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### Marital Supremacy and the Constitution of the Nonmarital Family

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# Marital Supremacy and the Constitution of the Nonmarital Family

Serena Mayeri\*

*Despite a transformative half century of social change, marital status still matters. The marriage equality movement has drawn attention to the many benefits conferred in law by marriage at a time when the “marriage gap” between affluent and poor Americans widens and rates of nonmarital childbearing soar. This Essay explores the contested history of marital supremacy—the legal privileging of marriage—through the lens of the “illegitimacy” cases of the 1960s and 1970s. Often remembered as a triumph for nonmarital families, these decisions defined the constitutional harm of illegitimacy classifications as the unjust punishment of innocent children for the “sins” of their parents. By reaffirming the legitimacy of governmental objectives such as discouraging illicit sex and promoting traditional marriage, courts obscured the ways in which marital supremacy injured adults as well as children, reinforcing*

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*racial, gender, and economic inequality and circumscribing sexual and reproductive freedom.*

*Using court documents and archival sources, this Essay uncovers alternative visions of the harm of illegitimacy penalties offered by advocates and activists who framed these laws and practices as centrally connected to poverty, systemic racial oppression, and the subordination of women. Civil rights and poverty lawyers spotlighted the disparate impact of illegitimacy penalties on poor families of color, especially African Americans in the South. Feminists emphasized how these laws disproportionately burdened women—who often bore primary responsibility for nonmarital children’s care and support—curtailing their sexual, reproductive, and economic freedom. The failure of these broader accounts of the harms of illegitimacy penalties to influence judicial opinions impoverished our constitutional politics in ways that reverberate today. In a world where marriage is both a privileged status and a status of the privileged, marriage equality that rests upon non-marriage’s ignominy risks reinforcing the many other status inequalities that taint the legacy of marital supremacy.*

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## INTRODUCTION

Despite a transformative half century of social change, marital status still matters. The marriage equality movement has drawn attention to the many benefits the law confers on married couples, from parental rights to immigration preferences to tax breaks and public entitlements.<sup>1</sup> Marital supremacy<sup>2</sup>—the legal privileging of marriage—endures, despite soaring rates of nonmarital childbearing and a widening “marriage gap” that divides Americans by race, wealth, and education.<sup>3</sup> The stakes of marital supremacy are higher than ever as marriage becomes the province of the privileged.

Yet marital supremacy has a contested history. This Essay explores the surprisingly neglected story of constitutional challenges to “illegitimacy”-based classifications,<sup>4</sup> and to other “illegitimacy penalties,”<sup>5</sup> in the 1960s and 1970s. During this period, the Supreme Court began to apply heightened scrutiny to laws that discriminated against “illegitimate” children in areas such as wrongful death recovery, workers’ compensation, child support, inheritance,

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1. On the long history of marriage’s public significance, see NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* (2000).

2. In this Essay, I use the term “marital supremacy” to refer broadly to the legal privileging of marriage over non-marriage, and marital over nonmarital families. For other uses of the term, see, for example, ELIZABETH FREEMAN, *THE WEDDING COMPLEX: FORMS OF BELONGING IN MODERN AMERICAN CULTURE* (2002); ELIZABETH H. PLECK, *NOT JUST ROOMMATES: COHABITATION AFTER THE SEXUAL REVOLUTION* (2012); Serena Mayeri, *The Status of Marriage: Marital Supremacy Challenged and Remade, 1960–2000* (unpublished manuscript) (on file with author).

3. See, e.g., JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* (2014).

4. I use the terms “legitimate” and “illegitimate” advisedly, without wishing to endorse in any way their denigration of nonmarital families. Where possible, I substitute the (also imperfect) term “nonmarital,” but when discussing legal status, only legitimate and illegitimate accurately capture the categories that distinguish the treatment of (some) nonmarital children from that of other children. Similarly, the term “marital children” does not accurately describe all children considered legally legitimate, since legitimacy can result from the operation of various legal presumptions or, in recent times, from post hoc legal processes of legitimation.

5. “Illegitimacy penalties” include laws that distinguish between legitimate and illegitimate children (often called “illegitimacy-based classifications”) as well as other laws and practices that impose disadvantages on nonmarital children and their parents, such as bans on the employment of nonmarital parents; laws requiring unmarried mothers to disclose the identities of their children’s fathers; “suitable home” and substitute father laws withholding welfare benefits because of a mother’s nonmarital sexual relationship; and the exclusion of unmarried mothers from “mother’s insurance” benefits under the Social Security Act. Lawsuits challenging these illegitimacy penalties rarely appear on lists of the illegitimacy cases decided in the 1960s and 1970s; including them exposes the wider range of constitutional arguments advocates made about the consequences of marital supremacy and illuminates the stakes of the Court’s approach to illegitimacy.

and government benefits.<sup>6</sup> These decisions followed and prompted statutory reforms that mitigated many of the harshest legal disabilities historically imposed upon nonmarital children.<sup>7</sup>

The illegitimacy cases are often remembered as a triumph for nonmarital families, a long overdue recognition of children's humanity irrespective of birth status.<sup>8</sup> But these decisions hardly championed the equal status of adults who lived outside the bonds of marriage. The constitutional harm of illegitimacy classifications, according to the Justices, lay in the punishment of "hapless" and "innocent" children for the "sins" or "transgressions" of their parents.<sup>9</sup>

The illegitimacy cases reshaped, but did not vanquish, marital supremacy. By focusing on the blamelessness of children, these decisions not only obscured the constitutional harms of illegitimacy penalties' detrimental impact on adults, but also ignored how these laws reinforced broader racial, sexual, and socioeconomic inequities that impoverished entire families.<sup>10</sup> The Court found nothing unconstitutional about discouraging illicit sex and promoting traditional marriage. Rather, to the extent illegitimacy classifications violated equal protection, their infirmity lay in the tenuous relationship between means (punishing innocent children) and ends (detering adult misconduct).<sup>11</sup>

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6. See, e.g., *Levy v. Louisiana*, 391 U.S. 68 (1968); *Glonn v. Am. Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972); *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Trimble v. Gordon*, 430 U.S. 762 (1977).

7. Scholars generally, and historians in particular, have paid relatively little attention to the illegitimacy cases. For recent exceptions in the legal literature, see Susan Frelich Appleton, *Illegitimacy and Sex, Old and New*, 20 AM. U. J. GENDER SOC. POL'Y & L. 347 (2012); Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73 (2003); Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. DAVIS L. REV. 527 (2014); Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345 (2011); Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387 (2012); Allison Anna Tait, *A Tale of Three Families: Historical Households, Earned Belonging, and Natural Connections*, 63 HASTINGS L.J. 1345 (2012); Deborah A. Widiss, *Non-Marital Families and (or After?) Marriage Equality*, 42 FLA. ST. U. L. REV. 547 (2014). There is one book-length study of the cases by political scientists, which analyzes the decisions but does not draw upon archival sources. MARTHA T. ZINGO & KEVIN E. EARLY, *NAMELESS PERSONS: LEGAL DISCRIMINATION AGAINST NON-MARITAL CHILDREN IN THE UNITED STATES* (1994).

8. For critical perspectives, see, for example, ZINGO & EARLY, *supra* note 7; Davis, *supra* note 7; Murray, *supra* note 7; see also Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 167 (2015) ("In family law, the marital family serves as a misleading synecdoche for all families, not only marginalizing nonmarital families but also actively undermining their already tenuous bonds.").

9. For a historical perspective on the dangers of invoking innocent children to achieve policy reform, see Linda Gordon, *The Perils of Innocence, or What's Wrong With Putting Children First*, 1 J. HIST. CHILDHOOD & YOUTH 331 (2008).

10. See Davis, *supra* note 7, at 92.

11. Cf. Gerald Gunther, *The Supreme Court 1971 Term: Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972) (observing that the Court avoided making difficult normative judgments about morals regulations by

But this was far from the only available account of illegitimacy classifications' harms, constitutional and otherwise. Advocates initially framed illegitimacy penalties as centrally connected to poverty and to systemic racial oppression. As feminist advocacy generated new constitutional sex equality arguments, activists and lawyers emphasized the disproportionate burden illegitimacy penalties imposed on unmarried mothers who often bore sole responsibility for the care and support of nonmarital children. Opponents of illegitimacy penalties proclaimed, sometimes cautiously but occasionally boldly, a right to sexual freedom outside of marriage. And they questioned, directly and indirectly, the constitutionality of marital supremacy itself.

Hardly a trace of these arguments about race, sex, sexual liberty, and economic inequality appears in the Court's illegitimacy opinions.<sup>12</sup> This erasure had profound and enduring consequences for nonmarital families—disproportionately poor and headed by women of color—and for the contemporary constitutional landscape.

This Essay recovers alternative accounts of the harms of illegitimacy penalties and explores why these accounts failed to infiltrate constitutional doctrine and disappeared from historical memory. Part I dives into early illegitimacy litigation, tracing race discrimination arguments against illegitimacy penalties through archival and other primary sources. The plaintiffs in these early cases were African American women and children, challenging laws with a dramatically disparate impact on poor black families. Some also attacked illegitimacy penalties as violations of sexual privacy and liberty. But arguments emphasizing the unfairness of punishing innocent children for circumstances beyond their control won the day in court. By the early 1970s, despite other promising constitutional developments for nonmarital sex, procreation, and familial bonds, a child-focused approach dominated illegitimacy doctrine.

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focusing on how well a law served the government's stated objective rather than on the legitimacy of the objective itself).

12. To the extent that the illegitimacy cases and the sex and racial equality cases seem connected in constitutional law, it is largely by analogy. Like race, the argument goes, illegitimacy remains outside the individual's control and should not be a basis for invidious discrimination. And like sex, illegitimacy classifications are subject to an intermediate standard of equal protection scrutiny. The canonical constitutional sex equality cases cite to court decisions applying heightened scrutiny to illegitimacy classifications. But though many of the cases litigated by Ruth Bader Ginsburg in the 1970s overthrew government support for male supremacy *within* marriage, turning husbands and wives into fungible spouses, they did not question marital status as a basis for allocating government benefits in the first place. *See, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *see also* Serena Mayeri, "The First Order of Business": Feminists Challenge Male Supremacy in Marriage (Sept. 20, 2014) (unpublished manuscript) (on file with the author). On Ginsburg's constitutional strategy, see SERENA MAYERI, *REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION* (2011); Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 (2010); Serena Mayeri, *Reconstructing the Race-Sex Analogy*, 49 WM. & MARY L. REV. 1789 (2008).

Part II describes feminists' alternative accounts of illegitimacy's constitutional harm. Beginning in the early 1970s, feminists argued that "illegitimate" children's inability to inherit from their fathers, or to hold them liable for child support, unjustly placed the entire burden of nonmarital sex, childbearing, and childrearing on mothers. Illegitimacy penalties such as mandatory paternity disclosure and bans on hiring unmarried parents also infringed on women's decisional autonomy and reproductive freedom. But the feminist case against illegitimacy penalties never penetrated Supreme Court rulings. After child-focused arguments reached their apex, the 1970s ended with a series of defeats for illegitimacy plaintiffs.

Part III investigates why more capacious accounts of illegitimacy's constitutional harm fell by the wayside. Accidents of timing and procedural hurdles played a role, but so did deep reluctance to accept feminist arguments that challenged assumptions about women's primary responsibility for nonmarital children, and about privatized dependency, sexual morality, and marital supremacy itself. Focusing on illegitimacy penalties' harm to "hapless" and "innocent" children provided safe common ground in a polity increasingly fractured by matters of family structure and sexuality. By the late 1970s, larger political shifts eroded once promising constitutional doctrines such as sexual privacy, disparate impact, reproductive freedom, and sex equality.

The illegitimacy cases altered the terms of marital supremacy, to be sure. But the Court's failure to question governmental objectives—such as promoting marriage and deterring illicit relationships—meant that even as customary norms stigmatizing nonmarital sex and cohabitation eased, even as white and male supremacy became improper aims of government action, and even as purposefully punishing nonmarital children no longer passed constitutional muster, marriage remained a legitimate engine of privilege. By the turn of the twenty-first century, thousands of material benefits, large and small, depended on marital status. Constitutional contestation focused on access to marriage, not upon its legal and social primacy.

The history recounted here has been almost entirely forgotten. Remembering it exposes the stakes of current struggles to reconcile marriage equality with other progressive goals. Critics have long worried that prioritizing marriage sidelined worthier causes and marginalized nonconforming individuals and families.<sup>13</sup> Marriage equality advocates attacked restrictions on same-sex marriage with a rich constitutional arsenal that included powerful arguments about equality, dignity, and autonomy for

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13. See, e.g., *AGAINST EQUALITY: QUEER REVOLUTION, NOT MERE INCLUSION* (Ryan Conrad ed., 2014); NANCY POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2008); MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* (1999); Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 *COLUM. J. GENDER & L.* 236 (2006); Katherine M. Franke, *Longing for Loving*, 76 *FORDHAM L. REV.* 2685 (2008); see also Suzanne A. Kim, *Skeptical Marriage Equality*, 34 *HARV. J. L. & GENDER* 37 n.2 (2011) and sources cited therein.

gay and lesbian adults and their families. Still, activists, lawmakers, and judges on both sides of the same-sex marriage debate also invoked innocent children as primary victims or beneficiaries of same-sex marriage.<sup>14</sup> “Illegitimacy as injury”<sup>15</sup> made a quiet comeback, implicitly denigrating nonmarital children and families by reinforcing the superiority of marriage as the *sine qua non* of legitimate family formation.

The hard-won triumph of same-sex couples in their struggle for the right to marry is worthy of joyful celebration. But whether this spectacular constitutional victory is the harbinger of greater social and material equality for diverse family forms remains to be seen. In *United States v. Windsor*, Justice Anthony Kennedy extolled the unique capacity of legal marriage to allow couples to “live with pride in themselves and their union,”<sup>16</sup> and to “confer[] upon them a dignity and status of immense import.”<sup>17</sup> In *Obergefell v. Hodges*, he declared, “Without the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser.”<sup>18</sup> The children of couples who could not marry, he continued, “suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life.”<sup>19</sup> Kennedy’s emphasis on the suffering of blameless nonmarital children has a political and constitutional history worth remembering. In a world in which marriage is both a privileged status and a status of the privileged, marriage equality that rests upon non-marriage’s ignominy risks reinforcing the many other status inequalities that taint the legacy of marital supremacy.

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14. For a critical perspective on the invocation of children in the marriage equality debate, see, for example, Nancy D. Polikoff, *For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage Both Miss the Mark*, 8 N.Y. CITY L. REV. 573 (2005).

15. See Murray, *supra* note 7, at 419–23.

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

17. *Id.* at 2692. Justice Kennedy’s tribute to marriage evoked earlier gestures toward marriage’s sacred and foundational status as a “basic civil right.” See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“Marriage is one of the ‘basic civil rights of man, fundamental to our very existence and survival’ (citations omitted)). Earlier, the Court declared marriage “the foundation of the family and society, without which there would be neither civilization nor progress.” *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

18. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2590 (2015).

19. *Id.*; see also *Windsor*, 133 S. Ct. at 2694 (declaring that same-sex couples’ inability to marry “humiliates tens of thousands of children,” making it “even more difficult for the children to understand the integrity and closeness of their own famil[ies] and [their] concord with other families in their communities and in their daily lives.”). For critiques of this aspect of *Windsor*, see, for example, Noa Ben-Asher, *Conferring Dignity: The Metamorphosis of the Legal Homosexual*, 37 HARV. J. L. & GENDER 243 (2014); Douglas NeJaime, *Windsor’s Right to Marry*, 123 YALE L.J. ONLINE 219 (2013); Widiss, *supra* note 7. For early critical commentary on *Obergefell*, see, for example, Serena Mayeri, *Marriage (In)equality and the Historical Legacies of Feminism*, 6 CALIF. L. REV. CIRCUIT (forthcoming 2015) (on file with author); Melissa Murray, *Obergefell v. Hodges and the New Marriage Inequality*, 104 CALIF. L. REV. (forthcoming 2016) (on file with author).

## I.

“HAPLESS AND INNOCENT CHILDREN”: THE EARLY ILLEGITIMACY LITIGATION,  
1966–1972

Illegitimacy penalties occupied a peculiar position in midcentury law and public policy. Progressive reformers had long lamented the stigma and material disadvantages imposed upon nonmarital children as cruel and anachronistic relics. Indeed, reforms in the nineteenth and twentieth centuries ameliorated many of the harshest legal disabilities that attached under the common law, when a “bastard” was *filius nullius*—child of no one.<sup>20</sup> By the 1960s, legislation in many states enabled some children to be legitimated by their mothers’ subsequent marriage, to inherit from their mothers and maternal relatives, and to make claims on their “natural fathers” for support.<sup>21</sup> Nevertheless, these reforms were uneven and incomplete: illegitimate children often could not inherit from their biological fathers or paternal relatives, receive government benefits to which legitimate children were entitled, sue for their parents’ wrongful death or workers’ compensation, or effectively enforce nonmarital fathers’ child support obligations.<sup>22</sup> State level legal reforms proceeded in a lopsided fashion, shoring up the mother-child relationship but leaving most nonmarital children with little claim to support or care from their biological fathers.<sup>23</sup> Federal law, too, contained a bewildering patchwork of statutory provisions, often relying on state law definitions and rules to determine whether and when illegitimate children could receive various Social Security and other benefits.<sup>24</sup>

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20. At common law, “bastards” had no right to support or inheritance from their parents or other relatives and no right to adopt their biological fathers’ surnames. HARRY KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* 5 (1971).

21. See MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* ch. 6 (1985); JOHN WITTE, JR., *THE SINS OF THE FATHERS: THE LAW AND THEOLOGY OF ILLEGITIMACY RECONSIDERED* ch. 5 (2009).

22. As Harry Krause wrote in 1966, “Differences in the fifty state legal systems and, for specific areas, federal law, are very pronounced and range from highly progressive to very traditional approaches.” Harry D. Krause, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEX. L. REV. 829, 830 (1966) (citations omitted); see also, e.g., CALEB FOOTE, ROBERT J. LEVY & FRANK E.A. SANDERS, *CASES AND MATERIALS ON FAMILY LAW*, ch. 1, § B (1966) (describing the “status of children born out of wedlock circa 1965”); Marilyn Klosty & Howard J. Weiss, Editorial, *Illegitimacy*, 26 BROOK. L. REV. 45, 76–79 (1959) (chart comparing states’ various approaches to property rights of illegitimate versus legitimate children).

23. See, e.g., Krause, *supra* note 22, at 854 (“[S]tatutes have provided in nearly all states that in matters of inheritance the illegitimate occupies the same position with respect to his mother as a legitimate child.”). However, as Jacobus tenBroek wrote in 1964, “Lightening the public burden for support of the poor equally motivated the creation of both parents’ legal liability for their illegitimate children.” Jacobus tenBroek, *California’s Dual System of Family Law: Its Origin, Development, and Present Status, Part I*, 16 STAN. L. REV. 257, 284 (1964).

24. See Note, *The Rights of Illegitimates Under Federal Statutes*, 76 HARV. L. REV. 337 (1962) (explaining that illegitimate children’s rights under federal law often depended upon state law, and noting lack of clarity about which state rules should apply to the interpretation of a particular federal provision). State laws defined legitimacy quite disparately, and some states made legitimating a child more difficult than others. For instance, in some states, children could only be legitimated after

At the same time, many citizens and policymakers viewed “illegitimacy” as a more pressing social problem than ever. Rates of nonmarital childbearing climbed among both young white women and poor women of color. Social work professionals reframed white middle-class unwed pregnancy as a problem of individual psychological maladjustment, but conventional wisdom held that among nonwhite women, particularly African Americans, nonmarital childbearing reflected deeper cultural disorder.<sup>25</sup> The 1965 Moynihan Report reinforced the pervasive belief that “illegitimacy” and “matriarchy” contributed to a “tangle of pathology” that fed poverty, crime, and juvenile delinquency in black communities.<sup>26</sup>

Race and illegitimacy had long been intertwined.<sup>27</sup> In the 1950s and 1960s, public discourse increasingly associated nonmarital childbearing with rising public assistance costs and with unmarried African American mothers, who had only recently gained access to many federal and state social welfare programs.<sup>28</sup> Hard won civil rights victories inspired resistance in the form of morals regulation; as historian Anders Walker has written, many efforts to punish nonmarital childbirth were thinly veiled attacks on racial desegregation.<sup>29</sup> During this period, proposals for punitive anti-illegitimacy

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birth by the marriage of their biological parents; in other states, only fathers could legitimate (or “acknowledge”) children (with or without the mother’s consent); in still other states, mothers could do so unilaterally. To make matters more complicated, rules for establishing paternity also varied widely, with many states imposing statutes of limitation on paternity actions. *See generally id.*

25. *See generally* REGINA G. KUNZEL, *FALLEN WOMEN, PROBLEM GIRLS: UNMARRIED MOTHERS AND THE PROFESSIONALIZATION OF SOCIAL WORK, 1890–1945* (1993); RICKIE SOLINGER, *WAKE UP LITTLE SUSIE: SINGLE PREGNANCY AND RACE BEFORE ROE V. WADE* (1992). For contemporaneous assessments of differences in the perception and treatment of white and nonwhite unmarried mothers, see, for example, Ruth Chaskel, *The Unmarried Mother: Is She Different?*, *CHILD WELFARE*, Feb. 1967, at 65; Justine Wise Polier, *Problems Involving Family and Child*, 66 *COLUM. L. REV.* 305, 308 (1966). For a contemporaneous statistical analysis of illegitimacy rates among various demographic groups, see NATL. CTR. FOR HEALTH STATISTICS, U.S. DEP’T OF HEALTH, EDUC. & WELFARE, PUB. NO. 75-1013, *TRENDS IN ILLEGITIMACY: UNITED STATES 1940–1965* (1974).

26. DANIEL P. MOYNIHAN, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965). On the gender and racial politics of the Moynihan Report, see, for example, Serena Mayeri, *Historicizing the “End of Men”: The Politics of Reaction(s)*, 93 *B.U. L. REV.* 729 (2013).

27. *See, e.g.*, PEGGY PASCOE, *WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA* (2009) (describing how anti-miscegenation laws effectively rendered interracial sex and childbearing illicit and illegitimate); Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 *YALE L.J.* 2134, 2158 (2014) (detailing how, in the late nineteenth and early twentieth centuries, “restriction of father-child citizenship transmission outside the marital family regularly operated to exclude nonwhite children from citizenship”); Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 *STAN. L. REV.* 221, 221 (1999) (exploring the use of private law doctrines and the law of legitimacy to “reconcil[e] and preserv[e] both property rights and racial hierarchy”).

28. *See, e.g.*, JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* (1994).

29. *See generally* ANDERS WALKER, *THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED BROWN V. BOARD OF EDUCATION TO STALL CIVIL RIGHTS* (2009); Anders Walker, Note, *Legislating Virtue: How Segregationists Disguised Racial Discrimination as Moral Reform Following Brown v. Board of Education*, 47 *DUKE L.J.* 399 (1997). To give just one relevant example,

laws—denial of public assistance, institutionalization of nonmarital children, sterilization, and imprisonment—were widely understood as part of the backlash against civil rights.<sup>30</sup> As journalist Fred P. Graham put it in 1968, “‘Illegitimacy,’ like ‘crime in the streets,’ is becoming a substitute in many minds for the ‘Negro problem.’”<sup>31</sup>

Illegitimacy litigation did not proceed from a carefully planned, incremental constitutional strategy. Cases cropped up organically, without the handpicked plaintiffs favored by the NAACP Legal Defense Fund (LDF) in earlier campaigns against de jure racial segregation, and later, by Ruth Bader Ginsburg’s American Civil Liberties Union (ACLU) Women’s Rights Project in pursuit of sex equality. But the LDF and the ACLU did enter the fray, injecting broader concerns about race and poverty into their constitutional challenges to illegitimacy-based classifications. For a time, the ascendancy of civil rights and poverty law gave the young lawyers and scholars challenging illegitimacy penalties ammunition for their constitutional attacks. Civil libertarians and welfare rights lawyers also saw promise in the nascent jurisprudence of sexual privacy. This Part traces the origins, brief life, and premature demise of these arguments in early constitutional illegitimacy litigation.

A. *“Designed to Deprive a Single Class of Citizens”: Early Constitutional Arguments*

In 1960, Louisiana’s “suitable home” law, which withheld public assistance from mothers who had given birth outside of marriage, sparked a national outcry. The legislation, a direct response to racial desegregation efforts, purged tens of thousands of impoverished African American families from the state’s welfare rolls.<sup>32</sup> By this time, the success of constitutional

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Mississippi abolished common law marriage in 1956 in an apparent attempt to bolster illegitimacy rates among African American families so that black children could be denied access to white schools. WALKER, *THE GHOST OF JIM CROW*, *supra*, at 41–43; *see also* FOOTE, LEVY & SANDERS, *supra* note 22, at 117 n.116 (describing 1964 Louisiana statute criminalizing the act of giving birth to an “illegitimate” child, La. Rev. Stat. Ann. § 14:79.2 (Supp. 1964)); *id.* at 118 (noting that “such a deterrent approach is not limited to the deep South”). For the most influential contemporaneous analysis of the racial politics of welfare policy, see WINIFRED BELL, *AID TO DEPENDENT CHILDREN* (1965).

30. Such proposals were most common in, but not confined to, southern states. For press coverage of sterilization proposals, *see, for example*, *Sterilization Urged to Cut Illegitimacy*, WASH. POST, Mar. 11, 1959, at C8 (discussing proposed North Carolina bills); *To Curb Illegitimacy, Sterilize Unwed Mothers, States’ Lawmakers Urge*, WASH. POST, Feb. 13, 1960, at D1 (discussing proposed bills in Maryland and Virginia); *Sterilization Urged to Cut Costs*, CHICAGO TRIB., Mar. 1, 1961, at 1 (discussing Illinois bill); *Bill to Curb Illegitimacy is Signed in Mississippi*, N.Y. TIMES, May 28, 1964 (discussing enactment of Mississippi law authorizing imprisonment for up to ninety days as well as fines for unwed parents who had a second illegitimate child).

31. Fred P. Graham, *It’s Tough to Be Illegitimate*, N.Y. TIMES, Mar. 31, 1968, at E10.

32. On the Louisiana crisis, *see, for example*, JENNIFER MITTELSTADT, *FROM WELFARE TO WORKFARE: THE UNINTENDED CONSEQUENCES OF LIBERAL REFORM, 1945–1965*, at 86–91 (2005);

challenges to racial segregation provided the legal tools to question illegitimacy penalties on equal protection grounds. On behalf of the ACLU, a young lawyer named Melvin Wulf wrote a brief to the Department of Health, Education, and Welfare (HEW) attacking Louisiana's policy.<sup>33</sup> Wulf stressed that Louisiana's suitable home law was racially motivated, "a punitive step to deter its Negro citizens from pursuing their goal of equality."<sup>34</sup> Even if the Louisiana policy were not "designed to deprive a single class of citizens of rights to which they are otherwise entitled," as it clearly was, discriminatory intent could be inferred from the policy's severely disproportionate impact.<sup>35</sup>

Wulf's most novel argument came next: "We believe that any differential treatment to which out-of-wedlock children are subjected is invidious and likely unconstitutional."<sup>36</sup> Just as *Brown v. Board of Education* held that "the classification of Negroes qua Negroes was baseless," the "differential treatment accorded a class of citizens designated as 'illegitimate' is equally baseless."<sup>37</sup> Need, not status, was the appropriate criterion by which to determine welfare eligibility.

Notably, Wulf's memorandum did not deny that illegitimacy penalties might deter nonmarital sex and "promiscuity." He wrote: "It may well be that if out-of-wedlock children are deprived of minimum satisfaction of their physical needs, thereby placing their lives in jeopardy, there will be a decrease in the relationships leading to illegitimate births."<sup>38</sup> But, he continued, "[I]t is clearly unreasonable to attempt to improve a home's moral climate by starving its occupants to death."<sup>39</sup>

Wulf's memo contained seeds of the constitutional arguments that litigators would later raise in court, including the illegitimacy penalties' racially discriminatory intent and effect; the idea that illegitimacy-based

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see also Lisa Levenstein, *From Innocent Children to Unwanted Migrants and Unwed Moms: Two Chapters in the Public Discourse on Welfare in the United States, 1960–1961*, J. WOMEN'S HIST., Winter 2000, at 10–33 (comparing the framing of Louisiana's anti-welfare measures to those in Newburgh, New York).

