urge states to extend the term “marriage” to same-sex couples even when same-sex couples in registered domestic partnerships or civil unions receive the same benefits as married couples. See In re Marriage Cases, 183 P.3d 384, 452–53 (Cal. 2008); Kerrigan v. Comm't of Pub. Health, 957 A.2d 407, 481 (Conn. 2008); Vamum v. Brien, 763 N.W.2d 862, 905–07 (Iowa 2009); Opinions of the Justices to the Senate, 802 N.E.2d 565, 566–72 (Mass. 2004). At the same time, nothing would seem to prevent individuals from claiming they are married even when the state does not recognize them as such, provided that they do not seek state benefits or otherwise engage in fraud. Indeed, a state would likely violate the First Amendment if it prohibited individuals from using the term “marriage” in the absence of legal status. The Author thanks Jennifer Rothman for initially raising this point. Of course, same-sex couples may still be harmed if the state prevents them from using the term “marriage” in their interactions with the state. See Michael C. Dorf, Same-Sex Marriage, Second-Class Citizenship, and Law’s Social Meanings, 97 VA. L. REV. 1267, 1308–15 (2011).

44. See ONWUACHI-WILLIG, supra note 1, at 121.

45. If Leonard and Alice had never been legally married, no litigation would have been required, and there would have been no marriage to annul. The trial thus was a direct result of the legal validity of the marriage, and the jury ultimately affirmed that validity. See id. at 4.

46. See id. at 4. Notably, however, Alice’s family did not make such assumptions, nor did much of her community. See id. at 185–86.

47. In many ways, this is what Dean Camille Nelson and her spouse did decades later. See id. at 133.
and the money that flowed from it. Annulment or divorce were not his only options.

That Leonard and Alice did not perform their marriage in this way illustrates the power of social, as opposed to legal, conceptions of marriage. Onwuachi-Willig richly illustrates Leonard’s inability to stand up to his father and his lawyers. Even more so, she analyzes the two primary choices Leonard confronted: the choice between family money and his legal marriage, and the choice between high society acceptance and his legal marriage. Leonard failed to choose his legal marriage in both instances. The very fact that Leonard faced these choices is, in some ways, counterintuitive. Marriage has long been a mechanism for conveying family wealth, not disrupting that conveyance. Indeed, despite the portrayal of marriage as an effective relationship in most modern family law scholarship, marriage was historically an economic exchange between families and it remains a mechanism designed to distribute resources to this day. Likewise, legal marriage has long furthered social status rather than thwarting it; after all, marriage has been, and remains, the only relationship between adults officially recognized and supported by all fifty states.

Yet society does not treat all marriages alike even if they are equal

48. See, e.g., id. at 32–33.
49. Id. at 37–39.
50. See ONWUACHI-WILLIG, supra note 1, at 37–39.
51. See, e.g., Rosenbury, Two Ways to End a Marriage, supra note 34 passim.
52. See Janet Halley, What Is Family Law?: A Genealogy Part II, 23 YALE J.L. & HUMAN. 189 passim (2011) (analyzing and critiquing how family law professors in the twentieth century separated the family from the market, focusing on the affective nature of family relationships); Laura T. Kessler, New Frontiers of Family Law, in TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY 226, 240 (Martha Albertson Fineman ed., 2011) (arguing that “family law is becoming or is at least on the verge of becoming the law of intimacy”). Onwuachi-Willig herself appears to embrace this view when she laments that “true intimacy” or “true relationships” between African Americans and whites often did not result in marriage in the pre-Civil Rights era. See ONWUACHI-WILLIG, supra note 1, at 127.
53. See Halley, supra note 52, at 195; Rosenbury, Two Ways to End a Marriage, supra note 34 passim. Onwuachi-Willig’s personal narrative about the presentation of a bill at an ice cream shop and the story told by one of her interview subjects about splitting a restaurant bill between couples (as opposed to individuals), reveals that marriage is still perceived as creating an economic unit. ONWUACHI-WILLIG, supra note 1, at 175.
54. Laura A. Rosenbury, Friends with Benefits?, 106 MICH. L. REV. 189, 216–19 (2007) [hereinafter Rosenbury, Friends with Benefits?]. Of course, intestacy laws recognize relationships between parents and their adult children, between adult siblings, and between other adults who are otherwise related by blood or adoption. See Rosenbury, Two Ways to End a Marriage, supra note 34, at 1261–62. However, the state does not affirmatively support those relationships—all states permit adults to execute wills that explicitly disinherit such non-spousal relatives. For a general discussion of the justifications for this testamentary freedom, see Adam J. Hirsch & William K.S. Wang, A Qualitative Theory of the Dead Hand, 68 IND. L.J. 1, 6–14 (1992).
before the law. Rhineland provides one example of a legal marriage that met resistance from wealthy, white society. The narratives of Onwuachi-Willig’s interview subjects likewise reveal the ways that society privileges some legal marriages over others. Even as legal marriage is now formally race-neutral, social understandings of marriage remain deeply raced—privileging white couples over all others and privileging monoracial couples over interracial ones.

