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Intersectionality and the Constitution of Family Status

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Marital supremacy—the legal privileging of marriage—is, and always has been, deeply intertwined with inequalities of race, class, gender, and region. Many if not most of the plaintiffs who challenged legal discrimination based on family status in the 1960s and 1970s were impoverished women, men, and children of color who made constitutional equality claims. Yet the constitutional law of the family is largely silent about the status-based impact of laws that prefer marriage and disadvantage nonmarital families. While some lower courts engaged with race-, sex-, and wealth-based discrimination arguments in family status cases, the Supreme Court largely avoided recognizing, much less crediting, their constitutional significance. Moreover, constitutional family status jurisprudence mostly overlooked claims to sexual autonomy, sex equality, and racial and economic justice arising from plaintiffs' lived experience of intersecting status-based harms. The result is a constitutional family law canon that often obscures the social reality of legal regimes that elevate marriage at the expense of equality.

At particular historical moments, advocates have seized upon social movement victories and associated developments in constitutional doctrine—a brief openness to race-based disparate impact and economic justice claims, the emergence of sexual privacy and sex equality principles—to expose and exploit the intersections between race, class, gender, and family status-based inequality. Plaintiffs and their lawyers made race- and poverty-

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based discrimination arguments against laws and policies that distinguished between individuals and families based upon marital status. For instance, when advocates challenged "illegitimacy" penalties such as the denial of wrongful death and workers' compensation, inheritance rights, and government benefits to nonmarital children and their parents, they often argued that such policies had a disparate impact on families of color. Indeed, all of the early illegitimacy cases were brought by African American women and their children, but no Supreme Court opinion so much as mentions race.

Intersectional harms often underpinned legal assaults on family status inequalities. Challenges to welfare policies that capped AFDC benefit amounts, as well as lawsuits against "suitable home" and "substitute father" policies included race (and sometimes "family status") discrimination claims. Women of color and concerns about racially disparate impact played a prominent if often unspoken role in litigation challenging mandatory paternity disclosure for unmarried women poor enough to be eligible for public assistance. Constitutional and statutory challenges to policies excluding "unwed mothers" from employment frequently combined race and sex discrimination claims, contending that such restrictions disproportionately burdened women of color and frequently betrayed invidious racial motivation.

Courts often decided these cases without engaging the race discrimination claims, and the racial context frequently receded from judicial consciousness as cases moved up through appellate courts. That is not to say that the racial subtext had no impact on legal decisionmakers, however: there is evidence that it did, sometimes to plaintiffs' advantage. As the 1970s wore on, though, plaintiffs more frequently framed their claims as sex discrimination: they emphasized the severe disparate impact on women of laws penalizing nonmarital parenthood, given women's disproportionate responsibility for the care and support of children generally and nonmarital children in particular. Nonmarital fathers' claims, too, usually sounded in terms of sex discrimination (or due process, in the case of parental rights) rather than racial discrimination. Even so, women and men of color remained at the forefront of challenges to laws that discriminated based on marital status and sex.

Race and sex discrimination arguments were not inherently more progressive than other framings of plaintiffs' constitutional claims, of course. Many of the race- and poverty-based discrimination arguments promoted by opponents of illegitimacy classifications in the late 1960s, for instance, were perfectly compatible with the prevailing judicial trope of innocent (poor, black) children suffering unjustly for their parents' "sins." And applying formal sex equality principles to nonmarital fatherhood risked obscuring the disproportionate burden mothers tended to bear for the care and support of nonmarital children, as well as economic, social, and physical power differentials between men and women. The political valence of equality arguments depended on their substantive content. To the extent that constitutional claims derived from the lived experiences of individuals and families shaped by racial, gender, sexual and economic subordination, they could expand the meaning of principles such as equality, liberty, autonomy, and due process. When plaintiffs invoked the Constitution to vindicate a right to engage in nonmarital sex without reprisal from the government or a private employer; to call upon the state for benefits regardless of marital or birth status; or to exercise parental rights over nonmarital children, they laid claim to the universal significance of their particular experience.

