

# “BURN THIS BITCH DOWN!”\*: MIKE BROWN, EMMETT TILL, AND THE GENDERED POLITICS OF BLACK PARENTHOOD

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Mike Brown’s eighteen year-old dead body lay on the weathered, cracked, pavement over-warmed by an August Missouriian sun for four hours.<sup>1</sup> In the moments after he shot and killed Brown, police officer Darren Wilson walked to his police cruiser and drove away from Brown’s body, away from the six bullets he fired, bullets now lodged in Brown’s head, arms, and neck, bullets

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\* These were the words uttered by Mike Brown’s step-father, Louis Head, when he learned of the grand jury decision not to indict Darren Wilson, the police officer who shot and killed Brown.

† Professor of Law, Mercer University Walter F. George School of Law. This article is dedicated to my father, Harold A. McMurtry, Sr. Nothing could separate him from his children, and nothing could separate us from his love. The author thanks God, who has made all things possible in my life; my husband, Mark Anthony Chubb, for his unending and boundless love and support; my colleagues Linda Berger, Kathy Stanchi, Bridget Crawford, Margaret Johnson, and the organizers of the Feminist Jurisprudence Conference at the Center for Constitutional Law at the University of Akron School of Law for their hard work and vision; my research assistant John Wesley “Wes” Hollins, III; and Emily Haws and Cassandra Ramey for their generosity.

<sup>1</sup> DEP’T OF JUSTICE, REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 4, 8–9 (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj\\_report\\_on\\_shooting\\_of\\_michael\\_brown\\_1.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf) [https://perma.cc/YH29-KQ6M] [hereinafter DOJ REPORT ON SHOOTING OF MICHAEL BROWN]. The initial investigation into Brown’s death revealed that he was shot at approximately 12:02 p.m. and that his body was not moved to the office of the St. Louis County Medical Examiner until approximately 4:00 p.m. *Id.* at 8–9.

for which Wilson would not be held accountable.<sup>2</sup> Those sluggish, barely conscious hours continued to pass on August 9, 2014 drawing out of doors and indifference members of Brown's Ferguson, Missouri community.<sup>3</sup> As the hours dripped from the humidity laden day, Brown's stepfather Louis Head stood holding a sign that read: "Ferguson Police Just Executed My Unarmed Son!!!"<sup>4</sup> His expression was one mixed with disbelief, indescribable sadness, and an as yet imperceptible anger.<sup>5</sup> Subsequent pictures from that day show Head in an embrace with his wife, Lezley McSpadden, Mike Brown's mother, in attempts to provide her support and care.<sup>6</sup> Head would appear in another photo on August 9th with his hands up in surrender, the same position that witnesses say Brown assumed seconds before Wilson ended his life.<sup>7</sup> More time passed until that terminal fourth hour when the medical examiner ("ME") for the city of Ferguson arrived on the scene to examine the body.<sup>8</sup> The examination that followed was neither complete nor thorough; there would be no official pictures because the ME's camera lacked battery power.<sup>9</sup> The ME was not only late, but also unprepared.

Late and unprepared were themes that would persist throughout the Ferguson District Attorney Robert McColloch's investigation into the killing. A grand jury decided three months later, and a few hours late, that a justice system used to buttress a white supremacist police state would waste no resources to determine why another Black son's body lay dead in the street by the actions of another white cop.<sup>10</sup> Ferguson, America, and the world were unprepared for the social media attention, protests, and grassroots mobilization that followed. Within the gaze of the media, the courts, and the country, lady justice insisted

<sup>2</sup> *Id.* at 17. The report states that Brown was shot at least six times. No charges were brought against officer Wilson. *Id.* at 78–82.

<sup>3</sup> The report details police efforts at crowd control in the moments following the shooting. *Id.* at 8–9.

<sup>4</sup> Associated Press et al., 'No Justice, No Peace': Hundreds Gather to Protest Death of 18-Year-Old Black Teen Who was Shot Dead by a Cop as Police Chief Says Victim Got Into Fight with an Officer, DAILY MAIL (Aug. 10, 2014, 8:36 PM), <http://www.dailymail.co.uk/news/article-2721256/No-justice-no-peace-Hundreds-gather-protest-death-18-year-old-black-teen-shot-dead-cop-police-chief-says-victim-killed-getting-fight-officer.html> [https://perma.cc/BGQ6-AWDV]; T-Dubb-O (@tdubbo), INSTAGRAM, <https://www.instagram.com/p/rfZR3oiOAK/?hl=en> [https://perma.cc/4TU7-YKL2] (last visited Apr. 13, 2017).

<sup>5</sup> Associated Press et al., *supra* note 4; T-Dubb-O (@tdubbo), *supra* note 4.

<sup>6</sup> Leah Thorsen & Steve Giegerich, *Ferguson Day One Wrapup: Officer Kills Ferguson Teen*, ST. LOUIS POST-DISPATCH (Aug. 10, 2014), [http://www.stltoday.com/news/local/crime-and-courts/fatal-shooting-by-ferguson-police-prompts-mob-reaction/article\\_04e3885b-4131-5e49-b784-33cd3acbe7f1.html?utm\\_medium=twitter&utm\\_source=twitterfeed](http://www.stltoday.com/news/local/crime-and-courts/fatal-shooting-by-ferguson-police-prompts-mob-reaction/article_04e3885b-4131-5e49-b784-33cd3acbe7f1.html?utm_medium=twitter&utm_source=twitterfeed) [https://perma.cc/73UJ-YFS3].

<sup>7</sup> DOJ REPORT ON SHOOTING OF MICHAEL BROWN, *supra* note 1, at 8.

<sup>8</sup> Polly Mosendz, *Crime Scene Medical Examiner Took No Measurements, Photos of Brown*, NEWSWEEK (Nov. 25, 2014, 3:22 PM), <http://www.newsweek.com/crime-scene-medical-examiner-took-no-measurements-photos-brown-287074> [https://perma.cc/9XC5-TP9X].

<sup>9</sup> *Id.*

<sup>10</sup> DOJ REPORT ON SHOOTING OF MICHAEL BROWN, *supra* note 1, at 78–86.

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on willful blindness and post-racial comfort. Fixed in her unseeing eyes, Louis Head decided to engage Lady Justice's undamaged sense of hearing. When McCulloch announced the grand jury decision not to indict Darren Wilson for Mike Brown's death, Head uttered the words: "Burn this bitch down!"<sup>11</sup> Out of a father's grief was this expression of rage to make desolate what could offer his family no solace. For these words, the District Attorney would investigate whether to charge Mr. Head with incitement; Head was accused of inciting the riots that made Ferguson burn.<sup>12</sup>

Fifty-nine years previous, on another August day later in the month, a fisherman would discover the water-engorged body of another Black son. On August 28, 1955, Roy Bryant and J.W. Milam lynched fourteen-year old Emmett Till for allegedly whistling at Bryant's wife, Carolyn Bryant.<sup>13</sup> The two weighted Till's body with a seventy-five-pound cotton gin fan and dumped him in the Tallahatchie River in Money, Mississippi.<sup>14</sup> The Tallahatchie would divulge their gruesome secret several days later.<sup>15</sup> After narrowly avoiding a hasty Mississippi interment of her son's remains, a failed attempt by Mississippi authorities to thwart further investigation into Till's murder, Mamie Till secured transport of her son's body back to his hometown of Chicago, Illinois.<sup>16</sup> Once at the funeral home that would prepare her son for services, Mamie Till not only insisted on seeing her son, but also on leaving his body as it was for the funeral services in full view of the mourners; Ms. Till wanted an open casket.<sup>17</sup> Out of a mother's grief, she articulated her reasons for wanting Emmett viewed as he was brutalized: "[I want] all the world to witness [what they did to my boy]."<sup>18</sup> Her words brought worldwide attention to violence against Black people in the Jim Crow South and mobilized Black America to action.<sup>19</sup> The public spectacle of Emmett Till's murder and funeral, the trial and acquit-

<sup>11</sup> Ryan Gorman, *Mike Brown's Stepfather Under Investigation for Inciting Ferguson Riots*, AOL (Dec. 2, 2014, 1:06 PM), <http://www.aol.com/article/2014/12/02/michael-browns-ex-con-stepfather-under-investigation-for-inciting-ferguson-riots/21001737/> [<https://perma.cc/DG4B-3T74>].

<sup>12</sup> *Id.*

<sup>13</sup> FED. BUREAU OF INVESTIGATION, PROSECUTIVE REPORT OF INVESTIGATION CONCERNING: EMMETT LOUIS TILL ET AL. 6 (Feb. 9, 2006), <https://vault.fbi.gov/Emmett%20Till%20Emmett%20Till%20Part%2001%20of%2002/view> [<https://perma.cc/MBZ8-WL22>] [hereinafter FBI REPORT ON EMMETT TILL MURDER]; *Where is the Third Man in Till Lynching?*, JET, Sept. 29, 1955, at 8, 8.

<sup>14</sup> FBI REPORT ON EMMETT TILL MURDER, *supra* note 13, at 6–7. *But see Nation Horrified by Murder of Kidnapped Chicago Youth*, JET, Sept. 15, 1955, at 6, 6. The Jet Magazine article states that the cotton gin fan that weighted Till's body was 200 pounds.

<sup>15</sup> FBI REPORT ON EMMETT TILL MURDER, *supra* note 13, at 6–7; *Nation Horrified by Murder of Kidnapped Chicago Youth*, *supra* note 14.

<sup>16</sup> STEPHEN J. WHITFIELD, A DEATH IN THE DELTA: THE STORY OF EMMETT TILL xiii (1988); FBI REPORT ON EMMETT TILL MURDER, *supra* note 13, at 80–81.

<sup>17</sup> *Nation Horrified by Murder of Kidnapped Chicago Youth*, *supra* note 14, at 8–9.

<sup>18</sup> *Id.* at 9.

<sup>19</sup> CHRIS CROWE, GETTING AWAY WITH MURDER: THE TRUE STORY OF THE EMMETT TILL CASE 66–67 (2003).

tal of Bryant and Milam that followed, and the overt and escalating oppression of Black people in the former Confederacy reached a tipping point on December 1, 1955, when Rosa Parks refused to give up her seat on a Montgomery, Alabama bus; an act that began the Montgomery bus boycotts. Mamie Till's words marked the beginning of one of the largest grassroots movements to date to secure Black civil rights.

Mamie Till's words incited a movement, while Louis Head's words invoked the threat of prosecution for the crime of incitement. By declaring that she wanted "all the world to see [what Bryant and Milam did to her boy]," Mamie Till was able to access political Black parenthood from a space of Black motherhood and direct public attention to political action against white supremacists for the murder of her son. However, the parallel space of Black fatherhood was not available to Louis Head as an access point to political Black parenthood, parenthood that gives authority to bring attention to violence against Black children. In uttering the words "Burn this bitch down," Louis Head was arguably voicing his frustration and anger over not being able to protect Mike Brown as a father, but to opposite effect. A system that would seek to criminalize his grief and deny him a public expression of Black fatherhood to political ends is the subject of this article.

