

*A Right to Not Marry?*

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So much of the debate regarding women's equal citizenship (or lack thereof) is rooted in marriage's primacy in our law and in our culture. Historically, marriage was the principal rubric for organizing women's adult lives. Marriage provided women with physical protection, social respectability, and economic sustenance. As importantly, it provided women with a legible role in society—wife and mother. Indeed, as one Kansas court put it in 1887, "Marriage is for man only an episode, while for woman it is the epic of her life." And, as Ariela Dubler has shown, marriage was a totalizing institution for *all* women, whether married or not. Although they inhabited the terrain beyond marriage's borders, single women, as much as married women, found that their intimate lives were subtly—and not-so-subtly—shaped and regulated by marriage's normative ideals.

Modernly, marriage continues to dominate the legal and cultural treatment of women and policy efforts aimed at addressing the myriad problems that women confront. The marriage promotion efforts that accompanied welfare reform in the 1990s offer a compelling example of marriage's stranglehold on social policy that implicates women—and single women in particular. Concerned with swelling welfare rolls, conservative policymakers sought to "end welfare as we know it." Part of this effort involved transforming welfare into "workfare." However, an equally prominent pillar of the reforms involved promoting marriage among the poor. Single women's poverty, it was argued, was not necessarily the result of systemic or institutional forces, but rather from poor choices—particularly, the decision to raise children outside of marriage. Marriage, policymakers posited, would stabilize these fragile families by providing strong male breadwinners, and ultimately, privatizing the dependency of these families.

The emphasis on marriage is not confined to poor women or single mothers. Indeed, less-formalized marriage promotion efforts can be glimpsed in debates that focus on middle class women. Consider the recent book, *Is Marriage for White People?* There, law professor Richard Banks attributed the "marriage gap" among African-Americans to market forces. Black America had a surfeit of eligible, educated, marriageable women and a shortage of similarly-situated men. As a consequence, black men were less likely to settle down into stable marriages, preferring to play the field indefinitely. Black women, by contrast, were forced to either share the limited pool of eligible black men, or more problematically (in Banks' view) to "marry down," partnering with less educated, less economically stable black men. Cast adrift in these misaligned marriages, Banks argues, these women suffered. They were less financially stable and less emotionally satisfied than their peers who had married similarly-situated partners. As a consequence, their marriages suffered, contributing to high rates of divorce in the black community. In an effort to address the marriage gap and rising divorce rates, Banks proposes a novel solution: black women should broaden their pool of marriageable men to include non-black men.

For Banks, as with the marriage promotion efforts, the solution to the myriad problems facing African Americans—and African American women, in particular—is marriage. Rather than focusing on the institutional and systemic problems (poverty, mass incarceration, limited employment and educational opportunities, racial and gender discrimination in employment) that may cultivate an uneven marriage market, the solution is simply to marry other (non-black) men.

The emphasis on marriage as a solution to so many social ills is curious, especially given the rising numbers of individuals living their intimate lives outside of marriage. This disjunction between law and policy and life on the ground begs an important question: Would women be better off if marriage did not matter so much?

With this in mind, this project explores a novel prospect: a legal right to *not* marry. To be clear, such a right has roots in our jurisprudence on the right to marry. Though it is often overlooked, *Loving v. Virginia* spoke of “the freedom to marry *or not marry*.” Over time, however, the converse of the right to marry has been forgotten. Arguably, the clearest discussion of a right to not marry comes almost forty years after *Loving* in *Lawrence v. Texas*. In the course of decriminalizing same-sex sodomy, the *Lawrence* Court spoke of the right to engage in a “personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.” The Court went on to elaborate that the petitioners’ “right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.” In this way, *Lawrence* suggests that the petitioners’ conduct was protected by a liberty interest separate and apart from the right to marry—the right to not marry.

But importantly, *Lawrence* does not provide a comprehensive account of what is entailed in the right to not marry. Is non-marriage reserved exclusively for private, consensual, coupled sex outside of wedlock, or might this space host a broader variety of sexual acts, decisions, and actors beyond those who simply mimic marriage? More importantly, what sort of substantive constitutional protections might exist for the sexual acts and actors that occupy the zone of non-marriage? *Lawrence* is cagey about the level of protection afforded to the petitioners’ conduct. It is not characterized as a fundamental right, nor is the challenged Texas statute subject to strict scrutiny.

Nevertheless, *Lawrence* provides a platform for theorizing a right to not marry. More importantly, the decision’s discussion of the interaction between liberty and equality provides an important starting point for thinking about how greater protections for life outside of marriage could benefit the effort to secure women’s equal citizenship.