The courts' failure to recognize claims based on these intersectional experiences had wide-ranging and lasting consequences for equality law. Those consequences are visible in the Court's approach to illegitimacy classifications, which sees their primary harm as punishing "innocent children" for parental "transgressions," leaving untouched the legitimacy of privileging marriage in public and private law. They are visible in the federal constitutional jurisprudence of nonmarital fatherhood, which reflects the values of the divorced fathers' rights movement and of traditional adoption advocacy more than feminists' concerns about women's subordination, or poverty lawyers' desire to protect poor families from state intrusion. They are visible in state welfare policies that find no constitutional harm in requiring mothers to cooperate with authorities in identifying and seeking child support from impoverished fathers. We can also see these consequences in the Supreme Court's same-sex marriage jurisprudence, which characterizes unmarried individuals and nonmarital families as legally, socially, and economically inferior.

Marital supremacy is alive and well, even in an age of marriage equality.

In previous work, I have provided detailed historical accounts of constitutional litigation campaigns against illegitimacy penalties that targeted nonmarital children and their parents, and of debates over the constitutionality of restrictions on nonmarital fathers' parental rights.[1] This Article builds on those accounts in an effort to think systematically about why the Supreme Court's constitutional jurisprudence of the family has so little to say about the status-based inequalities that prompted plaintiffs to bring their claims and shaped advocates' strategy.

Part I describes how race- and poverty-based discrimination arguments figured prominently in early constitutional litigation challenging "illegitimacy"-based classifications and asserting welfare rights, but receded from view by the early 1970s. Notwithstanding the Court's silence on the relationship between race, poverty, sex equality, and family status, African American women attempted to redefine women's sexual and economic citizenship in the 1970s based on the intersectional experience of unmarried mothers of color, as Part II chronicles. Profound disagreements persisted, however, among advocates and policymakers who contested the relationship between poverty and family structure, and the role of the state in affecting both. Cases concerning the constitutional rights of unmarried fathers became a battleground for competing conceptions of parenthood outside of marriage. Part III explores how unmarried fathers of color presented constitutional claims that reflected the intertwined impact of race, national origin, gender, and class, with little success. The Article concludes by assessing the consequences of constitutional law's erasure of the intersectional experiences that spurred family status equality claims.

I. THE DECLINING SIGNIFICANCE OF RACE IN WELFARE AND ILLEGITIMACY CASES

No educated observer of the politics of public assistance and nonmarital childbearing in the 1960s could fail to acknowledge

1. Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CAL. L. REV. 1277 (2015) [hereinafter *Marital Supremacy*]; Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292 (2016) [hereinafter *Foundling Fathers*].

the significance of race for welfare and family policy. In the preceding decades, African American women and children gained access to Aid to Dependent Children (ADC) funds formerly reserved for the presumptively white "deserving poor," and political resistance intensified accordingly.[2] In the years after *Brown*, resistance to racial desegregation efforts frequently took the form of moral regulations targeting "illegitimacy," as legal historian Anders Walker has shown.[3] Proposed legislation at the state and local level included the denial of public assistance, institutionalization of nonmarital children, and sterilization and imprisonment of their parents.[4] The most notorious of these retaliatory measures, Louisiana's 1960 "suitable home" law, purged thousands of "illegitimate" black children from welfare rolls and sparked a national outcry.[5] Winifred Bell's influential 1965 study, *Aid to Dependent Children,* left no doubt of the connections between massive resistance and punitive anti-welfare measures.[6] The Moynihan Report, released the same year, solidified popular understandings of a connection between family structure, poverty, and violence.[7] By 1968, journalist Fred P. Graham wrote that "'[i]llegitimacy,' like 'crime in the streets,' is becoming a substitute in many minds for the 'Negro problem.'"[8]

Child welfare advocates had long criticized illegitimacy penalties for unjustly imposing crippling legal disabilities and social stigma upon nonmarital children.[9] Civil rights advances provided new constitutional weapons against such laws; racial discrimination seemed an apt description of illegitimacy penalties' purpose and impact, as well as a useful analogue to illegitimacy-based discrimination. In a series of lawsuits beginning with *Levy v. Louisiana*, family law professor and scholar of illegitimacy

2. *See, e.g.*, JENNIFER MITTELSTADT, FROM WELFARE TO WORKFARE 43–48 (2005).