"BLACK PARENTHOOD AS LETHAL"<sup>20</sup>

The right of Black parents to parent their children has remained highly contested since slavery. During slavery, slaves and their descendants were not permitted the legal right to marry, which was the only route to legitimate the children of their unions.<sup>21</sup> To provide otherwise would have meant that slaves could not be treated as property, but as autonomous entities with the ability to control themselves and the fate of their families.<sup>22</sup> Along with freedom, the passage of the Thirteenth Amendment to the United States Constitution ushered in new laws to formalize relationships between the formerly enslaved and their relations.<sup>23</sup> The economic devastation of the Civil War on the South made it a legal imperative to shift the financial responsibility of slaves and their children from the White plantation patriarch to newly freed Black fathers.<sup>24</sup> With freedom came the obligations of patriarchy. Southern states took several legal approaches to mint newly freed Black fathers with the patriarchal, financial, responsibility for those they had recognized as their wives and children during

<sup>20</sup> MARY NIALL MITCHELL, *RAISING FREEDOM'S CHILD* 173 (2008).

<sup>21</sup> THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619–1860*, at 44 (1996).

<sup>22</sup> *Id.* at 43–48.

<sup>23</sup> U.S. CONST. amend. XIII, §§ 1–2.

<sup>24</sup> See generally DREW GILPIN FAUST, *JAMES HENRY HAMMOND AND THE OLD SOUTH* (1982); LEWIS CECIL GRAY, *1 HISTORY OF AGRICULTURE IN THE SOUTHERN UNITED STATES TO 1860* (1933); J. WILLIAM HARRIS, *PLAIN FOLK AND GENTRY IN A SLAVE SOCIETY* (1985); STEPHANIE MCCURRY, *MASTERS OF SMALL WORLDS* (1997).

slavery, thus relieving former White plantation owners of the monetary burden of caring for the children they had fathered with enslaved women.<sup>25</sup>

Just after Congress passed the Thirteenth Amendment to the U.S. Constitution on January 31, 1865, but before its ratification and adoption in December 1865, former slave states began enacting legislation to formalize familial relationships and legitimate the children of enslaved women, either by their symbolic “husbands” or by slave owners. Maryland and Virginia legitimated the children of couples who entered into marriage by custom during slavery despite any action the couples took after emancipation to marry or not.<sup>26</sup> The Louisiana statute allowed either parent to legitimate a child born during slavery by acknowledging that child via declaration or by registering them in birth or baptismal rolls.<sup>27</sup> The Georgia statute made all children born in slavery the legitimate children of their enslaved, now newly freed mothers—but only of their formerly enslaved fathers if the mother and father were cohabitating at the time of the birth.<sup>28</sup> Statutes enacted in Missouri,<sup>29</sup> Maryland,<sup>30</sup> Tennessee,<sup>31</sup> North Carolina,<sup>32</sup> South Carolina,<sup>33</sup> Virginia,<sup>34</sup> and Texas<sup>35</sup> legitimated the children of parents who had cohabited during slavery. Alabama did the same by case law.<sup>36</sup> The Missouri and Texas statutes went even further by requiring formerly enslaved couples to formalize their marriage through a legal ceremony before

<sup>25</sup> See, e.g., R.A. Lenhardt, *Black Citizenship Through Marriage? Reflections on the Moynihan Report at Fifty*, 25 S. CAL. INTERDISC. L.J. 347, 353–55 (2016).

<sup>26</sup> Alexander Karst, *Slaves*, in 36 CYCLOPEDIA OF LAW AND PROCEDURE 493 (William Mack ed., 1910) (explaining the Maryland Act of Feb. 6, 1879); Cohabitation Act of 1866, 1866 Va. Acts 85; *Scott v. Raub*, 14 S.E. 178, 179 (Va. 1891).

<sup>27</sup> LA. CIV. CODE arts. 193–95 (1870); *Thomassin v. Raphael’s Exec.*, 11 La. 128, 132 (1837).

<sup>28</sup> Act of Mar. 9, 1866, 1866 Ga. Laws 240; Act of Dec. 13, 1866, 1867 Ga. Laws 156; *Pascal v. Jones*, 41 Ga. 220, 221 (1870).

<sup>29</sup> Act of Feb. 20, 1865, 1865 Mo. Laws 68 (concerning marital rights and children of colored persons).

<sup>30</sup> Karst, *supra* note 26; *Thomas v. Holtzman*, 18 D.C. (7 Mackey) 62, 67 (1888).

<sup>31</sup> Act of May 26, 1866, 1866 Tenn. Pub. Acts 65; TENN. CODE §§ 3303, 3304 (Milliken & Vertrees 1884); *Brown v. Cheatham*, 17 S.W. 1033, 1034 (Tenn. 1892).

<sup>32</sup> Act of Feb. 27, 1879, 1879 N.C. Sess. Laws 136; *Spaugh v. Hartman*, 64 S.E. 198, 199 (N.C. 1909); *Tucker v. Tucker* 13 S.E. 5, 6 (N.C. 1891); *Jones v. Hoggard*, 12 S.E. 906, 906–07 (N.C. 1891); *Tucker v. Bellamy*, 4 S.E. 34, 35 (N.C. 1887).

<sup>33</sup> Act of Dec. 21, 1865, 1866 S.C. Acts 291.

<sup>34</sup> Cohabitation Act of 1866, 1866 Va. Acts 85.

<sup>35</sup> TEX. CONST. of 1869, art. XII, § 27; TEX. REV. CIV. STAT. art. 1656 (1879); *Clements v. Crawford*, 42 Tex. 601, 603 (1874); *Hill v. Fairfax*, 38 Tex. 220, 222–23 (1873); *Cumby v. Garland*, 25 S.W. 673, 674 (Tex. Civ. App. 1894).

<sup>36</sup> *Stikes v. Swanson*, 44 Ala. 633, 635 (1870).

children could be legitimated.<sup>37</sup> Florida and Kentucky did the same by case law.<sup>38</sup>

At first glance these statutes appear to be innocuous and intended to legally cure the legal fiction of slave marriages, thereby legitimating the children of those unions. However, the cohabitation provisions of the statutes created inconsistencies with the reality of slavery and the ability of the enslaved to form the familial relationships recognized by law. Enslaved persons had limited autonomy over their bodies, their children's bodies, and the bodies of their fictive spouses. Slave families could be separated at any time through death, sale, or otherwise by the will of their masters, thus limiting the ability of enslaved spouses to cohabit and keep track of the location of their children.<sup>39</sup> However, litigation over inheritance and legitimacy created a portrait of slave parents as lethal to the interests of their children, sketching enslaved fathers as irresponsible men who fathered children with multiple women through illicit relationships. Several cases serve to illustrate these inconsistencies.

The court in *Branch v. Walker* interpreted the cohabitation provision in the North Carolina statute legitimating enslaved children.<sup>40</sup> At issue in *Branch* was the ability of the formerly enslaved father, Oscar Walker, to legitimate his children by two different women, Sarah Branch and Sukey (no last name), when Mr. Walker cohabited with each during slavery.<sup>41</sup> Mr. Walker and Ms. Branch lived together until some time before 1860, when Ms. Branch's owner moved to another county and took her along. Per custom, Oscar was permitted to visit Sarah twice each year, and did so until December 1865.<sup>42</sup> Mr. Walker also cohabited with Sukey on his master's plantation and together they had six children in the period of time before and during the Civil War.<sup>43</sup> Upon emancipation, Oscar and Sukey lived together as husband and wife, and in accordance with the law legalized their union and their children in 1866.<sup>44</sup> The two lived together until Oscar's death in 1869.<sup>45</sup>

Conflict arose when both Sarah and Sukey's children claimed inheritance rights over the land Oscar had owned at his death.<sup>46</sup> At trial, the judge instructed the jury that if Oscar and Sarah cohabited until Sarah's death and their children were born to them during that time, then Sarah's children were entitled to

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<sup>37</sup> Act of Feb. 20, 1865, 1865 Mo. Laws 68 (concerning marital rights and children of colored persons); *Clements*, 42 Tex. at 223; *Cumby*, 25 S.W. at 677.

<sup>38</sup> *Williams v. Kimball*, 16 So. 783, 784–85 (Fla. 1895); *Allen v. Allen*, 71 Ky. (8 Bush) 490, 490–92 (Ky. 1871).

<sup>39</sup> See generally FREDERIC BANCROFT, *SLAVE TRADING IN THE OLD SOUTH* (1996); WALTER JOHNSON, *SOUL BY SOUL* (1999).

<sup>40</sup> *Branch v. Walker*, 8 S.E. 896, 897–98 (N.C. 1889).

<sup>41</sup> *Id.* at 898.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 897–98.

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the land.<sup>47</sup> Alternately, if Oscar and Sukey had cohabited until emancipation in 1866 and their children were born to them during that time, then Sukey's children were entitled to the land.<sup>48</sup> The judge further instructed the jury that

there was no middle ground; that Oscar could have lived and cohabited with only one of them as man and wife; that a man could not live and cohabit, as man and wife, with two women at the same time; and that, if so living with Sarah, he could not so live with Sukey.<sup>49</sup>

The jury awarded the land to Sarah's children.<sup>50</sup>

Although the North Carolina Supreme Court in reviewing the case on appeal recognized that the cohabitation of enslaved family members was broken by sale or absences during the work week or longer, it found that the lower court judge erred only in failing to instruct the jury that the cohabitation between Oscar and Sarah or Sukey, respectively, be exclusive.<sup>51</sup> Because the status of the children was dependent upon the cohabitation of the parents during slavery and the legalization of the marriage after emancipation, then only the children of one union could be legitimate.<sup>52</sup> To decide anything else would be, in the court's words, to recognize polygamy.<sup>53</sup>

The Texas Supreme Court also grappled with the inheritance rights of children born to multiple women but sired by the same father.<sup>54</sup> *Livingston v. Williams* involved a dispute over property at the death of Moses Livingston.<sup>55</sup> Mr. Livingston, the slave of Philip G. Smith until June 19, 1865, entered into a marriage by custom with the enslaved woman Fannie, whom Smith also owned.<sup>56</sup> Moses and Fannie cohabited as husband and wife for about fifteen years, from 1850–1865, and had an undisclosed number of children during that time.<sup>57</sup> At some point during Moses and Fannie's cohabitation, Moses began cohabiting with another slave on the Smith plantation, Malinda, without Mr. Smith's permission.<sup>58</sup> Moses and Malinda also had an undisclosed number of children.<sup>59</sup> Moses and Fannie lived together until shortly after emancipation in fall 1865, and for intervals after that until Fannie's death in 1872; Moses and Malinda lived together until her death in 1876.<sup>60</sup> Based on the cohabitation patterns of Moses, Fannie, and Malinda, the trial court found that Malinda and Moses' on-

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<sup>47</sup> *Id.* at 898.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 898–99.

<sup>50</sup> *Id.* at 897.