33. Wulf later described this as "the first memorandum on the unconstitutionality of differential treatment of children born out of wedlock." Letter from Melvin Wulf to Norman Dorsen, (Nov. 20, 1967), collected in Norman Dorsen Papers, Tamiment Archive, Bobst Library, New York University [hereinafter Dorsen Papers]; see also MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973, at 84 (1993).

34. Memorandum from the ACLU on Louisiana Plan for Aid to Defendant Children, Filed with the Department of Health, Education, and Welfare, at 2 (Nov. 22, 1960) [hereinafter ACLU Memorandum to HEW], collected in Dorsen Papers, Box 32, Folder 11 (on file with the *California Law Review*).

35. *Id.* at 3.

36. *Id.*

37. *Id.* at 4.

38. *Id.* at 5.

39. *Id.* The state, Wulf reasoned, had more effective means of protecting children from immoral influences at its disposal: "If a home is in fact unsuitable because of a mother's promiscuity," a court could order removal of the children. *Id.* The ACLU, Wulf declared, was "not in favor of sin, but neither does it favor compounding sin with starvation." *Id.*

distinctions were invidious discrimination rather than justifiable privileging of normative marital families; a reluctance to directly challenge the state interests in deterring nonmarital childbearing and regulating sexual morality; and skepticism about the state's true motives, nurtured by the attenuated relationship between the means employed by the state and the ends purportedly sought.

Several years later, Illinois law professor Harry Krause established himself as the leading legal authority on illegitimacy with a series of articles culminating in an influential 1971 book.<sup>40</sup> Unlike many of the lawyers involved in the early illegitimacy cases, Krause's practice background was in tax and international business transactions, not in civil rights and poverty law.<sup>41</sup> But Krause quickly developed an academic portfolio in comparative family law and policy.<sup>42</sup> In *Equal Protection for the Illegitimate*, published in 1967, Krause framed the stakes as "a child's right to a familial relationship with his father," which he argued was "more akin to a 'fundamental right and liberty' or a 'basic civil right of man' than to a mere economic interest" entitled to a presumption of constitutionality.<sup>43</sup> He depicted illegitimacy as a "second-class status," calling its impact "a psychic catastrophe."<sup>44</sup> And, like Wulf, Krause compared illegitimacy discrimination's harm with that of racial segregation. Channeling *Brown*'s concern with "badges of inferiority" inflicted upon children, he called "the psychological effect of the stigma of bastardy . . . quite comparable to the damaging psychological effects upon the victims of racial discrimination."<sup>45</sup>

Krause deliberately emphasized the child's plight, rather than that of his parents, and the *paternal* bond as the crucial loss suffered by nonmarital children. The "psychic catastrophe" language would be cited again and again in plaintiffs' briefs challenging illegitimacy classifications, as would the analogy between illegitimacy and race. And Krause cannily perceived that children's innocence could be "successfully exploited," much like images of brave yet

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40. KRAUSE, *supra* note 20. Krause's articles published before the Supreme Court first addressed the illegitimacy question include Krause, *supra* note 22; Harry D. Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1967); Harry D. Krause, *Bastards Abroad—Foreign Approaches to Illegitimacy*, 15 AM. J. COMP. L. 727 (1967). For other early applications of equal protection analysis to illegitimacy classifications, see FOOTE, LEVY & SANDERS, *supra* note 22, at 72–73 (1966); Note, "Suitable Home" Tests Under Social Security: A Functional Approach to Equal Protection, 70 YALE L.J. 1192 (1961).

41. Born in Germany in 1932, Krause immigrated to the United States as a college student and served in the U.S. Army before attending law school at the University of Michigan and working for Covington & Burling. See Harry D. Krause, 1997 U. ILL. L. REV. 667 (1997).

42. *Id.*

43. Krause, *Equal Protection for the Illegitimate*, *supra* note 40, at 488 (emphasis added).

44. *Id.* (quoting Nandor Fodor, *Emotional Trauma Resulting from Illegitimate Birth*, 54 ARCHIVES NEUROLOGY & PSYCHOL. 381, 381 (1945)).

45. *Id.*

vulnerable children enduring hostile, hysterical mobs resisting school integration spoke more eloquently than any legal brief ever could.<sup>46</sup>

Child-focused arguments against illegitimacy penalties were nothing new. Historian Michael Grossberg describes post-revolutionary illegitimacy law reforms as “proceed[ing] from the conviction that parents’ sins should not be visited on the innocent issue.”<sup>47</sup> Advocates for children, such as New York reformer and Judge Justine Wise Polier, had attacked the stigma and legal disabilities of illegitimacy in the 1940s and 1950s.<sup>48</sup> What was new about the child-focused arguments of the 1960s was their context and their constitutionalization. In the past, critics of illegitimacy penalties had invoked morality, fairness, and an individual’s right not to be held responsible for the conduct of others. Until the civil rights victories of midcentury, they had little ammunition for arguments sounding in due process and equal protection.

Krause’s article debuted an equal protection argument that focused on the relationship between legislative means and state objectives, rather than on challenging the normative assumptions underlying illegitimacy laws.<sup>49</sup> Krause was careful not to question all laws privileging marriage and traditional family relationships—only those that punished children, who had no control over their parents’ marital status.

Nor did Krause contest the government’s ability to regulate sexual activity. “There is no question that the state may properly regulate many aspects of sexual conduct. Our society holds that intercourse outside of marriage is undesirable, and thus the discouragement of ‘illicit’ intercourse is considered a proper end of legislation.”<sup>50</sup> But the connection between illegitimacy penalties and the deterrence of nonmarital sex or unwed childbirth was remote: fathers, he pointed out, were more likely to be deterred if held responsible for the consequences of illicit sex. Mothers might be dissuaded by the “shame of illegitimate pregnancy” but were more likely to turn to birth control or abortion than to abstinence.<sup>51</sup> Krause did not question the validity of the *government interest* in combating illegitimacy. Rather, he argued that the *fit between means and ends* could not withstand constitutional scrutiny.

Krause applied the equal protection guarantee to illegitimacy-based distinctions in child support, inheritance, the right to recover under wrongful

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46. See *id.*; see also *id.* at 484 (“It is time that the matter be considered from the standpoint of the child!”); KRAUSE, *supra* note 20, at 294–95 (expressing frustration that “[w]ell-intentioned people have lavished disproportionate effort on the welfare mother”).

47. GROSSBERG, *supra* note 21, at 202.

48. See, e.g., Justine Wise Polier, *Illegitimate!*, WOMAN’S HOME COMPANION, Aug. 1947, at 32.

49. Krause, *Equal Protection for the Illegitimate*, *supra* note 40, at 493 (“[I]f the state wishes to discourage casual unions, it should do so directly, as, for example, by laws punishing fornication or providing incentives for marriage.”).

50. *Id.* at 491–92.

51. *Id.* at 492 & n.62.

death and workers' compensation statutes, and eligibility for benefits accrued through parental earnings and contributions, such as Social Security.<sup>52</sup> Each of these discriminations would come under constitutional attack during the following decade.

B. "Subject to Reexamination": *Levy and Glona*

The first illegitimacy cases to reach the Supreme Court, *Levy v. Louisiana*,<sup>53</sup> and *Glona v. American Guarantee and Liability Insurance Company*,<sup>54</sup> foreshadowed both the promise and the perils of attacking illegitimacy penalties under the Fourteenth Amendment. In court, advocates emphasized the unfairness and irrationality of penalizing innocent children for circumstances beyond their control, as well as the disparate impact of illegitimacy penalties on poor African American families. The Court's decisions in *Levy* and *Glona* left ambiguous the scope of the illegitimacy cases' challenge to marital supremacy and the racial and economic inequalities it reproduced. The opinions rendered governing constitutional principles obscure, and states' prerogatives to punish *parents* for nonmarital childbearing remained uncertain. Outside of court, though, civil libertarians raised questions about the continuing viability of a regime that privileged formal marriage and curtailed sexual liberty.

The *Levy* litigation began in 1964 when attorney Adolph Levy (no relation to the plaintiffs) filed a lawsuit in Louisiana seeking damages on behalf of Louise Levy's five children for their mother's wrongful death in a New Orleans hospital. His complaint depicted Louise Levy as a model mother and citizen: she worked hard, attended Catholic Mass regularly, and inculcated moral values in her children. She did not depend on welfare, scraping together money from her work as a domestic to send her children to parochial school. Her attorneys argued that Louise Levy's children should be compensated for her death from hypertensive uremia, which occurred after a doctor failed to detect and treat her condition, as if they had been legitimate.<sup>55</sup>

Levy stressed that the children's inability to recover for their mother's death would burden public coffers. "[T]he tortfeasor need reimburse no one. The State must support the tragic victims."<sup>56</sup> And he repeatedly proclaimed nonmarital children's innocence: "[T]he sins of the parents are being visited upon the children who had absolutely nothing to do with their status."<sup>57</sup> Levy

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52. See generally KRAUSE, *supra* note 20.

53. 391 U.S. 68 (1968).

54. 391 U.S. 73 (1968).

55. Petition for Damages Due to Malpractice on Behalf of Levy (La. Civ. Dist. Ct. for Orleans Dec. 16, 1964), reprinted in Appendix at 5, *Levy v. Louisiana*, 391 U.S. 68 (No. 508).

56. Petition for Writs of Certiorari and Review to the Court of Appeal, Fourth Circuit, State of Louisiana at 4, *Levy v. State* (La. 1967) (No. 48518), collected in Dorsen Papers, Box 32, Folder 14.

57. *Id.* The petition continues: "[T]his case does not present to the Court the question of whether parents who may be morally blameful may recover for the wrongful death of their child. It

also made equal protection and due process arguments against the illegitimacy exclusion's constitutionality, but with relatively little doctrinal support.<sup>58</sup> Recognizing that his clients' case would benefit from greater constitutional expertise, Levy requested assistance from the ACLU. Norman Dorsen, a civil liberties expert and New York University law professor, essentially took over the case before the Supreme Court. Later that year, at the NAACP LDF's request, Dorsen and Levy asked Harry Krause to author an amicus brief on the LDF's behalf.<sup>59</sup>

The LDF's Leroy Clark requested that Krause "show the court that many policies which on their face are designed to control 'morals' or which bear heaviest on the poor, have a profound impact on the Negro community, which has a high rate of illegitimacy and poverty."<sup>60</sup> This argument about the impact of facially race-neutral but purposefully discriminatory policies on African Americans echoed claims the LDF made in school segregation, housing discrimination, and voting rights cases.<sup>61</sup>

The Louisiana statute, Krause's LDF brief argued, "discriminates on the basis of race."<sup>62</sup> This "covert discrimination" had two sources: "disproportionately more Negro children than white children are born out of wedlock," and, "even more important[ly] . . . a high percentage (70%) of white illegitimate children are adopted . . . whereas very few (3–5%) Negro illegitimates find adoptive parents."<sup>63</sup> Together, these discrepancies meant that "95.8 percent of all persons affected by discrimination against illegitimates under the statute are Negroes. . . . [T]he classification of illegitimacy [here] . . . is a euphemism for discrimination against Negroes."<sup>64</sup> Race played a prominent role in Dorsen's brief as well, but as an *analogue* to illegitimacy, rather than as an impetus for penalizing non-marriage. Dorsen and his

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presents solely the question of whether children, morally blameless, may be prevented from recovery . . ." *Id.*

58. *See, e.g., id.* at 7–8.

59. *See* Letter from Norman Dorsen, N.Y.U. School of Law to Jack Greenberg, Director-Counsel of NAACP LDF (Nov. 13, 1967), *collected in* Dorsen Papers, Box 32, Folder 13; Letter from Leroy Clark, NAACP LDF, to Norman Dorsen (Nov. 29, 1967), *collected in* Dorsen Papers, Box 32, Folder 13; Letter from Norman Dorsen to Leroy Clark (Dec. 1, 1967), *collected in* Dorsen Papers, Box 32, Folder 13.

60. Letter from Leroy Clark, NAACP LDF, to Harry Krause, University of Illinois, School of Law, (Dec. 4, 1967), at 1, *collected in* Dorsen Papers, Box 32, Folder 13.

61. *Id.* Racially disparate impact had also been a focus of Wulf's brief against the Louisiana suitable home law in 1960. *See* ACLU Memorandum to HEW, *supra* note 34.

62. Brief for NAACP Legal Defense and Educational Fund as Amicus Curiae at 18, Levy v. Louisiana, 391 U.S. 68 (1967) (No. 508), 1968 WL 112827.

63. *Id.* at 18–19.

64. *Id.* at 20.

colleagues argued that classifications based on illegitimacy, like those based on race, deserved strict scrutiny.<sup>65</sup>

All of the briefs supporting the Levy children stressed that the central injustice imposed by discrimination based on illegitimacy was the punishment of children for their parents' wrongful conduct.<sup>66</sup> Consulting attorney Lois Sheinfeld wrote to Dorsen that courts were "showing an increasing awareness and sensitivity to punishment of status or conditions of being."<sup>67</sup> A recent lower court case had "lovely language on penalizing needy children because of the sexual activity of the mothers,"<sup>68</sup> and courts had recently invalidated laws that punished the "status" of drug addict or vagrant, rather than unlawful conduct.<sup>69</sup> Illegitimacy was "a status which is *both* involuntarily assumed and cannot be voluntarily quitted."<sup>70</sup> The Louisiana statute, the Levys' final brief contended, denied nonmarital children due process "on the basis of a condition of birth and a status over which they had no control and are powerless to correct."<sup>71</sup>

The State of Louisiana minced no words in defending the statute's exclusion of illegitimate children as necessary to preserve the institutions of "marriage and the legitimate family."<sup>72</sup> The State denied any intent to "punish[] illegitimates" or even to "discriminat[e] against immorality in sexual behavior."<sup>73</sup> Rather, Louisiana sought only "positive" ends such as "the *encouragement* of marriage" and "the preservation of the legitimate family as the preferred environment for socializing the child."<sup>74</sup> Defending the community's "withholding [of] prestige and honor" from illegitimate families, Louisiana asserted: "If the community grants almost as much respect for non-marriage as for marriage, illegitimacy increases."<sup>75</sup> Moreover, "illegitimate

65. Brief for Appellants at 9, *Levy v. Louisiana*, 391 U.S. 68 (No. 508), 1967 WL 113865; *see also* Brief for Executive Council of the Episcopal Church in the U.S.A. and the American Jewish Congress as Amici Curiae at 25, *Levy v. Louisiana*, 391 U.S. 68 (No. 508), 1967 WL 129635.

66. *See also* Letter from David Rudovsky, Def. Ass'n of Phila., to Norman Dorsen (Dec. 4, 1967), *collected in* Dorsen Papers, Box 32, Folder 13.

67. Letter from Lois P. Sheinfeld, N.Y.U. School of Law, to Norman Dorsen, regarding Levy: Punishment of Status (Nov. 22, 1967), *collected in* Dorsen Papers, Box 32, Folder 17.

68. Letter from Lois P. Sheinfeld to Norman Dorsen, regarding Levy Comments (Dec. 5, 1967), at 1, *collected in* Dorsen Papers, Box 32, Folder 12. The case was *Smith v. King*, 277 F. Supp. 31 n.7 (M.D. Ala. 1967), *aff'd*, 392 U.S. 309 (1968). *See* Part I.C *infra*.

69. *See, e.g.*, *Robinson v. California*, 370 U.S. 660 (1962) (holding that state law making narcotic addiction a criminal offense violated the Eighth Amendment's prohibition on cruel and unusual punishment).

70. Letter from Sheinfeld to Dorsen, *supra* note 67.

71. Brief for Appellants, *supra* note 65, at 20; *see also id.* at 7 ("It is obvious that a child's illegitimacy is like his race and ancestry and has nothing whatever to do with his own actions or conduct . . .").

72. Brief for the Attorney General, State of Louisiana at 3, *Levy v. Louisiana*, 391 U.S. 68 (1967) (No. 508), 1968 WL 112828.

73. *Id.* at 4.

74. *Id.* at 4-5 (emphasis added).

75. *Id.* at 7.

daughters tend to err in the manner of their illegitimate mothers, producing more illegitimate children.”<sup>76</sup>

The Levy children’s allies followed Krause in belittling the notion that denying illegitimate children the right to recover for the wrongful death of a parent would effectively deter illicit sexual behavior and prevent nonmarital childbearing. They did not, however, directly question the state interest in promoting marriage and discouraging illicit sex. Dorsen’s protégée Sylvia Law—then a third-year law student, later a leading feminist scholar and advocate—summed up the strategy: “We have not questioned the value of family (legitimate) system. We have shown that the discrimination here is *wholly ineffectual* in deterring illegitimacy or securing legitimate families.”<sup>77</sup>

Accused by Louisiana of attacking traditional marriage and family, the Levys’ allies tried to strike a delicate balance in their characterization of *Glona*, Levy’s mirror image. Minnie Brade Glona challenged her inability to recover for the wrongful death of her illegitimate teenage son, Billy, who perished in a car accident in Louisiana. Ms. Glona enjoyed nothing comparable to the Levy children’s amicus support from several prominent civil rights organizations, nor did she receive counsel from elite attorneys and scholars. Indeed, the Levys’ attorneys were careful to distinguish *Glona*, which the Fifth Circuit had decided unfavorably in a dismissive *per curiam* ruling.<sup>78</sup> “Denial of recovery to the mother,” the Levys’ lawyers argued, “involves neither the problem of economic dependence of child on mother that exists here nor the manifest inequity of punishing individuals—the illegitimate children—for the acts of others over whom they could have no control.”<sup>79</sup> Mothers, the brief implied, were not comparably blameless.

The Court decided *Levy* and *Glona* in the claimants’ favor. Justice William O. Douglas wrote short opinions in both cases that drew criticism for

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76. *Id.* at 7.

77. Sylvia Law, Notes on Reply Brief to La. Attorney General (Feb. 22, 1968), *collected in* Dorsen Papers, Box 32, Folder 15 (emphasis added). Similarly, Chip Gray wrote in his own notes, “Didn’t question social usefulness of family, but only relation of this discrimination to upholding it.” Chip Gray, Note on Possible Reply Brief (Feb. 23, 1968), *collected in* Dorsen Papers, Box 32, Folder 15. Strikingly, the briefs supporting the Levys spent relatively little time discussing the Supreme Court’s recent decision in *Loving v. Virginia*, which had invalidated the remaining anti-miscegenation statutes in June 1967, a few months before the Court noted probable jurisdiction in *Levy*. *Loving v. Virginia*, 388 U.S. 1 (1967). Perhaps *McLaughlin v. Florida*, the 1964 decision overturning an extra penalty for interracial cohabitation seemed more on point. *See* 379 U.S. 184 (1964). There, the Court had not questioned the state’s ability to regulate nonmarital sex, just its differential policing of unmarried interracial couples. *See* Ariela R. Dubler, *From McLaughlin v. Florida to Lawrence v. Texas: Sexual Freedom and the Road to Marriage*, 106 COLUM. L. REV. 1165, 1174–75 (2006).

78. *See* *Glona v. Am. Guar. & Liab. Ins. Co.*, 379 F.2d 545, 546 (5th Cir. 1967) (*per curiam*), *rev’d*, 391 U.S. 73 (1968) (“It cannot be said that the classification here by the Louisiana courts is unreasonable.”).

79. Reply Brief for the Appellants at 3, *Levy v. Louisiana*, 391 U.S. 68 (No. 508) (1967), 1967 WL 113866.

their enigmatic treatment of the constitutional issues at stake.<sup>80</sup> In *Levy*, Douglas “start[ed] from the premise that illegitimate children are not ‘nonpersons.’ They are human, live, and have their being.”<sup>81</sup> He called the classification that prevented Louise Levy’s children from recovering for her wrongful death “invidious,” and asked, “When the child’s claim of damage for loss of his mother is in issue, why, in terms of ‘equal protection,’ should the tortfeasors go free merely because the child is illegitimate? Why should the illegitimate child be denied rights merely because of his birth out of wedlock?”<sup>82</sup>

Douglas quoted more Shakespeare than precedent in *Levy*.<sup>83</sup> He did little to clarify the standard of review for laws distinguishing between legitimate and illegitimate children. Douglas did suggest that the “intimate familial relationship between a child and his own mother” implicated a “basic civil right” and concluded:

Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. These children, though illegitimate, were dependent upon her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would.<sup>84</sup>

Douglas’s opinion in *Glonn* was less florid but equally cryptic.<sup>85</sup> *Glonn*, Douglas wrote, differed from *Levy*, “where by mere accident of birth the innocent, although illegitimate child was made a ‘nonperson’ by the legislature.”<sup>86</sup> Douglas criticized Louisiana law for inconsistently penalizing illegitimacy, and wrote that the exclusion of mothers from recovery had “no possible rational basis . . . . It would, indeed, be farfetched to assume that women have illegitimate children so that they can be compensated in damages

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80. See, e.g., KRAUSE, *supra* note 20, at 66 (“It is regrettable—and may mar the new law of illegitimacy for some time to come—that the Supreme Court did not choose to document its epochal decision more carefully.”); Kenneth L. Karst, Book Review, 89 HARV. L. REV. 1028, 1032 (1976) (reviewing GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW (9th ed.)) (calling *Levy* “anything but a model of closely reasoned doctrinal exegesis”).

81. *Levy*, 391 U.S. at 70.

82. *Id.* at 71.

83. See *id.* at 72 n.6 (“We can say with Shakespeare: ‘Why bastard, wherefore base? When my dimensions are as well compact, My mind as generous, and my shape as true, As honest madam’s issue? Why brand they us With base? with baseness? bastardy? base, base?’ King Lear, Act I, Scene 2.”). Early drafts of Douglas’s opinions followed Shakespeare (and the petitioner’s brief) in referring at points to “bastards.” See Letter from Chief Justice Earl Warren to Justice William O. Douglas, on *Levy* and *Glonn* (Apr. 18, 1968), collected in Earl Warren Papers, Library of Congress [hereinafter Warren Papers], Box 551 (“I agree with both of your opinions . . . but I would feel a little more comfortable if you referred to the children other than as ‘bastards.’”).

84. *Levy*, 391 U.S. at 71–72.

85. *Glonn v. Am. Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968).

86. *Id.* at 75.

for their death.”<sup>87</sup> This sentence questioning the rationality of the statute—the relationship between means and ends—became perhaps the most oft-cited aspect of *Glon*. But it also obscured the appropriate standard of review for illegitimacy-based classifications, and prompted even sympathetic commentators to accuse Douglas of using “brute force” to achieve the desired result.<sup>88</sup>

Douglas likely believed it would be difficult to marshal a majority to declare illegitimacy classifications suspect. Justice Byron White at first objected to Douglas’s reference to “basic civil rights.”<sup>89</sup> White apparently overcame his misgivings and joined Douglas’s opinion, but Justices John Marshall Harlan, Hugo Black, and Potter Stewart dissented from both *Levy* and *Glon* in a combined opinion authored by Harlan.<sup>90</sup> To the dissenting Justices, “everything the Court says about affection, nurture, and dependence” was “irrelevant.” To impose a hierarchy of claimants on the basis of legal rather than biological relationships was perfectly constitutional, especially in light of the state’s unchallenged power “to provide that people who choose to live together should go through the formalities of marriage.”<sup>91</sup>

Justice Douglas’s opinions in *Levy* and *Glon* left ambiguous the magnitude of the Court’s departure from traditional deference to states’ ability to promote marriage and the legitimate family.<sup>92</sup> But the decisions inspired hope among civil libertarians that the Court might look askance at laws that distinguished between married and unmarried *parents* as well as their

87. *Id.* (echoing appellant’s brief); see also Bench Memorandum from CHW to Chief Justice Earl Warren (Mar. 19, 1968), at 9–10, collected in Warren Papers, Box 313 (“In only one sense is this a stronger case [than *Levy*] for the validity of the statute. If the challenged statute is to be justified as discouraging illicit sexual relationships, then it is more rational to place the disability on the parents rather than the child. However, that asserted justification is unpersuasive . . .”).

88. Herbert Semmel, *Social Security Benefits for Illegitimate Children after Levy v. Louisiana*, 19 BUFF. L. REV. 289, 290 (1970) (observing that the Court might instead “have framed the question in terms of whether it is rational for a state to discourage illegitimacy by depriving the unwed mother of a variety of benefits which the mother of a legitimate child receives”).

89. Letter from Justice Byron R. White to Justice William O. Douglas (May 9, 1968), regarding *Levy* and *Glon*, collected in William O. Douglas Papers, Library of Congress [hereinafter Douglas Papers], Box 1423, Folder 508.

I am inclined to join you in *Levy* and *Glon* but I wonder if in *Levy* you need to refer to “basic civil rights.” You do not do this in *Glon* and still reverse the decision. That is the tougher case and from it *Levy* is *a fortiori* without saying that it is a case to which we give special scrutiny. Perhaps we have not really put speech, race and voting in a different category but at least it seems that we have. I doubt that *Levy* belongs in this group but perhaps you disagree.

*Id.* White also drafted a concurrence, never filed, in which he characterized the challenged distinction as “irrational and arbitrary.” See Draft Concurrence in *Levy v. Louisiana* (May 16, 1968), at 4, collected in Byron R. White Papers, Library of Congress [hereinafter White Papers], Box 126, Folder 13.

90. Dorsen had clerked for Harlan in the 1957 Term. TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT 136 (1992).

91. *Levy v. Louisiana*, 391 U.S. 73, 78, 80 (1968) (Harlan, J., dissenting).

92. For an argument that *Levy* and *Glon* are less progressive than is often recognized, see Murray, *supra* note 7, at 390–99.

children,<sup>93</sup> as John “Chip” Gray and David Rudovsky suggested hopefully in a widely cited 1969 article.<sup>94</sup> The authors, recent law school graduates who had worked with Dorsen on the case, contended that Douglas had effectively applied strict scrutiny in *Levy*.<sup>95</sup> They interpreted *Glon* to mean that discrimination against unmarried *parents*, too, should be constitutionally suspect. Further, they contended, “*even assuming that the state can constitutionally regulate extramarital sexual activity*, it should be required to proceed with care in an area where both intimate human relationships and long-standing prejudices are involved.”<sup>96</sup>

Unlike Krause and the *Levy* and *Glon* briefs, the out-of-court writings of Dorsen, Gray, and Rudovsky did not assume an unfettered state prerogative to regulate extramarital sexual activity.<sup>97</sup> They suggested, anticipating a Supreme Court ruling still more than three decades in the future,<sup>98</sup> that “the ‘zone of privacy’ in the area of sexual relationships in marriage,” recognized by the Court in *Griswold v. Connecticut*, “should include private sexual activity between consenting adults.”<sup>99</sup>

Strikingly, the authors also challenged the legal primacy of marriage. The asserted state interest in “deter[ring] illegitimacy,” they wrote, boiled down to an interest in “formal marriages as such.”<sup>100</sup> And “[t]he question whether formal marriage promotes the interests traditionally associated with that institution . . . certainly is subject to reexamination in light of developing concepts of individual freedom and morality.”<sup>101</sup> The authors pointed out that “[i]ncreasingly the right of government to prohibit or discourage ‘immoral’

93. Notably, Justice Douglas’s original draft of *Levy* did not leave this impression. In an early version of the opinion he wrote, “If the constitutional question arose under an Act making father and mother liable for producing illegitimate children, we would have a different problem. Here we are not concerned with alleged ‘wrongdoers’ but with people born out of wedlock who were not responsible for their conception or for their birth.” Someone wrote on the draft copy, “WOD: Isn’t this susceptible of misconstruction? As contrary to *Glon* . . . ?” Another handwritten comment on the draft, also of unclear provenance, summed up the reaction of many to Douglas’s opinion: “The result is correct. In re the opinion: !!!” See William O. Douglas, First Circulated Draft of *Levy* Decision, at 1, collected in Douglas Papers, Box 1423, Folder 508.

94. John C. Gray, Jr. & David Rudovsky, *The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glona v. American Guarantee & Liability Insurance Co.*, 118 U. PA. L. REV. 1, 15–18 (1969).

95. *Id.* at 4–5. They also suggested, optimistically, that *Levy* might “be read to support the emergence of preferred social and economic rights,” potentially including the “right to receive welfare benefits” that anti-poverty lawyers were seeking in a contemporaneous litigation campaign. *Id.* at 5.

96. *Id.* at 15 (emphasis added).