3. *See* ANDERS WALKER, THE GHOST OF JIM CROW 5–6 (2009).

4. Mayeri, *Marital Supremacy*, *supra* note 1, at 1286 & n.30.

5. *See, e.g.*, MITTELSTADT, *supra* note 2, at 86–91. I use the terms "legitimate" and "illegitimate" without any wish to endorse their denigration of nonmarital families. For a fuller explanation of this usage, please see Mayeri, *Marital Supremacy*, *supra* note 1, at 1279 n.4.

6. WINIFRED BELL, AID TO DEPENDENT CHILDREN (1965).

7. Daniel Patrick Moynihan, *The Negro Family: The Case for National Action* (1965).

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

9. *See, e.g.*, Justine Wise Polier, *Illegitimate!*, WOMEN'S HOME COMPANION, Aug. 1947, at 32.

Harry Krause collaborated with lawyers at the ACLU and NAACP Legal Defense Fund to attack discrimination against illegitimate children in wrongful death recovery, inheritance, and workers' compensation.[10] Plaintiffs in these early cases were, to a person, African American mothers and children from the South.

LDF lawyers specifically requested in *Levy* 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."[11] Accordingly, Krause's amicus brief for the LDF enumerated how "disproportionately more Negro children than white children are born out of wedlock," and adoption rates for white children were orders of magnitude higher.[12] As a result, "95.8 percent of all persons affected by discrimination against illegitimates under the [challenged Louisiana wrongful death] statute are Negroes . . . .[T]he classification of illegitimacy . . . is a euphemism for discrimination against Negroes."[13] All of the briefs supporting Louise Levy's children framed the central injustice of their exclusion from recovery for her wrongful death as the punishment of innocent children for their parents' illicit conduct.[14]

No coordinated strategy guided the illegitimacy cases to the Supreme Court.[15] Welfare rights advocates, however, deliberately chose cases involving racially invidious intent and effect, employing a "southern strategy" designed to highlight especially egregious civil rights abuses.[16] Sylvester Smith's challenge to Alabama's "substitute father" regulation, which denied public

10. For more on Krause, see Martha F. Davis, *Male Coverture: Law and the Illegitimacy Family*, 56 RUTGERS L. REV. 73, 92–94 (2003); Mayeri, *Marital Supremacy*, *supra* note 1, at 1288–90; *Harry D. Krause*, 1997 U. ILL. L. REV. 667 (1997).

11. Letter from Leroy Clark, NAACP LDF, to Harry Krause, University of Illinois School of Law, Dec. 4, 1967, at 1, Norman Dorsen Papers, Box 32, Folder 13.

12. 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.

13. *Id.* Norman Dorsen and his ACLU colleagues argued that classifications based on birth status, like those based on race, should be subject to strict scrutiny. Brief for Appellants, Levy v. Louisiana, 391 U.S. 68 (No. 508), 1967 WL 113865.

14. Mayeri, *Marital Supremacy*, *supra* note 1, at 1292.

15. The NAACP, LDF, and the ACLU were repeat players in the early illegitimacy litigation, and legal aid lawyers later participated in many of the cases, but no concerted effort brought "test cases" to the Supreme Court; instead, cases arose more or less organically. For more, see Mayeri, *Marital Supremacy*, *supra* note 1, at 1343–44.