<sup>51</sup> *Id.* at 899.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Livingston v. Williams*, 13 S.W. 173, 173 (Tex. 1890).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

ly living child, George Livingston, was not entitled to inherit any portion of Moses's estate because he was not a legitimate heir.<sup>61</sup>

In affirming the lower court's ruling, the Texas Supreme Court held that the Texas statute legitimating slave children could not do so when the parents of the children cohabited without the intention of becoming husband and wife.<sup>62</sup> Key in the Court's determination was its statement on slave consent and marriage.<sup>63</sup> However, slave consent to marriage only had legal effect when recognized by the master.<sup>64</sup> Because Moses and Malinda carried on what the court described as a clandestine relationship outside their master's consent, then they could not be recognized as husband and wife. Malinda was not recognized as Moses' wife, so George could not be Moses' legitimate child or heir.<sup>65</sup> Such legal reasoning does not take into account the actual circumstances under which George cohabited with Fannie and Malinda. Again, enslaved persons had limited autonomy over their bodies. Numerous studies exist to show that slave masters bred slaves at will, and raped slave women who gave birth to the slave master's children.<sup>66</sup> By allowing only those children from the union that the master recognized at emancipation, Moses' marriage to Fannie, to inherit from Moses, the court left George without the legal or financial protection of legitimacy conferred by his father.

As *Branch* and *Livingston* make explicit, statutes governing legitimacy and the courts' interpretation of these laws at emancipation did not encompass the complexity of familial relationships on the plantation. The laws did not force responsibility on slave masters for their children by rape, as slave marriages provided convenient cover in the form of a putative father, who could only "marry" with the consent of the master. To the extent that slave fathers had multiple families, statutes legalizing marriage and legitimating children only allowed for one set of children to be legitimated—those birthed by the mother with whom the father cohabited at emancipation. This legal fiction did not take into account the separation of slave families at death or by sale, and ultimately left children from the non-legal union unprotected and illegitimate with respect to accessing the financial resources of the patriarch living or dead. Perhaps most problematic was that these laws set up the unprotected, illegitimate children of slave unions to be recaptured by the former slave states through apprenticeship laws. The necessity of these laws hinged on the notion of "black parenthood as lethal."<sup>67</sup> Best summarized by a former slaveholder: "The negro will not take care of his offspring unless required to it, as compared with the

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 173–74.

<sup>66</sup> See, e.g., WILLIAM GOODELL, *THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE* 82–83 (2d ed. 1853). See generally FAUST, *supra* note 24.

<sup>67</sup> MITCHELL, *supra* note 20.

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whites. The little children will die, they do die, and hence the necessity of very vigorous regulations . . . .<sup>68</sup>

#### PATHOLOGIZING BLACK PARENTHOOD

As statutes governing legitimacy were legalizing slave marriages and shifting patriarchal responsibility to formerly enslaved fathers, apprenticeship laws were simultaneously pathologizing black parenthood. The Thirteenth Amendment to the United States Constitution was passed by Congress on January 31, 1865 and ratified on December 6, 1865.<sup>69</sup> As early as January of 1866, states enacted legislation allowing court and county officials to bind out newly freed children whose parents were unable to care for them financially, less than one month out of slavery. Although laws governing the maintenance of poor white children were around prior to emancipation, after emancipation the law took on distinctly racial characteristics.<sup>70</sup> The Georgia Supreme Court in *Comas v. Reddish* echoed many states as it articulated the purpose of apprenticeship laws in the emancipation era:

An Act to alter and amend the laws of this State in relation to apprentices, was evidently designed to make provision for that large class of persons in our midst (colored minors) who, by the results of the civil war, have been thrown upon society, helpless from want of parental protection, want of means of support, inability to earn their daily bread, and from age and other causes. It was the imperative duty of the Legislature to make provision for this portion of our people, to give them the full protection of the law, and prevent their becoming burdensome upon the industry of the country.

The spirit of this act is wise, just, and humane, and comprehends, alike, the white and black, without discrimination. It is, moreover, clear and perspicuous, and should be enforced in good faith; and under color of its provisions, public functionaries should be vigilant in preventing any one, under the name of master, from getting the control of the labor and services of such minor apprentice, as if he were still a slave.<sup>71</sup>

Despite the court's nod to colorblindness and the purported equal application of the statute to Black and White children alike, the practice in Georgia and the former slave states was to apprentice minor children who had previously been enslaved to their former masters in the event that their parents were unable to provide for them materially and morally.<sup>72</sup> Of course formerly enslaved

<sup>68</sup> *Id.*

<sup>69</sup> *13th Amendment to the U.S. Constitution: Abolition of Slavery (1865)*, OURDOCUMENTS.GOV, [https://www.ourdocuments.gov/print\\_friendly.php?page=&doc=40&title=13th+Amendment+to+the+U.S.+Constitution%3A+Abolition+of+Slavery+%281865%29](https://www.ourdocuments.gov/print_friendly.php?page=&doc=40&title=13th+Amendment+to+the+U.S.+Constitution%3A+Abolition+of+Slavery+%281865%29) [https://perma.cc/R3AR-AYT2] (last visited Apr. 21, 2017).

<sup>70</sup> See, e.g., MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS 36–39, 78–83 (1994).

<sup>71</sup> *Comas v. Reddish*, 35 Ga. 236, 237 (1866).

<sup>72</sup> See, e.g., *Comas*, 35 Ga. at 238; *Adams v. Adams*, 36 Ga. 236, 236 (1867); *Thomas v. Newcom*, 64 Ky. (1 Bush) 83, 84 (1866); *Lamb v. Lamb*, 67 Ky. (4 Bush) 213, 214 (1868);

mothers and fathers were indigent; they were property that owned no property, now in danger of being divested of their children as a result of their former condition of slavery. Prior to the end of slavery, apprenticeship laws provided that White orphans and wards of the state were taught trades or other skills so that they could support themselves.<sup>73</sup> In emancipation, training Black children and their parents to support themselves took a back seat to assuring the financial well-being of the state and former slave owners. The Texas Supreme Court, in stating the intent of its legislature when enacting the apprenticeship laws posited:

The sudden emancipation of four millions of illiterate people, who had hitherto been slaves—a people without property, money, or book-learning—required some change of legislation. It is not to be denied, that the shock was a great one, and that it distracted the minds of many, and caused inventions, as to how the labor should be controlled for the benefit of the old masters. Although most men had long felt, few were willing to acknowledge, that slavery was a very expensive institution for the master.<sup>74</sup>

More expensive still was post-emancipation life for former slave owners, without the free labor of an enslaved workforce. Thus, in litigation involving apprenticeship contracts for minor Black children, courts looked to statutes legitimating slave marriages to determine the rights of fathers to control their children.<sup>75</sup> Children of fathers unable to legitimate them legally, that is those fathers like Moses in *Livingston v. Williams*,<sup>76</sup> and Oscar in *Branch v. Walker*,<sup>77</sup> were deemed bastards, even though fathers like Moses and Oscar were ready and able to acknowledge and care for them. Legally, the fathers of bastards had no rights to parent.<sup>78</sup> The case of Harry Pope and his minor son Elkin is illustrative.

Harry and Sarah Pope were married in the custom of the enslaved.<sup>79</sup> During their cohabitation, Sarah gave birth to Elkin.<sup>80</sup> Around 1859, Harry allegedly abandoned Sarah when she gave birth to another child by another man.<sup>81</sup> The “abandonment” was as result of Harry’s sale to another owner.<sup>82</sup> Regardless,

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*Timmins v. Lacy*, 30 Tex. 115, 126 (1867). See also TENN. CODE ANN. § 4323 (1896), which states:

Any child totally abandoned by the father, and for whom he fails to provide support and maintenance, may be bound out by the county court as through the father was dead, but no child shall be bound out unless the assent of the mother is first given in open court or she be unable to provide for its maintenance.

<sup>73</sup> *Timmins*, 30 Tex. at 116–17.

<sup>74</sup> *Id.* at 119.

<sup>75</sup> See, e.g., *Adams*, 36 Ga. at 236–37; *Timmins*, 30 Tex. at 125–26.

<sup>76</sup> *Livingston v. Williams*, 13 S.W. 173 (Tex. 1890).

<sup>77</sup> *Branch v. Walker*, 8 S.E. 896 (N.C. 1889).

<sup>78</sup> *Timmins*, 30 Tex. at 115.

<sup>79</sup> *Id.* at 125–26.

<sup>80</sup> *Id.* at 126.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

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Harry visited his children when possible and continuously acknowledged Elkin.<sup>83</sup> At the end of the Civil War, Harry contacted Mrs. Timmins, his, Sarah and Elkin's former owner, and allowed her to keep the children during 1866.<sup>84</sup> Harry subsequently contracted for the children to remain with Mrs. Timmins under a contract of apprenticeship in 1867 and possibly 1868.<sup>85</sup> As a condition of the apprenticeship agreement, Mrs. Timmins consented to give all of the children, including Elkin, 100 acres of land once they reached twenty-one, the age of majority.<sup>86</sup>

Sarah also committed to hire herself and the children to Mrs. Timmins for 1866, but left the plantation with Moses Lacy in December of 1865, right after the Thirteenth Amendment was ratified.<sup>87</sup> Sarah alleged that she took Elkin and another of her children with her, and hired them out to G.W. Pearson for 1866.<sup>88</sup> However, the day after the children were delivered to Pearson, Mary Timmins' son Robert went to Pearson's house with "a double-barreled gun, and carried said children back to [Mrs. Timmins'] house."<sup>89</sup> The Timminses alleged that the children were returned to them by force because Sarah had previously agreed by apprenticeship contract to bind the children to the Timminses.<sup>90</sup> When Sarah left the Timmins plantation, she married Moses; Harry subsequently married another woman.<sup>91</sup>

Although the court found that Sarah and Harry had entered into a marriage by custom or a contubernal relationship as slaves, and that Harry both acknowledged and recognized the children of their union, its opinion rested on the fact that Sarah and Harry were not cohabiting as husband and wife at the time of emancipation.<sup>92</sup> Because Elkin remained with Sarah at emancipation, was under her control until Robert Timmins took him back by force, and Elkin returned to Sarah by his own volition as soon as he was able, the court deemed that Elkin was under Sarah's control.<sup>93</sup> In affirming the lower court ruling to award Sarah and Moses Lacy custody of Elkin, the Texas Supreme Court waxed with certainty about the rights and obligations of fathers:

Surely it is not to be supposed that merely because the father, when discharging his duties as such, is regarded as the head of the family, may, after years of desertion and abandonment, during which he has left his wife to struggle unaided for their support, rob her, by means of this law, of the society of her children,

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 126–27.

<sup>86</sup> *Id.* at 126.

<sup>87</sup> *Id.* at 127.

<sup>88</sup> *Id.* at 128.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 127.

<sup>92</sup> *Id.* at 134–35.

<sup>93</sup> *Id.*

and thus add to the injury already done her the severest blow which can be inflicted upon a woman, whatever may be her condition or sphere in life.<sup>94</sup>

Thus, the court created another legal fiction. In this story Black fathers abandoned their families when unable to stop their separation from them by the ravages of slavery, and neglected their children when legitimacy laws prevented them from legitimating all of them.