97. Norman Dorsen & David Rudovsky, Comment, *Equality for the Illegitimate?*, WELFARE L. BULL., May 1967, at 15.

98. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

99. Gray & Rudovsky, *supra* note 94, at 16; see also Dorsen & Rudovsky, *supra* note 97, at 15.

100. Gray & Rudovsky, *supra* note 94, at 16.

101. *Id.* at 17.

conduct which damages no other public interest has been seriously challenged.”<sup>102</sup>

Of course, many (including Harry Krause, arguably the most prolific and influential illegitimacy expert in the 1970s) continued to question the premise of the civil libertarians’ out-of-court argument—that the “immoral conduct” of illegitimacy damaged no other public interest. But as the next Section describes, Dorsen, Gray, and Rudovksy were not alone. Plaintiffs and lawyers in welfare rights cases seized on the promise of *Griswold* to articulate a much more expansive vision of sexual privacy and autonomy than the Court’s opinions recognized.<sup>103</sup>

C. “*I Told Her It Was None of Her Business*”: *King v. Smith*

In *King v. Smith*, Mrs. Sylvester Smith challenged Alabama’s “substitute father” regulation, which denied public assistance to mothers suspected of having extramarital sexual relationships.<sup>104</sup> Such regulations were widely understood to serve the dual purpose of punishing African Americans and privatizing dependency by withholding public benefits from nonmarital families.<sup>105</sup> *King v. Smith* was a centerpiece of the welfare rights movement’s “Southern Strategy,” which targeted the most egregious policies enacted in the Deep South, where the connection between morals regulation and resistance to African American civil rights would be glaringly apparent.<sup>106</sup>

Whereas the Levy children’s attorneys succeeded in portraying Louise Levy as a model of maternal devotion, piety, and self-sufficiency, Smith resisted pressures to conform to conventional notions of respectability. Informed by her caseworker that her family of four children and one grandchild would be ineligible for Aid to Dependent Children (ADC) benefits if she did not contradict rumors that she had an intimate relationship with Willie Williams, a longtime family friend and a married father of nine children, Smith flatly refused to confirm or deny the affair. “I told her it was none of her business,” Smith recalled.<sup>107</sup> She also informed her (white) caseworker that she had every intention of “going with” whomever she wished so long as she was young enough to enjoy the company of men.<sup>108</sup> The Smith family could not forgo even Alabama’s stingy ADC benefit lightly; three of Smith’s children

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102. *Id.*

103. On the limitations of the Warren Court’s liberalism, see Justin Driver, *The Constitutional Conservatism of the Warren Court*, 100 CALIF. L. REV. 1101 (2012); see also MARC STEIN, *SEXUAL INJUSTICE: SUPREME COURT DECISIONS FROM GRISWOLD TO ROE* (2010).

104. *King v. Smith*, 392 U.S. 309 (1968).

105. See PLECK, *supra* note 2, at 47–70.

106. DAVIS, *supra* note 33, at 60.

107. Walter Goodman, *The Case of Mrs. Sylvester Smith: A Victory for 400,000 Children*, N.Y. TIMES, Aug. 25, 1968, at 62 (quoting Mrs. Sylvester Smith).

108. *Id.* at 29.

lived with their grandmother part-time while Smith worked daily eight-hour shifts as a cook in Selma for sixteen to twenty dollars per week.<sup>109</sup>

Smith's declaration of sexual independence and insistence that her personal life was nobody's business did not translate perfectly into legal or constitutional claims. But her arguments sounded in terms of sexual privacy and the right not to have government benefits conditioned upon marriage or celibacy.<sup>110</sup> Smith's attorney, New York anti-poverty lawyer Martin Garbus, argued that questioning a mother about her "most intimate relationships" and requiring answers as a condition of receiving benefits "violates her right to privacy," infringing upon her freedom of association in a manner that was "destructive of her personal relationships and [that] violate[d] her and her children's constitutional rights."<sup>111</sup> Garbus did not concede Alabama's "right to regulate nonmarital relationships" and "prohibit immoral conduct"; rather, he echoed the civil libertarians' skepticism about such regulations' constitutionality.<sup>112</sup>

Garbus also made arguments similar to those presented in *Levy*.<sup>113</sup> There was little question that the substitute father regulations had been enacted (as opposed to merely implemented) as part of a political program targeted specifically at curtailing African Americans' right to receive public assistance.<sup>114</sup> Alabama nevertheless denied any racial motivation and insisted that the policy was designed not to prevent or punish sexual immorality, but rather to exploit untapped resources and equalize the position of marital and nonmarital households. Welfare department head Ruben King's—and segregationist Governor George Wallace's—oft-quoted position was: "if a man wants to play, then let him pay; and if he has the pleasures of a husband, then he ought to have the responsibilities of a husband."<sup>115</sup> Asked whether he considered the regulation punitive, King answered in the negative. "[T]he

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109. DAVIS, *supra* note 33, at 60; Rickie Solinger, *The First Welfare Case: Money, Sex, Marriage, and White Supremacy in Selma, 1966, A Reproductive Justice Analysis*, 22 J. WOMEN'S HIST., Fall 2010, at 13, 19; *see also* Joanne L. Goodwin, 'Employable Mothers' and 'Suitable Work': A Re-Evaluation of Welfare and Wage-Earning for Women in the Twentieth-Century United States, J. SOC. HIST., Winter 1995, at 266.

110. *See* Solinger, *supra* note 109, at 23–26.

111. Brief for Appellees at 8, *King v. Smith*, 392 U.S. 309 (1968) (No. 949), 1968 WL 112516.

112. *See id.* at 70 n.57, 66 (relying, inter alia, on *Griswold* to argue that "Alabama's substitute father regulation unconstitutionally invades the privacy of mothers receiving ADC and imposes an unconstitutional restriction on their lives and liberty"); *see also* DAVIS, *supra* note 33, at 65–66.

113. *See* Brief for Appellees, *supra* note 111, at 23 n.9 (citing the NAACP LDF's brief in *Levy*).

114. *See* DAVIS, *supra* note 33, at 56. Garbus characterized one of the primary motivations behind the "substitute father rule" promulgated by Alabama's welfare officials as "discourag[ing] illegitimacy by penalizing Negro illegitimate children and their families by depriving them of aid." Brief for Appellees, *supra* note 111, at 23, 57 n.45; *see also id.* at 24–27 (detailing the dramatically disproportionate impact on "Negro" families).

115. Appendix at 77, *King v. Smith*, 392 U.S. 309 (No. 949). On Wallace's involvement in the promulgation of the substitute father regulation, *see* PLECK, *supra* note 2, at 56.

mother has a choice in this situation to give up her pleasures or to act like a woman ought to act and continue to receive aid.”<sup>116</sup> What about the children? asked Garbus. King had no answer.

Neither the federal district court nor the Supreme Court addressed Garbus’s arguments about race and illegitimacy-based discrimination, denial of due process, or sexual privacy and freedom of association. A three-judge panel in the Middle District of Alabama acknowledged the evidence of racially discriminatory purpose and effect in a footnote but did not base its equal protection ruling on the racist origins or impact of the substitute father regulation.<sup>117</sup> “The expressed interest of the State . . . in not desiring to underwrite financially or approve situations which are generally considered immoral is a laudable one,” said the court.<sup>118</sup> The judges found the law “irrational” and “unreasonable,” because “[t]he punishment under the regulation is against needy children, not against the participants in the conduct condemned by the regulation.”<sup>119</sup>

The Supreme Court adopted a similarly child-focused approach, but avoided the constitutional questions. Chief Justice Earl Warren wrote for a unanimous Court that Congress had “determined that immorality and illegitimacy should be dealt with through rehabilitative measures rather than measures that punish dependent children, and that protection of such children is the paramount goal of AFDC.”<sup>120</sup> In closing, Warren was careful “to emphasize” that Alabama remained free to “discourag[e] illicit sexual behavior and illegitimacy . . . by other means, subject to [unspecified] constitutional limitations.”<sup>121</sup> Though a major victory for welfare rights advocates,<sup>122</sup> *King v. Smith* was hardly a ringing endorsement of Mrs. Smith’s right to sexual and economic autonomy.

Justice Douglas saw *King v. Smith* as not only a welfare case, but also an illegitimacy case; not merely a question of statutory interpretation but also one of constitutional law.<sup>123</sup> His concurrence found Alabama rule’s punishing children for their mothers’ “sin” constitutionally infirm, and he placed “sin” in quotation marks throughout his opinion.<sup>124</sup> Douglas believed *Levy*, decided less than a month earlier, to be exactly on point.<sup>125</sup> The substitute father regulation

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116. Appendix, *supra* note 115, at 103–04.

117. *Smith v. King*, 277 F. Supp. 31, 37 n.7 (M.D. Ala. 1967), *aff’d*, 392 U.S. 309 (1968).

118. *Id.* at 39–40.

119. *Id.* at 38, 40.

120. *King*, 392 U.S. at 325.

121. *Id.* at 333–34.

122. As Karen Tani insightfully argues, *King v. Smith* was also a victory for HEW’s interpretation of equal protection in the welfare context. See Karen M. Tani, *Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor*, 100 CORNELL L. REV. 825, 885–89 (2015).

123. *King*, 392 U.S. at 334 (Douglas, J. concurring).

124. *Id.* at 335–36.

125. *Id.* at 336.

was “aimed at punishing mothers who have nonmarital sexual relations.”<sup>126</sup> In a “comparable situation,” the Court had held that the Equal Protection Clause “barred discrimination against illegitimate children.”<sup>127</sup> Douglas reserved judgment on “[w]hether the mother alone could be constitutionally cut off from assistance because of her ‘sin.’”<sup>128</sup> He thought “the immorality of the mother has no rational connection with the need of her children under any welfare program.”<sup>129</sup> Douglas’s concurrence came closer than the majority opinion to questioning whether punishing or deterring mothers’ sexual relationships was a proper aim of government, but even he did not directly challenge this objective.

In the months after *Levy*, *Glona*, and *King*, several state courts struck down statutory discriminations against illegitimate children, often using child-focused language.<sup>130</sup> Notably, though some commentators read the decision expansively,<sup>131</sup> *Glona*, in contrast to *Levy*, was rarely parsed by courts in these years,<sup>132</sup> except to cast doubt on the deterrent effect of illegitimacy-based discrimination on nonmarital sex.<sup>133</sup> Courts also cited *Glona* to distinguish the case as involving a presumptively genuine mother-child tie rather than a more tenuous or difficult-to-prove father-child relationship.<sup>134</sup> Indeed, the father-child relationship went to the heart of the remaining legal distinctions between legitimate and illegitimate children.

#### D. “*Illicit and Beyond the Recognition of the Law*”: *Labine v. Vincent*

By the early 1970s, many states had lightened or eliminated illegitimacy penalties for nonmarital children in other fields, but inheritance law remained the third rail of constitutional challenges. Even Dorsen and Rudovsky initially

126. *Id.*

127. *Id.*

128. *Id.* at 335 n.4.

129. *Id.* at 336.

130. *See, e.g.*, *R. v. R.*, 431 S.W.2d 152, 154 (Mo. 1968) (“Under the guise of discouraging illegitimacy, states may no longer cast the burden upon the innocent child.”); *In re Jensen*, 162 N.W.2d 861, 878 (N.D. 1968) (“This statute, which punishes innocent children for their parents’ transgressions, has no place in our system of government, which has as one of its basic tenets equal protection for all.”).

131. *See supra* notes 90–98 and accompanying text; *see also* Aleta Wallach & Patricia Tenoso, *A Vindication of the Rights of Unmarried Women and their Children: An Analysis of the Institution of Illegitimacy, Equal Protection, and the Uniform Parentage Act*, 23 U. KAN. L. REV. 23, 45 (1974) (“[*Glona*] can perhaps be understood as based upon some broader principle respecting the sanctity of a woman’s right of free choice and privacy in matters of child bearing and association involved in the formation of a family unit free from the imposition of coercive legal disabilities.”).

132. *See* Wallach & Tenoso, *supra* note 131, at 25 n.10 (“*Glona* became a footnote to *Levy*, since they were viewed as synonymous rather than correlative.”).

133. *See, e.g.*, *Griffin v. Richardson*, 346 F. Supp. 1226, 1234–35 (D. Md. 1972), *aff’d*, 409 U.S. 1069 (1972) (“To paraphrase what the Supreme Court has said in *Glona*, this court can see no possible rational basis for assuming that if an illegitimate child is allowed to recover Social Security benefits the cause of illegitimacy will be served.”).

134. *See, e.g.*, *In re Hendrix*, 326 N.Y.S.2d 646 (1971); *Burnett v. Camden*, 255 N.E.2d 650 (Ind. 1970).

hesitated to endorse full equality in inheritance law for nonmarital children,<sup>135</sup> perhaps understanding that equality threatened ancient principles of Anglo-American property law, raised thorny problems of proof, and caused otherwise sympathetic judges to balk. Many opponents of illegitimacy penalties eventually settled on the position that, to the extent fathers could reliably be identified, nonmarital children should inherit on the same terms as marital children—that is, fathers should not be conclusively presumed to intend that only their legitimate children inherit.<sup>136</sup>

It was not long before this very question reached the Supreme Court. In 1962, forty-two-year-old Lou Bertha Patterson gave birth to Rita Nell Vincent, while living with Rita's father, seventy-year-old Ezra Vincent, in rural Louisiana. Vincent formally acknowledged Rita as his child, which obliged him to support her, and he and Patterson raised Rita together until his death six years later. Vincent left no will, no spouse, and no legitimate children.<sup>137</sup> Patterson had been married before and had, by 1971, married again and become Lou Bertha Labine, but she never married Vincent. Under Louisiana's intestate succession law, an illegitimate child could only inherit if a decedent left no ancestors or collateral relatives;<sup>138</sup> because two siblings survived Vincent, Rita lost any claim to his estate. Labine appealed on her daughter's behalf, challenging the constitutionality of the succession hierarchy on equal protection grounds.

The Louisiana Court of Appeal denied Labine's appeal, distinguishing the inheritance laws from wrongful death statutes both in their potential deterrent effect on nonmarital childbearing and in their goal of preserving the stability of land titles.<sup>139</sup> Whereas it might be difficult to foresee death by tort, "all men must die and leave their property behind for their successors," so "the denial of inheritance rights to illegitimates might reasonably be viewed as encouraging marriage and legitimation of children."<sup>140</sup> The exclusion also served "the prompt and effective determination of the valid ownership of property left by decedents," protecting estates from "unknown and not easily ascertained claims."<sup>141</sup> The Louisiana Supreme Court summarily affirmed.<sup>142</sup>

The facts of *Labine v. Vincent* were sympathetic—Rita's father had formally acknowledged her,<sup>143</sup> so his paternity was undeniable. There were no

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135. Dorsen & Rudovsky, *supra* note 97.

136. Gray & Rudovsky, *supra* note 94, at 25–27.

137. Succession of Vincent, 229 So. 2d 449, 451 (La. Ct. App. 1969), *aff'd & writ refused*, 231 So.2d 395 (La. 1970), *aff'd sub nom. Labine v. Vincent*, 401 U.S. 532 (1971).

138. *Id.* at 450 n.1.

139. *Id.* at 450.

140. *Id.* at 452.

141. *Id.*

142. Succession of Vincent, 231 So.2d 395 (La. 1970), *aff'd sub nom. Labine v. Vincent*, 401 U.S. 532 (1971).

143. *Labine v. Vincent*, 401 U.S. 532, 532 (1971).

wife and legitimate children whose “family unity” would be disrupted by a nonmarital child’s inheritance. Had Rita been legitimate, “she would have inherited Ezra Vincent’s entire estate since she was his only child.”<sup>144</sup> Moreover, Vincent’s brother and sister had difficulty proving their relationship to the deceased.<sup>145</sup> Further, the Louisiana courts had also denied Rita “alimony” from Vincent’s estate, apparently because she was already receiving federal social security survivors’ benefits.<sup>146</sup> Making the most of these facts, Labine’s attorney, James J. Cox, opened his brief to the U.S. Supreme Court by characterizing his client as “a destitute Negro child . . . who was born out of wedlock.”<sup>147</sup>

As an amicus in *Labine*, the ACLU raised many of the same arguments presented by the briefs in *Levy*. The ACLU’s *Labine* brief, authored primarily by Krause in consultation with Dorsen and Wulf, argued that illegitimacy-based classifications had a disproportionate impact on African Americans and should be suspect based on an analogy to (and overlap with) racial classifications.<sup>148</sup> With new ammunition from Justice Douglas’s opinion in *Glonn*, the brief also called into question the deterrent effect on illicit sex of disinheriting nonmarital children.<sup>149</sup>

There were subtle differences from *Levy* as well. In the interim, the Court had decided *Dandridge v. Williams*, a challenge to Maryland’s cap on the total amount of AFDC benefits a family could receive, regardless of family size.<sup>150</sup> The plaintiffs unsuccessfully argued that such restrictions violated equal protection in part because of their disparate impact on large, impoverished families.<sup>151</sup> *Dandridge* dashed advocates’ hopes that the Court would recognize poverty as a suspect classification, and language about discrimination against or disparate impact on the poor receded from the illegitimacy cases.<sup>152</sup> On the other hand, *Labine*, unlike *Levy* and *Glonn*, presented an opportunity for Krause to bolster the father-child relationship he considered most crucial.

Another significant difference from *Levy* and *Glonn*: the Court’s composition. In 1968, Chief Justice Earl Warren retired. President Richard Nixon’s replacement, Warren Burger, initiated a rightward shift that was still incomplete when the Justices heard arguments in *Labine* in January 1971. By then, Harry A. Blackmun, a childhood friend and putative protégé of Burger’s

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144. Brief for Appellant at 4, *Labine v. Vincent*, 401 U.S. 532 (No. 70-5257), 1970 WL 136223.

145. *Id.* at 3.

146. *Id.*

147. *Id.*

148. Brief for ACLU as Amicus Curiae at 3–6, *Labine v. Vincent*, 401 U.S. 532 (No. 70-5257).

149. *Id.* at 7.

150. See *Dandridge v. Williams*, 397 U.S. 471 (1970).

151. See *id.* at 475, 484; DAVIS, *supra* note 33, at 129–30.

152. For more on anti-poverty lawyers’ reaction to *Dandridge*, see DAVIS, *supra* note 33, at 133.

had joined the Court, replacing the more liberal Abe Fortas. Burger seemed likely to join the *Levy* and *Glon*a dissenters (Harlan, Black, and Stewart) in upholding the Louisiana inheritance law, while the four remaining members of the *Levy/Glon*a majority (Douglas, Brennan, White, and Marshall) inclined toward invalidation.<sup>153</sup> In *Labine*, therefore, the newly minted Justice Blackmun would cast a decisive vote.

Blackmun's initial instinct was to sympathize with Rita Nell Vincent. "The case is a rather good one factually," he reflected.<sup>154</sup> Paternity was not in question, and the competing relatives were neither ancestors nor descendants of the decedent. Rita, Blackmun reflected, "is just as much a child of the decedent as a legitimate child would be and it is unfair to penalize her for her illegitimate status. Illegitimacy is not her fault."<sup>155</sup> On the other hand, laws "which g[a]ve priority to legitimacy encourage[d] marriage and family status," and avoided problems of proof in closer cases. *Levy* and *Glon*a, though "not exactly the same" as *Labine*, "afford[ed] a precedent," Blackmun wrote.<sup>156</sup> All in all, Blackmun's "general leaning" was "in favor of the acknowledged child."<sup>157</sup> He worried, however, about the "logical difficulty in drawing the line at that point."<sup>158</sup> It seemed to him that "any theory which favors an acknowledged child . . . has to go all the way and . . . favor any illegitimate child."<sup>159</sup> This brought Blackmun back to his concern about "spurious claims" and the "difficult aspect of proving paternity."<sup>160</sup>

Blackmun's clerk, Daniel B. Edelman, did not share his ambivalence. It was clear to Edelman, who later became a noted civil rights attorney, that Louisiana's inheritance law should be unconstitutional under *Levy*. Edelman found Justice Black's draft majority opinion "disturbing and unsatisfying to say the least," and he wrote passionate memoranda excoriating Black's circulations.<sup>161</sup> Stewart's clerk Thomas D. Rowe, Jr. was nearly as scathing in his denunciation of Black's opinion.<sup>162</sup>

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153. White was probably the least reliable vote in this group, given his misgivings about the reasoning in *Levy* and his generally more conservative approach, though his civil rights record placed him firmly in the liberal camp in those cases.

154. Memorandum from Justice Harry A. Blackmun to file, regarding *Labine*, at 1, collected in Harry A. Blackmun Papers, Library of Congress [hereinafter Blackmun Papers], Box 131, Folder 8.

155. *Id.* at 1–2.

156. *Id.*

157. *Id.* at 2.

158. *Id.*

159. *Id.*

160. *Id.*

161. Letter from Daniel B. Edelman, Clerk to Justice Blackmun, to Justice Harry A. Blackmun, regarding *Labine v. Vincent* Black Recirculation (Feb. 10, 1971), collected in Blackmun Papers, Box 131, Folder 8.

162. "[I]f there's any tenable reason for the decision in the opinion I can't find it," he wrote to the Justice. Letter from Thomas D. Rowe, Jr., Clerk to Justice Potter Stewart, to Justice Potter Stewart, regarding *Labine v. Vincent*, at 1, collected in Potter Stewart Papers, Manuscripts and Archives,

Despite their clerks' entreaties, Blackmun and Stewart joined Black's abrupt retreat from *Levy* and *Glona*. Stewart had dissented in the earlier cases, and Blackmun's vote with the majority in *Labine* surprised few; before Blackmun's authorship of *Roe v. Wade* and his drift to the left in subsequent years, he and Burger were often dubbed the (conservative) "Minnesota twins." Indeed Blackmun's first opinion for the Court upheld "midnight raids" on the homes of welfare recipients.<sup>163</sup>

Opponents of illegitimacy penalties had compared them to racial classifications in a bid for strict judicial scrutiny; Justice Black's opinion for a five-to-four majority in *Labine* instead analogized illegitimate children to "concubines."<sup>164</sup>

The social difference between a wife and a concubine is analogous to the difference between a legitimate and an illegitimate child. One set of relationships is socially sanctioned, legally recognized, and gives rise to various rights and duties. The other set of relationships is illicit and beyond the recognition of the law.<sup>165</sup>

The State could, therefore, "assert its power to protect the wife and children against the claims of a concubine and her children," Black wrote.<sup>166</sup> Black's opinion bolstered, in no uncertain terms, the State's prerogative to privilege marriage and to denigrate nonmarital relationships.

In dissent, Justice William Brennan's indignation was palpable—and child-centered. His opening paragraph accused the majority of "uphold[ing] the untenable and discredited moral prejudice of bygone centuries which vindictively punished not only the illegitimates' parents, but also the hapless, and innocent, children."<sup>167</sup> States could incentivize marriage "far more directly by focusing on the parents whose actions the State seeks to influence."<sup>168</sup> As much as he abhorred Black's cavalier dismissal of discrimination, Brennan's dissent reinforced the distinction between culpable unmarried parents on the one hand, and their blameless children on the other.<sup>169</sup>

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Sterling Memorial Library, Yale University [hereinafter Stewart Papers], Box 247, Folder 2885. Rowe importuned Stewart to at least write a separate concurrence to no avail. *Id.*

163. See *Wyman v. James*, 400 U.S. 309 (1971); LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN* 61–62 (2005).

164. *Labine v. Vincent*, 401 U.S. 532, 538 (1971).

165. *Id.* Justice Brennan's "Case History" of *Labine* noted that the language "illicit and beyond the recognition of the law" was a late addition to Justice Black's majority opinion. Case History, *Labine v. Vincent*, at xiv–xv, collected in William J. Brennan, Jr., Papers, Library of Congress, Box II:6, Folder 8.

166. *Labine*, 401 U.S. at 538.

167. *Id.* at 541 (Brennan, J., dissenting).

168. *Id.* at 558.

169. "[T]he formality of marriage," he wrote, "primarily signifies a relationship between husband and wife, not between parent and child." *Id.* at 552–53. He also approvingly quoted a North Dakota decision invalidating a similar law "punish[ing] innocent children for their parents' transgressions." *Id.* at 558–59.

E. “No Child Is Responsible for His Birth”: *Weber v. Aetna Casualty*

*Labine* horrified opponents of illegitimacy penalties.<sup>170</sup> Many liberals worried that the departures of Justices Black and Harlan over the next several months would allow Nixon to scuttle hard-won gains in civil rights and civil liberties. By the time the Court heard its next illegitimacy case, *Weber v. Aetna Casualty*, Justices Lewis F. Powell, Jr., a conservative Democrat and racial moderate from Virginia, and William H. Rehnquist, a conservative Republican, had joined the Court.

Like *Levy*, *Glona*, and *Labine*, the *Weber* case originated in Louisiana and involved an African American family. Willie Mae Weber had lived with Henry Clyde Stokes for three years, often caring for his four legitimate children while he was on the road as a truck driver and bearing two of Stokes’s children, one posthumously.<sup>171</sup> Weber described herself as his “common law wife,”<sup>172</sup> although Stokes remained married to the mother of his children, and Louisiana did not recognize common law marriage in any event.<sup>173</sup> Stokes and Weber apparently did not marry because Stokes’s wife was mentally ill and often hospitalized,<sup>174</sup> presumably making divorce difficult. When Stokes died in a job-related accident, his legitimate children reached a settlement with the insurance company that left nothing for his illegitimate children.<sup>175</sup> Willie Mae Weber appealed on behalf of her children, Letha Marie and Joseph, challenging the exclusion of illegitimate children from the statutory definition of “child.”<sup>176</sup> The Louisiana Supreme Court denied her claims.<sup>177</sup>

The arguments presented to the Court in *Weber* represented a departure from prior illegitimacy cases. Ironically, race virtually disappeared from the first illegitimacy case argued by an African American attorney, and not by his choice. Vanue Lacour, one of only a handful of black lawyers practicing in Louisiana, had experience litigating civil rights cases and would go on to a distinguished career as a professor at a historically black law school in Baton

170. See, e.g., Letter from Norman Dorsen to Justice William J. Brennan, Jr. (April 26, 1971), collected in Dorsen Papers, Box 29, Folder 16 (expressing “disappointment” at the *Labine* decision and complimenting Justice Brennan for a “powerful” dissent).

171. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 165 (1972); see also *State ex rel. Stokes v. Stokes*, 222 So. 2d 573 (La. Ct. App. 1969); Answer of Willie Mae Weber, *Stokes v. Aetna Cas. & Sur. Co.*, No. 129,119 (La. 19th Judicial Dist. Ct. E. Baton Rouge Parish Mar. 16, 1968), reprinted in Appendix at 20–21, *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (No. 70-5112).

172. See Answer of Willie Mae Weber, *supra* note 171.

173. On the disparate impact on poor women and women of color of failing to recognize common law marriage, see Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709 (1996).

174. *Weber*, 406 U.S. at 165.

175. *Id.* at 166–68 (explaining that under Louisiana law, unacknowledged illegitimate children could only recover if legitimate children did not exhaust available funds).

176. *Id.*

177. *Stokes v. Aetna Cas. & Sur. Co.*, 242 So.2d 567 (La. 1970), *rev’d sub nom. Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972).

Rouge.<sup>178</sup> When Lacour wrote to the ACLU to ask for amicus assistance, he specifically requested an “emphasis on the fact that the practical effect of the law excluding illegitimates from enjoying an equal right to workmen’s compensation is to discriminate against black people.”<sup>179</sup>

The ACLU filed an amicus brief, but apparently rejected Lacour’s suggested angle.<sup>180</sup> Rather than detailing the disparate impact of illegitimacy penalties on African Americans or arguing illegitimacy was a suspect classification, as they had in past cases, the claimants emphasized the continuing vitality of *Levy* after *Labine*, and argued that workers’ compensation benefits were more similar to wrongful death recovery than to inheritance.<sup>181</sup> As a result, neither of the Justices who wrote in *Weber* had been exposed to the race- (and poverty-) based arguments that their more senior colleagues had heard in *Levy*, *Glonn*, and *Labine*.<sup>182</sup>

The *Weber* strategy worked: at Conference, six of the nine Justices voted to reverse, with Burger and Blackmun tentatively on board.<sup>183</sup> Burger, who had expressed skepticism about Lacour’s position at oral argument, may have voted with the majority so that he, rather than Douglas, could assign the opinion.<sup>184</sup> Powell would write one of his first opinions for the Court in *Weber*, over a dissent from Rehnquist.<sup>185</sup>

Powell assigned the case to clerk J. Harvie Wilkinson III, the son of close family friends who had welcomed the Powells into their Richmond home for many Sunday dinners.<sup>186</sup> Wilkinson’s initial draft drew praise from Powell, who wrote, “Your draft opinion . . . is very good indeed, and I think very little

178. See Russell L. Jones, *African American Legal Pioneers: A Biography of Vanue B. Lacour “A Social Engineer,”* 23 S.U. L. REV. 63 (1995).