16. MARTHA DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT 56 (1993).

assistance to mothers suspected of extramarital sexual relationships, included arguments about racially discriminatory purpose and effect lifted from the *Levy* briefs.[17] Welfare rights advocates pressed race discrimination claims outside the South as well, advancing similar arguments in *New Jersey Welfare Rights Organization v. Cahill*, which challenged a requirement of "ceremonial marriage" for cohabiting couples to be eligible for certain public assistance benefits.[18]

Though some lower court opinions engaged plaintiffs' race discrimination arguments, none of the welfare or illegitimacy cases decided by the Supreme Court in the late 1960s mentioned race. In *King v. Smith*, the three-judge federal district court acknowledged evidence of racially discriminatory purpose and effect in a footnote, but did not rest its equal protection holding on those grounds. The lower court praised the state's reluctance to "underwrite financially or approve situations which are generally considered immoral" as "laudable," but noted that "punishment under the regulation is against needy children, not against the participants in the conduct condemned by the regulation."[19] The Supreme Court adopted a similar approach to decide the case on statutory grounds, with Chief Justice Warren careful "to emphasize" that states remained free to "discourag[e] illicit sexual behavior and illegitimacy . . . by other means, subject to constitutional limitations" he did not specify.[20]

By 1972, political shifts on and off the Court had devalued the currency of race discrimination arguments, especially those that relied primarily on disparate impact. When Willie Mae Weber and her children challenged the exclusion of illegitimate children from the Louisiana workers' compensation statute's definition of "child" after their father's death in a job-related accident, they were represented by Vanue Lacour, an accomplished young civil rights attorney and one of the few African Americans practicing law in Louisiana. When Lacour wrote to the ACLU to ask for assistance as amicus, he specifically requested "an emphasis on the fact that the practical effect of the

17. Mayeri, *Marital Supremacy*, *supra* note 1, at 1298.

18. New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973). Martha Davis writes that welfare rights advocates retreated from the "southern strategy" in the late 1960s, and focused resources mostly on Northern states. DAVIS, *supra* note 16, at 68–69.

19. Smith v. King, 277 F. Supp. 31, 39–40 (M.D. Ala. 1967), *aff'd*, 392 U.S. 309 (1968).

20. King v. Smith, 392 U.S. 309, 333–34 (1968).

law . . . is to discriminate against black people."[21] The ACLU's brief, however, did not reiterate the race discrimination claims prominent in previous illegitimacy litigation. And Justice Lewis F. Powell Jr.'s much-quoted opinion for the Court in *Weber v. Aetna Casualty* wholeheartedly embraced the theory that illegitimacy-based classifications were unconstitutional because they punished "hapless" children for the "irresponsible liaisons" of their parents.[22] Discrimination against illegitimate children was an "illogical" and "unjust" means of deterring illicit adult sex; the state's goal of promoting marriage itself posed no constitutional problem.[23]

Though Justice Powell, new to the Court, might not have been exposed to the race- and poverty-based discrimination arguments prominent in the earlier illegitimacy cases, he did consider—and reject—such claims in the welfare context. Welfare rights strategists hoped *Jefferson v. Hackney* would establish that inadequate public assistance provision not only contravened the Social Security Act but also discriminated against people of color in violation of the equal protection clause.[24] Whereas public assistance programs for the (predominantly white, Anglo) elderly and disabled provided close to one hundred percent of what the federal government deemed basic subsistence needs, Texas AFDC recipients, more than eighty percent of whom were African American and Mexican American single mothers and nonmarital children, received less than half of the subsistence standard.[25] Plaintiffs attacked these disparities as unconstitutional discrimination based on race and family status: the Center for Social Welfare Policy and Law's brief cited Bell's study and highlighted past attempts by Southern states to punish nonmarital births through criminalization, denial of benefits, and suitable home and substitute parent regulations. Texas, in particular, "was

21. Mayeri, *Marital Supremacy*, *supra* note 1, at 1306.

22. Weber v. Aetna, 406 U.S. 164, 176, 183 (1972). For more on *Weber*, see Mayeri, *Marital Supremacy*, *supra* note 1, at 1305–10.

23. Mayeri, *Marital Supremacy*, *supra* note 1, at 1307–08 (quoting Weber v. Aetna, 406 U.S. 164, 175–76).

24. Welfare rights advocates brought a case similar to *Jefferson v. Hackney* in Ohio. *See* PREMILLA NADASEN, WELFARE WARRIORS: THE WELFARE RIGHTS MOVEMENT IN THE UNITED STATES 61 (2005).