#### POLITICIZING BLACK PARENTHOOD

It would be this image of the delinquent Black father that influenced political action toward the Black family. In this picture, Black mothers occupied a space of victimhood (abandonment and neglect) where they and their children survived in spite of Black fathers' indifference. "Indifference" was the father's inability to care for a child financially, not the father's expressed desire to parent his children or include them as members of his household. Slavery imposed upon Black fathers the reality that they live away from their children, though as the stories of Oscar Walker, Moses Livingston, and Harry Pope indicate "living away" did not mean that they were absent from their children's lives. However, when viewed through the lens of the patriarchal structure of the plantation family, a familial structure that was normalized and socially divested of its economic benefits to White men, women, and their children, Black fatherhood became pathological inasmuch as Black fathers were not heads of household in the same manner as White fathers. In studying fatherhood generally, social scientists Toni Tripp-Reimer and Susan E. Wilson argue that "traditional" (western, White) ideals of fatherhood encapsulate numerous functions: (1) the endowment function—legitimizing children and passing on a surname;<sup>95</sup> (2) the provision function—assuming the role of provider through the financial care and emotional support of family members;<sup>96</sup> (3) the protection function—protecting children;<sup>97</sup> (4) the caregiving function—caring for children physically, emotionally, and contributing to their educational development;<sup>98</sup> and (5) the formation function—aiding children to develop into fully formed adults.<sup>99</sup> Black fathers were unable to legitimate their children until after 1865, and even then that right was dependent upon whether they had cohabitated with the mother of their children at emancipation. They were also unable to pass along their surname to their children, because children born in slavery were the property of the slave owner. Further, if the father was not living with the mother of his children at emancipation, then he had no legal right to give his surname;

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<sup>94</sup> *Id.* at 137–138.

<sup>95</sup> Toni Tripp-Reimer & Susan E. Wilson, *Cross-Cultural Perspectives on Fatherhood*, in *FATHERHOOD AND FAMILIES IN CULTURAL CONTEXT* 7–9 (Frederick E. Bozett & Shirley M.H. Hanson eds., 1991).

<sup>96</sup> *Id.* at 11–12.

<sup>97</sup> *Id.* at 12–13.

<sup>98</sup> *Id.* at 14–15.

<sup>99</sup> *Id.* at 15–17.

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likewise, the children's mother had no obligation to accept it. Slave owners were responsible for the care and maintenance of slaves until they transferred their financial obligations to Black fathers after 1865. Although the devastation of slave sales underscored that Black patriarchy would be no protection for Black families, Black men endeavored to be present in their children's lives as much as the institutional requirements of slavery and postbellum apprenticeship laws would permit. All in all, the lived experiences of Black fathers assured that their relationships with their children would not be formed and maintained in accordance with Western (White) norms.

In the late Nineteenth and early Twentieth centuries, sociologists and reformers engaged in study after study of Black family units to determine how well Black people were integrating into American life in the four decades following slavery. The main repository for information on African American life after slavery was in the reports compiled by renowned sociologist William Edward Burghardt Du Bois during his time at the Atlanta University Center. Du Bois convened a series of conferences for the social scientific study of African Americans after slavery and reported on the same. In the thirteenth of these reports, *The Negro American Family: Report of a Social Study made principally by the College Classes of 1909 and 1910 of Atlanta University, under the patronage of the Trustees of the John F. Slater Fund; together with the Proceedings of the 13th Annual Conference for the Study of Negro Problems, held at Atlanta University on Tuesday, May the 26th, 1908*, Du Bois knitted together the contributions from the conference devoted to studying African American families in four parts: Marriage; The Home; The Economics of the Family; and The Family Group.<sup>100</sup> Du Bois' goal for this report was simply truth; in his words:

The object of these studies is primarily scientific—a careful research for truth conducted as thoroughly, broadly and honestly as the material resources and mental equipment at command will allow; but this is not our sole object: we wish not only to make the Truth clear but to present it in such shape as will encourage and help social reform.<sup>101</sup>

That “reform” was in studying the barriers Black families faced in adhering to the perceived Western ideals of marriage and family. This brand of family was the means to endow Black men with patriarchal privileges, which depended on giving them the ability to be financial contributors to their households and the protector of women and children. It was also the vehicle to cultural assimilation and respectability for Black people. As Du Bois reported:

Without a doubt the point where the Negro American is furthest behind modern civilization is in his sexual *mores*. This does not mean that he is more criminal in this respect than his neighbors. Probably he is not. *It does mean that he is*

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<sup>100</sup> THE NEGRO AMERICAN FAMILY (W. E. Burghardt Du Bois ed., 1908), <https://babel.hathitrust.org/cgi/pt?id=hvd.hnuzia;view=1up;seq=7> [<https://perma.cc/QHB3-E283>].

<sup>101</sup> *Id.* at 5.

*more primitive, less civilized, in this respect than his surroundings demand, and that thus his family life is less efficient for its onerous social duties, his womanhood less protected, his children more poorly trained.* All this, however, is to be expected. This is what slavery meant, and no amount of kindness in individual owners could save the system from its deadly work of disintegrating the ancient Negro home and putting but a poor substitute in its place. The point is however, now, what has been the effect of emancipation on the *mores* of the Negro family.<sup>102</sup>

It was slavery that introduced to Black people what Du Bois termed “the monogamic family ideal,” which in his view was designed as a moralizing force to temper the sexual immorality of slaves and their masters.<sup>103</sup> Though imperfect in practice on the plantation, as it was subject to the whims of the slave master, marriage was integral to the economic security and cultural “normalization” of Black people. The key to social equality lay in economic opportunity for Black men, which would allow them to marry at an earlier age; late marriage was not ideal “for a folk in the Negro’s present moral development.”<sup>104</sup> African American migration patterns into cities were skewed in favor of women because more work opportunities existed for them there.<sup>105</sup> This left the majority of Black men to languish in the country without economic or physical access to a wife and children within a nuclear familial structure.<sup>106</sup> Such disproportionate numbers were viewed as problematic for White people as well as Black people, but especially so for Black people.<sup>107</sup> As Du Bois would summarize:

Preponderance of one sex over the other forebodes nothing but evil to society. The maladjustment of economic and social conditions upsets the scale where nature intended a balance. The argument of [one reformer] is as correct as it is courageous: “Where women preponderate in large numbers,’ she says, ‘there is a proportionate increase in immorality, because women are cheap; where men preponderate in large numbers there is also immorality because women are dear.”<sup>108</sup>

The proposed solution was to give Black men access to greater earning potential, thereby allowing them entrée to the societal norms for marriage.<sup>109</sup> The hope for Black people’s successful integration into the postbellum United States lay in “a respectable class [of African Americans], and this class is increasing, where married parents live virtuous lives, guard the sanctity of their homes, and strive to bring up their children in the path of virtue.”<sup>110</sup>

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<sup>102</sup> *Id.* at 37 (emphasis added).

<sup>103</sup> *Id.* at 21–22.

<sup>104</sup> *Id.* at 36.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 36–37.

<sup>109</sup> *Id.* at 36.

<sup>110</sup> *Id.* at 39.

Du Bois' report was not without its critique of the Western marriage ideal, although that critique imported stereotypes about the morality and industry of Black men and women. He wrote:

One thing further may be said, with diffidence but hearty conviction. The marriage *mores* of modern European culture nations, while in many respects superior to those of other peoples, are far from satisfactory, as Prostitution, Divorce, and Childlessness prove only too conclusively. Much has been written as to remedies and improvements, chiefly in the line of punishing prostitution, denying divorce and stressing child-rearing as a duty. It seems to the writer that here the Negro race may teach the world something. Just as [one scholar] has pointed out that what is termed Negro "laziness" may be a means of making modern workingmen demand more rational rest and enjoyment rather than permitting themselves to be made machines, so too the Negro woman, with her strong desire for motherhood, may teach modern civilization that virginity, save as a means of healthy motherhood, is an evil and not a divine attribute. That while the sexual appetite is the most easily abused of all human appetites and most deadly when perverted, that nevertheless it is a legitimate, beneficent appetite when normal, and that no civilization can long survive which stigmatizes it as essentially nasty and only to be discussed in shamefaced whispers. The Negro attitude in these matters is in many respects healthier and more reasonable. Their sexual passions are strong and frank, but they are, despite example and temptation, only to a limited degree perverted or merely commercial. The Negro motherlove [sic] and family instinct is strong, and it regards the family as a means, not an end, and although the end in the present Negro mind is usually personal happiness rather than social order, yet even here radical reformers of divorce courts have something to learn.<sup>111</sup>

However, his critique would go largely unnoticed in the next major study of the Black Family, E. Franklin Frazier's *The Negro Family in the United States*.<sup>112</sup>

Writing thirty-one years after Du Bois, and citing him heavily, Frazier picked up the theme of Black familial pathology as an inherited trait of slavery. In Frazier's study, slavery enhanced the animalistic, sexual appetites of Black men and women, which were only mediated by the slave's choice of monogamy and the slave master's concession to slave marriage.<sup>113</sup> Frazier argued that accepting the Western marriage ideal was part and parcel of a slave's development beyond animalistic tendencies to human tendencies.<sup>114</sup> Emancipation brought the breakdown of much of the patriarchal assimilation that slaves learned on the plantation.<sup>115</sup> In freedom, "stable" families, most likely those where contubernal husbands and wives cohabitated together with their children at the end of slavery, strong patriarchal tendencies remained.<sup>116</sup> However, for

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<sup>111</sup> *Id.* at 41–42.

<sup>112</sup> E. FRANKLIN FRAZIER, *THE NEGRO FAMILY IN THE UNITED STATES* (1939).

<sup>113</sup> *Id.* at 23–29, 32, 37–39, 41.

<sup>114</sup> *Id.* at 41.

<sup>115</sup> *Id.* at 180.

<sup>116</sup> *Id.* at 101, 106, 169–70.

the most part, newly freed slaves roamed the countryside or migrated to cities and jettisoned their morality along the way.<sup>117</sup> The result was a high incidence of children born outside of marriage,<sup>118</sup> abandoned wives and mothers,<sup>119</sup> wayward children,<sup>120</sup> and delinquent fathers.<sup>121</sup> As it had been in slavery, the monogamic family ideal would be the healing salve for Black immorality and poverty.

Black men, according to Frazier, were destabilized by the ever-shifting economic landscape below their feet in their attempts to become heads of households. Though the Freedmen's Bureau attempted to provide some land grants of abandoned plantations and farms to newly freed slaves in 1865, its plans were soon thwarted by the Johnson administration as it sought to restore political and economic power to the former leaders of and cosigners to the Confederacy.<sup>122</sup> By 1870, all efforts to provide for newly freed people had been largely abandoned,<sup>123</sup> the effect of which was to capture the Black family in the whirlpool of pathology.<sup>124</sup> For Frazier, Black men reached the Western family ideal when they acquired land, a wife, and children.<sup>125</sup> Landlessness and joblessness made this goal largely unattainable within the confines of the nuclear familial structure, although Black familial ties were formed and maintained in different ways. Frazier's study is replete with examples of men and women who eschewed the formal bonds of marriage, yet nevertheless worked land, lived near one another and raised children together.<sup>126</sup> In instances where the father did not live in the same home with the children, he provided for their maintenance and support.<sup>127</sup> This was not evidence of familial stability and resilience for Frazier. On the contrary, Black fathers absent from the physical home of their families were simply absent, leaving Black women to fend for themselves and their children.<sup>128</sup>

Thus, Frazier marginalized the role of Black fathers in *The Negro Family in the United States*; his major focus was on Black women as female heads of household, the physical structure where they and their children resided.<sup>129</sup> Pick-

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<sup>117</sup> *Id.* at 271, 273–74, 278, 280.

<sup>118</sup> *Id.* at 108–09.

<sup>119</sup> *Id.* at 284–85.

<sup>120</sup> *See generally id.* at 358–75.

<sup>121</sup> *See id.* at 327–33.