179. Letter from Vanue Lacour to Mel Wulf, Legal Dir. of ACLU (Nov. 16, 1971), collected in Dorsen Papers, Box 35, Folder 12.

180. See Brief for ACLU as Amicus Curiae, *Weber*, 406 U.S. 164 (No. 70-5112).

181. *Id.*

182. It is quite possible, even probable, that Powell would not have discussed the racial impact of illegitimacy classifications anyway, but the absence of such arguments from the briefs likely ensured their absence from the opinion.

183. See Conference Notes, *Weber v. Aetna Casualty & Surety Co.* (Feb. 18, 1972), collected in Lewis F. Powell, Jr., Papers, Powell Archives, Washington and Lee School of Law [hereinafter Powell Papers].

184. It seems likely that Douglas would have assigned the opinion to himself.

185. See Conference Notes, *Weber v. Aetna Casualty & Surety Co.*, *supra* note 183 (noting Burger’s “tentative” vote at conference to reverse).

186. See J. Harvie Wilkinson III, *Lewis F. Powell, Jr. — A Personal View*, 65 WASH. & LEE L. REV. 3, 3-4 (2008). On Powell’s friendship with Wilkinson’s father, J. Harvie Wilkinson, Jr., see JOHN C. JEFFRIES, JR., *JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY* (2d ed. 2001) (passim). Powell was sworn in on January 7, 1972; the Court heard oral arguments in *Weber* on February 28. See Joan Biskupic & Fred Barbash, *Retired Justice Lewis Powell Dies at 90*, WASH. POST, Aug. 26, 1998, A1; see also *Weber v. Aetna Cas. & Surety Co.*, 92 S. Ct. 1400, 1400 (1972).

revision is required.”<sup>187</sup> Powell’s only real criticism concerned Wilkinson’s final paragraph, where the clerk began:

Our legal experiment with illegitimacy has always risked being an ineffectual attempt to punish the parent by stigmatizing the child. It has refuted the notion that legal burdens in our society bear some relationship to individual responsibility or wrongdoing and that no man under our system of law be unduly victimized by the fortuitous conditions and circumstances of his birth. Though it may not always void them, the Fourteenth Amendment peers most searchingly at statutory classifications and statuses over which individuals have slight or no control.<sup>188</sup>

Here, Wilkinson cited several cases involving race discrimination, including *Brown v. Board of Education* and *Hirabayashi v. United States*.<sup>189</sup> He continued:

No child controls his illegitimacy. What social opprobrium these hapless children may suffer we are powerless to prevent, but the most senseless of their legal burdens the Equal Protection Clause compels us to eliminate. We can see most poignantly the fallacy of discriminating between classes of offspring where, as in the case before us, the deprivation was so equally shared; where, as here, the legitimate and the illegitimate are alike without a father.<sup>190</sup>

Powell gently urged Wilkinson to tone down this language. He wrote,

Your last page or two—while beautifully written—may sound a little more like a social studies lecture than a judicial decision. I like what you have written and hesitate to modify or omit much of it, but let’s take a look at it—asking the question whether, in the US Reports, it will seem a little overzealous in the social implications?<sup>191</sup>

In the end, Powell’s *Weber* opinion closely resembled Wilkinson’s draft. Finding *Levy* to be the “applicable precedent,”<sup>192</sup> the decision—unanimous except for Rehnquist—resoundingly reinforced the child-focused critique of illegitimacy penalties. Powell and Wilkinson intentionally left the standard of review ambiguous, writing that the “essential inquiry” in equal protection cases involved examining what “legitimate state interest” the “classification promote[d]” and asking “[w]hat fundamental personal rights” it “might . . .

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187. Memorandum from Justice Powell to Mr. Wilkinson, No. 70-5112, *Weber v. Aetna* (Mar. 13, 1972), at 1, collected in Powell Papers, *Weber v. Aetna* file.

188. J. Harvie Wilkinson, III, First Draft of *Weber v. Aetna* Opinion (March 10, 1972), at 14, collected in Powell Papers, *Weber v. Aetna* file.

189. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

190. Wilkinson, First Draft of *Weber v. Aetna* Opinion, *supra* note 188, at 14–15.

191. Memorandum from Justice Powell to Mr. Wilkinson, No. 70-5112, *Weber v. Aetna* (Mar. 13, 1972), at 2, collected in Powell Papers, *Weber v. Aetna* file.

192. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 172 (1972).

endanger.”<sup>193</sup> The opinion affirmed that “the regulation and protection of the family unit have indeed been a venerable state concern.”<sup>194</sup> The Court did “not question the importance of that interest” but rather “how the challenged statute will promote it”<sup>195</sup>—that is, the relationship between means and ends. Quoting *Glona*, Powell rejected the notion that “persons will shun illicit relations because the offspring may not one day reap the benefits of workmen’s compensation.”<sup>196</sup>

Powell’s closing paragraphs retained much of the substance of Wilkinson’s “social studies lecture,” albeit stated somewhat more concisely and with fewer rhetorical flourishes. *Weber*’s final paragraph would be quoted again and again in future illegitimacy cases:

The status of illegitimacy has expressed through the ages society’s condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as unjust—way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise.<sup>197</sup>

*Weber* thus solidified the child-focused account of illegitimacy’s harm: nonmarital relationships remained “irresponsible,” but “hapless children” should be protected from their most oppressive legal consequences.<sup>198</sup>

193. *Id.* at 173.

194. *Id.* Wilkinson’s first draft called this a “sacred and venerable state concern.” Wilkinson, First Draft of *Weber v. Aetna* Opinion, *supra* note 188, at 11.

195. *Weber*, 403 U.S. at 173.

196. *Id.*

197. *Id.* at 175–76.

198. *Id.* at 174, 176. Rehnquist’s dissent did not attract the votes of any of his colleagues, not even Stewart, the only surviving dissenter from *Levy* and *Glona*. *Id.* at 177. It did succeed in provoking Wilkinson’s ire. Rehnquist accused the majority of infidelity to its recent decision in *Dandridge* to uphold Maryland’s cap on welfare benefits for large families against an equal protection challenge. *Id.* at 184. Wilkinson fumed that Rehnquist “should hardly be so pious about precedent” given that his dissent “by implication . . . casts a major shadow over most of this Court’s equal protection work in the last decade and a half.” Memorandum from J. Harvie Wilkinson, III, to Justice Powell, *Weber* (Apr. 14, 1972), at 2, *collected in* Powell Papers, *Weber v. Aetna* file. Wilkinson drafted a footnote for Powell, which would have replied to Rehnquist’s criticism but in so doing, strongly implied that something more than rational basis review applied to illegitimacy-based classifications. *See id.* In the interest of “leav[ing] [Powell] flexible and uncommitted” on the appropriate standard of review, and recognizing disagreement among the majority Justices about the proper level of scrutiny, Wilkinson ultimately recommended that Powell let Rehnquist’s critique go unanswered. *See id.*

*Weber*'s focus on the injustice visited upon innocent children may have been over-determined, but it was not inevitable. Child-focused arguments dominated the ACLU's brief in *Weber* to an unprecedented extent.<sup>199</sup> True, the briefs in illegitimacy cases from *Levy* on barely mentioned the impact of illegitimacy penalties on the parents of nonmarital children, other than to cast aspersions on the power of these laws to deter nonmarital sex. But Douglas's *Glon* opinion had left the door open to parents' claims. Some commentaries, including the widely cited Gray and Rudovsky article, suggested more capacious interpretations of *Glon* and *Levy* that encompassed the rights of adults as well as children and emphasized the illegitimacy cases' potential to expand the doctrine of sexual privacy.<sup>200</sup>

Further, the Court was beginning to reconsider the rights of unmarried couples and parents in the early 1970s. Just a few weeks before *Weber* (but without Powell or Rehnquist's participation), the Court validated Peter Stanley's challenge to an Illinois policy denying fathers custody of their nonmarital children without so much as a hearing.<sup>201</sup> In *Stanley*, Justice White quoted *Levy* and *Glon* as he declared that the law had not "refused to recognize those family relationships unlegitimized by a marriage ceremony," and that "natural, but illegitimate, children . . . cannot be denied the right of other children because familial bonds in such cases were often as warm, enduring, and important as those arising within a more formally organized family unit."<sup>202</sup> Many hoped (or feared) that *Stanley* portended a new era for nonmarital parenthood. *Eisenstadt v. Baird*, too, seemed to bode well for the rights of the unmarried, as the Court extended constitutional protections for contraceptive use beyond the "sacred precincts of the marital bedroom"<sup>203</sup> to include "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether or not to bear or beget a child."<sup>204</sup>

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199. Nor did the briefs for *Weber* press the point that illegitimacy-based classifications should be suspect and subject to strict scrutiny, although advocates would pick up and promote this argument again in future cases. It seems likely that Douglas, Brennan, and Marshall would have endorsed this position. White might have been a tougher sell, given his misgivings about the "basic civil rights" language in *Levy*—but he did join the *Frontiero* plurality to make sex suspect. Burger, Stewart, and Rehnquist would almost certainly not have embraced this position, and it seems highly unlikely that Blackmun would have, given his vote with the majority in *Labine*.

200. See *supra* notes 88–98 and accompanying text (discussing Gray & Rudovsky, *supra* note 94); Dorsen & Rudovsky, *supra* note 97; see also Semmel, *supra* note 88, at 300–01 (suggesting that *Glon* might call into question the exclusion of unmarried mothers from Social Security "mother's insurance" benefits).

201. See *Stanley v. Illinois*, 405 U.S. 645 (1972).

202. *Id.* at 651–52.

203. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

204. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). The "sacred precincts of the marital bedroom" invoked by Douglas in *Griswold*, 381 U.S. at 479, gave way to Justice Brennan's declaration that "the marital couple is not an independent entity with a mind and heart of its own, but

Despite these promising contemporaneous developments, Powell's account in *Weber* of the harm of illegitimacy classifications had enormous staying power: every pro-plaintiff illegitimacy decision thereafter quoted liberally from the opinion's lament for "hapless" children.<sup>205</sup> This focus on children and on means-ends rationality eclipsed the expansive visions of sexual privacy and autonomy offered by civil libertarians and welfare rights advocates in cases such as *King v. Smith* and in out-of-court writings questioning marital supremacy itself.

The Court's failure to discuss race in the early illegitimacy cases may have been a blessing in disguise: if the Court had relied on racially discriminatory impact or motive to invalidate illegitimacy-based classifications, its rulings might have been interpreted to *require* such discriminatory intent or effect in order to warrant constitutional scrutiny. Indeed, some commentators speculated that the unmentioned racial and socioeconomic subtext served to deepen the Justices' sympathy for plaintiffs in these early cases.<sup>206</sup> Further, a recognition of illegitimacy penalties' disparate impact on people of color and the poor would have been compatible with a child-focused rationale that did not extend meaningful protection to unmarried adults or parents.

But the Court's failure to adopt advocates' arguments about sexual privacy and autonomy, the harms illegitimacy penalties visited on parents as well as children, and the constitutionally questionable government interest in privileging formal marriage and traditional family structure had far reaching detrimental consequences. Advocates' accounts of the constitutional harm of illegitimacy penalties posed a more profound challenge to the race and class-inflected structural inequalities marital supremacy sustained. And as the next Part demonstrates, once arguments about illegitimacy penalties' reinforcement of class- and race-based oppression fused with the feminist imperative to challenge women's subordination, the impact of illegitimacy penalties on adults and the true costs of marital supremacy were thrown into stark relief.

## II.

### "AN INDEPENDENT JUSTIFICATION FOR THE ABOLITION OF ILLEGITIMACY": THE RISE AND FALL OF FEMINIST ARGUMENTS, 1972-1979

Seen from the perspective of Willie Mae Weber or Lou Bertha Labine, the illegitimacy cases were about more than a denial of rights to hapless and

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an association of two individuals each with a separate intellectual and emotional makeup." *Eisenstadt*, 405 U.S. at 453.

205. See, e.g., *Gomez v. Perez*, 409 U.S. 535, 538 (1973); *N.J. Welfare Rights Org. v. Cahill*, 411 U.S. 619, 620 (1973) (per curiam); *Jimenez v. Weinberger*, 417 U.S. 628, 632 (1974); *Trimble v. Gordon*, 430 U.S. 762, 769-70 (1977).

206. See, e.g., John T. Noonan, Jr., *The Family and the Supreme Court*, 23 CATH. U. L. REV. 255, 260 (1973) ("Lines drawn on the basis of legitimacy could be viewed as a sophisticated form of racial discrimination. The Court could have felt that it realistically extended the constitutional prohibition of racial discrimination in striking them down.").

innocent children. Rita Vincent's inability to inherit from her father and the Weber children's lack of access to Henry Stokes's workers' compensation benefits left their mothers on their own to fend for themselves and their children. Whether or not limiting sources of support for nonmarital children effectively deterred illicit sexual relationships—the focus of inquiry in the early illegitimacy cases—denials of benefits or inheritance on the basis of illegitimacy burdened their mothers at least as much as the children themselves.

By the early 1970s, with new constitutional weapons in hand, some feminists and anti-poverty lawyers challenged the child-centered focus of illegitimacy litigation. The unfairness of holding mothers solely responsible for their illegitimate children's support had troubled feminists of earlier eras.<sup>207</sup> But it was not until the late 1960s that courts began seriously to question the constitutionality of laws that treated women and men differently. In *Reed v. Reed* (1971), the Supreme Court ruled an Idaho statute preferring male estate administrators unconstitutional;<sup>208</sup> eighteen months later, in *Frontiero v. Richardson* (1973), the Court struck down a provision requiring military servicewomen to prove their husbands' dependence in order to receive spousal housing and medical benefits automatically available to servicemen and their wives.<sup>209</sup> And in *Weinberger v. Wiesenfeld* (1975), Ruth Bader Ginsburg successfully argued that denying Social Security "mothers' insurance" benefits to widowed fathers unconstitutionally devalued their wives' earnings.<sup>210</sup>

Around the same time, feminists began to reframe illegitimacy penalties as injurious to women as well as to children.<sup>211</sup> Like the earlier sexual libertarian arguments, the broadest feminist critiques of illegitimacy penalties emerged outside the courtroom. In the early 1970s, for instance, Aleta Wallach and Patricia Tenoso attacked the dominant child-focused campaign against illegitimacy laws head-on.<sup>212</sup> The "legal literature," they wrote in 1974, was "replete with expressions of concern for the 'innocent' child," ignoring the impact of illegitimacy penalties on women and on "the family unit as a

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207. See, e.g., Kristin Collins, Note, *When Fathers' Rights Are Mothers' Duties: The Failure of Equal Protection in Miller v. Albright*, 109 YALE L.J. 1669, 1694–97 (2000) (describing how feminists in the 1920s and 1930s understood "that unmarried women's practical right to transmit citizenship to foreign-born children was predicated upon their legal responsibility to assume full financial and caregiving duties" and "argued that this sex-based policy disadvantaged American women relative to American men by perpetuating the sex-based allocation of parental duties").

208. 404 U.S. 71 (1971).

209. 411 U.S. 677 (1973).

210. 420 U.S. 636 (1975).

211. This effort was not confined to the United States. See, e.g., U.N. Commission on the Status of Women, *The Status of the Unmarried Mother: Law and Practice: Report of the Secretary-General*, U.N. Doc. No. E/CN.6/540/Rev.1 (1971).

212. See Patricia Tenoso & Aleta Wallach, Book Review, 19 UCLA L. REV. 845 (1972) (reviewing KRAUSE, *supra* note 20); Wallach & Tenoso, *supra* note 131. For examples of Krause's efforts to shift attention from mothers' rights to the child-father relationship, see, for example, Harry D. Krause, *The Bastard Finds His Father*, 3 FAM. L.Q. 100, 106 (1969).

whole.”<sup>213</sup> This approach ignored “an independent justification for abolition of illegitimacy: the right of women to self-determination requires that they be free from all forms of male domination.”<sup>214</sup> Wallach and Tenoso sought to unsettle the patriarchal nuclear family ideal and empower women as independent economic, social, and sexual actors untethered to men.

Feminists like Wallach and Tenoso criticized anti-illegitimacy campaigns that took for granted the inherent undesirability of nonmarital childbearing. “Illegitimacy,” they argued, was a “problem” primarily because law and social norms made it so.<sup>215</sup> Patriarchy and poverty were the true culprits. On this view, Harry Krause’s proposed Uniform Legitimacy Act “merely substitute[d] paternity for marriage as the basis for classifying children.”<sup>216</sup> Krause’s relentless focus on ascertaining paternity reflected his “implicit assumption that only the male can or should support a family.”<sup>217</sup> As a result, Krause failed to “treat the mother as an economic resource” by “eliminat[ing] the barriers to her employment.”<sup>218</sup> Nor did he consider alternatives to paternal support—namely “adequate governmental support of all unmarried mothers and their children.”<sup>219</sup> For these feminists, privileging marriage and privatizing dependency through paternity impaired women’s sexual and economic autonomy and ensured women’s subordination to men in both the private realm of family and the public world of the market and political life.<sup>220</sup>

Hardly a trace of this full-throated feminist attack on marital supremacy, sex inequality, and sexual repression appeared in the dozen-odd illegitimacy opinions issued by the Supreme Court in the 1970s. Yet in many of these cases, advocates did translate some of the feminist critique into constitutional arguments. These challenges never coalesced into a grand strategy of the sort that propelled racial desegregation campaigns, and, to a lesser extent, Ginsburg’s sex equality litigation. Still, feminist-inflected arguments were

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213. Wallach & Tenoso, *supra* note 131, at 25 (“Because of the caretaker-dependent relationship between mother and child, . . . the child’s status is inextricably bound to that of its mother.”).

214. *Id.* By “coercing women into marriage, [illegitimacy] submerges their identities and limits their freedom.” *Id.* at 28.

215. *Id.* at 30.

216. Tenoso & Wallach, Book Review, *supra* note 212, at 865. Krause’s Uniform Legitimacy Act proposal, described in his 1971 book, became a basis for the Uniform Parentage Act (UPA), for which Krause served as the draftsman-reporter. See Harry D. Krause, *The Uniform Parentage Act*, FAM. L.Q., Spring 1974, at 1–25.

217. Tenoso & Wallach, Book Review, *supra* note 212, at 850.

218. *Id.*

219. *Id.* For contemporaneous treatments of feminism and illegitimacy, see, for example, Herma Hill Kay’s discussion of “Illegitimacy and the Social Status of Women,” in KENNETH M. DAVIDSON, RUTH B. GINSBURG & HERMA H. KAY, *SEX-BASED DISCRIMINATION: TEXT, CASES AND MATERIALS* 323–29 (1974) and sources cited therein.

220. Wallach and Tenoso argued that “classifications based upon ‘illegitimate’ motherhood should be constitutionally suspect” because of their infringement of “important rights of privacy in sexual relationships and freedom of personal choice in matters of marriage (or non-marriage), childbearing, and family form.” Wallach & Tenoso, *supra* note 131, at 60–61 (citations omitted).

made powerfully, albeit sporadically, in the 1970s illegitimacy cases. But the child-focused rationale for questioning illegitimacy penalties proved remarkably resilient, with lasting consequences for sex equality, racial justice, and marital supremacy.

In the 1970s, feminists initiated or joined challenges to an array of anti-illegitimacy laws and policies, including the exemption of nonmarital fathers from liability for child support; limitations on illegitimate children's ability to inherit from their fathers; laws requiring mothers to disclose their children's paternity or face penalties including loss of public assistance, fines, and incarceration; employment bans on the parents of illegitimate children; and the exclusion of illegitimate children and their parents from various federal government benefits. As Section I.A describes, feminist arguments emphasized how these laws imposed a disproportionate economic and social burden on women, especially poor women of color; curtailed women's sexual autonomy and invaded their privacy; and infringed upon women's freedom to choose to bear children. Feminists defended unmarried mothers against charges of sin and selfishness, lauding their courage, independence, strength of character, and devotion to their children. Section I.B takes a brief detour to consider the Social Security Act cases, a rare instance in which sex equality claims did not surface. Finally, Section I.C describes how the Court circumvented feminist arguments against illegitimacy penalties, selectively embracing child-focused arguments and sidestepping or rejecting sex discrimination claims against these laws and policies.<sup>221</sup>

A. *“Designed to Subordinate Females”*: Feminist Arguments Against Illegitimacy Penalties

Linda Gomez believed Francisco Perez when he told her he was not married. They met at a party and began dating. Perhaps she thought he would someday be her husband when she became pregnant with his child. Certainly she might have thought he would be responsible for supporting their daughter. She would have been wrong on all counts. Perez, it turned out, was married to another woman and had no intention of marrying Linda or of supporting their daughter Zoraida. And under Texas statutory and common law, Linda and Zoraida had no remedy: state courts had long held that fathers were not liable for supporting their illegitimate children.<sup>222</sup>

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221. For the purposes of this Essay, I use the term “feminist” to describe arguments that emphasized how illegitimacy penalties perpetuated *women's* subordination. This Part briefly discusses nonmarital fathers' claims of sex discrimination to the extent that they illuminate the feminist arguments that are this Essay's primary subject. There is much more to be said about nonmarital fathers and feminists' ambivalence about their constitutional claims to parental rights; I pursue that topic in depth elsewhere. See Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. (forthcoming 2016).

222. Texas was an outlier in this regard; by the late 1960s, other holdouts had enacted or revised their support statutes to include “natural” fathers. KRAUSE, *supra* note 20, at 22.

Plaintiffs in *Gomez v. Perez*, one of two Texas child support cases to reach the U.S. Supreme Court in the early 1970s, pioneered the argument that placing the full burden of economic support for nonmarital children on mothers violated equal protection. Legal aid attorneys representing Linda Gomez wrote in their brief to the Supreme Court in 1972: “Equally as onerous as the State’s discrimination against the illegitimate child is its invidious scheme to place the entire burden of supporting such child on the female parent. To extoll the virtues of motherhood but be blind to its toils may be fact, but should it be law?”<sup>223</sup> *Linda R.S.*, challenging the exclusion of nonmarital fathers from liability under Texas’s criminal non-support statute, similarly emphasized the economic hardship imposed on mothers of nonmarital children while fathers escaped scot-free. Although “employed full time,” Linda had “very little money,” and according to federal court papers filed in 1970, could not maintain her daughter “in a manner equal to the opportunities and privileges of a comparably situated ‘father-supported’ child.”<sup>224</sup>

Plaintiffs elaborated the economic burden argument in challenges to laws that limited nonmarital children’s ability to inherit from their intestate fathers, including in the leading Supreme Court case, *Trimble v. Gordon*. In 1974, twenty-eight-year-old Sherman Gordon of Chicago died suddenly, “the victim of a homicide.”<sup>225</sup> He left no spouse and one child, four-year-old Deta Mona Trimble. Under Illinois law, Gordon’s parents and siblings stood to inherit his estate—an almost-new Plymouth automobile worth about \$2,500—even though Gordon had been adjudicated Deta Mona’s father and held liable for child support while he lived.<sup>226</sup> Gordon had lived with Deta Mona and her mother, Jessie, until his death: Ms. Trimble described Gordon to the Probate Court as her “common law husband” but she understood that “that don’t count.”<sup>227</sup>

The same year, in *Fernandez v. Shapp*, Philadelphia’s Community Legal Services collaborated with feminist lawyer Ann Freedman of the Women’s Law Project to bring a federal class action lawsuit challenging Pennsylvania’s inheritance laws. The state’s intestate succession law precluded children born “out of wedlock” from inheriting from their fathers, and vice-versa.<sup>228</sup> When fathers bequeathed property to their illegitimate children, those children paid a

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223. Brief for Appellant at 20, *Gomez v. Perez*, 409 U.S. 535 (1973) (No. 71-575), 1972 WL 136247.

224. Appendix at 11, *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973) (No. 71-6078) (Stipulated Statement of Fact).

225. *Trimble v. Gordon*, 430 U.S. 762, 764 (1977).

226. *Id.* Deta Mona would have inherited her father’s estate in full had she been legitimate.

227. Record of Proceedings in Trial Court, *In re Gordon*, No. 74 P 5902 (Ill. Cir. Ct. Cook Cnty. Probate), reprinted in Appendix at 16, 19, *Trimble v. Gordon*, 430 U.S. 762 (No. 75-5952). Illinois had abolished common law marriage in 1905.

228. See Plaintiffs’ Memorandum of Law in Support of Cross-Motion for Summary Judgment at 10, No. 74-2959, *Fernandez v. Shapp* (E.D. Pa. 1976), collected in Dorsen Papers, Box 34, Folder 11 (describing 20 Pa. Stat. § 2107; 72 Pa. Stat. §§ 2485-403, -404 (Supp. 1975)).

higher tax on the inheritance.<sup>229</sup> Children and mothers, by contrast, could inherit from one another regardless of legitimacy or intestacy and paid no extra inheritance tax.<sup>230</sup>

Both *Fernandez* and *Trimble* highlighted that, by limiting the paternal inheritance rights of nonmarital children, the law placed an unfair economic burden on mothers. “When one parent dies, the surviving parent obviously retains the duty of support and maintenance of the child as a legal matter,” Freedman and her colleagues wrote, “and as a practical matter, the burden . . . becomes greater because it is no longer shared.”<sup>231</sup> Moreover, mothers suffered a “clear economic disadvantage” compared with surviving fathers, a disadvantage exacerbated by the inheritance laws.<sup>232</sup> “[T]he child’s mother, as sole surviving parent, is burdened with the far more onerous task of supporting a child who has no claim against his or her father’s estate . . . requiring [the mother] to replace the support previously provided by the father.”<sup>233</sup>

Like feminists of earlier eras who decried sexual double standards, advocates also highlighted how illegitimacy classifications shamed and penalized sexually active unmarried women while allowing men to engage in nonmarital sex and procreation with impunity. Lois Fernandez, an African American single mother of two, a Philadelphia community activist, and a plaintiff in *Fernandez v. Shapp*, later recalled: “[T]he thing that bothered me the most was that . . . [t]he question of the fathers never came up. . . . [T]here were the mothers, who were considered ‘whores,’ or ‘illicit women,’ and then there were the children, who were considered ‘bastards,’ ‘illegit.’ I just couldn’t accept that.”<sup>234</sup> Linda Gomez’s lawyers attributed Texas law’s “sexual discrimination” in child support liability to the “days of antiquity, when men were ‘free to sow their wild oats’ while society endowed women, the weaker sex, with the duty to remain chaste, or at least guard against the ‘accidents of love.’”<sup>235</sup> Courts should ask, they contended, “what possible legitimate state interest is promoted by singling out the female partner to acts of sexual

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229. *See id.* at 10–11.

230. *See id.* at 10.

231. *Id.* at 28.

232. *Id.*

233. *Id.*; *see also* Brief of the Appellants at 56, *Trimble v. Gordon*, 430 U.S. 762 (1977) (No. 75-5952), 1976 WL 181301.

234. Fernandez later described her ensuing campaign to persuade lawmakers and judges to reconsider Pennsylvania’s illegitimacy laws. Lois Fernandez, *Legitimate*, COWBIRD (Nov. 26, 2013), [http://cowbird.com/story/83078/Legitimate\\_By\\_Lois\\_Fernandez](http://cowbird.com/story/83078/Legitimate_By_Lois_Fernandez); *see also* Kendall Wilson, *A Mother’s War on ‘Illegitimate,’* PHILA. TRIB., Dec. 9, 2003 (“During her crusade, she was constantly beating back the stereotype of unwed mothers—particularly Black unwed women in this situation—as ‘whores gobbling up welfare.’”).

235. Brief for Appellant at 21, *Gomez v. Perez*, 409 U.S. 535 (1973) (No. 71-575), 1972 WL 136247.

promiscuity [and] forcing her, and her alone, to bear the economic consequences.”<sup>236</sup>

The most sophisticated version of this argument appeared in Katie Mae Andrews’s attack on a Mississippi school district’s ban on hiring unwed parents, filed in 1973.<sup>237</sup> In *Andrews v. Drew Municipal Separate School District*, social psychologist Kenneth Clark (author of the “doll studies” cited in *Brown*)<sup>238</sup> testified that the challenged rule was part of “a long history of discrimination against females on matters of sex and sexual behavior . . . designed to subordinate females to an essentially inferior role, which the power of our society is mobilized to reinforce.”<sup>239</sup> An amicus brief from the ACLU Women’s Rights Project and Equal Rights Advocates condemned illegitimacy penalties as a historical pillar of women’s subordination, part of a “double standard of sexual morality” that visited harsh punishments for nonmarital sex on women alone.<sup>240</sup> “The history of anti-illegitimacy measures,” the feminist groups declared, “is thematically linked to discrimination against women.”<sup>241</sup>

Depriving women of any claim on fathers’ resources also infringed upon their reproductive freedom, advocates contended. For many women, the ability to exercise control over reproduction meant more than the right to use contraception or to terminate a pregnancy. Poor women, especially unmarried women of color, faced involuntary sterilization at the hands of doctors who took it upon themselves—often with explicit or tacit encouragement from government officials—to curb the fertility of populations considered burdens on the public fisc.<sup>242</sup> For these women, some of whom had religious or moral

236. *Id.* at 20.