These extralegal understandings of marriage are powerful. However, that power does not mean law plays no role in perpetuating marital hierarchies. Onwuachi-Willig illustrates the ways law perpetuates housing segregation, discouraging the formation of interracial relationships and often limiting the areas in which interracial spouses feel comfortable living. In even more detail, Onwuachi-Willig also analyzes how some courts have adopted narrow interpretations of employment discrimination laws, failing to provide redress for employees facing harassment or adverse employment actions because of their interracial relationships. Such interpretations render invisible the ways employers may privilege employees in monoracial marriages to the detriment of employees in interracial marriages.

In her quest to bring all marriages into the privileged fold, Onwuachi-Willig thus exposes many of the important ways law supports the monoracial marital ideal. Even more intersections between law and extralegal norms emerge if we extend Onwuachi-Willig’s project to interrogate why marriage is privileged at all. States originally recognized legal marriage in order to provide incentives for white men to privatize the dependency of white women and their children. Indeed, marriage law and the law of slavery worked in tandem to encourage white men to take on the support of children conceived with both white women and women who were enslaved; white men received the benefits of marriage in exchange for supporting their “legitimate” children while they received the benefit of increased property accumulation for overseeing offspring born to slaves.

55. ONWUACHI-WILLIG, supra note 1, at 240–44, 249–50.
56. Id. at 156–84.
57. Id. at 185–98; see also Elizabeth F. Emens, Intimate Discrimination: The State’s Role in the Accidents of Sex and Love, 122 HARV. L. REV. 1307, 1398–99 (2009).
58. ONWUACHI-WILLIG, supra note 1, at 195–201, 207–12.
59. Id.
60. See, e.g., Schneider, supra note 23, at 496–503.
61. See Laura F. Edwards, “The Marriage Covenant Is at the Foundation of All Our Rights”: The Politics of Slave Marriages in North Carolina After Emancipation, 14 LAW & HIST. REV. 81, 82 (1996) ("Before emancipation, white household heads assumed economic, legal, and moral responsibility for a range of dependents, who included African-American slaves as well as white women and children.").
As states made marriage available to freed slaves and other African Americans, that construct of marriage did not change. As Onwuachi-Willig has illustrated in previous work: "One method for accomplishing the integration of former slaves into free society without burdening Whites with related economic costs was to insist that newly freed Blacks adopt and comply with the standard legal institution of marriage." States thus extended marriage on the terms previously only available to white men and their dependent women. The state’s interest in privatizing dependency and regulating sex was opened to all who conformed to mixed-sex coupledom, but that openness fostered assimilation, not transformation.

Many extralegal assumptions about marriage thus grow out of a state institution created around white needs and norms. Color-blindness and, ultimately, gender-blindness did not erase the color or gender of legal marriage. Instead, white privilege, male privilege, and heterosexual privilege so infused the institution of legal marriage that color-blindness and gender-blindness became a way of extending some, but not all, of that privilege to those who were not white or male or, now, even heterosexual (in some states).

Given these connections between the origins of legal marriage and the extralegal assumptions that Onwuachi-Willig seeks to address, it seems logical to go beyond Onwuachi-Willig’s project to challenge legal marriage itself. According to Our Hearts confirms that changing the law of marriage often does not change extralegal assumptions about marriage. Although internal changes to legal marriage have not been sufficient, broader changes designed to dislodge marriage’s role in defining the legal family might serve Onwuachi-Willig’s goals. Indeed, such an approach may be the best way to achieve Onwuachi-Willig’s “hope about a reframing of the normative ideal for family, or better yet, of a release of any need for an ideal at all.”


64. Franke more fully analyzes the regulatory effects of extending legal marriage to African Americans during the Reconstruction era. See Franke, supra note 62 passim.

65. In other words, marriage law always privileged some individuals over others, in service of state goals. For more discussion of the history of marriage regulation, see COTT, supra note 4 passim.

66. In my view, this commentary on the limits of law reform within existing structures is one of the most important contributions of Onwuachi-Willig’s analysis, although she does not explicitly frame the contribution in this manner.