<sup>122</sup> *Id.* at 100–01.

<sup>123</sup> *Id.* at 101.

<sup>124</sup> *Id.* at 106–07.

<sup>125</sup> *Id.* at 101–03, 163–66.

<sup>126</sup> *Id.* at 117–24.

<sup>127</sup> *Id.* at 117–18.

<sup>128</sup> *Id.* at 126.

<sup>129</sup> *Id.* at 125–32. This contrasted with the data Frazier used from census records, which acknowledged the different types of familial connections that existed in Black communities. If no male was present in the home, Frazier classified these as female-headed. *Id.* at 127.

ing up, in part,<sup>130</sup> on Du Bois' theme of "Negro motherlove," Frazier argued that Black mothers were more dependable parents than the fathers of their children.<sup>131</sup> These women were also not likely to submit to male authority, a fixture of the patriarchal Western familial structure, as their status as heads of household made them self-sufficient.<sup>132</sup> Using the Western familial ideal as a measurement for these women's choices with whom to partner, how to partner with them, and when to have children, Frazier framed Black women's sexual relationships outside of marriage as sexually loose and irregular couplings, effectively placing those choices outside of the moralizing structure of the nuclear family.<sup>133</sup> Although Frazier did reference the disruptions of slave sales and emancipation as contributors to family disorder,<sup>134</sup> his main point was that circumstance should not be elevated over the conscious choice to assimilate Western family and marriage ideals.<sup>135</sup> As Frazier explained:

That the Negro has found within the patterns of the white man's culture a purpose in life and a significance for his strivings which have involved sacrifices for his children and the curbing of individual desires and impulses indicates that he has become assimilated to a new mode of life.<sup>136</sup>

Missing from Frazier's analysis was that varied Black familial combinations were quite "normal" and functional; fictive kinship networks (aunties, uncles, godparents) and "away" fatherhood were necessities borne of the slave auction block and human trafficking that served as mechanisms for the survival and cultural continuance of Black people.<sup>137</sup>

Du Bois and Frazier were among the foremost sociologists of their time; Du Bois was the first African American to earn a PhD from Harvard University, while Frazier became the first African American to head the American Sociological Association in 1948.<sup>138</sup> Both men conducted their research on Black family life from the context of university appointments at Historically Black Colleges and Universities ("HBCUs"); Du Bois was at Atlanta University and Frazier was at Howard University.<sup>139</sup> Through his work on the Black family, each man desired to explain contemporary problems in Black communities by

<sup>130</sup> Note Frazier's description of Black mothers as cold-hearted to their own children but fierce defenders of their White charges. *Id.* at 42, 481–82.

<sup>131</sup> *Id.* at 41.

<sup>132</sup> *Id.* at 125.

<sup>133</sup> *Id.* at 115–16, 126.

<sup>134</sup> *Id.* at 39–41, 173–78.

<sup>135</sup> *Id.* at 483, 487.

<sup>136</sup> *Id.* at 487.

<sup>137</sup> See generally JOHN W. BLASSINGAME, *THE SLAVE COMMUNITY* (1979); HERBERT G. GUTMAN, *THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750–1925* (1976); Linda M. Chatters et al., *Fictive Kinship Relations in Black Extended Families*, 25 J. COMP. FAM. STUD. 297 (1994).

<sup>138</sup> Vernon J. Williams, Jr., *E. Franklin Frazier and the African American Family in Historical Perspective*, 23 WESTERN J. BLACK STUD. 246, 247 (1999).

<sup>139</sup> See generally FRAZIER, *supra* note 112; *THE NEGRO AMERICAN FAMILY*, *supra* note 100.

using sociological methods of research and analysis. As Du Bois mentioned in his preface to *The Negro American Family*, his goal was truth and a desire for social reform to aid Black people in advancing beyond perceived pathology.<sup>140</sup> Du Bois' work was not without his own critique, as evidenced by his challenge of Western familial, marital, and sexual norms as being the only valid measure of Black family health and Black advancement. Frazier too desired to contribute to the scholarly literature on Black families. However, in contrast to Du Bois, he accepted in his interpretation of data on Black family life the Western familial and marital ideals as the defining measurements for Black pathology and Black progress. It is important to note that despite the impetus for each work, both was subsequently read through the "white gaze," an implicit analytical framework that normalizes whiteness and compares all non-whites to widely held White cultural norms and postulated beliefs.<sup>141</sup> In particular, Frazier's work on the Black family was read and interpreted through the white gaze of social scientist and Assistant Secretary of Labor under President Lyndon B. Johnson, Daniel Patrick Moynihan.<sup>142</sup> Moynihan, along with fellow social scientist Nathan Glazer in their text *Beyond the Melting Pot: The Negroes, Puerto Ricans, Jews, Italians, and Irish of New York City*, described Frazier's work as:

[O]ne of the most important books written on the American Negro, [in which he] has traced the history of the family, from slavery, to the Southern postslavery [sic] situation, to the Northern City. What slavery began, prejudice and discrimination, affecting jobs, housing, self-respect, have continued to keep alive among many, many, colored Americans. This is the situation in the Negro community; it will be the situation for a long time to come.<sup>143</sup>

Moynihan's distorted gaze of Black familial relations would form the foundation of the infamous Moynihan Report and influence policies toward Black men, women, and children into the present day.

After assessing the long history of Black familial relationships in slavery, Daniel Patrick Moynihan declared "[a]t the heart of the deterioration of the fab-

<sup>140</sup> THE NEGRO AMERICAN FAMILY, *supra* note 100, at 5.

<sup>141</sup> See generally, e.g., W. E. BURGHARDT DU BOIS, THE SOULS OF BLACK FOLK (7th ed. 1907) (arguing that Black people exist in a "double-consciousness" where they are constantly aware of their difference and marginalization); FRANTZ FANON, BLACK SKIN, WHITE MASKS (Richard Philcox trans., 1952) (exploring the duality of an oppressed person to know oneself and to be simultaneously "known" through the eyes of the oppressor); GEORGE YANCY, BLACK BODIES, WHITE GAZES (2008) (arguing that because of race privilege, White people view the world through a lens that blocks out the experiences of people of color); WHITENESS (Thomas K. Nakayama & Judith N. Martin eds., 1999) (a series of articles problematizing whiteness as a normalizing lens that "others" people of color and their experiences).

<sup>142</sup> DANIEL PATRICK MOYNIHAN, U.S. DEP'T OF LABOR, THE NEGRO FAMILY (1965), <http://web.stanford.edu/~mrosenfe/Moynihan's%20The%20Negro%20Family.pdf> [https://perma.cc/8BYM-YFUY].

<sup>143</sup> NATHAN GLAZER & DANIEL PATRICK MOYNIHAN, BEYOND THE MELTING POT 52 (2d ed. 1970).

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ric of Negro society is the deterioration of the Negro family.”<sup>144</sup> For Moynihan, the route to salvation for Black people was to embrace patriarchy with its attendant roles and relationships. Citing revered historians, sociologists, politicians, and educators such as E. Franklin Frazier,<sup>145</sup> Whitney Young,<sup>146</sup> and Dorothy Height,<sup>147</sup> Moynihan constructed a thesis to explain the Black male and his failings as a husband and father. The high unemployment rate for Black men and the prevalence of Black female headed homes in the mid-twentieth century led Moynihan to conclude that Black women lacked strong leadership in family matters, and that Black children were simultaneously illegitimate and the products of the proverbial “broken home.”<sup>148</sup> In an almost eerie reverberation of courts’ interpretations of post-emancipation apprenticeship laws, Moynihan’s conclusion was that the absence of male headed family structures led to Black women and their children being a drain on state resources.<sup>149</sup> In his words, “The steady expansion of this welfare program, as of public assistance programs in general, can be taken as a measure of the steady disintegration of the Negro family structure over the past generation in the United States.”<sup>150</sup>

Moynihan adopted historian Stanley Elkins’s thesis that slave families were female centered or matrifocal as a result of slave sales and/or prohibitions on legal slave marriage.<sup>151</sup> Absent from Moynihan’s analysis was an examination of the laws that legalized marriage and legitimated children, and how they served to undermine Black fathers’ attempts to support their families even when separated by slave sales or forced couplings by the decree of slave masters. Instead, Moynihan looked to nature to explain restrictions on Black male patriarchal rights: “[t]he very essence of the male animal, from the bantam rooster to the four-star general, is to strut. Indeed, in 19th century America, a particular type of exaggerated male boastfulness became almost a national style. Not for the Negro male. The ‘sassy nigger’ was lynched.”<sup>152</sup> Accordingly, a Black male’s inability to assume his proper place as head of the Black family led to the “family [pathologies]” of “divorce, separation, and desertion, female family head, children in broken homes, and illegitimacy.”<sup>153</sup> Moynihan’s study gave no credence to the thesis that perceived Black familial pathology was not a natural occurrence, but rather by design. His solution was to focus national

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<sup>144</sup> MOYNIHAN, *supra* note 142, at 5.

<sup>145</sup> *Id.* at n.18 (citing FRAZIER, *supra* note 112, at 298).

<sup>146</sup> *Id.* at n.32 (citing WHITNEY YOUNG, *TO BE EQUAL* 25 (1964)).

<sup>147</sup> *Id.* at n.36 (citing DOROTHY HEIGHT, *PRESIDENT’S COMM’N ON THE STATUS OF WOMEN, REPORT OF CONSULTATION OF PROBLEMS OF NEGRO WOMEN* (1963)).

<sup>148</sup> *Id.* at 7–8.

<sup>149</sup> *Id.* at 12.

<sup>150</sup> *Id.* at 14.

<sup>151</sup> *Id.* at 16.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 19.

attention on “fixing” the Black family, primarily the failure of Black fathers to parent their children and head their households as husbands to Black women.<sup>154</sup>

Moynihan’s critique of the Black family, particularly the insistence that patriarchy was the cause of its ills, looks only at parenthood and Black fatherhood within the confines of nuclear families. However, as previously discussed, fathers separated from their children in slavery and through legitimation laws sought to be involved in their children’s lives and to parent them even though they did not live with the mother. Sociologists studying Black families in the early to mid-nineteenth century noted high incidences of mothers and children who lived with extended family, and fathers who lived away in separate residences and remained involved in their children’s lives.<sup>155</sup> This phenomenon was again noted in a study of Black families in the 1980s.<sup>156</sup> The reasons for Black fathers to live away are myriad, ranging from their search for employment, the type of employment and its demands, and their children’s mothers’ current relationship status.<sup>157</sup> Although census data recording births and different configurations of family have been somewhat unreliable, sociological studies that were conducted as late as the turn of the twenty-first century have noted that away parenting for Black fathers is common.<sup>158</sup> Interviews conducted with children growing up in such homes reveal that many Black fathers contribute financially to the household when they are able and spend time with their children when their work schedules allow.<sup>159</sup> Regardless, these fathers’ absence from their children’s primary residence as financial heads of households has rendered them invisible as fathers and failures as patriarchs for those who have subscribed to Moynihan’s assessment of Black family life.