237. See generally *Andrews v. Drew Mun. Separate Sch. Dist.*, 371 F. Supp. 27 (N.D. Miss. 1973), *aff’d*, 507 F.2d 611 (5th Cir. 1975), *cert. granted*, 423 U.S. 820 (1975), *cert. dismissed as improvidently granted*, 425 U.S. 559 (1976).

238. *Brown v. Board of Educ.*, 347 U.S. 483, 494 n.11 (1954).

239. MAYERI, REASONING FROM RACE, *supra* note 12, at 151 (quoting Appendix at 188, *Drew Mun. Separate Sch. Dist. v. Andrews*, 425 U.S. 559 (1976) (No. 74-1318)).

240. Brief for Equal Rights Advocates Inc. and ACLU as Amici Curiae at 9–11, *Drew Mun. Separate Sch. Dist. v. Andrews*, 425 U.S. 559 (No. 74-1318), 1974 WL 175944 (quotation marks omitted).

241. *Id.* at 5. (“The concept of “illegitimacy” has varied in its legal dimensions across cultures and eras . . . With this pervasive variability, one constant appears: where legal and moral authorities have punished the offspring of sexual intercourse occurring outside the bounds of approved relationships, those authorities have likewise punished the maternal biological parents of these children . . .”); see also Brief for Respondents at 61, *Drew Mun. Separate Sch. Dist. v. Andrews*, 425 U.S. 559 (No. 74-1318), 1976 WL 194019 (“[The rule] penalizes the unwed mother who assumes responsibility for the care and nurturance of the child and ignores the abandoning father, effectively rewarding his irresponsibility.”).

242. On involuntary sterilization, see REBECCA KLUCHIN, FIT TO BE TIED: STERILIZATION AND REPRODUCTIVE RIGHTS IN AMERICA, 1950–1980 (2009); JENNIFER NELSON, WOMEN OF COLOR AND THE REPRODUCTIVE RIGHTS MOVEMENT (2003); JOHANNA SCHOEN, CHOICE AND COERCION: BIRTH CONTROL, STERILIZATION, AND ABORTION IN PUBLIC HEALTH AND WELFARE (2005); ALEXANDRA MINNA STERN, EUGENIC NATION: FAULTS AND FRONTIERS OF BETTER BREEDING IN AMERICA (2005); see also DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY (1997).

objections to abortion,<sup>243</sup> the private relationship between woman and physician elevated by Blackmun's opinion in *Roe v. Wade* was often a site of coercion rather than cooperative counsel.

Accordingly, Rhonda Copelon and Nancy Stearns, young feminist lawyers from the Center for Constitutional Rights (CCR) argued in *Andrews* that excluding unwed mothers from employment encouraged abortion, penalized women who chose to continue rather than terminate a pregnancy, and violated the reproductive liberty protected by *Roe v. Wade*.<sup>244</sup> The appearance in court of civil rights icon Fannie Lou Hamer, a well-known victim of involuntary sterilization, poignantly drove home this point in a region where such procedures were common enough to be called "Mississippi appendectom[ies]."<sup>245</sup> To exercise genuine reproductive freedom, Dallas attorney Windle Turley argued in *Linda R.S.* to judges who had recently considered *Roe v. Wade*, unmarried women must be able to draw on all possible sources of financial support lest they be denied meaningful reproductive choice.<sup>246</sup> "Because of such state enforced economic hardship, [unmarried mothers in Texas] are not permitted to freely elect between keeping and rearing their child and the alternatives of placing that child for adoption or even having its birth aborted."<sup>247</sup>

Some illegitimacy penalties continued the tradition of invasively patrolling poor women's personal lives by conditioning their livelihoods on disclosure. Invoking a right to privacy to challenge laws and practices that forced disclosure of intimate relationships, plaintiffs followed in the footsteps of Mrs. Sylvester Smith.<sup>248</sup> *Roe v. Norton*, for instance, attacked a Connecticut statute that punished poor unmarried mothers' failure to disclose the name of their children's fathers with a contempt citation that carried a fine and up to one

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243. Andrews testified, "God put us here on earth and if it came up to that I feel that we should have them, you know. If we try to get rid of it, as most people do, that's killing it. Well, you know where we would wind up then." MAYERI, REASONING FROM RACE, *supra* note 12, at 156.

244. See generally *id.* at 145–67; *Teachers: Discrimination Against Unwed Mothers*, 3 WOMEN'S RTS. L. REP. 28 (1975). As CCR lawyer Jan Goodman put it, "We are arguing that all women should have the freedom to choose . . . whatever the choice is, to bear the child or to abort." MAYERI, REASONING FROM RACE, *supra* note 12, at 155.

245. NELSON, *supra* note 242, at 68. Fannie Lou Hamer also personally opposed abortion. On Fannie Lou Hamer's life, see CHANA KAI LEE, FOR FREEDOM'S SAKE: THE LIFE OF FANNIE LOU HAMER (1999); KAY MILLS, THIS LITTLE LIGHT OF MINE: THE LIFE OF FANNIE LOU HAMER (1994).

246. Plaintiff's Complaint, *Linda R.S. v. Richard D.*, Civ. No. 3-4336-B (N.D. Tex. Dec. 3, 1970), reprinted in Appendix at 6–7, *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973) (No. 71-6078); see also Brief for Appellants at 10, *Linda R.S. v. Richard D.*, 410 U.S. 614 (No. 71-6078). The three-judge federal district court panel that heard *Linda R.S.* included Judge Sarah Hughes, who dissented from the panel's denial of standing on child-focused grounds. See *Linda R.S. v. Richard D.*, 335 F. Supp. 804, 808 (N.D. Tex. 1971) (Hughes, J., dissenting).

247. Plaintiff's Complaint, *supra* note 246; see also *id.* at 7 ("Said statutes deprive unwed pregnant women and unwed mothers of their federal constitutional rights" under the Ninth and Fourteenth Amendments including "the fundamental right of all women to freely choose whether to bear children" and "whether to keep their children.").

248. See *supra* Part 1.C; see also PLECK, *supra* note 2, ch. 3; Solinger, *supra* note 109.

year in prison.<sup>249</sup> The Connecticut law was part of the latest attempt by states to mandate that unmarried mothers whose families might be eligible for public assistance cooperate with government officials in establishing paternity.<sup>250</sup> One mother, Rosalynn Carr, told the judge hearing her case: “I would consider it a gross intrusion on my privacy to have to give the [father’s] name.”<sup>251</sup> The mothers’ brief to the Supreme Court stressed that “for a woman to appear in court, be examined and cross-examined as to the names of persons with whom she had sexual intercourse, their address and other identifying information, and other details of her past sexual conduct, is a humiliating and degrading experience.”<sup>252</sup>

Plaintiffs also argued that illegitimacy penalties violated a broader right to decisional autonomy in matters related to sex, marriage, and family. Mothers who challenged mandatory paternity disclosure claimed the prerogative to make financial and interpersonal decisions for their families without state interference. They drew on the *Griswold-Eisenstadt-Roe* line of sexual privacy decisions, the recognition of some rights for unmarried fathers in *Stanley v. Illinois*, and a series of parental rights cases stretching back to the early part of the twentieth century.<sup>253</sup> The Mississippi plaintiffs contended that banning unwed mothers from employment “infringes one of the most sacred and private aspects of the family relationship—that between parent and child—by literally conditioning employment on the abandonment of one’s child and thereby punishing the maintenance of the parent-child relationship.”<sup>254</sup>

Though the Court had ignored advocates’ invitation in the early litigation to address illegitimacy penalties’ disparate impact on African Americans and

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249. *Roe v. Norton*, 422 U.S. 391 (1975). Married mothers, of course, were not subjected to this indignity since their husbands’ paternity generally was presumed. For an in-depth study of *Roe v. Norton* and the underlying issues from a children’s rights perspective, see Stephen D. Sugarman, *Roe v. Norton: Coerced Maternal Cooperation*, in *IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY* 365 (Robert H. Mnookin ed., 1985). For a contemporaneous critical perspective on the case, see Aviam Soifer, *Parental Autonomy, Family Rights, and the Illegitimate: A Constitutional Commentary*, 7 *CONN. L. REV.* 1 (1974).

250. As welfare policy advocate Elizabeth Wickenden wrote in an internal memo, “The mother is shamed, coerced, denied the dignity of her own judgment about the best interest of her child and ultimately runs the risk of imprisonment.” Elizabeth Wickenden, “Policy Background of *Roe v. Norton*,” Justine Wise Polier Papers [hereinafter Polier Papers], MC413, Box 138, Folder: *Roe v. Norton*—CDF (on file with the Schlesinger Library, Radcliffe Institute, Harvard University).

251. Appendix of Brief of Children of Appellants at 14a, *Roe v. Norton*, 422 U.S. 391 (No. 73-6033).

252. Brief for Appellants at 50, *Roe v. Norton*, 422 U.S. 391 (No. 73-6033), 1974 WL 186122; see also Justine Wise Polier, Memo to File: April 24, 1974, *Roe v. Norton*, Polier Papers, Box 138, Folder: *Roe v. Norton*—CDF (listing as the first of several “serious constitutional issues” raised by the case the mother’s “right to remain silent,” her “right to privacy” and “her right to be protected from public humiliation”). Similarly, in the Mississippi teachers’ case, plaintiffs complained that school officials invasively “investigated” job applicants’ personal lives to uncover evidence of past nonmarital childbirth. See *MAYERI, REASONING FROM RACE*, *supra* note 12, at 157.

253. See, e.g., Brief for Appellants, *supra* note 252.

254. Brief of Respondents at 36, *Drew Mun. Separate Sch. Dist. v. Andrews*, 425 U.S. 559 (1976) (No. 74-1318), 1976 WL 181168.

the poor, race discrimination arguments persisted in several subsequent cases.<sup>255</sup> Race played an especially prominent role in *Andrews*, the Mississippi teachers' case. All five applicants denied jobs were African American women, and as many as 40 percent of the Drew school district's African American students were born to unmarried parents. Superintendent George F. Pettey presided over a school district that had mightily resisted desegregation; after most whites decamped to "segregation academies," Drew's student population was 80 percent black, but the number of white teachers and administrators rose. The school district's attorney, Champ Terney, was segregationist Senator James O. Eastland's son-in-law, and he called Ernest van den Haag, a prominent defender of racial segregation in the 1950s, to testify. Andrews's attorney, twenty-four-year-old Charles Victor McTeer, an African American protégé of Morty Stavis at CCR, secured the testimony of civil rights paragons Kenneth Clark and Fannie Lou Hamer.<sup>256</sup>

Cases that involved obvious and direct harm to unmarried mothers and did not foreground discriminatory impact on presumptively innocent children risked an unsympathetic reception. Many continued to believe it fair, or at least sound social policy, for women to shoulder the blame for exposing their children to the iniquity of illegitimate status and to the penury of paternal absence. For plaintiffs, these cases provided an opportunity to defend the moral character of mothers who bore sole responsibility for their children's care, and to argue that unmarried mothers deserved social support, not condemnation.

For instance, when the Drew, Mississippi, school district defended its policy as necessary to protect children from moral corruption and to stem the tide of "schoolgirl pregnancies," Hamer and Mae Bertha Carter staunchly defended the integrity of Andrews and the other young women turned away by Superintendent Pettey.<sup>257</sup> Mrs. Carter, the (married) mother of thirteen children

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255. See, e.g., *N.J. Welfare Rights Org. v. Cahill*, 349 F. Supp. 491 (D. N.J. 1971), *aff'd*, 411 U.S. 619 (1973) (per curiam); Brief for Appellants at 30, *Jefferson v. Hackney*, 406 U.S. 535 (1972) (No. 70-5064) (arguing that Texas's allocation of AFDC and other welfare benefits discriminated against nonmarital families of color based on race and family status). The internal correspondence of advocates involved in *Roe v. Norton* emphasized how mandatory paternity disclosure for AFDC recipients disproportionately affected African American women and children. See, e.g., Wickenden, *supra* note 250. Lois Fernandez recalled her own mother's skepticism that she could successfully challenge a "white man's law." See Fernandez, *supra* note 234.

256. See MAYERI, REASONING FROM RACE, *supra* note 12, at 149–52. Andrews's attorneys argued, inter alia, that the school district's "illegitimacy rule constitutes a race-based classification, built upon the legacy of slavery, and discriminates against Black women and their children." Brief of Respondents at 64, *Drew Mun. Separate Sch. Dist. v. Andrews*, 425 U.S. 559 (No. 74-1318). They noted "the overwhelming correlation of race and illegitimacy" and projected that the black–white adoption differential and the "illegitimate" birthrate in Sunflower County combined to yield "144 Black identifiably illegitimate children for every one white child similarly situated." *Id.* at 65.

257. See, e.g., Respondents at 24, 28, *Drew Mun. Separate Sch. Dist. v. Andrews*, 425 U.S. 559 (No. 74-1318) (summarizing Hamer's testimony) ("She believed that the community had great respect for those young women who, after bearing children out of wedlock, returned to school to get an education or a better job, or otherwise sought gainful employment to avoid the welfare rolls. As an

who had almost singlehandedly integrated the Drew public schools, testified that she would be proud to see Ms. Andrews teach her children.<sup>258</sup>

Hamer's and Carter's testimony valorized the plaintiffs' efforts to lift themselves out of poverty and support their children on their own as evidence of strong character rather than moral delinquency. Hamer highlighted the catch-22 imposed by powerful whites on black families generally and black women in particular: single mothers were damned if they relied on stingy and stigmatized public assistance, and damned if they sought a decent living through employment in the public school system. "[W]hen you say we are lifting ourselves up and you tell us to get off of welfare, then when peoples try to go to school to get off of welfare to support themselves, this is another way of knocking them down."<sup>259</sup> Hamer's testimony depicted Andrews and her compatriots as responsible citizens, eschewing public assistance in favor of employment and self-sufficiency.

The challenge to Connecticut's mandatory paternity disclosure law also sought to rehabilitate unmarried mothers, who stood accused of depriving children already marked by illegitimacy of paternal knowledge and support. "Why," asked the Connecticut attorney general, "should a mother be permitted, by her inaction, to cast her child into the eternal caverns of illegitimacy[?]"<sup>260</sup> Federal district Judge M. Joseph Blumenfeld decried the "anguish suffered by illegitimate children denied the satisfaction of knowing their paternity,"<sup>261</sup> declaring the interests of "recalcitrant mother[s]"<sup>262</sup> diametrically opposed to those of their "innocent children."<sup>263</sup> The statute, he wrote, "operates prophylactically against the adverse differential treatment which the unwed mothers would impose on their children" by withholding information about

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example, she noted that Ms. [Andrews] had a fine reputation in her community, primarily because of her own effort . . . to further her education." (citations omitted).

258. See Appendix at 113-14, *Drew Mun. Separate Sch. Dist. v. Andrews*, 425 U.S. 559 (No. 74-1318).

259. *Id.* at 102. Andrews testified that she had taken a factory job in a nearby town that paid significantly less than a teacher's aide salary in order to provide for her son. When Rogers lost her job because of Pettey's rule, she "was thereby forced onto the welfare rol[ls] in order to provide for her child." Brief for Respondents at 5, *Drew Mun. Separate Sch. Dist. v. Andrews*, 425 U.S. 559 (No. 74-1318), 1976 WL 194019. Hamer also vigorously disputed the notion that sexual behavior varied by race. Appendix, *supra* note 258, at 103. She had worked for white families all her life, Hamer said, and knew nonmarital sex to be at least as common among them. *Id.* Clark, too, took pains to emphasize the moral neutrality of sexual activity and rejected any connection between nonmarital childbearing and lower moral standards. "[U]nwed parenthood reflects the inability or lack of knowledge . . . as to how to avoid unwed parenthood, if it is undesired," he stated in his deposition. *Id.* at 192.

260. Brief of the Appellee at 10, *Roe v. Norton*, 422 U.S. 391 (1975) (No. 73-6033), 1974 WL 186124.

261. *Doe v. Norton* 356 F. Supp. 202, 206 n.6 (D. Conn. 1973), *supplemented*, 365 F. Supp. 65 (D. Conn. 1973), *vacated sub nom.* *Roe v. Norton*, 422 U.S. 391 (1975).

262. 365 F. Supp. at 72.

263. *Id.* at 79 n.23.

their fathers and depriving them of their best possible source of financial support.<sup>264</sup>

The plaintiffs in *Roe v. Norton*, represented by Frank Cochran of the Connecticut Civil Liberties Union (CCLU), objected strongly to these assaults on mothers' character. The stringent sanctions imposed for noncompliance produced a record replete with poignant testimony from women who feared that disclosing fathers' identities would have devastating consequences. Some mothers recounted how fathers had threatened physical harm to them and their children if their identities were revealed. Others worried that fathers who had taken a voluntary interest in their children would skip town forever if found legally liable for child support. Some women had moved on to new relationships and feared that disclosure would jeopardize their plans for marriage and adoption by a new stepfather.<sup>265</sup>

Cochran also secured the testimony of child welfare experts to counter the state's contention that paternity disclosure always served nonmarital children's best interests. They testified that forcing an unwilling mother to identify her child's father would cause material and psychological harm to the child that would rarely, if ever, be outweighed by the often illusory promise of financial or psychic benefits from establishing paternity.<sup>266</sup> And incarcerating a mother—usually the “primary” “psychological parent”—would be “catastrophic,” according to prominent pediatric psychiatrist Albert Solnit, co-author of the influential *Beyond the Best Interests of the Child*.<sup>267</sup> Moreover, he said, a mother, “the one who has the care and the responsibility and the loving affectionate bond” with a child, should be the one to determine the child's best interests.<sup>268</sup> Mothers, the plaintiffs argued, should be considered champions, not enemies, of their children's well being.<sup>269</sup>

By the mid-1970s, advocates could rely upon a growing complement of constitutional sex equality precedents to support their case against the sex discriminatory effects of illegitimacy penalties.<sup>270</sup> To the extent that illegitimacy penalties could be framed as sex-based classifications, advocates

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264. *Id.* at 79. Judge Blumenfeld was later remembered for his liberal rulings in areas such as abortion and domestic violence. See Alfonso A. Narvaez, *M. Joseph Blumenfeld, Judge, 84*, N.Y. TIMES, Nov. 6, 1988.

265. Appendix at 29–35, *Roe v. Norton*, 422 U.S. 391 (1975) (No. 73-6033) (1975); Sugarman, *supra* note 249, at 389–90.

266. See, e.g., Appendix, *supra* note 265, at 62–71 (deposition of Albert J. Solnit, M.D.).

267. *Id.* Children “cannot escape the devastating impact of the loss of the person who has taken care of them since they were born, helpless as an infant into this world,” Solnit testified. *Id.* at 66.

268. *Id.* at 67.

269. The plaintiffs' lawyers did not, in the end, rely upon the expert testimony at trial. See Sugarman, *supra* note 249, at 391.

270. State Equal Rights Amendments served as additional ammunition in some cases: the Women's Law Project's Ann Freedman relied on Pennsylvania's ERA as well as the federal Equal Protection Clause in *Fernandez*. See generally Plaintiffs' Memorandum of Law in Support of Cross-Motion for Summary Judgment, No. 74-2959, *Fernandez v. Shapp* (E.D. Pa. 1976), collected in Dorsen Papers, Box 34, Folder 11.

used the *Reed/Frontiero* line of cases to invoke heightened scrutiny of the relationship between means and ends. And the disparate impact on women of restricting the employment of parents of nonmarital children called such policies into question under both statutory and constitutional precedents. As Texas federal district court Judge Sarah T. Hughes concluded in her 1971 decision holding a bank's ban on hiring unmarried parents unlawful under Title VII, "it is common knowledge that it is easier to determine if a woman has illegitimate children than men."<sup>271</sup> Arguments of this kind loomed large in *Andrews*, where the employment ban ostensibly excluded all unmarried parents—but Superintendent Pettey himself admitted that his rule did not affect unwed fathers.<sup>272</sup> When it came to pregnancy, women, not men, were, as he put it, "stuck with the result."<sup>273</sup>

Plaintiffs capitalized on recent feminist defeats as well as victories. The Supreme Court's 1974 decision in *Kahn v. Shevin*<sup>274</sup> (upholding a property tax exemption for widows against a sex discrimination challenge) frustrated advocates who saw in *Kahn* remnants of courts' old patronizing attitude toward women. But *Kahn* also highlighted women's economic disadvantage, especially after the death of the men on whom they depended for financial support. "There can be no dispute," Justice Douglas wrote for the *Kahn* majority, "that the financial difficulties confronting the lone woman . . . exceed those facing the man. . . . [T]he job market is inhospitable to the woman seeking any but the lowest paid jobs."<sup>275</sup> In *Kahn*, the "lone woman" in question was a presumably elderly widow whose marital bargain of financial support in exchange for family care had been disrupted through no fault of her own. In intestacy cases such as *Fernandez* and *Trimble*, the plaintiffs argued that women who had never married—and quite possibly had never depended upon their children's fathers for financial support—should benefit from the same principle. Thus, the intestacy plaintiffs implicitly challenged the privileged position widows held by virtue of marriage.

Then, in 1975, *Weinberger v. Wiesenfeld* provided a precedent that seemed tailor-made for challenging sex discriminatory illegitimacy

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271. DARWIN PAYNE, *INDOMITABLE SARAH: THE LIFE OF JUDGE SARAH T. HUGHES* 299 (2004) (quoting Sarah T. Hughes) (citations omitted). For more on early cases challenging bans on unmarried mothers' employment, see MAYERI, *REASONING FROM RACE*, *supra* note 12, ch. 5; Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-)History*, 95 B.U. L. REV. 713 (2015).

272. Appendix at 39, *Drew Mun. Separate Sch. Dist. v. Andrews*, 425 U.S. 559 (1976) (No. 74-1318). When asked how she knew that the only male teacher's aide in the elementary school did not have any illegitimate children, the official who had turned *Andrews* away replied, "He is married." *Id.* at 55.

273. *Id.* at 39.

274. 416 U.S. 351 (1974).

275. *Id.* at 353; *see also* Plaintiffs' Memorandum of Law, *supra* note 228, at 29 ("[H]ere, in an analogous situation, the statute is doing the opposite of what was approved in *Kahn*." (emphasis in original) (citation omitted)).

classifications.<sup>276</sup> The exclusion of widowers and their children from Social Security survivors' benefits available to widows, Justice Brennan wrote, "discriminates among surviving children solely on the basis of the sex of the surviving parent."<sup>277</sup> So, argued plaintiffs' lawyers, did many state intestacy laws.<sup>278</sup> By the mid-1970s, sex equality arguments seemed among the most potent weapons against the only remaining negative precedent, *Labine v. Vincent*. But these arguments were conspicuously absent from the challenges to illegitimacy classifications in the Social Security Act that reached the Court in the mid-1970s. The next Section briefly considers these cases before describing the fate of feminist and other arguments against illegitimacy penalties in the Supreme Court.

B. "*Promoting Equality Between Illegitimate and Legitimate Children*": *The Social Security Cases*

*Frontiero* and *Wiesenfeld* came too late to be helpful to Ramon Jimenez and his attorneys. Ramon Jimenez and Elizabeth Hernandez had lived together in Chicago with their three children.<sup>279</sup> When Hernandez left the family in 1968, Jimenez found himself caring for a five-year-old, a three-year-old, and an infant alone.<sup>280</sup> Disabled since 1963, Jimenez had previously claimed Social Security benefits for his legal wife, Filomena, and their five children, all of whom remained in Jimenez's native Puerto Rico.<sup>281</sup> But when Jimenez applied for benefits on behalf of the three nonmarital children he had lived with and supported from birth, he discovered that only the eldest, Magdalena, was eligible.<sup>282</sup> Puzzled, Jimenez sought counsel from the Chicago Legal Assistance Foundation.<sup>283</sup> Illegitimate children, they discovered, could only receive insurance benefits if they were born prior to the onset of the wage-earner's disability.<sup>284</sup> In contrast, "[a]fter-born" legitimate children—regardless of whether they lived with or were supported by their wage-earning parent—were automatically eligible for benefits.<sup>285</sup> In Illinois, the only way to

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276. 420 U.S. 636 (1975).

277. *Id.* at 651. Quoting *Stanley*, he declared: "[A] father, no less than a mother, has a constitutionally protected right to the 'companionship, care, custody, and management' of 'the children he has sired and raised.'" *Id.* at 652.

278. *Reed v. Reed* proved invaluable to plaintiffs in the intestacy cases for strategic as well as substantive reasons. See Telephone Interview with James Weill and Jane Greengold Stevens (Aug. 6, 2013).

279. *Jimenez v. Weinberger*, 417 U.S. 628, 630 (1974).

280. *Id.*

281. Interview with Jane Greengold Stevens, in New York, N.Y. (June 19, 2013).

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*; *Jimenez v. Weinberger*, 417 U.S. 628, 634–36 (1974).

legitimate a child was for the parents to marry each other, not a practical option for Ramon Jimenez.<sup>286</sup>

To Jimenez's attorney Jane Greengold Stevens, the statute seemed "blatantly unfair" to nonmarital children, who were powerless to change their parents' marital status.<sup>287</sup> Though their claim was an "everyday" matter, far from a carefully selected test case, Stevens later realized that Ramon Jimenez and his children were "a poster family for promoting equality between legitimate and illegitimate children," since Ramon had lived with the children their whole lives and indeed had become their sole source of support and care.<sup>288</sup> The government's concern about collusive or fraudulent claims of paternity might have been warranted in cases involving an absent or delinquent father, but Jimenez was neither.

In hindsight, *Jimenez* was a possible but hardly an obvious vehicle for a sex discrimination claim. The overall statutory scheme, by limiting the circumstances under which illegitimate children were eligible for benefits, left many women in the lurch—arguably a disparate impact.<sup>289</sup> But in *Jimenez*, the mother had left the family. And unlike the child support cases, where paternal non-support obviously burdened mothers and absolved fathers, the discrimination challenged in *Jimenez* affected both men and women. In any event, Stevens, though an ardent feminist, simply did not see *Jimenez* as a sex discrimination case. She later recalled approaching the problem of illegitimacy-based classifications as an anti-poverty lawyer primarily concerned with the welfare of children.<sup>290</sup>

*Mathews v. Lucas*, like *Jimenez*, involved an illegitimacy-based classification in the federal Social Security Act, denying survivors' benefits to certain illegitimate children who could not prove they were dependent upon their father at the time of his death. Unlike *Jimenez*, though, the facts in *Mathews v. Lucas* arguably lent themselves to a sex discrimination claim.<sup>291</sup> Belmira Lucas had lived in Providence with Robert Cuffee for approximately twenty years, and borne him two children, Darin and Ruby.<sup>292</sup> Lucas despaired of divorcing her legal spouse, Raymond Lucas, because of his severe

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286. Interview with Jane Greengold Stevens, *supra* note 281.

287. Telephone Interview with John Henry Schlegel (March 22, 2013); Interview with Jane Greengold Stevens, *supra* note 281.

288. Interview with Jane Greengold Stevens, *supra* note 281.

289. As Herbert Semmel explained in 1969, "At present, when illegitimate children do not qualify for Social Security benefits it is usually because their claim is based on the eligibility and earnings of their father. . . . [M]ost illegitimates can qualify for children's benefits based on their mother's account. However, a mother may have insufficient quarters of covered earnings to qualify either herself or the child for benefits or she may have a lower earning base than the father . . . . In many cases, the father dies, becomes disabled or retires before the mother's status entitles the child to benefits." Semmel, *supra* note 88, at 294.

290. Interview with Jane Greengold Stevens, *supra* note 281.

291. *Mathews v. Lucas*, 427 U.S. 495 (1976).