67. ONWUACHI-WILLIG, supra note 1, at 279–80.
III. UNPACKING THE INVISIBLE KNAPSACK OF MARITAL PRIVILEGE

Onwuachi-Willig’s challenge to the monoracial aspect of “same-race couple privilege”\(^6\) is deeply important, but stopping there leaves “couple privilege” intact. Even in Onwuachi-Willig’s ideal world, marriage would remain the only relationship between adults recognized and supported by all fifty states, thereby privileging some forms of personal life over others.\(^69\)

Here, it is useful to turn to Onwuachi-Willig’s discussion of Peggy McIntosh’s influential paper, *White Privilege: Unpacking the Invisible Knapsack.*\(^70\) Onwuachi-Willig creatively extends McIntosh’s analysis to examine fifteen invisible privileges enjoyed by monoracial, white, mixed-sex couples and, to a lesser extent, by monoracial, black, mixed-sex couples.\(^71\) She then compares that list of privileges to the privileges enjoyed by black-white, mixed-sex couples, finding that such interracial couples enjoy, at best, two of those fifteen privileges.\(^72\) Onwuachi-Willig concludes “even in a post-—*Loving v. Virginia* world, black-white, heterosexual couples encounter discrimination at the intersection of race and family.”\(^73\)

As discussed in Part II, states mandate none of this modern-day discrimination. In this way, the discrimination that Onwuachi-Willig identifies is much like the discrimination that people of color generally continue to encounter amidst white privilege.\(^74\) Extralegal forces reinforce white privilege, and monoracial marital privilege, even as law, including marriage law, is now explicitly race-neutral. Facially race-neutral law has not eliminated racial hierarchy throughout society.

Yet, although law is now facially race-neutral, it is not family-neutral. State statutes no longer define race or racial difference.\(^75\) Instead, to the

\(^6\) Id. at 168.

\(^69\) For previous discussion of this privileging of marriage over all other relationships, see supra note 54 and accompanying text.


\(^71\) Id. at 159–66.

\(^72\) Id. at 169–72.

\(^73\) Id. at 172.

\(^74\) See McIntosh, supra note 70.

\(^75\) In contrast, states historically promulgated statutes defining race. See, e.g., Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109 passim (1998). See also Taunya Lovell Banks, *Book Review*, 44 LAW & SOC’Y REV. 881, 882 (2010) (reviewing PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA (2009)) (“Because the mere existence of miscegenation laws was insufficient to maintain white dominance, it fell to courts and state legislatures to define and thereby ‘produce’ race. Once the legal status of these laws seemed secure, mechanisms were needed to
Marital Status and Privilege

extent that states still use the term “race” in statutes, primarily anti-discrimination statutes, courts interpret it to refer to a universal aspect of identity: all people have a race. In contrast, states continue to define family to include some and exclude others.

States define family most obviously by determining who is a legal spouse or a legal parent and then extending the benefits, obligations, and default rules of marriage and parenthood only to those individuals who qualify. States also define family in more subtle ways. For example, if an individual fails to validly execute a will prior to death, states distribute that individual’s property to statutorily defined family members in an order—or hierarchy—determined by the state governing the probate proceedings. Legal spouses are always at the top of this hierarchy, although they often must split the estate with the legal children of the decedent, or, in a few states, they must split the property with the decedent’s parents or siblings if the decedent left no children.

In almost all states, individuals who function as spouses yet do not enjoy the legal status of spouse, such as cohabiting partners not registered with the state, have no right to make claims against the deceased spouse’s estate. Moreover, if the decedent has no surviving

 assure their enforcement. County clerks, law enforcement officials, and keepers of vital statistics became ‘race definers’ and ‘race police.’”).

76. For example, four years after Loving, the Supreme Court stated that, in passing Title VII, “[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.” Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). Five years later, the Court emphasized that Title VII’s prohibition on race discrimination is “not limited to discrimination against members of any particular race,” and similarly found that Section 1981 of the Civil Rights Act of 1866 “was meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race.” McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278-79, 295 (1976).

77. See, e.g., Bernstein, supra note 20, at 146-52. These benefits, obligations, and default rules are not available to individuals who function as family members but do not enjoy the legal status of spouse or parents. For a critique of this status-based approach to family recognition, see Nancy Polikoff, Beyond (Straight and Gay) Marriage: Valuing All Families Under the Law passim (2008).

78. See, e.g., Rosenbury, Two Ways to End a Marriage, supra note 34, at 1261–62 (providing a fifty-state analysis of intestacy statutes).