While Moynihan’s *The Negro Family: The Case for National Action* has been widely criticized in the years since it was made public, legislation attempting to address poverty and crime in Black communities has adopted its fundamental premise.<sup>160</sup> The study’s legacy was to cement in the public imagination the seemingly incongruous existence of Black motherhood as victimhood (the absence of an in-residence male head of household) and Black motherhood as heroism (the persistence of Black families despite the absence of a patriarch).<sup>161</sup> It would be through this lens, which normalized White familial relations as rooted in and thriving because of patriarchy, that Black motherhood could be politicized. Leaders of the nascent national movement for Black civil

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<sup>154</sup> *Id.* at 47–48.

<sup>155</sup> JENNIFER HAMER, WHAT IT MEANS TO BE DADDY 48 (2001).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 51–52.

<sup>158</sup> *Id.* at 48–49.

<sup>159</sup> *Id.* at 50–51.

<sup>160</sup> See, e.g., Symposium, *The Moynihan Report: 50 Years Later*, 8 GEO. J. L. & MOD. CRITICAL RACE PERSP. 1 (2016).

<sup>161</sup> See, e.g., Serena Mayeri, *Historicizing the “End of Men”: The Politics of Reaction(s)*, 93 B.U. L. REV. 729 (2013); Verna L. Williams, *The Patriarchy Prescription: Cure or Containment Strategy?*, 8 GEO. J. L. & MOD. CRITICAL RACE PERSP. 61 (2016).

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rights would focus this lens, crafted and polished by the scholars and activists Moynihan quoted to advance his thesis,<sup>162</sup> to bring national attention to extra-judicial violence against Black men.

#### BLACK MOTHERHOOD IN THE CAUSE FOR CIVIL RIGHTS

The NAACP Legal Defense Fund's victory in *Brown v. Board of Education*<sup>163</sup> was a national, public expression of grassroots movements throughout the South for the cause of Black civil rights. *Brown* served as a catalyst to inspire those standing in resistance to Jim Crow throughout the American South to continue. Fresh from the win, the NAACP urged its southern members to push for desegregation locally.<sup>164</sup> Segregation was no more deeply entrenched in the South than in Mississippi. When the Mississippi Statehouse convened in November of 1954, it resolved to actively block school desegregation.<sup>165</sup> To ensure its intention, White men formed Citizens' Councils to organize their extra-judicial violence against the Black population who called it to account.<sup>166</sup> Between July 1954 and October 1954, the number of Citizens' Councils grew to twenty.<sup>167</sup> In his December 1954 field report, the young NAACP assistant field secretary Medgar Evers noted that among the top racial issues facing the state of Mississippi was the continued growth of Citizens' Councils.<sup>168</sup> Evers explained that these Councils were known as the "‘uptown’ Ku Klux Klan" because "[p]ossibly four (4) out of five (5) bank officials, presidents or vice, hold a key position in the Councils."<sup>169</sup> The main goal of each Council was "‘Keeping the Negro in his place’" by blocking access to schools, the franchise, and otherwise assuring financial dependence.<sup>170</sup> When Evers along with his wife, Myrlie, opened an NAACP field office in Jackson, Mississippi in 1955, a Citizens' Council was there to greet it.<sup>171</sup> The NAACP would report that out of Mississippi's eighty-two counties, sixty-five had Citizens' Councils with a total estimated membership of 60,000 by August of the same year.<sup>172</sup> It was on Au-

<sup>162</sup> Moynihan's Report was published after the passage of the Civil Rights Act of 1964, but before the Voting Rights Act of 1965. Accordingly, those scholars whose work he accessed in creating the Report were widely known at the advent of the "classic" Civil Rights Movement (1955–1965).

<sup>163</sup> *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

<sup>164</sup> MEDGAR EVERS, *THE AUTOBIOGRAPHY OF MEDGAR EVERS* 14 (Myrlie Evers-Williams & Manning Marable eds., 2005).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 18.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 18–19.

<sup>171</sup> *Id.* at 14.

<sup>172</sup> *Id.*

gust 28, 1955 that fourteen-year old Emmett Till was lynched in Money, Mississippi for allegedly whistling at Mrs. Carolyn Bryant, a White woman.<sup>173</sup>

At the time of Emmett's murder, Mamie Till Bradley was divorced,<sup>174</sup> Emmett's father, Louis Till, had died just before Emmett had turned four.<sup>175</sup> Employed and raising Emmett on her own,<sup>176</sup> Ms. Bradley was the matriarch of a female-headed household; Emmett was the son "abandoned" by one father at death, the other by indifference. Her motherhood was that imagined by post-emancipation courts and retold through the white gaze in the histories written about slave families in her era. However, pastor, activist, scholar, and father Dr. Martin Luther King, Jr., would speak differently about motherhood from his pulpit at Dexter Avenue Baptist Church in Montgomery, Alabama on the Mother's Day before Emmett's death. In his sermon, *Crisis Facing Present-Day Family Life in America*, King addressed the breakdown of the American family and offered the following solution to his Black congregants:

The first thing that can be done to restore the family to a harmonious unit is for each individual to respect the dignity and worth of every other individual in the family [.] The parents must respect each other, and the children must respect and be respected by the parents [.] Men must accept the fact that the day has passed when the man can stand over the wife with an iron rod asserting his authority as "boss[.]" This does not mean that women no longer respect masculinity, ie [sic], strong, dynamic manliness, women will always respect that [.] But it does mean that the day has passed when women will be trampled over and treated as some slave subject to the dictates of a despotic husband [.] One of the great contributions that Christianity has made to the world is that of lifting the status of womanhood from that of an insignificant child-bearer to a position of dignity and honor and respect [.] Women must be respected as human beings and not treated as mere means [.] Strictly speaking, there is no boss in the home; it is no lord-servant relationship [.] The family should be a cooperative enterprise [*strikeout illegible*] {where} all members are working together for a common goal[.]<sup>177</sup>

In contrast, United States Ambassador to the United Nations Adlai Stevenson's words to the overwhelmingly White, all-female audience of nascent college graduates at Smith College in May of 1955 gives a different account of the

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<sup>173</sup> Ruth Feldstein, "I Wanted the Whole World to See": Race, Gender, and Constructions of Motherhood in the Death of Emmett Till, in NOT JUNE CLEAVER: WOMEN AND GENDER IN POSTWAR AMERICA, 1945–1960, at 263 (Joanne Meyerowitz ed., 1994).

<sup>174</sup> *Id.* at 265 n.10.

<sup>175</sup> MAMIE TILL-MOBLEY & CHRISTOPHER BENSON, DEATH OF INNOCENCE 17 (2003). For more on Louis Till, see JOHN EDGAR WIDEMAN, WRITING TO SAVE A LIFE: THE LOUIS TILL FILE 11–12 (2016) (positing the thesis that when the press learned that Louis Till was hanged for the rape and murder of an Italian woman during his tour of duty in World War II, it effectively assured that Milam and Bryant would be acquitted for Emmett Till's murder).

<sup>176</sup> Feldstein, *supra* note 173, at 269.

<sup>177</sup> Martin Luther King, Jr., "The Crisis in the Modern Family," *Sermon at Dexter Avenue Baptist Church*, in 6 THE PAPERS OF MARTIN LUTHER KING, JR. 212 (Clayborne Carson et al. eds., 2007).

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function of women as wives and mothers in a familial structure. He admonished:

I think there is much you can do about our crisis in the humble role of housewife. The peoples of the West are still struggling with the problems of a free society and just now are in dire trouble. For to create a free society is at all times a precarious and audacious experiment. Its bedrock is the concept of man as an end in himself. But violent pressures are constantly battering away at this concept, reducing man once again to subordinate status, limiting his range of choice, abrogating his responsibility and returning him to his primitive status of anonymity in the social group. I think you can be more helpful in identifying, isolating and combating these pressures, this virus, than you perhaps realize . . . . [The] typical Western man, or typical Western husband, operates well in the realm of means, as the Romans did before him. But outside his specialty, in the realm of ends, he is apt to operate poorly or not at all. . . . And here's where you come in: to restore valid, meaningful purpose to life in your home . . . . You may be hitched to one of these creatures we call "Western man" and I think part of your job is to keep him Western, to keep him truly purposeful, to keep him whole.<sup>178</sup>

In reinforcing the primacy of male headed households, Stevenson recounted:

I have just returned from sub-Sahara [sic] Africa where the illiteracy of the African mother is a formidable obstacle to the education and advancement of her child and where polygamy and female labor are still the dominant system. The point is that whether we talk of Africa, Islam or Asia, women "never had it so good" as you do. And in spite of the difficulties of domesticity, you have a way to participate actively in the crisis in addition to keeping yourself and those about you straight on the difference between means and ends, mind and spirit, reason and emotion . . . . In modern America the home is not the boundary of a woman's life. There are outside activities aplenty. But even more important is the fact, surely, that what you have learned and can learn will fit you for the primary task of making homes and whole human beings in whom the rational values of freedom, tolerance, charity and freeinquiry [sic] can take root.<sup>179</sup>

The differences in the roles of women as wives and mothers in Black and White communities, as described by King and Stevenson, presented a problem for the leaders of the first movement for Black lives as they designed advocacy efforts to bring national attention to the plague of white supremacy and its ever present danger for Black people. King could speak about Black people to Black people in terms of loving admiration, but as Du Bois and Frazier's work on the Black family illustrate, these were not terms that White America believed or cared to understand. Black women had existed beyond the boundaries of the home as female heads of house. Due to discriminatory hiring practices, limited

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<sup>178</sup> Adlai E. Stevenson, *A Purpose for Modern Woman*, WOMEN'S HOME COMPANION, Sept. 1955, at 30–31.

<sup>179</sup> *Id.*

employment opportunities, and stilted educational access for Black men,<sup>180</sup> her labor contribution to the household was its financial lifeblood. Thus, to make their efforts effective, civil rights leaders engaged in the tricky dance of making the problems of Black America relevant through the white gaze by presenting them in patriarchal terms. By doing so, they appealed to popular notions of the victimhood and heroism of Black women, while simultaneously underscoring both the pitfalls and importance of patriarchy.

It was from a space of both victimhood and heroism that Mamie Till Bradley was able to focus national attention on the peril that had befallen her son by accessing the narrative of the Black family as it existed in the White imagination. Mamie Till Bradley was a mother of a murdered child, and her grief over the loss of a child was a universal sentiment.<sup>181</sup> In her words: “I set out to trade the blood of my child for the betterment of my race, and I do not now wish to deviate from such course.”<sup>182</sup> On September 3, with the national press and upwards of 50,000 people in attendance, Mamie Till Bradley stood by Emmett’s open casket and showed the world her son’s body as “an exhibition of human bestiality, brutality[,] and barbarism.”<sup>183</sup> In the September 15, 1955 issue of *Jet Magazine* that reported the lynching to a national Black community, pictures of Emmett both before and after the lynching were featured prominently.<sup>184</sup> An enlarged photo of Till’s distorted face was adorned with the caption: “Close-up of lynch victim bares mute evidence of horrible slaying. Chicago undertaker A. A. Raynor said youth had not been castrated as was rumored. Mutilated face of victim was left unretouched by mortician at mother’s request. She said she wanted ‘all the world’ to witness the atrocity.”<sup>185</sup> She appealed to the nation as a mother, a mother who raised her son to “know his place” in the segregated South.<sup>186</sup> As a mother the nation heard her, although the jurors in Emmett Till’s murder trial clung to pathological Black motherhood instead of its political

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<sup>180</sup> HAMER, *supra* note 155, at 53 (arguing that “never-married fathers tend to be poorer, have less education, and fewer job skills,” and that “our society continues to define noncustodial fatherhood in primarily economic terms”); Patricia Hill Collins, *Intersections of Race, Gender, and Nation: Some Implications for Black Family Studies*, 29 J. COMP. FAM. STUD. 27, 28 (1998). Collins argues that “cultural and psychological values have long been emphasized as central to understanding Black family organization instead of economic and political phenomena, such as industrial and labor market trends, employment patterns, migration histories, residential patterns, and governmental policies.” *Id.* at 28.