292. Appendix at 10, *Mathews v. Lucas*, 427 U.S. 495 (No. 75-88).

disabilities.<sup>293</sup> Lucas therefore had trouble proving that her relationship with Cuffee was a valid common law marriage under Rhode Island law,<sup>294</sup> though she testified that Cuffee gave her a ring symbolizing their marriage in 1950, four years after they began living together.<sup>295</sup> Robert supported Darin and Ruby, and they called him Daddy.<sup>296</sup> But when Raymond died in 1965, Belmira did not marry Robert—perhaps out of embarrassment at having lived so long out of wedlock, as she told the court,<sup>297</sup> or perhaps because of Robert’s drinking and violent behavior, which led their relationship to dissolve shortly thereafter.<sup>298</sup>

Robert left to live with his mother in 1966; Belmira testified that he saw the children two or three times per week and gave Ruby money from his mother and aunt while he was unable to work.<sup>299</sup> In the meantime, Belmira was providing most of her family’s support, working for the local electric company. When Robert died in 1968, Darin and Ruby were not eligible for survivors’ benefits because they could not prove that they were dependent upon Robert at the time of his death. This result left Belmira Lucas high and dry—not *in spite of* the fact that she had been the primary breadwinner during the final years of Robert’s life, but *because* their children had depended upon her and not him.<sup>300</sup> Even so, as in *Jimenez* there was no sex-based distinction apparent on the face of the statute—only arguably a disparate impact on women—and so it is perhaps unsurprising that the Lucas’ attorneys did not argue sex discrimination. But in their omission of sex equality arguments, the Social Security cases were the exception in 1970s illegitimacy litigation rather than the rule.<sup>301</sup>

### C. “*The Risks All Seem to Be on Her Side*”: Failure in the Supreme Court

None of the feminist-inflected arguments explored in Section II.A penetrated Supreme Court opinions. Court victories for illegitimacy plaintiffs relied on *Weber*’s child-focused rationale. Several cases with explicitly feminist framings settled or were rendered effectively moot by statutory and

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293. *See id.* at 51.

294. *Id.* at 32 (describing relationship as “common law union” and explaining that the couple did not marry because “she was not free to marry”); *see also id.* at 66–70 (administrative law judge’s ruling against recognizing common law marriage).

295. *Id.* at 48.

296. *Id.* at 27.

297. *Id.* at 61.

298. *See id.* at 49.

299. *Id.* at 11–14, 26–27.

300. Another challenge to the same provision featured a sixteen-year-old father and a fourteen-year-old mother; the young parents had lived with their parents, and the father had never supported the child because he left to serve in Vietnam, where he was killed at nineteen. *See Norton v. Mathews*, 427 U.S. 524 (1976).

301. And by the time she became involved in her second and third illegitimacy cases (*Trimble* and *Lalli*, both intestacy cases), sex equality arguments were a regular part of Jane Greengold Stevens’s repertoire.

regulatory developments. And the 1970s ended with a series of disheartening defeats for illegitimacy plaintiffs.

1. *Weber Redux, 1973–1977*

Despite the prominent place of sex equality claims in the Texas child support cases, child-focused arguments again prevailed. Justice Byron White wrote a short per curiam opinion in *Gomez v. Perez* (1973), holding that to “den[y] such an essential right” as child support “to a child simply because its natural father has not married its mother” was “illogical and unjust.”<sup>302</sup>

In *Trimble v. Gordon* (1977), the Justices’ internal debates focused primarily on the wisdom of overturning *Labine*.<sup>303</sup> Clerk Gene Comey advised Powell to “hit *Labine* where it really hurts: the statement that the social difference between a wife and a concubine is analogous to the social difference between a legitimate and an illegitimate child. It may be,” wrote Comey, “that the state has the power to say that the wife takes property and the concubine does not. It cannot be said that such a rule is illogical or unjust . . . [it] has some relationship to individual responsibility. But with respect to illegitimate children, the opposite is true.”<sup>304</sup> Powell’s majority opinion borrowed heavily from *Weber*, and reflected Comey’s suggested reasoning: “The parents have the ability to conform their conduct to societal norms, but their illegitimate children can affect neither their parents’ conduct nor their own status.”<sup>305</sup> The five-to-four decision confirmed the child-focused account of illegitimacy penalties’ harm and sidestepped the sex discrimination question altogether.<sup>306</sup>

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302. *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (per curiam) (quotations excluded); see also *N.J. Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973) (per curiam) (striking down a New Jersey law awarding benefits to families according to parents’ marital status).

303. Both Blackmun’s and Powell’s conference notes suggest that *Trimble*’s relationship to *Labine* was the focus of conference discussion. Blackmun correctly predicted that the Court would be “sadly split” in *Trimble*. He was wrong, however, about how Powell would vote. Contrary to Blackmun’s forecast that Powell would join Burger, Stewart, and Rehnquist to affirm, Powell made clear at conference that he strongly disliked *Labine* and would reverse the Illinois court. Memorandum from Justice Blackmun, No. 75-5952, *Trimble v. Gordon* (Dec. 3, 1976), collected in Blackmun Papers, Box 249, Folder 5; see also LFP Conference Notes, *Fiallo v. Levi*, No. 75-6297, Dec. 10, 1976, LFP Papers, at 39.

304. Bobtail Bench Memorandum from Gene Comey to Justice Powell, No. 75-5952, *Trimble v. Gordon* (Dec. 6, 1976), at 3, collected in Powell Papers.

305. *Trimble v. Gordon*, 430 U.S. 762, 770 (1977). Four Justices dissented: Burger, Blackmun, and Stewart agreed with the Illinois Supreme Court that *Labine*—which all of them had joined—should control. Stewart and Blackmun privately expressed misgivings about *Labine*. But Blackmun disliked Powell’s majority opinion, writing in the margin of one draft: “W[oul]d not join this opinion even if I agreed with the result.” Third Draft of Opinion for the Court in *Trimble v. Gordon* (Jan 24, 1977), at 1, collected in Blackmun Papers, Box 249, Folder 5.

306. *Trimble*, 430 U.S. 762 at 766 (“As we conclude that the statutory discrimination against illegitimate children is unconstitutional, we do not reach the sex discrimination argument.”). The race discrimination question, Powell noted in a footnote, had been raised by the appellants below but was not before the Court. *Id.* at 765 n.10.

The most explicitly feminist illegitimacy cases never produced Supreme Court opinions. *Fernandez v. Shapp*, the challenge to Pennsylvania's inheritance laws, settled shortly after *Trimble* was decided with an unpublished consent decree.<sup>307</sup> The Justices used statutory and regulatory developments to avoid issuing opinions in *Roe v. Norton*, the mandatory paternity disclosure case, and *Andrews*, the unwed mothers' employment case.<sup>308</sup>

Then, in *Mathews v. Lucas* (1976), the Court interrupted a string of victories for plaintiffs with a ruling that upheld an illegitimacy classification in the Social Security Act.<sup>309</sup> Ironically, Justice Blackmun's opinion for the majority in *Lucas* gave feminists a backhanded boost at the expense of the campaign against illegitimacy penalties. Justifying the decision not to apply strict scrutiny, Blackmun wrote that "discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes."<sup>310</sup> The only references to sex discrimination in *Lucas* concerned the analogy—or lack thereof—between sex- and illegitimacy-based classifications.

## 2. Making "the Most of a Bad Case": *Fiallo v. Bell* and *Lalli v. Lalli*, 1977–1978

In *Fiallo v. Bell*, another illegitimacy case decided on the same day as *Trimble* in 1977, the sex discrimination issue was difficult to dodge, but the case was also difficult to win.<sup>311</sup> Ramon Martin Fiallo was born in New York in 1971 to Ramon Fiallo-Sone and Celia Francisca Michel Rodriguez, natives of Guadeloupe who never married each other. Court papers described Ramon's

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307. See *Adens ex rel. Green v. Schweiker*, 773 F.2d 545, 547–48 (3d Cir. 1985) (noting that Pennsylvania's discriminatory intestacy laws were "declared unconstitutional in a consent decree filed on May 30, 1978, *Fernandez v. Shapp*, No. 74-2959 (E.D. Pa. 1987)"). Lois Fernandez and her allies also successfully lobbied the Pennsylvania legislature to reform other state laws that discriminated against nonmarital children and their parents. See Stephen Franklin, *Mother Wins Fight to End Stigma of Illegitimacy*, BULLETIN (Philadelphia), Dec. 10, 1978, at 3; Pamela Smith, *Lois Fernandez: Because of Her, There are No More 'Illegitimate Children' in Pennsylvania*, PHILA. TRIB., Jan. 2, 1979, at 1.

308. *Roe v. Norton* was remanded in light of a statutory change. Sugarman concluded in 1985 that Connecticut policy effectively remained the same as it was before the litigation. See Sugarman, *supra* note 249. The Court dismissed the writ of certiorari in *Andrews* as improvidently granted because of a regulatory change prohibiting marital status discrimination against public schoolteachers. For more, see MAYERI, REASONING FROM RACE, *supra* note 12, at 162–65 (describing the Justices' consideration of *Andrews*). In another contemporaneous case, the Third Circuit upheld a public library's discharge of a Pennsylvania custodian and librarian for openly living together outside of marriage. *Hollenbaugh v. Carnegie Free Library*, 545 F.2d 382 (3d Cir. 1976). The Supreme Court denied the employees' petition for certiorari over dissents from Justices Brennan and Marshall. See *Hollenbaugh v. Carnegie Free Pub. Library*, 439 U.S. 1052, 1055 (1978) (Brennan, J., dissenting from denial of cert.) ("Petitioners' rights to pursue an open rather than a clandestine personal relationship and to rear their child together in this environment closely resemble the other aspects of personal privacy to which we have extended constitutional protection.").

309. 427 U.S. 495 (1976).

310. *Id.* at 506.

311. *Fiallo v. Bell*, 430 U.S. 787 (1977).

mother as the “bread-winner,” and his father as Ramon’s “primary caretaker and constant companion.”<sup>312</sup> Ramon’s U.S. citizenship would have eased his father’s path to legal residency had his parents married. Moreover, regulations exempted mothers of illegitimate citizen children but not fathers from restrictive immigration quotas.<sup>313</sup> Conversely, plaintiff Serge Warner, the West Indian-born son of U.S. citizen Cleophus Warner, could not bypass the quota system to become a permanent resident, as he could have done if his mother had been a citizen—or if his parents had been married.<sup>314</sup> Plaintiff teenagers Trevor and Earl Wilson were permanent U.S. residents whose Jamaican father could not obtain a visa to move to the United States after the death of their mother in 1974, though a mother (or a “legitimate” father) could have done so.<sup>315</sup>

Congress’s plenary power over immigration made challenging these sex- and illegitimacy-based classifications an uphill battle.<sup>316</sup> Indeed, classifications considered far more offensive to the Constitution flourished in American immigration law, virtually untouched by the civil rights revolution.<sup>317</sup> But the plaintiffs in *Fiallo*, their Legal Aid Society lawyers emphasized, included not merely “aliens” but U.S. citizens and permanent residents.<sup>318</sup> They succeeded in persuading one of three judges, former civil rights lawyer Jack B. Weinstein, whose dissent proclaimed,

Legal discrimination between men and women or legitimates and illegitimates with no rational basis is no longer tolerated. Where, as here, statutory invidious discrimination punishes American citizens by denying them familial association, one of the most precious attributes of humanity, the courts should say what is plain: the statute is unconstitutional.<sup>319</sup>

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312. Appendix at 6, *Fiallo v. Bell*, 430 U.S. 787 (No. 75-6297) (Amended Complaint – Class Action).

313. See *Fiallo*, 430 U.S. at 789; see also Brief for Appellants at 9–11, *Fiallo v. Bell*, 430 U.S. 787 (No. 75-6297).

314. See *Fiallo*, 430 U.S. at 803–04; see also Brief for Appellants, *supra* note 313, at 7–9.

315. See *Fiallo*, 430 U.S. at 790 n.3, 792 n.4; see also Brief for Appellants, *supra* note 313, at 11–13.

316. On *Fiallo* and how the plenary power doctrine operated in the executive and legislative branches, see Kristin A. Collins, Plenary Power, Coordinate Branches, and Gender-Based Nationality Laws, in *THE PUBLIC LAW OF GENDER: FROM THE LOCAL TO THE GLOBAL* (Kim Rubenstein & Katharine G. Young eds.) (forthcoming 2016).

317. As two members of the three-judge district court empaneled to hear *Fiallo* wrote, “alien[s]” could “be denied entrance on grounds which would be constitutionally suspect or impermissible in the context of domestic policy, namely, race, physical condition, political beliefs, sexual proclivities, age, and national origin.” *Fiallo v. Levi*, 406 F. Supp. 162, 165 (E.D.N.Y. 1975), *aff’d sub nom.* *Fiallo v. Bell*, 430 U.S. 787 (1977) (internal citations omitted). For a fascinating historical perspective, see Collins, *supra* note 27.

318. See, e.g., Brief for Appellants at 6–7, *Fiallo v. Bell*, 406 F. Supp. 162 (No. 75-6297), 1976 WL 181344.

319. *Fiallo*, 406 F. Supp. at 169 (Weinstein, J., dissenting).

The *Fiallo* plaintiffs' sex discrimination claim focused almost exclusively on discrimination against unwed fathers.<sup>320</sup> They presented empirical studies demonstrating that unmarried fathers often had strong bonds with their children. They argued that the challenged regulations unconstitutionally "stereotyped" unwed fathers as uninvolved and uncaring when often—as in the plaintiffs' cases—the opposite was true.<sup>321</sup> In fact, the plaintiffs emphasized, out-of-wedlock pregnancies most often occurred as a result of "exclusive long-term relationships between the mothers and the fathers."<sup>322</sup>

The regulations' impact on mothers did not go unmentioned: in a footnote, the plaintiffs' brief clarified that although the "primary sex discrimination imposed by the challenged provisions is against illegitimate children and their fathers," the law "discriminate[d] against women as well."<sup>323</sup> A citizen or permanent resident father could rest assured that if he could not care for his illegitimate citizen or permanent resident child, "that child can be united in this country with the other parent, the mother."<sup>324</sup> But a U.S. citizen or permanent resident mother "has no similar assurance . . . since the father is effectively barred from entering this country."<sup>325</sup> As a result, Trevor and Earl Wilson's mother, Leony Moses, "could not be assured that upon her death her children would be supported and cared for in this country" by their surviving parent.<sup>326</sup>

The footnote gave a tantalizing hint of a full-throated argument that the citizenship laws discriminated against mothers as well as fathers. Like Paula Wiesenfeld, whose Social Security benefits were worth less to her family than a husband's would have been, Leony Moses's U.S. citizenship did not guarantee her and her children the care of their "sole surviving parent."<sup>327</sup> Indeed, it is not difficult to imagine Ruth Bader Ginsburg making such an argument, had she argued *Fiallo*. Ginsburg very much wanted to file an amicus brief, but despite her repeated entreaties and Norman Dorsen's support, Legal Director Mel Wulf—author of the ACLU's first constitutional analysis of illegitimacy classifications sixteen years earlier—rejected the idea, for reasons that are not entirely clear.<sup>328</sup> The *Fiallo* plaintiffs' sex discrimination argument remained limited to its detrimental effects on fathers.<sup>329</sup>

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320. See Brief for Appellants, *supra* note 318, at 23–31.

321. See *id.* at 23–26.

322. *Id.* at 26.

323. *Id.* at 24, n.17.

324. *Id.*

325. *Id.*

326. *Id.*

327. The brief cited *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

328. See ACLU Memorandum to HEW, *supra* note 34. Janet Calvo was receptive to the idea as well. See Letters from Ruth Bader Ginsburg to Norman Dorsen & Mel Wulf (Dec. 4, 1975); Mel Wulf to Ruth Bader Ginsburg (Dec. 9, 1975); Janet M. Calvo to Ruth Bader Ginsburg (Dec. 12, 1975) ("We plan to appeal . . . and would welcome your participation as Amicus Curiae."); Ruth Bader Ginsburg to Mel Wulf et al. (Dec. 17, 1975) ("Agree with Mel that this litigation is in good hands. However,

Many did see the distinctions between fathers and mothers in *Fiallo* as constitutionally problematic. Powell clerk J. Philip Jordan initially called them “totally arbitrary sex discrimination” and deemed the government’s concern that parents might bring unlimited numbers of illegitimate children to the United States “a bunch of *crap!*”<sup>330</sup> But Congress’s plenary immigration power proved a formidable obstacle, leading Powell to observe that the Legal Aid Society’s brief made “the most of a bad case.”<sup>331</sup> Blackmun agreed, and even Brennan and Marshall at first reluctantly joined the majority, before deciding to dissent.<sup>332</sup> In the end, Powell wrote the majority opinion upholding the challenged provision.<sup>333</sup> He apparently rejected clerk Gene Comey’s advice that he not refer to “the perceived absence in most cases of close family ties” between fathers and their nonmarital children as a rationale for the law.<sup>334</sup>

Marshall’s dissenting opinion in *Fiallo* marked the first time that a Court opinion discussed a claim of sex discrimination in a case involving nonmarital families and illegitimacy-based classifications.<sup>335</sup> Citing the sex equality cases,

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would very much like to do an amicus for the ACLU. . . . [I]f the Court is willing to entertain any breach, *Fiallo* seems the most sympathique case one could bring up.”); Norman Dorsen to Mel Wulf (Dec. 23, 1973) (“I vote to allow an amicus in *Fiallo*, on the condition that I get a look at it before it is put into final form . . .”), collected in ACLU Records, Box 1380, Folder: *Fiallo v. Levi*.

329. The child-focused arguments so prominent in the illegitimacy cases were more muted in *Fiallo*, handicapping the plaintiffs. One Justice told Legal Aid Society attorney Janet M. Calvo at oral argument: “[Y]ou really are not entitled to rely on the cases that rely on the unfairness of visiting the sins of the parents on their children.” Transcript of Oral Argument, *Fiallo v. Bell*, 430 U.S. 787 (1977) (No. 75-6297). Calvo pointed out that *Glonn* had involved discrimination against a parent, but the Justice did not seem convinced, insisting, “It’s on account of [the father’s] own conduct whereas in the case we just heard before”—referring to *Trimble*, argued the same day—“the child was being discriminated against on the account of his natural parents [sic] conduct.” *Id.*

330. Preliminary Memorandum for Justice Powell, No. 75-6297, *Fiallo v. Levi* (May 10, 1976), at 1, 3 (handwritten notations of J. Philip Jordan), collected in Powell Papers. Later, however, Jordan moderated his position. “[P]erhaps Congress’ power over immigration, plus need to avoid fraud, is enough to justify it,” he wrote. *See id.* at 1.

331. Memorandum for Justice Powell, No. 75-6297, *Fiallo v. Levi* (Nov. 17, 1976), at 4, collected in Powell Papers.

332. *See* Powell’s and Blackmun’s conference notes on *Fiallo*. LFP Conference Notes, No. 75-6297, *Fiallo v. Levi* (Dec. 10, 1976), at 18, collected in LFP Papers. Chief Justice Burger, in fact, initially assigned the majority opinion to Marshall. Marshall declined. Letter from Justice Marshall to Chief Justice Burger, Assignment of Opinion in *Fiallo v. Levi* (Dec. 13, 1976), collected in Powell Papers.

333. *Fiallo v. Bell*, 430 U.S. 787, 788 (1977).

334. *See id.* at 799. Comey recommended that Powell avoid endorsing the Government’s contention that “natural fathers and illegitimate children” were less likely to have a “strong interest in intimacy” than other parent-child pairings. Bobtail Bench Memorandum from Gene Comey, No. 75-6297, *Fiallo v. Levi* (Dec. 6, 1976), at 4, collected in Powell Papers. Comey saw “no reason to rely on this somewhat ‘distasteful’ argument,” which contradicted the Court’s recent move toward “a position where legitimate and illegitimate families are generally considered to have a strong degree of family intimacy and unity.” *Id.*

335. In *Stanley v. Illinois*, 405 U.S. 645 (1972), the plaintiff raised the issue of sex discrimination against fathers, but White’s opinion relied instead on concepts of due process. In *Jimenez v. Weinberger*, 417 U.S. 628 (1974), and especially *Mathews v. Lucas*, 427 U.S. 495 (1976), the plaintiffs could have, but did not, highlight how the challenged classifications disadvantaged

the illegitimacy cases, and the “fundamental ‘freedom of personal choice in matters of marriage and family life,’”<sup>336</sup> Marshall condemned the challenged provisions. He credited the plaintiffs’ claim that the laws constituted “invidious discrimination” against unwed fathers and illegitimate children and infringed upon the parent-child relationship in ways foreclosed by decisions such as *Stanley* and *Wiesenfeld*.<sup>337</sup> But Marshall’s dissent, too, framed the sex equality issue as a matter of discrimination against fathers, not mothers.

The next illegitimacy case to reach the Court, *Lalli v. Lalli*, did not present the most auspicious facts for raising sex (or race) discrimination claims.<sup>338</sup> Mario Lalli ran a publishing company that specialized in “dream books” for “bettors who play the numbers.”<sup>339</sup> In January 1973, Lalli’s body was found riddled with bullets and wrapped in an awning in the Pelham Bay section of the Bronx. Several days later, thirty-year-old William Farrell was arrested for murder, a business dispute the apparent motive.<sup>340</sup>

When he died, Mario was legally married to Rosamond Lalli but had lived with Eileen Lalli, the mother of at least two of his children, for many years, until Eileen’s death in 1968. When Mario and Eileen’s son Robert Lalli later requested an accounting of Mario’s estate in the hope of claiming an inheritance, the Surrogate’s Court turned him down.<sup>341</sup> New York law required a court order of filiation during the father’s lifetime in order for a nonmarital child to participate in probate proceedings.<sup>342</sup> While there was no question that Mario had acknowledged, lived with, and supported Robert and his late sister Maureen, the only documentary evidence Robert could produce were baptismal certificates and a document in which Mario gave his consent to his “son” Robert’s underage marriage.<sup>343</sup>

In most of the earlier illegitimacy cases, advocates could frame the plaintiffs as devoted but impoverished mothers, fathers, and innocent children challenging laws motivated at least in part by disdain for illicit sex and

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women and men on the basis of sex. In *Gomez v. Perez*, 409 U.S. 535 (1973), *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), *Drew Municipal Separate School District v. Andrews*, 425 U.S. 559 (1976), and *Trimble v. Gordon*, 430 U.S. 762 (1977), plaintiffs and amici argued that the challenged illegitimacy-based classifications harmed women by burdening them with sole responsibility for the support of nonmarital children, but the Court declined to discuss sex discrimination on any terms.

336. *Fiallo*, 430 U.S. at 810 (Marshall, J., dissenting).

337. *Id.* at 813.

338. 439 U.S. 259 (1978).

339. *Son is Arrested in Slaying of ‘Dream Books’ Publisher*, N.Y. TIMES, Jan. 13, 1973, at 14.

340. *Id.* The *Times* reported that William was Mario’s “illegitimate” son, but Blackmun’s oral argument notes indicate that William was the son of Mario’s deceased nonmarital partner, Eileen, by another man.

341. Appendix at A-31 to A-32, *Lalli v. Lalli*, 439 U.S. 259 (No. 77-1115) (Decree of Surrogate Evans V. Brewster); see also *Lalli*, 439 U.S. at 261–63.

342. See *Lalli*, 439 U.S. at 261–62.

343. See Appendix, *supra* note 341, at A-14 to A-17. Robert Lalli also introduced several affidavits supporting his claim that he and his sister had lived with, been acknowledged by, and received support from Mario Lalli. See *id.* at A-17 to A-28.

illegitimacy. With a deceased mother, an adult plaintiff, a relatively well-off and apparently dysfunctional family involved in an unsavory business, *Lalli* lacked a similarly sympathetic factual situation. In any event, the four Justices who dissented in *Trimble* were unlikely to want to strike down the New York law.<sup>344</sup> Blackmun wrote wryly: “In this modern day, illegitimacy is of no significance, apparently, and the popular thing would be to reverse.”<sup>345</sup> Blackmun wanted to uphold the law, though he “would not do so alone if all the [other *Trimble* dissenters] give way.”<sup>346</sup>

To Blackmun’s surprise, however, Powell voted to uphold the New York law, believing that *Trimble* was distinguishable.<sup>347</sup> The remaining members of the *Trimble* majority adhered to their earlier position.<sup>348</sup> As in *Trimble*, Powell’s was the deciding vote in *Lalli* and Burger assigned him the opinion. Powell framed the statute as concerned not with marital status or legitimacy, but merely with the establishment of paternity to ensure the “just and orderly disposition of property at death,” which was an “interest of considerable magnitude.”<sup>349</sup> Unlike the statute in *Trimble*, New York’s law did not absolutely bar illegitimate children from inheritance.<sup>350</sup>

Even if *Lalli* had come out the other way, the case seemed a flawed vehicle for a sex discrimination ruling. As several clerks observed, Robert Lalli’s mother was no longer alive, much less a party to the case.<sup>351</sup> The clerks also doubted whether any sex discrimination claim had been raised below, though Jane Greengold Stevens had coauthored an amicus brief making sex equality arguments to the high Court.<sup>352</sup> Clerk Eric Anderson recommended to Powell “that the Court not get into the sex discrimination issues,” and Powell

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344. Memorandum, Justice Blackmun, No. 77-1115, *Lalli v. Lalli*, at 9, collected in Blackmun Papers, Box 283, Folder 9.

345. *Id.* at 10.

346. *Id.*

347. Justice Stevens disagreed, writing to Powell of “not wanting to retreat from the Court’s fine opinion in *Trimble*.” Letter from Justice Stevens to Justice Powell, No. 77-1115, *Lalli v. Lalli* (Nov. 14, 1978), collected in Powell papers.

348. See *Lalli v. Lalli*, 439 U.S. 259, 275–77 (1978) (Stewart, J. concurring).

349. *Id.* at 268 (Powell, J.). Burger asked Powell to call it “an interest of the highest order.” Letter from Chief Justice Burger to Justice Powell, No. 77-1115, *Lalli v. Lalli* (Nov. 30, 1978), collected in Powell Papers.

350. Blackmun’s brief concurring opinion called *Trimble* a “derelict,” a characterization that Stewart’s concurrence disputed. *Id.* at 277 (Blackmun, J., concurring). The dissenters worried that requiring an official paternity determination penalized children of fathers who voluntarily supported them, thus obviating the need for a formal order of filiation. *Id.* at 278 (Brennan, J., dissenting).

351. Bench Memorandum from Gary Sasso to Justice White, collected in White Papers, Box 436, Folder 5; Preliminary Memorandum from Michael Sundermeyer, No. 77-1115-ASX, *Lalli v. Lalli* (Mar. 6, 1978), at 5, collected in Blackmun Papers, Box 283, Folder 9 (noting that “A DWSFQ w[oul]d be consistent with your votes in *Trimble* and *Labine*”); Bench Memorandum from Eric Anderson to Justice Powell, No. 77-1115, *Lalli v. Lalli* (Sept. 29, 1978), collected in Powell Papers. The party opposing Robert Lalli’s inheritance was Mario’s legal widow, Rosamond Lalli. *Lalli*, 439 U.S. at 261.

352. See Brief Amicus Curiae of the Legal Aid Society of New York City and Legal Services of the Elderly Poor in Support of Appellant at 22–28, *Lalli v. Lalli*, 439 U.S. 259 (No. 77-1115).

agreed.<sup>353</sup> As the last in the line of intestacy cases that came before the Court in the 1970s, *Lalli* seemed at best an emblem of the Justices' vacillation, at worst, a retreat from the principles that had intermittently animated the illegitimacy cases.

3. “Neither Illogical Nor Unjust”: *Parham v. Hughes*, 1979

“Sex discrimination issues” could not be avoided in *Parham v. Hughes*.<sup>354</sup> When a tragic automobile accident killed six-year-old Lemuel Parham and his mother, Cassandra Moreen, his father Curtis Parham did as Minnie Brade Glona had done a decade earlier: sued for his son's wrongful death.<sup>355</sup> Parham did not live with Lemuel and his mother, but he was deeply involved in the boy's life, providing financial support, visiting him daily, and taking care of Lemuel at home on many weekends.<sup>356</sup> Under Georgia law, a mother could sue for the wrongful death of a nonmarital child regardless of his legitimacy. Fathers, in contrast, were required to have legitimated their children in order to file such an action.<sup>357</sup> Parham had signed his son's birth certificate but had not completed the required legitimation paperwork.<sup>358</sup> The Georgia Supreme Court upheld the statutory exclusion against his due process and equal protection challenge, distinguishing *Glona*.<sup>359</sup>

By the time *Parham* reached the Supreme Court, some observers despaired of discerning a consistent pattern in the Justices' treatment of illegitimacy-based classifications. Clerk Albert Lauber wrote to Blackmun: “Quite frankly, I must confess that trying to reconcile all these cases is the most difficult task I have faced in my tenure as a law clerk.”<sup>360</sup> Blackmun's own votes were a mixed bag; Powell, too, appeared to vacillate. Powell had written florid opinions striking down illegitimacy penalties as inimical to the principle that “hapless” children should not suffer for their parents' “irresponsible liaisons”;<sup>361</sup> he had also authored and joined relatively bloodless decisions upholding illegitimacy classifications as rationally related to legitimate

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353. Bench Memorandum from Eric Anderson to Justice Powell, No. 77-1115, *Lalli v. Lalli* (Sept. 29, 1978), collected in Powell Papers. Next to this sentence in Anderson's bench memo, Powell wrote, “Yes.” *Id.* at 8.