25. Jefferson v. Hackney, 406 U.S. 535, 558 (1972) (Marshall, J., dissenting).

a prime and vigorous perpetrator" of such racially motivated measures.[26]

Justice Powell, perhaps the most likely swing vote in *Jefferson*, did not think much of the constitutional race discrimination argument.[27] His clerk Hamilton P. Fox III viewed disparate impact analysis as a dangerous slippery slope. "If the Court measures racial discrimination entirely by impact," Fox wrote, "then the Court would compel lawmakers and administrators to take into account racial balance in every situation." Racial impact was not "irrelevant," in Fox's view, "but its relevance is that it tends to show motivation and purpose."[28] Fox saw no such evidence of purpose in the record, and he believed the discrepancies had a rational basis: whereas the aged and disabled largely were incapable of supporting themselves, AFDC recipients might be encouraged to work and reduce their "dependency" on public funds. Fox found this logic neither "intelligent" nor "humane," but "reluctant[ly]" concluded that the plaintiffs' constitutional claims should be rejected. Powell apparently agreed with Fox's constitutional conclusion, though he ultimately declined to follow his clerk's recommendation that the Court find for the plaintiffs on statutory grounds.

Coming on the heels of other welfare rights defeats, the Court's 5-4 decision in *Jefferson* sounded the death knell for race-based disparate impact claims in welfare cases, and hastened the demise of poverty lawyers' attempt to constitutionalize welfare rights.[29] Once central to the constitutional case against illegitimacy classifications and to welfare rights activists'

26. Brief for Appellants, Jefferson v. Hackney, 30–36 (citing Bell, *Aid to Dependent Children*). Davis writes that welfare rights strategist Ed Sparer recommended positioning *Jefferson* as the first equal protection case to reach the Supreme Court because of its "dramatic and egregious facts" relative to contemporaneous cases. DAVIS, *supra* note 16, at 134.

27. Justice Harry Blackmun, who, like Powell, had recently joined the Court, had written his first opinion in a welfare case, *Wyman v. James*, rejecting the plaintiff's claims. *See* Wyman v. James, 400 U.S. 309 (1971); LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN 61–62 (2005).

28. Hamilton P. Fox III, Bench Memo, Jefferson v. Hackney [406 U.S. 535], on file with the Lewis F. Powell Jr. Papers, 1921-1998, Ms 001, Lewis F. Powell Jr. Archives, Washington and Lee University, Lexington, VA [hereinafter *Powell Papers*], Box 370, Folder 28.

29. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970) (upholding restrictions on welfare benefits to large families against equal protection challenge); *Wyman*, 400 U.S. 309 (upholding caseworker searches of AFDC recipients' homes against constitutional challenge). *See also* DAVIS, *supra* note 16, at 134.

constitutional strategy, by the early 1970s race-based disparate impact arguments faded into the background of the Court's welfare and illegitimacy jurisprudence. In both contexts, when the Court found for plaintiffs, it did so in the name of protecting needy children, rather than vindicating claims of racial or economic justice for adults and their families.

II. SEXUAL CITIZENSHIP, ECONOMIC JUSTICE, AND INTERSECTIONAL EXPERIENCE

In the late 1960s and early 1970s, a new generation of feminist and welfare rights critiques challenged the child-focused account of illegitimacy penalties' harm and focused attention on how punishing nonmarital childbearing and nonmarital children subordinated adult women—especially women of color, and poor and low-income women—impeding their sexual and reproductive autonomy, their economic independence, and their ability to care for their families.