79. Some states also include individuals registered with the state as a “domestic partner” at the top of the hierarchy. See id.

80. Id. at 1261–73.


82. The primary exception is found in Washington, which awards cohabitants an equitable share of their partners’ property upon death if they qualify as being in “committed intimate relationships.” See Oliver v. Fowler, 168 P.3d 348, 353–56 (Wash. 2007) (describing the evolution of the doctrine, including its earlier focus on “meretricious relationships” as articulated in Vasquez v.
family members, as defined by the state, their estates are given, or “escheat,” to the state, even when the decedent left behind friends and other loved ones at death. States therefore play an active role in defining family to this day. States place certain relationships and activities within the legal family and other relationships and activities outside of it. In so doing, states necessarily privilege some ways of life and stigmatize others by signaling that some relationships are deserving of state recognition and support while others are not. Michael Warner puts it bluntly: “Marriage sanctifies some couples at the expense of others. It is selective legitimacy.” Marriage therefore is not just one choice among many. Instead, by treating marriage like no other relationship, states position marriage as “the privileged choice[.]

Current fights over same-sex marriage are, at their root, a manifestation of this dynamic. Both proponents and opponents explicitly acknowledge states’ power to privilege marriage. Proponents argue that the majority of states refusing to recognize same-sex marriage should bring same-sex intimacy into the privileged fold, whereas opponents argue that states should hold the line at traditional definitions of marriage. Few question whether states should privilege marriage, or the couple form, at all. Instead, most

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83. See, e.g., MO. REV. STAT. § 474.010 (2000).
84. Rosenbury, Friends with Benefits?, supra note 54, at 204–05 (“Even if friends are performing many, or all, of the functions traditionally ascribed to spouses, parents, or children, friends are not eligible . . . . to inherit each other’s estates under state intestacy rules.”). See also John T. Gaubatz, Notes Toward a Truly Modern Wills Act, 31 U. MIAMI L. REV. 497, 559 (1977) (advocating for an intestacy regime that recognizes a “decedent’s close family might include nonblood relatives and friends[.]”).
85. See, e.g., Bernstein, supra note 20, at 177 (discussing how state-sponsored marriage “stigmatizes cohabitation as less privileged” and “establishes the gender-dimorphous dyad as the preferred way to arrange one’s private life”).
87. Rosenbury, Friends with Benefits?, supra note 54, at 199; see also id. at 218–19 (discussing the consequences of privileging marriage over friendship).
88. Indeed, there would be little to dispute if marital privilege did not seem desirable. See Jane S. Schacter, The Other Same-Sex Marriage Debate, 84 CHI.-KENT L. REV. 379, 381–83 (2009).
89. Michael Warner and other queer theorists are the primary exceptions. Suzanne Kim also advocates a “skeptical marriage equality” perspective, which supports same-sex marriage “while remaining critical of marriage as a legal category and of its privileged status in law and society.” Suzanne A. Kim, Skeptical Marriage Equality, 34 HARV. J.L. & GENDER 37, 41 (2011). In addition,
arguments center on the appropriate ways to extend or retract that privilege. The fact that privilege attaches to legal marriage is therefore assumed and naturalized.

Onwuachi-Willig, even as she embraces a nuanced conception of privilege, similarly assumes that privilege should flow to marriage; she would simply like more of the extralegal effects of that privilege to flow to black-white couples. This, ironically, is particularly salient during Onwuachi-Willig’s discussion of the invisible knapsack of privilege enjoyed by white monoracial couples and black monoracial couples. She identifies the eleventh privilege as follows: “White, heterosexual couples can go shopping together, fairly well assured that people will understand that they are intimate partners and not just friends. When checking out, they rarely encounter the question: ‘Is this together?’” When altering the analysis to consider black monoracial couples, Onwuachi-Willig modifies the description slightly: “Black, heterosexual couples can go shopping together, fairly well assured that people will understand that they are intimate partners, and not just friends or strangers. When checking out or dining out, they rarely encounter the question: ‘Is this together?’”

Onwuachi-Willig targets privilege that monoracial couples no doubt enjoy and black-white couples often do not. Yet in describing that privilege, she posits a world in which couples are first, either “intimate partners” or “just friends,” and, later, are either “intimate partners,” “just friends,” or “strangers.” In doing so, Onwuachi-Willig embraces a hierarchy of relationships: privilege attaches to the understanding that couples are “intimate partners,” and harm or discrimination flows from the mistaken perception that they are “just friends.” In fact, “just friends” may be just like “strangers,” given the modification of Onwuachi-Willig’s description.