<sup>181</sup> Feldstein, *supra* note 173, at 268–69. Feldstein’s discussion of Mamie Till Bradley is one that seeks to examine the significance of her actions following her son’s murder within the white gaze and in contrast to images of White womanhood and motherhood. In comparison, I contextualize Mamie Till-Bradley within a larger discussion of Black motherhood and family that predates Moynihan and Frazier and eschews a reading of those texts solely through the white gaze.

<sup>182</sup> *Id.* at 287.

<sup>183</sup> *50,000 New Yorkers Urge ‘Dixie March’*, JET, Oct. 6, 1955, at 3–4. A. Philip Randolph used these words to describe Emmett Till’s death.

<sup>184</sup> *Nation Horrified by Murder of Kidnaped Chicago Youth*, *supra* note 14, at 6–9.

<sup>185</sup> *Id.* at 9.

<sup>186</sup> Feldstein, *supra* note 173, at 280.

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counterpart.<sup>187</sup> As the French newspaper *L'Aurore* would report: "What could a Black mother say [in court] that would be of any value?"<sup>188</sup>

The trial of Roy Bryant and J.W. Milam for Till's murder would begin on September 19<sup>189</sup> and end five days later in an acquittal.<sup>190</sup> In the weeks and months after the trial, Mamie Till Bradley attended rallies, spoke at churches, and made appearances at the NAACP's behest; her speaking engagements were to raise money for the organization to fund its civil rights efforts.<sup>191</sup> Accompanied by her father, John M. Carthan, her cousin, Raymond Mooty, and sponsored by the weight of an overwhelmingly male NAACP under the leadership of Roy Wilkins, Mamie Till regained at her son's death the patriarchal figures of "husband" and "father" that both were denied during his life.<sup>192</sup> As Moses Lacy had done for Sarah Pope just after emancipation, these men gave Mamie Till Bradley the authority to speak as a mother on behalf of her child and those countless children bloodied by the relentless blows thrown by Jim Crow. Carthan and Mooty legitimated Emmett, and by extension them all.

#### BLACK FATHERHOOD IN THE AGE OF BLACK LIVES MATTER

At some time after 4:05 p.m. on August 9, 2014, Louis Head, Mike Brown's stepfather held up the hastily scribbled sign: "Ferguson Police Just Executed My Unarmed Son!!!"<sup>193</sup> A day later, the *St. Louis Post Dispatch* would publish a picture of Head standing behind Mike Brown's mother, Lesley McSpadden with his head resting on hers and his arm around her neck.<sup>194</sup> The caption read: "Lesley McSpadden is comforted by her husband, Louis Head, after her 18-year-old son was shot and killed by police earlier in the afternoon in the 2900 block of Canfield Drive on Saturday, Aug. 9, 2014, in Ferguson. Head is the step-father."<sup>195</sup> In the hours that followed the shooting, residents of Ferguson gathered to bear witness to the killing and provide support for one another. To control the crowd, the Ferguson Police Department requested help from the St. Louis Police Department, who subsequently secured the perimeter in the area where the shooting had occurred.<sup>196</sup> As it had done one August nearly sixty years before in the Emmett Till lynching, the NAACP began an almost

<sup>187</sup> *Id.* at 282. Feldstein argues that Bradley's lack of emotion during the trial was evidence of her lack of womanliness; she did not fall into the common trope of the "emotionally overwrought" mother. *Id.* at 281.

<sup>188</sup> *Id.*

<sup>189</sup> *Will Mississippi 'Whitewash' the Emmett Till Slaying?*, *JET*, Sept. 22, 1955, at 8.

<sup>190</sup> Feldstein, *supra* note 173, at 263–64.

<sup>191</sup> *How the Till Case Changed 5 Lives*, *JET*, Nov. 24, 1955, at 10–13.

<sup>192</sup> *Id.*

<sup>193</sup> Associated Press et al., *supra* note 4; T-Dubb-O (@tdubbo), *supra* note 4.

<sup>194</sup> Thorsen & Giegerich, *supra* note 6.

<sup>195</sup> *Id.*

<sup>196</sup> Betsey Bruce, *Teenager Shot, Killed in Ferguson Apartment Complex*, FOX 2 NOW ST. LOUIS, (Aug. 9, 2014, 3:50 PM), <http://fox2now.com/2014/08/09/man-shot-killed-in-fergus-on-apartment-complex/> [<https://perma.cc/F3WZ-CZ8H>].

immediate investigation into Mike Brown's death.<sup>197</sup> The residents of Ferguson began protesting well into the night and into the days that followed, as an increasingly militarized police force escalated anxiety and tension with residents.<sup>198</sup> Six days later, Head stood with family and others in attendance at a press conference held at the Ferguson Police Department.<sup>199</sup> At the press conference, Ferguson residents learned that Darren Wilson was the officer who shot Mike Brown.<sup>200</sup>

More than three months later, St. Louis County Prosecutor Robert McCulloch announced that Officer Wilson would escape indictment in the Brown killing. After McCulloch's announcement, Lezley McSpadden climbed on top of a car to address the crowd.<sup>201</sup> Video accounts show her "standing on a car, shouting that she'[d] never done anything to hurt anyone and breaking down in tears."<sup>202</sup> Head is shown "[climbing] up on the car to comfort her" and "[wrapping] her in a hug."<sup>203</sup> Shortly after, Head yelled "Burn this mother\*\*\*cker down! Burn this bitch down!"<sup>204</sup>

Speaking out of frustration and despair, Louis Head's message was one already felt by those insisting that Black Lives Matter. His remarks were to an overwhelmingly Black audience and through a Black gaze; they were not sanitized for a White audience and not the scripted lines for a highly-coordinated movement. Rather, they were an expression of the building rage in Black communities over the deaths of unarmed Black men and women by state and extrajudicial violence. Failing to recognize that Head echoed the sentiments of Black communities across the nation, Ferguson Police Chief Thomas Jackson chose to investigate whether Head intended to incite the riots and looting that began in Ferguson after McCulloch's remarks.<sup>205</sup> Benjamin Crump, attorney for the Brown family and regarded as "[t]he most prominent civil-rights lawyer of his

<sup>197</sup> *Id.*

<sup>198</sup> See, e.g., Antonio French (@AntonioFrench), TWITTER (Aug. 9, 2014, 4:25 PM), <https://twitter.com/antoniofrench/status/498248648699150336?lang=en> [<https://perma.cc/2JSM-N3Q4>] ("Police have brought out the large gear in #Ferguson.").

<sup>199</sup> Erin McClam, *Anger Flares Again in Ferguson After Revelations in Michael Brown Shooting*, NBC NEWS, (Aug. 15, 2014, 10:48 PM), <http://www.nbcnews.com/storyline/michael-brown-shooting/anger-flares-again-ferguson-after-revelations-michael-brown-shooting-n181861> [<https://perma.cc/5WP5-8TX5>]; *'Beyond Outraged': Family Angered Over Police Revelations in Michael Brown Shooting*, SBS NEWS, (Aug. 16, 2014, 11:28 AM), <http://www.sbs.com.au/news/fragment/beyond-outraged-family-angered-over-police-revelations-michael-brown-shooting> [<https://perma.cc/6YNK-M8Y7>].

<sup>200</sup> McClam, *supra* note 199.

<sup>201</sup> Zach Noble, *'Burn This Bi\*\*h Down!': Mike Brown's Step-Dad Caught on Vid Inciting Violence, and Here's How the Family Attorney Responded*, BLAZE (Nov. 25, 2014, 1:42 PM), <http://www.theblaze.com/stories/2014/11/25/burn-this-bih-down-mike-browns-step-dad-caught-on-vid-inciting-violence-and-heres-how-the-family-attorney-responded/> [<https://perma.cc/SB7R-7AFV>].

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> Gorman, *supra* note 11.

<sup>205</sup> *Id.*

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generation,”<sup>206</sup> condemned Head’s statements in a press conference describing them as “triggered by raw emotion and . . . completely inappropriate.”<sup>207</sup> The media quoted Brown’s biological father, Mike Brown, Sr. as “call[ing] for peace”.<sup>208</sup> In the weeks that followed, attention shifted from Louis Head, who was there visibly (as documented by the press and social media) from the time of the shooting through the announcement of the indictment, to Mike Brown Sr., who remained largely absent from the press until Head’s remarks. Louis Head’s fatherhood was that imagined by the post-emancipation courts, depoliticized by Emmett Till’s murder, and pathologized by the Moynihan Report. Like Harry Pope and fathers like him who after slavery sought to legitimate the children they recognized as their own, Head was excluded from fatherhood by one with a better claim, and denied the opportunity to offer his son protection.

Realizing that the route to political attention for the deaths of Black children was through Black motherhood, not Black fatherhood, Crump followed the pattern of his predecessors in the NAACP. To rehabilitate McSpadden’s role as a mother, and legitimate Mike Brown, Jr.<sup>209</sup> as a child, Benjamin Crump engaged in the dance of his civil rights forbears to make Mike Brown Jr.’s death relevant on a national scale. Mimicking their moves, Crump reconstructed Lezley McSpadden in patriarchal terms by restoring Brown’s biological father to her side and refocusing attention to her pain as a Black mother. He shifted America’s eyes from Louis Head’s Black gaze to the White gaze that would politicize McSpadden’s motherhood. Like Mamie Till before her, Lezley McSpadden wanted the whole world to see what they did to her boy. Like Carthan and Mooty had done for Mamie Till Bradley, Mike Brown Sr., as Mike Brown Jr.’s biological father, granted access for McSpadden to speak from a position of power and persuasion.

Thus began the fiction of Mike Brown Sr.’s role as the head of a household where Mike Brown Jr. figured prominently. In actuality, Mike Brown, Sr. was an “away” father reconstituted as the head of his own nuclear family; this was the narrative that would play in the press. *Esquire Magazine* ran a story by John H. Richardson in January 2015 titled: “Mike Brown Sr. and the Agony of the

<sup>206</sup> John H. Richardson, *Michael Brown Sr. and the Agony of the Black Father in America*, *ESQUIRE* (Jan. 5, 2015), <http://www.esquire.com/news-politics/interviews/a30808/michael-brown-father-interview-0115/> [<https://perma.cc/549Z-6JPA>].

<sup>207</sup> Ben Mathis-Lilley, *Police Investigating Michael Brown’s Steppfather for Inciting Riot by Shouting “Burn This Bitch Down”*, *SLATE* (Dec. 2, 2014, 2:51 PM), [http://www.slate.com/blogs/the\\_slatest/2014/12/02/michael\\_brown\\_stepfather\\_riot\\_investigation\\_louis\\_head\\_shouted\\_burn\\_this.html](http://www.slate.com/blogs/the_slatest/2014/12/02/michael_brown_stepfather_riot_investigation_louis_head_shouted_burn_this.html) [<https://perma.cc/W5ST-YHSS>] (internal quotations omitted).