354. 441 U.S. 347 (1979).

355. *Parham v. Hughes*, No. 5643-C (Ga. Super. Ct. Cnty. Richmond Sep. 13, 1977), reprinted in Appendix at 3, *Parham v. Hughes*, 441 U.S. 347 (No. 78-3); see also *Parham*, 441 U.S. at 349.

356. *Parham v. Hughes*, No. 5643-C (Ga. Super. Ct. Cnty. Richmond Sep. 13, 1977), reprinted in Appendix at 3, *Parham v. Hughes*, 441 U.S. 347 (No. 78-3).

357. *Parham*, 441 U.S. at 348–49.

358. *Id.* at 349.

359. *Hughes v. Parham*, 243 S.E.2d 867, 871 (Ga. 1978), *aff'd*, 441 U.S. 347 (1979).

360. Preliminary Memorandum from Albert G. Lauber to Justice Blackmun, *Parham v. Hughes*, No. 78-3 (Mar. 1, 1979), collected in Blackmun Papers, Box 291, Folder 2.

361. See, e.g., *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175–76 (1972).

government interests in preventing fraudulent and spurious claims of paternity.<sup>362</sup>

Framing *Parham* as primarily a sex discrimination case provided one way to avoid this morass. At conference, Brennan and Marshall, reliable votes for illegitimacy plaintiffs, took this approach, and White agreed. Blackmun remained ambivalent; he drafted and considered filing a separate dissent in *Parham* attempting to make sense of his (and the Court's) seemingly contradictory positions in illegitimacy cases.<sup>363</sup> After writing several agonized memos on the subject, clerk Lauber concluded that the best way to reconcile Blackmun's votes in the illegitimacy cases was to say that he "ha[d] much more difficulty with *gender-based* classifications than with *illegitimacy-based* classifications."<sup>364</sup>

In the end, though, Stewart's plurality opinion sidestepped both the illegitimacy and the sex discrimination questions presented by *Parham*. The challenged law, he declared, simply did not reflect "invidious discrimination" and therefore warranted no special scrutiny.<sup>365</sup> *Parham* epitomized the underside of the child-centered account of illegitimacy penalties' harm: quoting the familiar "hapless and innocent children" passage from *Weber*, Stewart wrote that the "basic rationale" of the illegitimacy decisions was that it was "unjust and ineffective for society to express its condemnation of procreation outside the marital relationship by punishing the *illegitimate child* who is in no way responsible for his situation and is unable to change it."<sup>366</sup> In contrast, he declared, it was "neither illogical nor unjust for society to express its 'condemnation of irresponsible liaisons beyond the bonds of marriage' by not conferring upon a biological father the statutory right to sue for the wrongful death of his illegitimate child."<sup>367</sup> When a statute affected the rights of fathers

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362. Sometimes on the same day, as in *Trimble* and *Fiallo*, and in *Parham* and *Caban v. Mohammed*. Compare *Trimble v. Gordon*, 430 U.S. 762 (1977) (Powell, J.) (striking down Illinois intestacy law excluding illegitimate children from paternal inheritance on April 26, 1977), with *Fiallo v. Bell*, 430 U.S. 787 (1977) (Powell, J.) (upholding immigration laws classifying based on sex and illegitimacy on April 26, 1977); compare *Caban v. Mohammed*, 441 U.S. 380 (1979) (Powell, J.) (invalidating stepfather adoption where biological father had lived with and raised "illegitimate" children on April 24, 1979), with *Parham v. Hughes*, 441 U.S. 347 (1979) (Stewart, J.) (upholding Georgia wrongful death law precluding nonmarital fathers from recovering in the absence of "legitimation" on April 24, 1979). Some of the Justices were relatively consistent in their votes, with Douglas, Brennan, and Marshall always supporting the plaintiffs, and Rehnquist a reliable vote for the defendants. Burger and Stewart had voted for the plaintiffs in some of the early cases, but beginning in 1976, they always sided with defendants.

363. Various versions of his draft dissent, never filed, suggested that Blackmun had distinguished between three categories of cases—inheritance, non-inheritance, and federal welfare statutes. Draft dissent, *Parham v. Hughes* (No. 78-3), collected in Blackmun Papers, Box 291, Folder 2.

364. Preliminary Memorandum from Albert G. Lauber to Justice Blackmun, *Parham v. Hughes*, No. 78-3 (Mar. 1, 1979), collected in Blackmun Papers, Box 291, Folder 2.

365. *Parham v. Hughes*, 441 U.S. 347, 355 (1979).

366. *Id.* at 352 (emphasis added).

367. *Id.* at 353.

only, “[t]he justifications for judicial sensitivity to the constitutionality of differing legislative treatment of legitimate and illegitimate children are simply absent.”<sup>368</sup> As for the alleged sex discrimination, Stewart interpreted the Court’s earlier cases as applying only to circumstances in which men and women were “similarly situated.”<sup>369</sup> Here, he insisted, they were not: under Georgia law, only a father could unilaterally legitimate a child. Moreover, whereas unmarried mothers were easily identifiable, fathers’ identity “will frequently be unknown.”<sup>370</sup>

Powell provided a fifth vote to uphold the Georgia statute, though he concurred separately.<sup>371</sup> Justice White, whose opinion in *Stanley v. Illinois* several years earlier had ushered in a new era of limited parental rights for nonmarital fathers, wrote a strongly worded dissent condemning the plurality’s failure to see the constitutional harm suffered by Curtis Parham. “What we said in *Glona* about unmarried mothers,” White insisted, “applies equally to unmarried fathers.”<sup>372</sup> Of course, the significance of what the Court said in *Glona* about unmarried mothers was deeply contested and far from clear.<sup>373</sup> In any event, the *Parham* plurality opinion strongly suggested that little more than a decade later, many Justices interpreted *Glona* narrowly indeed.

#### 4. “High Court Rules Against Unwed Mothers”: *Califano v. Boles*, 1979

At the decade’s close, an unsuccessful constitutional challenge to the exclusion of unwed parents from “mothers’ insurance” benefits starkly spotlighted the limitations of illegitimacy jurisprudence’s challenge to marital supremacy and sex inequality. Margaret Gonzales and Norman W. Boles lived together unmarried in Georgetown, Texas, between 1963 and 1966.<sup>374</sup> Their son, Norman J. Boles, was born in 1964.<sup>375</sup> In 1967, Norman Sr. returned to Tennessee and married a woman who bore him two sons.<sup>376</sup> When Norman Sr. died in 1971, all three of the Boles children received children’s insurance benefits, but Gonzales’s application for mothers’ insurance benefits was denied.<sup>377</sup> Only Nancy Boles, Norman’s legal widow, was eligible for mothers’ benefits under the Social Security Act.<sup>378</sup> With the help of Texas Legal Aid lawyers and attorneys from the Center for Law and Social Policy (CLASP) in

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368. *Id.*

369. *Id.* at 354.

370. *Id.* at 355.

371. Powell’s concurrence upheld the statute’s sex-based classification under the intermediate scrutiny standard. *Id.* at 359 (Powell, J., concurring in the judgment).

372. *Id.* at 363 (White, J., dissenting).

373. *See supra* notes 92–103 and accompanying text.

374. *Boles v. Califano*, 464 F. Supp. 408, 410 (W.D. Tex. 1978).

375. *Id.*

376. *Id.*

377. *Id.*

378. *Id.*

Washington, D.C., Gonzales and Norman Jr. filed a class action lawsuit in 1974 on behalf of all similarly situated unmarried mothers and nonmarital children.<sup>379</sup> The plaintiffs' attorney in the Supreme Court, Herbert Semmel of CLASP, had long eyed this statutory exclusion: in 1969, he had suggested that *Glon* might be read to invalidate it.<sup>380</sup>

When the *Boles* litigation began, only mothers married to wage earners were eligible for so-called "mothers' insurance" benefits when a father died.<sup>381</sup> In 1975, the Supreme Court ruled in *Weinberger v. Wiesenfeld* that excluding widowed fathers from these benefits violated equal protection.<sup>382</sup> For the *Boles* plaintiffs in particular, *Wiesenfeld* seemed like a godsend. Litigants and judges alike agreed that the determinative question was whether the primary intended beneficiaries of the mothers' insurance program were mothers themselves or their children. If the provision was aimed at children, then excluding mothers who had never married the wage-earning father seemed like unconstitutional discrimination against illegitimate children, plain and simple.

The *Boles* plaintiffs argued that children were the primary intended beneficiaries, and federal district court Judge Jack Roberts agreed. Roberts found that "Mother's Benefits are not related to an obligation to support the mother but rather stem from the statutory purpose to assist the children" by "allow[ing] the surviving child of a deceased worker to receive the care of its surviving parent, relieving at least to some extent the necessity of the surviving parent to leave the child and go to work."<sup>383</sup> Roberts granted summary judgment to the plaintiffs, calling the mothers' benefit exclusion "the classic case of visiting the sins of the parents on the child."<sup>384</sup>

If mothers' benefits truly were children's benefits by another name, *Boles* was an easy case. But if, as the federal government maintained, mothers—parents, after *Wiesenfeld*—were the intended beneficiaries, matters became

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379. *See id.*

380. *See Semmel, supra* note 88, at 300 ("Approached from the perspective of the mother of an illegitimate, *Glon* can be read to assert that a mother cannot be denied a benefit based on a relationship to her illegitimate child which is afforded mothers of legitimates. . . . The class of persons receiving benefits are mothers of the deceased children and Congress may not constitutionally discriminate within such a class solely on the basis of whether the mother ever entered into a formal marriage with the father.").

381. *See Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (extending the benefit to fathers).

382. The decision in *Wiesenfeld*, *see supra* note 277 and accompanying text, provided a promising precedent for sex-discriminatory illegitimacy classifications like those challenged in the intestacy cases, because it invalidated discrimination against children based on the sex of their surviving parent. The child-centered language of *Wiesenfeld* also seemed a boon to illegitimacy plaintiffs generally. *See* 420 U.S. at 652.

383. *Boles v. Califano*, 464 F. Supp. 408, 411 (W.D. Tex. 1978), *rev'd*, 443 U.S. 282 (1979). The Social Security Act had, until 1965, excluded illegitimate children from all benefits. Thereafter, Roberts wrote, "Congress included illegitimate children but hedged their benefits with a series of discriminatory provisions," most of which the Supreme Court had already deemed unconstitutional by the late 1970s. *Id.* at 417.

384. *Id.* at 413.

much more complicated. The government argued that Congress had merely used marriage as a proxy for economic dependence, intending to replace support lost upon a wage-earner's death.<sup>385</sup> It was perfectly reasonable to assume that unmarried mothers were "significantly less likely to have been dependent on the wage-earner."<sup>386</sup> Indeed, the government pointed out, if an unmarried father "did not choose voluntarily to support the unmarried mother, in most states she had no legal recourse to compel him to do so."<sup>387</sup> As Assistant Solicitor General Harriet Shapiro<sup>388</sup> told the Court, "The theory behind mothers' benefits is that a wife with an entitled child in her care should have the same option that she had before her husband's death. That is, either to stay home, supported by her husband to take care of the children, or else to work and help to support the family."<sup>389</sup> The vast majority of never-married mothers had never had such a choice—at least not by virtue of marriage to their children's father.

The Court had made clear in earlier Social Security cases that the government could not use parental marital status—illegitimacy—as a proxy for a child's dependency or lack thereof.<sup>390</sup> In other words, an illegitimate child could not be denied benefits outright on the assumption that she did not depend upon her parent for support; at the very least, the child must be afforded the opportunity to prove dependency. But in a series of cases decided in the mid-1970s, the Court held that for adults, marriage *could* be used as a shorthand for dependency. In 1976, the Court unanimously held that Congress could cut off disability benefits to an individual who married someone ineligible for such benefits, because the government could assume that a married person could depend upon his or her spouse for support.<sup>391</sup> The same year, the Justices upheld the exclusion of divorced women under age sixty-two from certain Social Security benefits available to similarly situated married women, finding it reasonable to assume that ex-spouses were less likely to be dependent than married couples.<sup>392</sup> Since marriage was a legitimate proxy for adults' dependency, the government argued in *Boles*, restricting Social Security

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385. Brief for Appellant at 10, *Califano v. Boles*, 443 U.S. 282 (1979) (No. 78-808) 1979 WL 213898.

386. *Id.* at 11.

387. *Id.* at 16.

388. On Shapiro, see Clare Cushman, *Women Advocates Before the Supreme Court*, 26 J. SUP. CT. HIST. 67, 73 (2001), [http://supremecourthistory.org/assets/pub\\_journal\\_2001\\_vol\\_1.pdf](http://supremecourthistory.org/assets/pub_journal_2001_vol_1.pdf).

389. Transcript of Oral Argument, *Califano v. Boles*, 443 U.S. 282 (1979) (No. 78-808), [http://www.oyez.org/cases/1970-1979/1978/1978\\_78\\_808](http://www.oyez.org/cases/1970-1979/1978/1978_78_808).

390. See *Griffin v. Richardson*, 346 F. Supp. 1226 (D. Md. 1971), *summarily aff'd*, 409 U.S. 1069 (1972); *Davis v. Richardson*, 342 F. Supp. 588 (D. Conn. 1972), *summarily aff'd*, 409 U.S. 1069 (1972).

391. *Califano v. Jobst*, 434 U.S. 47 (1977).

392. *Mathews v. de Castro*, 429 U.S. 181 (1976); see also *Weinberger v. Salfi*, 422 U.S. 749 (1975).

benefits to parents who had married the family wage-earner posed no constitutional problem.<sup>393</sup>

At first, it seemed as if the child-focused view of the case would prevail in the Supreme Court. Jack Pratt, clerk to Chief Justice Burger, wrote confidently in his “cert pool memo” that the district court was correct,<sup>394</sup> and at first, a majority of the Justices agreed.<sup>395</sup> But what had begun as a narrow victory for the plaintiffs became a five-to-four decision against them, authored by the Court’s foremost opponent of illegitimacy plaintiffs, Justice Rehnquist.

Rehnquist was the only Justice with a more or less consistently conservative record in both sex- and illegitimacy-based discrimination cases.<sup>396</sup> The rare exception was *Wiesenfeld*, where—ironically—Rehnquist had concurred separately to underscore his belief that the “*only* purpose of [the mother’s insurance program] is to make it possible for children of deceased contributing workers to have the personal care and attention of the surviving parent.”<sup>397</sup> In *Boles*, Rehnquist did an about-face. His majority opinion accepted the government’s view that the “benefit to a child as a result of the

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393. See Brief for Appellant, *supra* note 385, at 12–17.

394. Bench Memorandum from Bill McDaniel, Jr., for Justice Blackmun, No. 78-808, *Califano v. Boles* (Apr. 18, 1979), at 25, collected in Blackmun Papers, Box 296, Folder 10. The government, Pratt declared, “focuses on the wrong relationship: once it is conceded that the statute seeks to benefit children, the economic dependency of the mother is irrelevant,” and so were the cases upholding marriage as a proxy for adult dependency. Preliminary Memorandum from Jack Pratt to Justice Blackmun, No. 78-808-ADX, *Califano v. Boles* (Jan. 14, 1979), collected in Blackmun Papers, Box 296, Folder 10. Blackmun (often a swing vote in illegitimacy cases) and his clerks agreed with Pratt’s assessment.

395. See Bench Memorandum from Bill McDaniel, Jr., for Justice Blackmun, No. 78-808, *Califano v. Boles* (April 18, 1979), collected in Blackmun Papers, Box 296, Folder 10; Preliminary Memorandum from Albert G. Lauber to Justice Blackmun, No. 78-808-ADX, *Califano v. Boles* (Jan. 14, 1979), at 7–8, collected in Blackmun Papers, Box 296, Folder 10 (memo typed by Jack Pratt at end of Preliminary Memo). At conference, Burger indicated that he would vote to uphold the district court decision; even with Powell on the fence, the Chief Justice’s vote secured a majority for the plaintiffs. See Memorandum from Chief Justice Burger to Conference, No. 78-808, *Califano v. Boles* (Apr. 27, 1979), collected in Powell Papers. But that majority unraveled by the following day, as first Burger and then Powell decided to vote for reversal. See *id.*

396. Rehnquist had dissented from two otherwise unanimous 1973 rulings: *Frontiero v. Richardson*, 411 U.S. 677 (1973), see *supra* note 12 and accompanying text, and *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973), which held unconstitutional a state requirement that couples be “ceremonially married” and living with one common child in order to receive certain welfare benefits. In *Cahill*, Rehnquist wrote that “ceremonial marriage that could quite reasonably be found to be an essential ingredient of the family unit that the . . . Legislature is trying to protect from dissolution . . .” 411 U.S. at 622 (Rehnquist, J., dissenting). Whereas in earlier illegitimacy cases, “a disability was visited solely on an illegitimate child,” in *Cahill* “the statute distinguish[ed] among types of families,” so that “whatever denial of benefits the classification makes is imposed equally on the parents as well as the children.” *Id.* By the late 1970s, the only reliable majority in these cases consisted of swing Justices who might vote either way depending upon the case. Justices Blackmun, Powell, Stewart and, to a lesser extent, Stevens and White all fell into this category. Justices Brennan and Marshall were the only consistent liberal votes in both sets of cases.

397. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 655 (1975) (Rehnquist, J., concurring) (emphasis added).

parent or guardian's receipt of mother's insurance benefits" was merely "incidental."<sup>398</sup>

Blackmun clerk Bill McDaniel reacted indignantly to Rehnquist's first draft. Rehnquist had tried to undercut *Wiesenfeld's* impact on sex equality law by focusing on children, and now, "his position has come back to haunt him."<sup>399</sup> In order "to avoid a result that would benefit illegitimates," McDaniel wrote, "he now retreats from his former avowed position. I do not find this convincing," the clerk fumed. "I do find it unseemly."<sup>400</sup>

Justice Marshall's dissent, too, excoriated Rehnquist's—and the Court's—reinterpretation of statutory purpose. Moreover, his opinion, joined by Brennan, Blackmun, and White, disputed the majority's view that the "discriminatory impact on illegitimates" did not pose any constitutional problem. In past cases, the fact that illegitimate children were not wholly excluded from benefits had not stopped the Court from finding an equal protection violation. Marshall lamented the Court's "imprimatur" for a distinction "needlessly predicated on a disfavored social status" that was "beyond an individual's power to affect."<sup>401</sup>

Notably, though, despite their vehement disagreement over the proper resolution of the case, the *Boles* litigants and Justices all agreed that victory for the plaintiffs hinged upon reading the mother's insurance program as primarily benefiting children, rather than parents. None of the court documents so much as suggested that unmarried mothers *themselves* might have a constitutional claim against exclusion from the statutory scheme.

In some ways, this elision is unsurprising. After all, the Court had recently held that marriage was a constitutionally legitimate proxy for dependency.<sup>402</sup> But none of the earlier cases implicated a distinction between married and never-married mothers. The previous Social Security cases, *Jimenez* and *Lucas*, had not made sex discrimination arguments either, but such arguments had become common in the most recent cases concerning intestacy and employment discrimination against unmarried mothers. *Boles* did not clearly implicate a purely sex-based classification, since married mothers received benefits, but other cases had framed discrimination against unwed mothers as sex discrimination.<sup>403</sup> Privacy and liberty arguments were available as well: a student note published shortly after the *Boles* decision suggested that the

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398. *Califano v. Boles*, 443 U.S. 282, 294 (1979).

399. Memorandum from Bill McDaniel, Jr., to Justice Blackmun, No. 78-808, *Califano v. Boles* (June 2, 1979), at 1–2, collected in Blackmun Papers, Box 296, Folder 10.

400. *Id.* at 2.

401. *Boles*, 443 U.S. at 306 (Marshall, J., dissenting). Marshall concluded: "Although a 'blanket and conclusive exclusion' of illegitimate children may be an administratively expedient means of screening for dependence . . . it is also inaccurate, unjust, and, under this Court's settled precedents, unconstitutional." *Id.*

402. See, e.g., *Califano v. Jobst*, 434 U.S. 47 (1977).

403. See discussions of *Andrews*, *Fernandez*, *Trimble*, and *Lalli*, *supra*, Part II.

challenged statute unconstitutionally infringed upon mothers' "fundamental right" to choose not to marry.<sup>404</sup>

By the late 1970s, influential feminists and constitutional scholars had highlighted the connection between "illegitimacy," reproductive freedom, and sex equality.<sup>405</sup> Certainly, the *Boles* statute's detrimental impact on unmarried mothers was no mystery. The *Washington Post* headline after the *Boles* decision proclaimed, "High Court Rules, 5 to 4, Against Unwed Mothers."<sup>406</sup> As Social Security manager Richard Hyde put it:

We read that couples living together outside of marriage is a growing trend. Maybe it's all part of the woman's liberation and equal rights movements. But one must wonder if a girl considering such an arrangement ever thinks about the absence of equal risks—the risks all seem to be on her side. If you don't believe this—ask Margaret Gonzales.<sup>407</sup>

### III.

#### ILLEGITIMACY, INEQUALITY, AND THE LEGACIES OF MARITAL SUPREMACY

The illegitimacy cases changed the law in important ways. Whatever the limitations of the Court's reasoning, the act of striking down most distinctions between "legitimate" and "illegitimate" children meant that many nonmarital families enjoyed greater protection from legal disabilities such as children's inability to inherit or obtain child support from fathers, and that nonmarital children received government benefits from which they had long been excluded. By extension, these rule changes benefited (some) parents of nonmarital children and made the world safer for nonmarital sex and childbearing, even if their underlying rhetoric and rationale were less progressive than they might have been.

These changes occurred against a backdrop of political tumult that provided both opportunities and constraints for opponents of illegitimacy penalties. In the mid- to late-1960s, anti-poverty and civil rights lawyers seized the opening offered by the Warren Court's civil rights jurisprudence to make race and wealth equality arguments against laws that disadvantaged nonmarital families. The political obstacles to normalizing nonmarital sex, childbearing, and family formation were formidable even—or perhaps especially—in the heyday of Great Society liberalism. For many liberals and civil rights leaders, "illegitimacy" remained a scourge, threatening to sabotage racial progress by

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404. Barbara Levitan, Comment, *Califano v. Boles: Unequal Protection for Illegitimate Children and their Mothers*, 9 N.Y.U. REV. L. & SOC. CHANGE 241, 243, 266 (1979).

405. For two prominent examples, see Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451, 459 (1978); Kenneth L. Karst, *The Supreme Court 1976 Term Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 57–58 & n.320 (1977).

406. *High Court Rules, 5 to 4, Against Unwed Mothers*, WASH. POST, June 28, 1979, at A4.

407. Richard D. Hyde, *Living Together Has Its Risks When It Comes to Death Benefits*, FREE LANCE-STAR (Fredericksburg, Va.), Aug. 27, 1979, at 5.

undermining the male breadwinner ideal and contributing to the “tangle of pathology” inherent in “matriarchal” family structure.<sup>408</sup> For conservatives and many Southern “moderates,” moral regulations, including illegitimacy penalties, had become a convenient way to resist desegregation and shore up racial hierarchy after the demise of de jure racial discrimination.<sup>409</sup>

By the early 1970s, feminists and their allies could capitalize on the women’s movement’s increasing political salience and on emerging sex equality precedents to highlight the distinctive harms illegitimacy penalties imposed on women. Soon after feminists unseated “breadwinner liberalism” as the reigning ideology undergirding progressive social policy, however, the ascendancy of a countermovement committed to “breadwinner conservatism” reconfigured the old constraints.<sup>410</sup> Nixon’s Court appointments replaced two liberals on illegitimacy cases (Warren and Fortas) and two dissenters from *Levy/Glona* (Harlan and Black) with two conservatives (Burger and Rehnquist) and two swing voters (Powell and Blackmun). Feminists became entrenched in an unexpectedly lengthy and unsuccessful battle over the Equal Rights Amendment (ERA); though they achieved significant change through the courts, their efforts ran aground precisely in areas most salient to reproduction and the primacy of marital families.<sup>411</sup>

For understandable reasons, then, advocates did not deploy the full arsenal of feminist challenges to illegitimacy penalties in court. They did not, for instance, directly question the privatization of dependency within the nuclear family. Even *Andrews*, which celebrated women’s economic autonomy from men, depicted the plaintiffs as engaged in an admirable quest for independence from public assistance, for self-sufficiency through market work. Advocates in the other illegitimacy cases often mentioned the irrationality of neglecting available private sources of support and thus increasing public welfare expenditures.

It is also true that no feminist organization prioritized the illegitimacy cases or launched a concerted campaign on behalf of unmarried mothers in particular.<sup>412</sup> Many aspects of feminists’ legal agenda during this period

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408. See Mayeri, *supra* note 26, and sources on the Moynihan Report cited therein; see also MOYNIHAN, *supra* note 26, at 8–9, 29–37.

409. See generally WALKER, THE GHOST OF JIM CROW, *supra* note 29. See also *supra* Part II.

410. I borrow these terms from Robert O. Self’s compelling synthetic history of this period, ALL IN THE FAMILY: THE REALIGNMENT OF AMERICAN POLITICS SINCE THE 1960S (2012).

411. See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict, and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323 (2006). On the achievements and limits of feminist legal advocacy in the 1970s, see MAYERI, REASONING FROM RACE, *supra* note 12.

412. Feminist organizations’ involvement in the cases discussed here was not insignificant. Ginsburg attempted to persuade her colleagues to allow the ACLU WRP to file an amicus brief in *Fiallo v. Bell*, see *supra* notes 323–329 and accompanying text. The WRP also reviewed Frank Cochran’s early submissions in *Roe v. Norton*. See Supplement to Jurisdictional Statement, *Roe v. Norton*, 422 U.S. 391 (1974) (No. 73-6033), collected in ACLU Records, Mudd Library, Princeton University, Box 2833, Folder: *Roe v. Norton*; Memorandum including Frank Cochran’s proposed

encompassed women regardless of marital status: reproductive freedom, the campaign against employment discrimination generally, and pregnancy discrimination in particular, to name a few. In part, the failure to foreground illegitimacy penalties likely reflected ambivalence among some feminist strategists about the wisdom of placing unwed parents at the center of feminist litigation campaigns. Attacking male supremacy within marriage—which loomed large on the agenda of leading feminist legal advocates<sup>413</sup>—posed a fairly radical challenge to American law and social life. Challenging marital supremacy in a political environment where feminists stood accused by ERA opponents of assaulting traditional marriage and family relationships likely seemed impolitic.<sup>414</sup> Courtroom advocates in particular were acutely aware of their audience and of the generational norms that made even otherwise liberal judges like Justice Brennan balk at much tamer feminist claims about the normative ideals of family life.<sup>415</sup>

Communities in which nonmarital childbearing was prevalent were themselves divided over the wisdom of fighting for “unwed mothers” rights: Katie Mae Andrews’s lawyer, Charles Victor McTeer, for instance, recalls sharp divisions within Drew, Mississippi’s, African American community over her case.<sup>416</sup> Andrews and her co-plaintiff Lestine Rogers presented themselves as responsible, religious women who had made a mistake born of ignorance and lack of access to contraception, not as champions of sexual liberty or flouters of marriage.<sup>417</sup> The testimony in *Andrews* revealed some dissension about the moral valence of nonmarital sex, however. When questioned about how she would counsel a student who asked whether she should engage in sexual intercourse, teacher’s aide applicant Viola Burnett replied that she saw no harm in it, and would advise her pupils to do as they pleased.<sup>418</sup> Philadelphia activist and plaintiff Lois Fernandez owned her decision to become a single mother as a choice she made with pride and without regrets.<sup>419</sup>

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outline for brief, *Roe v. Norton*, 422 U.S. 391 (No. 73-6033), collected in ACLU Records, Box 4430, Folder: *Roe v. Norton* (privacy). And the WRP joined Equal Rights Advocates in filing a strong feminist amicus brief in *Andrews v. Drew*. As discussed *supra* Part II, feminists within organizations with a broader civil rights or legal services focus also played important roles in these cases.