Onwuachi-Willig therefore implicitly embraces states’ privileging of

Nancy Polikoff convincingly argues why marriage should be “knock[ed] . . . off its perch,” but her proposal to “value all families” at times risks reinforcing the norm of coupled interdependence and care, albeit in both conjugal and nonconjugal forms. See Polikoff, supra note 77, at 90, 131–33. For a fuller discussion, see Rosenbury, Friends with Benefits?, supra note 54, at 200–01.

90. For one example, see Elizabeth S. Scott, Marriage, Cohabitation and Collective Responsibility for Dependency, 2004 U. Chi. Legal F. 225, 229–30, 236–55 (defending the privileged status of marriage and arguing that the privilege should be extended to same-sex couples who choose to marry).

91. See supra notes 70–74 and accompanying text.


93. Id. at 164. Onwuachi-Willig uses this modified description a second time when she describes the ways black-white couples do not enjoy the privilege. See id. at 171.

94. Id. at 160–61, 164, 171.

95. For further analysis of the term “just friends,” see Rosenbury, Friends with Benefits?, supra note 54, at 207.
legal marriage over other relationships between adults, including friendship. After all, states recognize marriage and only marriage—friends are generally grouped with strangers for purposes of family law. More explicitly, like the majority opinion in Lawrence v. Texas, Onwuachi-Willig promotes "one vision of intimacy—that of a couple engaged in emotional and sexual intimacy." She therefore reinforces the common distinction between individuals who are viewed as dating and those who are "just friends," a "distinction [that] implies that [the] dating relationship may lead to the privileged state of marriage, whereas the friendship will not."

Onwuachi-Willig does not acknowledge the ways her analysis reinforces the states' hierarchy of relationships beyond arguing that marriage should be extended to same-sex couples. Overlooking that hierarchy is one of the unearned privileges of marriage and, more generally, of the romantic couple form. Just as one of the privileges of whiteness is not having to think about race, a privilege of marriage is not having to think of the ways that society is structured around marriage.

Of course the unearned privileges of marriage intersect with other unearned privileges, including white and monoracial privilege. Legal marriage provides a floor of privilege, which whiteness and monoraciality then elevate. Yet white marital privilege, or monoracial marital privilege, would necessarily be different without the initial floor of privilege supported by the state. Questioning that floor of unearned privilege very well could

96. This privileging becomes more explicit when Onwuachi-Willig writes: "Alice ... lived until her late eighties, but to use the word 'lived' may be an exaggeration. . . . Though surrounded by her family members, Alice remained alone, never partnering with another man." ONWUACHI-WILLIG, supra note 1, at 203.


98. Rosenbury & Rothman, supra note 23, at 835.


100. For similar points not deploying the language of "unearned privilege," see Vivian Hamilton, Mistaking Marriage for Social Policy, 11 VA. J. SOC. POL'Y & L. 307, 331–35 (2004) (discussing how "[c]ouples who marry . . . implicitly communicate approval (or, at best, lack of principled disapproval) of the institutionalized heterosexual privileging that is marriage . . . ."); Rosenbury, Friends with Benefits?, supra note 54, at 199 (arguing that the choice of marriage "reinforces both the privilege of the couple and the corresponding stigmatization of others").

101. ONWUACHI-WILLIG, supra note 1, at 254–56. See also BARBARA FLAGG, WAS BLIND BUT NOW I SEE: WHITE RACE CONSCIOUSNESS AND THE LAW 1 (1998) ("[W]hites' social dominance allows us to relegate our own racial specificity to the realm of the subconscious."); LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 90–91 (2002) (arguing that many whites, unlike most African Americans, assume that race is and/or should be "like a vapor . . . nonconstraining . . . evanescent"); Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581, 604 (1990) ("At a 1988 meeting of the West Coast 'fem-crits,' Pat Cain and Trina Grillo asked all the women present to pick out two or three words to describe who they were. None of the white women mentioned their race; all of the women of color did.").
help Onwuachi-Willig in her quest for "a reframing of the normative ideal for family, or better yet, of a release of any need for an ideal at all."\textsuperscript{102}

Once the privilege of marital, and family, status is acknowledged, the current ideal of family might be better dissected and dismantled. It is unlikely that law will be capable of positing a completely ideal-less conception of family. Law by its very nature has regulatory effects, subjecting people to identities instead of merely reflecting them.\textsuperscript{103} Yet challenging the unearned privilege of marriage by, for instance, legally recognizing more diverse forms of relationship,\textsuperscript{104} might begin to make the current ideal of family less intelligible.