<sup>208</sup> Gorman, *supra* note 11.

<sup>209</sup> I refer to Mike Brown as a Jr. throughout the text to differentiate him from his father. He was not a Jr. As his mother wrote: “Everybody thinks he was a junior, but he wasn’t. Even though he had his Daddy’s first and last name, his full name was Michael Orlandus Darrion Brown. I wanted my son to have his own identity, so he did.” LEZLEY MCSPADDEN, *TELL THE TRUTH & SHAME THE DEVIL: THE LIFE, LEGACY, AND LOVE OF MY SON MICHAEL BROWN* 3 (2016).

Black Father in America.”<sup>210</sup> The story opens with Brown Sr. at his house on Thanksgiving with his new wife<sup>211</sup> Calvina and extended family. Richardson recounts:

Brown’s house is an ordinary ranch in a pleasant, safe neighborhood a few miles from where his son was killed, completely average except for one thing—down in the man cave the walls are decorated with photos of Brown’s dead son, a tapestry of his dead son, a photo of a mural dedicated to his dead son. Hanging on the corner of the TV is a black necktie with his dead son’s face peeking out at the very bottom, like a bit of sun under a long black cloud. Brown leans against a pillow bearing his dead son’s face. Mike-Mike, they called him, as if saying his name once weren’t enough to express their love.<sup>212</sup>

Halfway down the page where the story appears is a painting by Tim O’Brien.<sup>213</sup> In it is the dead body of Mike Brown, on his stomach, underwear peeking through the top of his pants.<sup>214</sup> The caption reads “I Should Have Been There to Protect Him.”<sup>215</sup> Five paragraphs later appears break out text in bold: “When Michael was sixteen, they [Mike Brown, Sr. and Mike Brown, Jr.] had the talk about being cooperative with police.”<sup>216</sup> This was the expression of true fatherhood, the salvation for the Black family. This was fatherhood that sought to protect and taught Black sons their “place” vis-à-vis law enforcement—parenting like Mamie Till’s when she taught Emmett to “know his place.” Richardson’s telling of the moments following Brown Jr.’s shooting makes Brown Sr. the male head of house for Brown Jr., Brown Sr.’s wife and their children, even as Louis Head was legally married to McSpadden and a resident of their home.<sup>217</sup> McSpadden is described as her own head of house in the story, gathering with her family and turning over the events that lead to her son’s death again and again with incredulity and horror.<sup>218</sup> In Richardson’s retelling, Brown Sr. remained the calm and vigilant patriarch even though McSpadden yelled at him when he arrived on the scene with his wife: “[Calvina’s] not the mother. What does she need to be out here for?”<sup>219</sup> Brown Sr. waited on the sidelines with his wife when a cousin informed him that the shooting victim was indeed Mike.<sup>220</sup> It was Brown Sr. who watched over the body, afraid that the police would plant a gun at the scene to buttress tales of self-defense.<sup>221</sup> It

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<sup>210</sup> Richardson, *supra* note 206.

<sup>211</sup> *Id.* Mike Brown, Sr. was married approximately three weeks prior to Mike Brown, Jr.’s death.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

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was Brown Sr. and his wife who “spent four hours and thirty-two minutes watching [Brown, Jr. ] lay on the ground.”<sup>222</sup> Despite his primal desire to serve as a father, to protect his son, Brown Sr. reflected: “We [he and Calvina]<sup>223</sup> was treated like we wasn’t [sic] parents, you know? That’s what I didn’t understand. They sicced dogs on us. They wouldn’t let us identify his body. They pulled guns on us.”<sup>224</sup> In Brown Sr.’s tale, he was an involved father who was engaged in Brown, Jr.’s life, leading him through childhood into young adulthood with wisdom and guidance. His job at Brown Jr.’s death, according to Benjamin Crump, was to “fight for [Brown Jr.’s] legacy.”<sup>225</sup>

Lezley McSpadden’s memory of her life with Mike Brown, Sr. is a departure from his own. McSpadden unexpectedly found herself a mother at sixteen, raising Brown Jr. with the help of her and Brown Sr.’s immediate and extended families.<sup>226</sup> She and Brown Sr.’s coupling was a tale of impetuous love spattered throughout with accusations of domestic abuse and abandonment. From McSpadden’s account, Mike Brown, Sr. did not contribute financially to his son’s maintenance and took little interest in him, even though the family lived in his parent’s house.<sup>227</sup> Shortly after Brown, Jr.’s first birthday, Brown Sr. beat McSpadden for the first time, a cycle that would continue until their ultimate split approximately four years later.<sup>228</sup> In McSpadden’s telling of she and her son’s story, Brown, Sr.’s mother and father were the constant in her son’s life, not his father.<sup>229</sup> However, in the months following Mike Brown Jr.’s death, Brown, Sr. was allowed his “rightful” place as Brown Jr.’s father. He would appear by McSpadden’s side in television interviews<sup>230</sup> and in their travels to speak to the United Nations Committee Against Torture.<sup>231</sup> McSpadden’s memoir came full circle to Medgar Evers and his report that sparked the investigation into Emmett Till’s lynching; Myrlie Evers penned the *Forward*.<sup>232</sup> In an homage to his mother and mothers primarily responsible for the financial and

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* Given the context of Brown, Sr.’s words in the article, it appears that he is speaking about himself and Calvina, not himself and Lezley.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> MCSPADDEN, *supra* note 209, at 3.

<sup>227</sup> *Id.* at 82–83, 93.

<sup>228</sup> *Id.* at 99–101, 105–13.

<sup>229</sup> *Id.* at 82–112.

<sup>230</sup> Gillian Mohney, *Michael Brown’s Family to File Civil Suit Against Ferguson, Darren Wilson*, ABC NEWS (Mar. 5, 2015, 12:09 PM), <http://abcnews.go.com/US/michael-browns-family-file-civil-suit-ferguson-darren/story?id=29412398> [<https://perma.cc/NRS8-YP8Z>]; Jim Suhr, *Judge: Release Grand Jury Material to Michael Brown’s Family*, FOX 2 NOW ST. LOUIS (June 6, 2016, 3:03 PM), <http://fox2now.com/2016/06/06/judge-release-grand-jury-material-to-michael-browns-family/> [<https://perma.cc/JD9K-M87C>].

<sup>231</sup> Josh Levs, *Michael Brown’s Parents Address the U.N.: ‘We Need the World to Know’*, CNN (Nov. 12, 2014, 1:22 AM), <http://www.cnn.com/2014/11/11/us/ferguson-brown-parents-u-n-/> [<https://perma.cc/B2XD-ECMT>].

<sup>232</sup> MCSPADDEN, *supra* note 209, at ix.

emotional support of their children, the rapper Common would write in the Preface:

Everything I know in life, my experiences of life, and what I know to be love and life came from my mother. She is the most consistent form of love I can identify beyond God and the first person that I really got to know fully and deeply. I didn't have the blessing of growing up with a father at home or a male figure to truly sit there and take the time to teach me life's truths. The stuff I learned about being a man, both the beautiful and the ugly, I learned from my male friends and the men in my neighborhood. But my mother taught me how to live. She did her best to teach me how to be a respectable, strong black man.<sup>233</sup>

In Common's words rest the enduring narrative of the heroic Black mother, failed by the Black male patriarch, and the symbol of a failing Black family. There are no Black fathers here to protect and bring outrage to the murders of Black children; their roles have been silenced by patriarchal notions of family that have historically served to use Black fathers, mothers, and their children as political currency and exploit them for everyone's benefit but their own.

#### BURN THIS BITCH DOWN!

Perhaps Louis Head's exclamation "Burn This Bitch Down!" is a rallying cry to destroy policies that prevent families to configure in a manner that best suits their needs. Mass incarceration, high rates of unemployment, and common notions that Black fatherhood is contingent upon a father's financial contribution to a child's upbringing have all aided in constructing various formations of the Black family and different modes of parenting. However, scholars and politicians have deemed pathological any familial formation outside of the nuclear family structure, with the father as the primary breadwinner who resides in the family home.<sup>234</sup> Moynihan's flawed thesis of patriarchy as the cure for perceived Black familial instability most recently gained traction in the 2016 election coverage for President of the United States. The rhetoric of the Republican Party cast Black communities as inner city hells, full of female-headed homes leading to irresponsibility, criminality, and a drain on the country's resources.<sup>235</sup>

Likewise, in the 2016 presidential race, the Democratic Party chose the narrative of Black female victimhood and heroism, as best evidenced by the Mothers of Movement. During the Democratic National Convention, the mothers of Mike Brown, Sandra Bland, Eric Garner, Jordan Davis, Trayvon Martin,

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<sup>233</sup> *Id.* at xiii.

<sup>234</sup> See, e.g., Jessica Dixon Weaver, *The First Father: Perspectives on the President's Fatherhood Initiative*, 50 FAM. CT. REV. 297, 300 (2012).

<sup>235</sup> See, e.g., Melissa Chan, *Donald Trump Claims Black and Hispanic People Are 'Living in Hell'*, FORTUNE (Sep. 26, 2016), <http://fortune.com/2016/09/26/presidential-debate-donald-trump-living-in-hell-black-people/> [<https://perma.cc/KU93-TB2J>]; Candace Smith, *Trump Warns of Inner City 'Hell' for Blacks Where Trayvon Martin Was Shot*, ABC NEWS (Oct. 25, 2016, 8:57 PM), <http://abcnews.go.com/Politics/trump-warns-city-hell-blacks-trayvon-martin-shot/story?id=43057914> [<https://perma.cc/34LD-GJ4Q>].

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Dontre Hamilton, and Oscar Grant, all children killed by the extra judicial or state violence, took the stage as an example of endurance and survival.<sup>236</sup> Missing were the fathers of these deceased children, thereby reinforcing stereotypes of their absence and dereliction.

Since emancipation, negative perceptions of Black families in general, and Black fathers, in particular, have been imprinted in the minds of jurists, legislators, and politicians with no critique of patriarchy and its uses to lay waste to Black family life. The plantation system is a model of Western patriarchy, where the benevolent White father raped Black women who were his property or bred them with the Black male enslaved to increase his labor force; there were no laws requiring him to legitimate his children. This same father figure split families apart on the auction block and contributed to Black family formations that are now denigrated. Patriarchy, thus construed, has given Black fathers limited power to legitimate their children and Black mothers the authority to speak on their children's behalf in a political sphere. Simultaneously, it has silenced fathers who have no legal or societal claim on their children by virtue of not being part of a nuclear family structure. Until the falsehood of patriarchy as a savior for Black families and communities burns and we grapple with the role of white supremacy in creating instability in Black communities, we will continue to deny Black fathers the right to participate in their children's lives and to protect them from a system of white supremacy that would render Black fatherhood unnecessary and obsolete.

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<sup>236</sup> Jaweed Kaleem, '*Black Lives Matter!*' Chants Erupt as Mothers of the Movement Take the Stage at the DNC, L.A. TIMES (July 26, 2016, 7:35 PM), <http://www.latimes.com/politics/la-na-dnc-mothers-of-the-movement-20160726-snap-story.html> [https://perma.cc/53F6-6V9B].