413. See Mayeri, “The First Order of Business”: Feminists Challenge Male Supremacy in Marriage, *supra* note 12.

414. On the 1970s ERA debate, see, for example, Siegel, *supra* note 411; see also Serena Mayeri, *A New E.R.A. or a New Era? Amendment Advocacy and the Reconstitution of Feminism*, 103 NW. U. L. REV. 1223 (2009) and sources cited therein.

415. On Justice Brennan’s evolving views on women, feminism, sex equality, and female law clerks, see SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 315–16, 386–408 (2010).

416. Telephone Interview with Charles Victor McTeer (Aug. 2012).

417. Indeed, Andrews married in the mid-1970s and worked as a teacher and librarian in the Mississippi public schools for four decades. MAYERI, REASONING FROM RACE, *supra* note 12, at 235.

418. Brief for Petitioners at 29, *Drew Mun. Separate Sch. Dist. v. Andrews*, 425 U.S. 559 (1976) (No. 74-1318), 1978 WL 173528.

419. See Fernandez, *supra* note 234; Wilson, *supra* note 234.

The illegitimacy cases were not the product of a concerted or centralized litigation campaign. Though some advocates and organizations became interested and involved in multiple cases, their participation tended to occur more by happenstance than by design. Moreover, counsel and allies of illegitimacy plaintiffs ran the ideological gamut from Moynihanian reformers such as Harry Krause,<sup>420</sup> to civil libertarians like Norman Dorsen and his protégés,<sup>421</sup> to legal aid lawyers like Jane Greengold Stevens,<sup>422</sup> to activists primarily motivated by feminism—even fairly radical feminism, at least by the standards of 1970s feminist lawyering.<sup>423</sup>

Even the more progressive civil libertarians and feminists moderated their most innovative arguments in court. The challenge posed by the illegitimacy cases to marital supremacy was significantly more limited than the broadest feminist attacks on illegitimacy penalties articulated by young activists such as Wallach and Tenoso. Advocates understandably hesitated to question directly the states' prerogative to promote traditional family relationships, or to deter illicit sexual behavior, especially when doing so was unnecessary—and perhaps counterproductive—to overturning discriminatory laws. They never

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420. For Krause's views on the Moynihan Report and the "social problem of illegitimacy," see e.g., KRAUSE, *supra* note 20, ch. 8.

421. On the more expansive sexual privacy arguments advanced by Dorsen and his students Chip Gray and David Rudovsky, see *supra* notes 93–103 and accompanying text. On Martin Garbus's sexual privacy arguments in *King v. Smith*, see *supra* notes 110–16 and accompanying text.

422. Stevens recalls perceiving *Jimenez v. Weinberger*, 417 U.S. 628 (1974), the first illegitimacy case she litigated, as primarily concerning the rights of children. Later, she made sex equality arguments in *Trimble v. Gordon* and as amicus in *Lalli v. Lalli*, but although she identified strongly as a feminist, she made her name as an advocate for the rights of persons with disabilities. Interview with Jane Greengold Stevens, *supra* note 281. Herbert Semmel (*Califano v. Boles*), Frank Cochran (*Roe v. Norton*), James Weill (*Trimble v. Gordon*), all had distinguished careers in public interest law but were not primarily identified with feminism. Semmel, for a time a colleague of Krause's at the University of Illinois, disagreed with some aspects of Krause's approach. Compare, e.g., Carol B. Stack & Herbert Semmel, *The Concept of Family in the Poor Black Community*, in JOINT ECONOMIC COMMITTEE CONGRESS OF THE UNITED STATES, STUDIES IN PUBLIC WELFARE, PAPER NO. 12 (PART II): THE FAMILY, POVERTY AND WELFARE PROGRAMS—HOUSEHOLD PATTERNS AND GOVERNMENT 275 (Joint Comm. Print 1973) (arguing against rigorous child support enforcement against poor black fathers), with Harry D. Krause, *Child Welfare, Parental Responsibility, and the State*, in STUDIES IN PUBLIC WELFARE, PAPER NO. 12 (PART II), *supra*, at 255 (arguing that morality and fiscal responsibility required more rigorous child support enforcement). On Semmel's life, see *Herbert Semmel, 73, Lawyer in Civil Rights Suits*, N.Y. TIMES, Feb. 10, 2004.

423. Nancy Stearns and Rhonda Copelon, the lawyers at the CCR who became involved in the *Andrews* case, were active in early reproductive rights and reproductive justice advocacy and went on to become important feminist litigators and activists. Ann Freedman, whose Women's Law Project collaborated with Philadelphia's Community Legal Services to argue *Fernandez v. Shapp*, played an important role in 1970s legal advocacy and coauthored foundational feminist legal texts. On Stearns, see, e.g., BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING 376 (Linda Greenhouse & Reva B. Siegel eds., 2012). On Copelon, see, e.g., Dennis Helvesi, *Rhonda Copelon, Lawyer in Groundbreaking Rights Cases, Dies at 65*, N.Y. TIMES, May 8, 2010. On Freedman, see, e.g., Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971) (co-authored by Ann Freedman); BARBARA A. BABCOCK ET AL., SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES (1975) (same).

argued in court that women (or men) had a constitutional right to engage in nonmarital sex, though notably, they did contend that women's reproductive autonomy should include the right to bear nonmarital children as well as the prerogative to terminate a pregnancy.<sup>424</sup> Notwithstanding these limitations, imposed under considerable political constraints, courtroom advocates advanced a much more capacious account of what was wrong with illegitimacy penalties than judicial opinions ever made visible.

Despite their efforts, by the end of the 1970s, the child-focused view of illegitimacy's harm had prevailed. Adults could be sanctioned for immorality, but innocent children should not suffer needlessly for their parents' transgressions. Marriage alone could be a proxy for adults' dependency, even when it would no longer suffice as a measure of children's needs. Courts scrutinized the relationship between means and ends, but ultimately upheld the government's interest in discouraging nonmarital sex, cohabitation or childbearing, and in encouraging marriage and legitimate family relationships.<sup>425</sup> Marital supremacy remained alive and well, and the formal sex neutrality now required for married couples did not extend to nonmarital partners or unmarried parents. Further, illegitimacy jurisprudence conveyed the impression that sex, race, and illegitimacy were separate, non-overlapping categories—suitable for purposes of (often unfavorable) comparison but not for illuminating their mutually reinforcing and deeply intertwined character.

Why did arguments against sex inequality and marital supremacy make so little headway in the illegitimacy cases? One reason was inauspicious timing in a changing political environment. The early entrenchment of the child-focused approach in the years before feminist legal advocates began to win constitutional cases in the Supreme Court and the Court's increasingly conservative composition in the years thereafter meant that the Justices' collective appetite for liberal innovations declined just as feminist momentum accelerated. Advocates such as Norman Dorsen and Sylvia Law later became champions of sex equality, but even had they been inclined to make such arguments when they strategized about the first illegitimacy cases in 1967, they would have had little doctrinal ammunition.<sup>426</sup> Even *Weber* preceded the Court's first deep consideration of sex equality under the equal protection clause in *Frontiero v. Richardson* by several months, and Justices Powell and

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424. See *supra* notes 242–47 and accompanying text.

425. Notably, feminists and other progressive critics were not the only observers to see the Court's illegitimacy decisions as essentially conservative. See, e.g., Samuel A. Alito, *Equal Protection and Classifications Based on Family Membership*, 80 DICK. L. REV. 410 (1976); Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463 (1983).

426. Also, by the mid-twentieth century, most states had reformed their laws to recognize mother-child relationships regardless of marital status, so that they incorporated sex-based as well as illegitimacy-based classifications, but the Louisiana laws challenged in the early cases (*Levy*, *Glon*, *Labine*, and *Weber*) did not.

Rehnquist joined the Court too late to take part in *Stanley v. Illinois* or *Reed v. Reed*.<sup>427</sup> Moreover, the Court's personnel changes, underwritten by electoral and cultural shifts, meant that the outcomes in 1970s illegitimacy cases would largely be determined by swing Justices Powell, Blackmun, and Stewart.

Procedural obstacles with substantive subtexts also plagued illegitimacy plaintiffs. In *Linda R.S.*, the challenge to a criminal non-support law that exempted nonmarital fathers from liability, the Supreme Court ultimately agreed with the federal district court majority's holding that a mother and her child lacked standing to challenge the state's failure to prosecute unmarried fathers.<sup>428</sup> In *Gomez*, the challenge to a similar exemption in Texas's civil child support law, Powell clerk William Kelly noted that there was "a sex discrimination argument buried in this case . . . the mother but not the father has a duty of support."<sup>429</sup> But because it was not clear whether the Texas statute explicitly required mothers to support their illegitimate children, Kelly thought the sex discrimination claim was "not squarely presented."<sup>430</sup>

Indeed, skeptics often wondered whether sex discrimination claims were properly before the Court in cases involving illegitimacy-based classifications. These qualms reflected more than just procedural objections. In *Trimble*, for instance, Blackmun privately thought the sex discrimination claim "pretty far-fetched. Illegitimate children, male and female, are treated alike. That is where the focus should be rather than on the parents."<sup>431</sup> Moreover, Blackmun wrote in an internal memo, "the classification between the mother and the father is a legitimate one, according to our cases, for motherhood is exposed to public view, whereas paternity of illegitimates is often a subject of spurious claims and is difficult to prove."<sup>432</sup>

Blackmun also called the argument that mandatory paternity disclosure involved a sex-based classification subject to heightened equal protection scrutiny "spurious."<sup>433</sup> Reflecting privately on *Roe v. Norton*, he wrote: "An action to establish paternity must be brought by a woman, and that classification cannot be avoided."<sup>434</sup> He saw the classification as similar to the one the Court had upheld in *Geduldig v. Aiello* (1974), where a majority of Justices refused to characterize the exclusion of pregnancy from a California

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427. For his part, Justice Blackmun joined Chief Justice Burger's dissent in *Stanley v. Illinois*, 405 U.S. 645, 659 (1972).

428. *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973).

429. Memorandum from William C. Kelly, Jr., to Justice Powell, No. 71-575, *Gomez v. Perez* & No. 71-6078 *Linda R.S. v. Richard D.* and Texas (Dec. 5, 1972), at 2, *collected in* Powell Papers.

430. *Id.*

431. Memorandum from Justice Blackmun, No. 75-5952, *Trimble v. Gordon* (Dec. 3, 1976), at 6, *collected in* Blackmun Papers, Box 249, Folder 5.

432. *Id.*

433. Memorandum from Justice Blackmun, No. 73-6003, *Roe v. Norton* (Jan. 31, 1975), at 4, *collected in* Blackmun Papers, Box 205 ("The secondary argument that the classification is based on sex is spurious.").

434. *Id.*

disability insurance scheme as sex discriminatory.<sup>435</sup> Nor did Blackmun, or his clerk, Moynihan protégé Richard Blumenthal, buy the plaintiffs' argument that reticent mothers had their children's best interests at heart.<sup>436</sup>

Notably, some judges did recognize the discriminatory impact of illegitimacy penalties on women even before the Court decided its first constitutional sex equality case. For instance, Texas state appellate Judge Carlos Cadena, an accomplished civil rights attorney and scholar, wrote a scathing dissent from his court's decision in *Gomez*.<sup>437</sup> A legal pioneer and founding member of the Mexican American Legal Defense and Education Fund, Cadena and his co-counsel had successfully argued the landmark case *Hernandez v. Texas* (1954), which established that the Equal Protection Clause protected not only African Americans but also other subordinated groups such as Mexican Americans.<sup>438</sup> Cadena, the youngest of seven children of Mexican immigrants, also knew something about the hardships of single motherhood. Cadena's parents separated when he was a child. His father returned to Mexico, and his mother, who supported the family as a housekeeper and laundress, conditioned her consent to a divorce on his pledge to pay for Carlos to attend college.<sup>439</sup> Cadena later married a military widow with eight children, whom they raised alongside one of his own.<sup>440</sup>

In an opinion both scholarly and colorful,<sup>441</sup> Cadena ridiculed the notion that refusing to hold unwed fathers responsible would serve the government purpose of deterring illegitimacy. It could not, Cadena wrote, "be seriously contended that the governmental purpose of promoting marriage and discouraging sexual promiscuity is promoted by a rule which guarantees to the rake immunity from liability for the support of the children born as a result of his extramarital copulative performances."<sup>442</sup> Nor was the cause of "family unity" served by a law that exempted not only men with legitimate spouses and children from support liability, but also unattached men. Beside, Cadena remarked, it was "strange that the state shows no concern whatever for the stability of the legitimate family of the illegitimate mother, on whom the State of Texas places the obligation of support."<sup>443</sup>

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435. *Id.*

436. See correspondence in *Roe v. Norton* file, collected in Blackmun Papers, Box 205.

437. For more on Cadena, see Martin Donell Kohout, *Cadena, Carlos Cristian (1917–2001)*, TEXAS STATE HISTORICAL ASS'N (June 12, 2010), <http://www.tshaonline.org/handbook/online/articles/fcaas>.

438. See *Hernandez v. Texas*, 347 U.S. 475 (1954).

439. See Kohout, *supra* note 437.

440. See *id.*

441. *G— v. P—*, 466 S.W.2d 41, 42 (Tex. Ct. Civ. App. 1971) (Cadena, J., dissenting), *rev'd sub nom. Gomez v. Perez*, 409 U.S. 535 (1973). Cadena cited many of the major works of scholarship on illegitimacy penalties, including those of Krause and Gray and Rudovsky. *Id.*

442. *Id.* at 45.

443. *Id.*

In a footnote, Cadena posed a rhetorical question that Gomez's lawyers would pick up in their briefs to the U.S. Supreme Court: "May the illegitimate mother complain that she is denied the equal protection of the laws because her obligation[s] to her illegitimate child are substantially greater than those imposed upon the man who was her partner in the socially disapproved procreative act?"<sup>444</sup> Cadena's *Gomez* dissent thus belies the notion that sex equality arguments were unavailable or inaccessible to judges before the mid-1970s, or that they were too difficult to see in cases apparently involving illegitimacy rather than sex classifications.

To be sure, some cases presented mothers' sex equality, privacy, and reproductive autonomy claims more centrally than others. Cases involving employment bans (*Andrews*), mandatory paternity disclosure (*Norton*), and clear, facial sex-based classifications (*Andrews*, *Fernandez*) probably provided the best opportunities for successful feminist arguments given their obvious impact on women. None of these cases produced a Supreme Court opinion, though *Norton* and *Andrews* were fully briefed and argued. The Justices at the Court's ideological center seemed relieved to avoid the thorny constitutional questions these cases raised.<sup>445</sup> After the Court successfully dodged the sex equality/illegitimacy nexus in *Andrews* and *Trimble*, the decade's remaining cases (*Fiallo*, *Lalli*, *Boles*) proved more difficult—though hardly hopeless—vehicles for highlighting illegitimacy penalties' burden on mothers.

Politically, child-focused arguments always had an edge over expansive visions of sexual freedom, race and sex equality, and even privacy. One could believe fervently in the sanctity of marriage and the traditional family, in the immorality of nonmarital sex, and in the inviolability of privatized dependence and nevertheless recoil at laws that punished "hapless and innocent" children for circumstances utterly beyond their control. As the Court and the nation's political climate drifted to the right, consensus on issues of morality and equality became ever more elusive. A focus on children allowed advocates and courts to sidestep these thornier issues and unite behind the banner of children's welfare.<sup>446</sup>

Appeals to children's well being also conveniently underwrote more pecuniary motivations. Support and inheritance rights for nonmarital children helped to privatize their dependency, as did allowing them to receive workers'

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444. *G— v. P—*, 406 S.W.2d at 45.

445. See *supra* Part II.C.1. Some advocates sensed this reluctance and sought advantage: Jim Weill, co-counsel in *Trimble*, later recalled his hope that presenting a sex discrimination claim would push the Justices to decide the case in the plaintiffs' favor but on other grounds so as to sidestep the fraught intersection between sex equality and illegitimacy penalties. Telephone Interview with James Weill and Jane Greengold Stevens, *supra* note 278.

446. Cf. Linda Greenhouse, *What Would Justice Powell Do? The 'Alien Children' Case and the Meaning of Equal Protection*, 25 CONST. COMMENT. 29 (2008).

compensation and to recover for the wrongful death of their parents.<sup>447</sup> Making illegitimate children eligible for Social Security benefits eased the welfare burden on states. Allowing unmarried mothers access to decent jobs saved on public assistance costs. Privileging marriage, in other words, did not always serve the cause of privatizing dependency.<sup>448</sup> And as these examples reflect, most illegitimacy penalties could easily be framed as injurious to both women and children. Mandatory paternity disclosure, by contrast, apparently pitted mothers' desire for privacy and autonomy against children's right to a father's support and care. This supposed conflict motivated advocates to expose how child-centered rationales obscured baser purposes: they accused supporters of mandatory paternity disclosure of concealing "fiscal concerns" beneath a patina of solicitude for children's welfare.<sup>449</sup>

Advocates had a larger arsenal of constitutional weapons at their disposal by the mid-1970s. But the emerging jurisprudence of sex equality, sexual privacy, and parental rights had its limitations. Many of the equal protection cases won by feminists in the 1970s established the right of married couples to pursue more egalitarian divisions of household and market labor, free of government-imposed sex stereotypes.<sup>450</sup> Husbands and wives could no longer be assumed by law to fall naturally into breadwinning and caregiving/dependent roles. But many of the government benefits now available to widowers as well as widows, marital families where wives were primary breadwinners, and surviving fathers as well as mothers, remained wholly unavailable to unmarried parents. The Court severely limited the definition of sex discrimination under the Equal Protection Clause, exempting discrimination based on pregnancy from constitutional censure and upholding sex-based distinctions based on "real" differences.<sup>451</sup> And crucially, by the end

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447. See Appleton, *supra* note 7, at 360 (noting that the Court's illegitimacy decisions "offered welcome changes for the state itself, paving the way for the increasing privatization of dependency").

448. For a sampling of the literature on the relationship between government recognition of families and the privatization of dependency past and present, see generally Ariela R. Dubler, *Governing Through Contract: Common Law Marriage in the Nineteenth Century*, 107 YALE L.J. 1885 (1998); Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181 (1995); Melissa Murray, *Family Law's Doctrines*, 163 U. PA. L. REV. 1985 (2015); Murray, *supra* note 7; Laura A. Rosenbury, *Federal Visions of Private Family Support*, 67 VAND. L. REV. 1835 (2014).

449. Mandatory paternity disclosure divided opponents of illegitimacy-based classifications. Some, like Krause, generally favored the requirement that mothers identify biological fathers, on the ground that children deserved access to all possible sources of support. Others protested such rules as a violation of women's privacy, often arguing that mothers' and children's interests were ultimately one and the same. See *supra* notes 260–69 and accompanying text.

450. See *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Califano v. Goldfarb*, 430 U.S. 199 (1977).

451. See, e.g., *Geduldig v. Aiello*, 417 U.S. 484 (1974) (holding that pregnancy discrimination was not sex discrimination under the equal protection clause).

of the 1970s, a policy's disparate impact on a disadvantaged group carried little weight without proof of discriminatory intent.<sup>452</sup>

The reasoning, if not the result, of the sexual privacy cases, too, fell short of feminist ideals.<sup>453</sup> Apart from the well-known failure of *Roe v. Wade* to rely on sex equality grounds for abortion rights, and Justice Douglas's paean to the "sanctity of the marital bedroom" in *Griswold*, these cases subtly reaffirmed marital supremacy in other ways. Some supporters of decriminalizing contraception for unmarried couples argued to the Court in *Eisenstadt* that the tragic costs of "illegitimacy" could thus be avoided.<sup>454</sup> *Roe v. Wade* referred to the "continuing stigma of unwed motherhood" as a justification for allowing women to "consider" abortion "in consultation" with a "responsible physician."<sup>455</sup> Virtually no one even hinted, in any of these cases, that the state could not constitutionally prohibit fornication. And the "unwed fathers" cases tread cautiously in questioning the state's ability to privilege marriage or to distinguish between unmarried parents on the basis of sex.<sup>456</sup> Indeed, the specter of equal rights for unmarried mothers and fathers cast a long shadow over challenges to sex discrimination and marital supremacy in the 1970s and beyond.<sup>457</sup>

The Court's rulings legalizing abortion and contraception yielded important material advances in both liberty and equality, making nonmarital sex less costly and allowing women greater economic and social as well as sexual autonomy. When plaintiffs prevailed, the illegitimacy cases also improved lives, granting access to benefits for "illegitimate" children that assisted nonmarital children and, by extension, those responsible for their support. But reasoning as well as results mattered. The Court's reluctance to address the constitutional implications of illegitimacy penalties for racial, gender, and economic inequality, or for sexual privacy and liberty, meant that even favorable statutory and regulatory developments remained vulnerable to reversal. For instance, the failure to apply sex equality or sexual privacy and liberty principles to mandatory paternity disclosure laws in the 1960s and 1970s left the door open to stringent requirements that enlisted welfare recipients in state efforts to identify fathers and collect child support even after

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452. See MAYERI, REASONING FROM RACE, *supra* note 12, chs. 4–5.

453. For a contemporaneous reading of these cases as essentially conservative, see Thomas C. Grey, *Eros, Civilization and the Burger Court*, 43 L. & CONTEMP. PROBS. 83, 88 (1980) (arguing that the contraception and abortion cases were "like the general run of the Court's decisions in this area, dedicated to the cause of social stability through the reinforcement of traditional institutions and have nothing to do with the sexual liberation of the individual").

454. See STEIN, *supra* note 103, at 118–19. *But see* Neil S. Siegel & Reva B. Siegel, *Contraception as a Sex Equality Right*, 124 YALE L.J. FORUM 349, 355–56 (2015) (recounting the ACLU's prescient 1965 interpretation of the equal protection clause as encompassing women's right to access contraception in order to achieve educational and economic equality).

455. 410 U.S. 113, 153 (1973).

456. See Murray, *supra* note 7; Davis, *supra* note 7.

457. See Mayeri, *supra* note 221.

statutory entitlements to public assistance disappeared with the enactment of welfare reform in the 1990s.<sup>458</sup>

In other areas, statutory rights never materialized, leaving marital privileges intact. For instance, while Congress and the courts extended to nonmarital children some—though not all—Social Security benefits available to legitimate children, unmarried parents never received the same courtesy. Spousal benefits and benefits to formerly married parents became formally sex-neutral, and divorced spouses gained somewhat greater protection. But custodial parents (often mothers) who had not married their children’s wage-earning parent (often fathers) never won the equal right to the “mothers’ insurance” benefits the Court extended to (married) fathers in *Wiesenfeld*. And, of course, as contemporary marriage equality advocates remind us, thousands of federal and state benefits follow marital status and remain unavailable to non-spouses.<sup>459</sup>

The focus on harm to children elided not only sex inequality, but racial and economic injustice—just as nonmarital childbearing rates climbed among low-income families, disproportionately people of color. Failing to question the legal privileging of marriage as an instance of race-, gender-, and class-salient harm obscured the pernicious effects of marital supremacy on the very groups that could least afford to lose access to the benefits that accompany marriage. Indeed, tying social supports to conjugal partnership, marital or not, meant that many poor women and women of color suffered a double disadvantage because they lacked partners likely to be eligible for employment-related benefits. Since the 1970s, increasing economic inequality, high rates of incarceration, and chronic unemployment have intersected with divergent marriage rates to intensify the gap between highly educated women who could aspire to raise their children in gender egalitarian partnerships with affluent male peers, and their impoverished counterparts, who no longer could count on sharing the burdens of raising children in poverty with a partner, much less rely on a second income to escape its clutches.

Child-focused accounts of illegitimacy penalties’ harms endure, reflecting marital supremacy’s resilience as well as the cross-cutting appeal of children as political symbols. Justice Kennedy’s concern that depriving same-sex couples of marital status “humiliates tens of thousands of children” is but one modern iteration of an idiom that family law reformers have used to various ends for at least two centuries.<sup>460</sup> Many who make child-focused arguments are sincere in their concern for families’ welfare. Certainly, the relative success of these

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458. On the 1996 welfare reform’s approach to mothers’ mandatory cooperation in paternity establishment and related issues, see generally GWENDOLYN MINK, *WELFARE’S END* (2002); ANNA MARIE SMITH, *WELFARE REFORM AND SEXUAL REGULATION* (2007).

459. On federal benefits, see, for example, U.S. GOV’T GEN. ACCOUNTING OFFICE, *GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT* (Jan. 23, 2004).

460. *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013).

claims in illegitimacy litigation confirms their considerable strategic benefits.<sup>461</sup> But histories such as this remind us that embracing the trope of innocent children at the expense of non-conforming adults' equality, freedom, and dignity carries a steep price—not only for adults, but for entire families.<sup>462</sup>

#### CONCLUSION

A casual reader of the illegitimacy cases could be forgiven for thinking that the laws they invalidated were mere relics of archaic common-law and Victorian approaches to sexual morality. Certainly the punishment of blameless children for the sins of their parents seemed “illogical and unjust” in the modern era. But understanding the origins of these cases in the crucible of civil rights activism, conservative reaction, and later, feminist advocacy, reveals them less as anachronistic aberrations and more as part of a larger battle over the relationship between family structure and racial, sexual, and economic justice. The more expansive arguments advocates made, in and out of court, about the relationship between illegitimacy penalties and other forms of inequality remind us that judicial opinions often mask the real stakes of legal and constitutional questions. If these advocates' most capacious arguments had succeeded, the stakes of marriage equality might not be so high, for marriage might not be the exclusive path to family recognition and to social and economic citizenship. Marriage equality advocates might have channeled resources into other worthy battles without worrying that foregoing marriage rights would deprive LGBT families of precious dignitary and material benefits.<sup>463</sup> We might today have a constitutional politics that challenges not only the exclusion of same-sex couples or inequities between spouses, but also the legal primacy of marriage itself.

This account of lost promise should not obscure the obstacles that stood, and still stand, in the way of challenges to marriage's legal primacy. True, marriage has ceased to be obligatory and permanent and no longer dictates sex and gender roles.<sup>464</sup> But as a primary vehicle for managing and privatizing dependency in the absence of a robust welfare state or other social supports for families, marriage remains central to American political economy as well as a unique source of legal and cultural legitimacy. Threatening marital supremacy

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461. On the benefits and costs of riskier arguments, see, for example, Suzanne B. Goldberg, *Risky Arguments in Social-Justice Litigation: The Case of Sex Discrimination and Marriage Equality*, 114 COLUM. L. REV. 2087 (2014).

462. Cf. Gordon, *supra* note 9.

463. As Douglas NeJaime has shown, marriage cast a long shadow over the LGBT rights struggle long before marriage equality became a prominent movement goal, as campaigns for non-marital recognition shaped marriage's meaning and vice-versa. See Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87 (2014).

464. On the malleability of marriage's internal infrastructure, see, for example, Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758 (2005).

was and is therefore perceived by many as an assault on the very foundation of society. Progressives, then and now, often join conservatives and traditionalists in policing the boundaries between marriage and non-marriage, even if they disagree about who should be able to marry and what roles husbands and wives should assume.

Marriage equality—and gender equality within marriage—certainly need not come at the expense of nonmarital children and their parents. Indeed, marriage equality has radical and transformative, as well as conservative, potential.<sup>465</sup> But the history of the illegitimacy cases suggests that focusing on the harm to (presumptively innocent) children while downgrading or penalizing their parents' nonmarital (and presumptively not so innocent) relationships has destructive symbolic and material consequences for nonmarital families. Plaintiffs attacking illegitimacy penalties won significant victories, to be sure, and they made understandable strategic decisions along the way. The story told here makes clear, though, that winning is not everything: the terms on which marriage equality becomes part of our constitutional culture will help to determine whether same-sex couples' access to marriage is the latest chapter in the history of marital supremacy or the opening salvo in a renewed battle for racial, sexual, and economic justice.

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465. On the potentially progressive implications of the marriage equality movement's success for nonmarital families, see, for example, Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. (2016); see also Michael Boucai, *Glorious Precedents: When Gay Marriage Was Radical*, 27 YALE J.L. & HUMAN. 1 (2015) (showing how early same-sex marriage litigation reflected the more radical aims of the 1970s gay liberation movement); Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817 (2014) (arguing that the marriage equality movement's success has had salutary implications for LGBT individuals and families that reach far beyond marriage). On the need to address discrimination against nonmarital families alongside or in the wake of marriage equality, see Courtney Joslin, *Marital Status Discrimination 2.0*, 95 B.U. L. REV. 805 (2015); Widiss, *supra* note 7.