If the marital ideal is destabilized in this manner, the role played by marriage, and particularly monoracial marriage, in feelings of "belonging,"\textsuperscript{105} "place,"\textsuperscript{106} and "visibility,"\textsuperscript{107} might be reduced. Because marriage is currently the only relationship between adults affirmatively recognized and supported by the state,\textsuperscript{108} marriage is the norm against which all relationships are measured.\textsuperscript{109} Belonging, place, and visibility therefore are all determined by a couple's ability to conform to that norm. Given the history of legal marriage and the extralegal assumptions attaching to it, as discussed in Part II, interracial couples always will be farther from that norm than monoracial couples. Individuals not in couples, or otherwise not living in identifiable family forms, are even farther from the norm.\textsuperscript{110} Such disparities are likely to persist until the norm becomes less intelligible.

Unpacking the knapsack of unearned marital privilege, and spreading its goods across a broader range of relationships, therefore appears to be the

\begin{itemize}
  \item \textsuperscript{102} Onwuachi-Willig, supra note 1, at 279–80.
  \item \textsuperscript{104} For some ideas about how to recognize more diverse forms of relationship, see Polikoff, supra note 77, at 123–45; Elizabeth F. Emens, Monogamy's Law: Compulsory Monogamy and Polyamorous Existence, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 354–61 (2004); Katherine M. Franke, Longing for Loving, 76 FORDHAM L. REV. 2685, 2703 (2008); Alice Ristroph & Melissa Murray, Disestablishing the Family, 199 YALE L.J. 1236, 1270–78 (2010); Rosenbury, Friends with Benefits?, supra note 54, at 220–33.
  \item \textsuperscript{105} Onwuachi-Willig, supra note 1, at 183.
  \item \textsuperscript{106} Id. at 132.
  \item \textsuperscript{107} Id. at 174.
  \item \textsuperscript{108} For previous discussion of this privileging of marriage over all other relationships, see supra note 54 and accompanying text.
  \item \textsuperscript{109} See Rosenbury, Friends with Benefits?, supra note 54, at 218–19.
  \item \textsuperscript{110} After all, couples at the very least have the place created by the floor of "marriage" or "family," whereas others do not. Similarly, couples are generally more visible than those who live in unintelligible families.
\end{itemize}
best strategy for loosening, if not releasing, the ideal of family. In a world that recognized more diverse forms of relationship, place-based racial hierarchies and other forms of white privilege would still disadvantage black couples and black-white couples. But legal marriage would no longer clearly privilege some and stigmatize others, cracking the foundation of extralegal forces that maintain hierarchies of relationship. Such disruption of marital privilege in turn has the potential to affect ways individuals and families perform their relationships and identities at home, work, and the spaces between.

IV. BEYOND PRIVILEGED PERFORMANCES

Onwuachi-Willig concludes According to Our Hearts by considering how monoracial marital privilege extends beyond the social sphere to the workplace. This is an important contribution, as scholars often assume that work is immune from the dynamics of intimacy pervading the private sphere. Indeed, some feminists have posited the workplace as a site of liberation from the gendered caregiving of the home. Other feminists adopt a more nuanced and sobering view, analyzing the support many male workers receive from sources outside of the workplace—from stay-at-home wives or even working wives and other family members—and the ways that workers without such support are often hampered.

Onwuachi-Willig extends these insights, arguing that a “supportive spouse” is in fact often a “job assistant,” at least in many white-collar workplaces. Marriage in these situations does not merely provide background support for workers; instead, marriage is part of the job. And if marriage is part of the job, then the differential privilege attaching to monoracial and interracial marriage will likely impact assessments of job

111. For a discussion of these forms of white privilege, see CHARLES W. MILLS, THE RACIAL CONTRACT 41–42 (1997).

112. ONWUACHI-WILLIG, supra note 1, at 207–32.


116. ONWUACHI-WILLIG, supra note 1, at 228.

117. Id. at 212–19, 227–29 (describing jobs with a “couple requirement”).
performance, benefiting those employees in monoracial marriages and harming those employees in interracial marriages.\textsuperscript{118}

Onwuachi-Willig is rightly concerned about this potential for workplace discrimination on the basis of the race of one’s spouse. She posits that the relational nature of this discrimination causes much of it to fall through the cracks of Title VII, despite increasingly expansive interpretations of Title VII’s prohibition of discrimination “because of race.”\textsuperscript{119} Onwuachi-Willig therefore proposes that discrimination “because of . . . interraciality” be added to Title VII’s list of prohibitions.\textsuperscript{120}

Adding “interraciality” to Title VII’s list of prohibitions would certainly bring more visibility to interracial couples, challenging the implicit assumption that couples are monoracial. Moreover, such an amendment would identify harm unknown to many people in monoracial marriages, given monoracial privilege. The amendment therefore would likely have both symbolic and practical effect.