African American women as individuals and as activists in the grassroots welfare rights movement struggled against the racist, sexist dehumanization of welfare recipients, prominently including the state's intrusion on the personal and sexual lives of black single mothers. Sylvester Smith's challenge to Alabama's substitute father law not only underscored the racial motivations and effects of punitive anti-illegitimacy welfare measures, but also advanced a robust vision of sexual autonomy and privacy. Smith resisted conventional notions of respectability: when told that her family would be ineligible for ADC benefits if she did not disprove rumors of her intimate relations with a married father of nine children, Smith adamantly refused to confirm or deny the affair. "I told [the caseworker] it was none of her business," Smith later recalled, adding that she had every intention of "going with" whomever she wished as long as she was young enough to enjoy the company of men.[30] Smith, who worked daily eight-hour shifts as a cook in Selma for less than twenty dollars per week to support her four children and one grandchild, valued her social and sexual autonomy enough to risk losing the stingy but significant ADC benefit for which her family was eligible.[31]

30. Mayeri, *Marital Supremacy*, *supra* note 1, at 1297.

31. For more, see Rickie Solinger, *The First Welfare Case: Money, Sex, Marriage, and White Supremacy in Selma, 1966: A Reproductive Justice Analysis*, 22 J. WOMEN'S HIST. 13 (2010).

Smith's defiant declaration of sexual independence 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.[32] Her lawyer, Martin Garbus, argued that the substitute father regulation, by requiring mothers to disclose their "most intimate relationships," violated her rights to privacy and freedom of association.[33] ACLU lawyers who litigated the early illegitimacy cases made supportive arguments outside of court: in 1967, Norman Dorsen, David Rudovsky, and John "Chip" Gray argued for an expansive interpretation of *Griswold v. Connecticut* to "include [all] private sexual activity between consenting adults," and suggested that "the right of government to prohibit or discourage 'immoral' conduct which damages no other public interest has been seriously challenged."[34] In 1969, Rudovsky and Gray interpreted *Levy* and its companion case, *Glona v. American Guarantee and Liability Insurance Company*, to require strict judicial scrutiny of laws that discriminated against the *parents* of nonmarital children.[35] The Court's 1972 decision in *Eisenstadt v. Baird*, invalidating a contraceptive ban for unmarried individuals, encouraged civil libertarians and feminists to hope for an expansive interpretation of sexual and reproductive freedom outside the bonds of marriage.[36]

The declining fortunes of race-based constitutional disparate impact claims, poverty-based equal protection claims and the welfare rights movement coincided with the rise of feminist legal advocacy and the emergence of constitutional sex equality law in the early 1970s. Feminist lawyers and commentators offered a sharp critique of the approach promoted by Harry Krause and embraced by the Court, which framed the primary harm of illegitimacy penalties as their injury to blameless children powerless to prevent parental misconduct. Young lawyers Patricia Tenoso and Aleta Wallach wrote in 1974 of "an independent justification for abolition of illegitimacy: the right of women to self-determination requires that they be free from all forms of

32. Mayeri, *Marital Supremacy*, *supra* note 1, at 1298.

33. *Id*.

34. *Id*. at 1296–97 (quoting Norman Dorsen & David Rudovsky, Comment, *Equality for the Illegitimate?*, WELFARE L. BULL., May 1967, at 15).

35. John C. Gray Jr. & David Rudovsky, *The Court Acknowledges the Illegitimate*, 118 U. PA. L. REV. 1 (1969).

36. Eisenstadt v. Baird, 405 U.S. 438 (1972).

male domination."[37] They excoriated Krause's focus on ascertaining paternity and extracting child support from biological fathers, contending that state policy should instead "treat the mother as an economic resource" by "eliminat[ing] barriers to [] employment" for unmarried mothers and guaranteeing "adequate governmental support of all unmarried mothers and their children."[38] "Illegitimacy," they contended, was only a problem because law and society made it so; patriarchy and poverty were the true culprits.[39]

Like some welfare rights advocates, feminists such as Wallach and Tenoso questioned the foundational premises of marital supremacy, including the two-parent nuclear family's superiority, the undesirability of nonmarital childbearing, and the privatization of dependency.[40] Constitutional litigation was not a medium ideally suited to translating such revolutionary critiques into action. Nevertheless, plaintiffs and their advocates advanced feminist arguments that illegitimacy penalties imposed a disproportionate economic and social burden upon women, especially the poor women of color who dominated the ranks of nonmarital motherhood: Katie Mae Andrews and four other African American women who lost or were refused jobs as teachers by a white superintendent in a rural Mississippi school district because they had children "out of wedlock";[41] Linda Gomez, who challenged a Texas law exempting fathers of nonmarital children from child support obligations;[42] the women threatened by Connecticut and other states with fines and imprisonment as well as the denial of public assistance for refusing to disclose the identity of their children's fathers;[43] Jessie Trimble,

37. 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, 25 (1974).