At the same time, however, Onwuachi-Willig’s proposed amendment also risks reinforcing two existing privileges: marital privilege and monoracial privilege. Given the discussion of unearned marital privilege in Part III, it should be obvious how the addition of “interraciality” would reinforce marital privilege. When marriage is part of the job, all employees without intelligible partners are harmed.\textsuperscript{121} “Interraciality” may make interracial partners more intelligible, bringing them into the charmed circle of monoracial couple privilege.\textsuperscript{122} In doing so, however, the boundaries of that circle are strengthened, not weakened. Privilege might be extended to more spouses, but those living outside the married couple form would remain stigmatized.\textsuperscript{123}

\begin{enumerate}
\item \textsuperscript{118.} Id.
\item \textsuperscript{119.} Id. at 195–98.
\item \textsuperscript{120.} Id. at 22, 257.
\item \textsuperscript{121.} Moreover, employees who do not conform to the gendered expectations of marriage may also be harmed. See Laura A. Rosenbury, \textit{Work Wives}, HARV. J.L. & GENDER (forthcoming 2013). Cf. Catherine Albiston, \textit{Institutional Inequality}, 2009 WIS. L. REV. 1093, 1096 (analyzing “the way that institutions incorporate historical social practices that presumed women would be marginal workers and would occupy subordinate roles in both the workplace and family”).
\item \textsuperscript{123.} Moreover, marital privilege may be particularly problematic at work because it reinforces norms of the ideal worker as a white man with a wife at home, freeing him of caregiving responsibilities. See, e.g., Williams, supra note 29, at 1447–52. All employees live in a world with others and are defined, at least in part, by those others. If employers may, without challenge, privilege marital relationships over other relationships, then white, male norms will pervade the workplace. Cf. Barbara J. Flagg, \textit{Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking}, 104 YALE L.J. 2009, 2029 (1995) (describing the process by which employers...
The ways in which the addition of "interraciality" would likely reinforce monoracial privilege are more subtle. Creating this new category of prohibited discrimination would not merely strengthen the force of Title VII's anti-discrimination mandate, but would also imply that such discrimination did not, and could not, fall within the existing prohibition on race discrimination. The addition of "interraciality" therefore would necessarily affect the meaning of "race" in Title VII doctrine. Most saliently, "race" would include monoraciality but not interraciality, reinforcing monoraciality as a core component of race.

Of course, the existing language of Title VII already maintains monoracial privilege. Silence about an aspect of identity does not mean that aspect is irrelevant. Instead, as Onwuachi-Willig so convincingly illustrates throughout *According to Our Hearts*, such silence reinforces the privileged end of an identity hierarchy, in this case monoraciality. Yet, naming the identity does not in turn eliminate that privilege, nor does it necessarily "destabilize our notions of clear-cut, fixed categories of race." Instead, the new category would have its own regulatory effects, policing what falls within both the new and old categories. Race would more explicitly include monoraciality, but interraciality would be something other than race.

Removing interraciality from the category of race may also limit understandings of the performative nature of race, further solidifying rather than destabilizing notions of race. Many scholars have previously argued that Title VII's prohibition of discrimination because of race should encompass discrimination based on racial performance. In other words, race must be conceptualized as more than phenotype; race comes into existence through acts. In this way, race is a performance much like marriage is a performance. Removing interraciality from the category of race risks removing a key act—the formation of personal relationships—through which race is produced.

Instead of supporting a new category of discrimination on the basis of interraciality, Onwuachi-Willig's goals might be better served by embracing the relational nature of race, racial privilege, and racial discrimination. The

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124. This point is made implicitly throughout *According to Our Hearts*. See ONWUACHI-WILLIG, supra note 1 passim. For example, see id. at 257–58.

125. Id. at 265.

analysis in *According to Our Hearts* provides the most compelling account to date of the ways in which the choice of one’s intimate partner influences understandings of race in the workplace, as well as throughout society, and the benefits and harms that flow therefrom. Race is therefore not lodged solely in the individual, but instead comes into being through the relationships we choose and others’ reactions to those choices.

Indeed, the relational nature of race is illustrated repeatedly throughout *According to Our Hearts*, starting with Onwuachi-Willig’s expert dissection of the Rhinelander case. As discussed in Part II, no law prevented Leonard from staying married to Alice. Instead, Leonard chose to end the marriage to maintain his relationship with his parents, his social standing, and his inheritance. That he had to choose between marriage and those privileges reveals that Leonard’s whiteness was not static. Instead, his status as white—and the privileges that flowed therefrom—was rooted in activity policed by his family and elite, white social circle. Leonard’s family and social circle were likely concerned that Alice, a black woman, might gain access to white wealth through her marriage to Leonard. But they were likely just as concerned that Leonard would continue to claim whiteness while simultaneously engaging in activities that threatened white supremacy. One way to read the case, then, is that Leonard sacrificed his marriage to maintain his whiteness.

Whiteness is thereby performed, or not performed, through marriage. Onwuachi-Willig’s contemporary interviews of interracial couples reveal that such performances continue to this day. Monoracial marriage signals “racial loyalty” not just among African Americans, but also among whites. White men continue to give up some degree of white privilege when they marry African-American women. At the very least, being in an interracial relationship eliminates the privilege of not having to think about


128. Of course, choice is constrained by marital privilege. See supra Part III. Ideally, Onwuachi-Willig’s analysis could be extended beyond intimate partners to include all relationships.

129. See ONWUACHI-WILLIG, supra note 1 passim.

130. See supra text accompanying notes 45–50.

131. See ONWUACHI-WILLIG, supra note 1 passim.

132. For a similar description, see MORA, supra note 7, at 191.

133. ONWUACHI-WILLIG, supra note 1, at 215.

134. Id. at 256.
race. It is therefore not surprising that there are fewer interracial marriages between white men and black women than there are between black men and white women. White men, at the top of both race and gender hierarchies, have more to lose from interracial marriage than anyone else.

Onwuachi-Willig’s proposal that Title VII be amended to prohibit discrimination on the basis of “interraciality” risks obscuring this constitutive interaction between race and relationship. By separating race from relationship, the proposal leaves performances of race arguably outside the reach of Title VII. Instead of calling for a new category, Onwuachi-Willig’s analysis better supports a more robust conception of the existing category of “race.” If some employees are advantaged by performing whiteness through monoracial marriage, while others are harmed by failing to perform race in that manner, that is discrimination because of “race.”

Bolstering the existing category of race in this manner challenges monoraciality by exposing the ways that it participates in the performance of race, thereby opening the door to considerations of other ways by which race and racial privilege are performed and maintained in the workplace. Privileged performances thus might be better exposed and questioned, freeing scholars and judges to think more creatively about law’s ability to address inequalities in the workplace and, ultimately, in society at large. Doing so might in fact put us on the road toward realizing Onwuachi-Willig’s “hope about a reframing of the normative ideal for family, or better yet, of a release of any need for an ideal at all,” thereby “destabiliz[ing] our notions of clear-cut, fixed categories of race.”

135. It is possible this privilege explains John Mayer’s disgust at the thought of dating women with a (non-white) race. Id. at 131–32.

136. For further discussion of these differential rates of black-white marriage, see id. at 126.

137. Onwuachi-Willig’s analysis therefore undermines recent suggestions that African-American women are affirmatively choosing not to date, or marry, white men. See RALPH RICHARD BANKS, IS MARRIAGE FOR WHITE PEOPLE? 120–66 (2011). Of course, both whites and blacks may fear the loss of racial status when engaging in interracial relationships. But whites, and specifically white men, have more societal privilege to lose than others even as they may be viewed as occupying a superior position within the relationship itself.

138. Indeed, this was Judge Calabresi’s conclusion in Holcomb v. Iona College, 521 F.3d 130, 131 (2d Cir. 2008).

139. For example, by exposing the ways in which existing structures are built around white norms. See Flagg, supra note 123, at 2029.

140. ONWUACHI-WILLIG, supra note 1, at 279–80.

141. Id. at 265.
V. CONCLUSION

According to *Our Hearts* compellingly dissects multiple ways that performances of marriage and race intersect and inform each other even in a world of facially race-neutral family law. Marital privilege informs racial privilege, and racial privilege informs marital privilege. Onwuachi-Willig seeks to distribute marital privilege equally across race and interraciality, but her analysis also invites a broader challenge to marital status itself. This Article has analyzed how such a challenge to marital status might disrupt privilege rather than merely distributing it, better destabilizing privileged understandings of both relationships and race. Onwuachi-Willig’s analysis, as extended, may thus free our hearts to experience even more diverse forms of family, work, and play.