38. Patricia Tenoso & Aleta Wallach, Book Review, 19 UCLA L. Rev. 845, 850 (1972).

39. Mayeri, *Marital Supremacy*, *supra* note 1, at 1312 (citing Wallach and Tenoso).

40. On privatized dependency, see, for example, MARTHA FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH-CENTURY TRAGEDIES 167–68 (1995); Brenda Cossman, *Contesting Conservatisms, Family Feuds, and the Privatization of Dependency*, 13 AM. U. J. GENDER SOC. POL'Y & L. 415 (2005).

41. *See* 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).

42. *See* Gomez v. Perez, 409 U.S. 535, 538 (1973) (per curiam).

43. *See* 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).

Lois Fernandez, and fellow plaintiffs in lawsuits attacking discriminatory inheritance laws in Illinois and Pennsylvania;[44] Margaret Gonzales, who contested the exclusion of unmarried mothers from Social Security survivors' benefits.[45]

Plaintiffs and their lawyers emphasized how illegitimacy penalties often forced women to bear most or all of the economic burden of supporting nonmarital children after fathers died or deserted their families; how such laws shamed and punished women for illicit sex while allowing men to escape the consequences with impunity; and how denying jobs, child support payments, government benefits, and inheritance rights to nonmarital families effectively restricted women's reproductive autonomy by penalizing their decision to bear and raise nonmarital children. They protested when illegitimacy penalties continued the tradition of invasively patrolling poor women's personal lives by conditioning sustenance on the disclosure of sexual relationships or paternity.

Some of these cases were obviously and explicitly entwined with the struggle for racial justice. In *Andrews v. Drew Municipal Separate School District*, Superintendent George F. Pettey presided over a school district that had mightily resisted desegregation; most white families had decamped to "segregation academies," leaving the schools more than eighty percent black but the ranks of teachers and administrators increasingly dominated by whites. The disparate impact of excluding nonmarital parents was unmistakable: all five of the rejected applicants were African American women, and as many as forty percent of Drew's African American students were born to unmarried parents. The school district's attorney was segregationist Senator James O. Eastland's son-in-law, and he called a once-prominent defender of racial segregation, Ernest van den Haag, to testify. Andrews's attorney, Charles Victor McTeer, a twenty-four-year-old African American protégé of the Center for Constitutional Rights' Morty Stavis, enlisted social psychologist Kenneth Clark and civil rights icon Fannie Lou Hamer to testify on behalf of the plaintiffs. District Court Judge William Keady certified Mrs. Hamer as an expert on the "social mores of the black community." Briefs submitted by McTeer, by

44. *See* Trimble v. Gordon, 430 U.S. 762 (1977).

45. *See* Boles v. Califano, 464 F. Supp. 408 (W.D. Tex. 1978), *rev'd*, 443 U.S. 282 (1979).

feminist lawyers Nancy Stearns and Rhonda Copelon at CCR, and amici including the Equal Rights Advocates and ACLU Women's Rights Project made race as well as sex discrimination arguments against the exclusion of unmarried mothers from employment. Indeed, the plaintiffs' equal protection argument was explicitly intersectional, requesting that the Justices apply strict scrutiny because the case implicated so many different rights and theories.[46]

In other cases, although everyone understood that the law's impact would fall disproportionately on women of color, race was less a constitutional hook than a subtly invoked subtext. Their private correspondence makes clear that child welfare advocates and their allies understood *Roe v. Norton*, the challenge to Connecticut's punitive mandatory paternity disclosure law, as part of a larger campaign for racial and economic justice. Jessie and Deta Mona Trimble's lawyers made race as well as sex discrimination arguments when challenging Illinois's inheritance laws in state court, but apparently dropped the race-based disparate impact arguments on appeal to the U.S. Supreme Court. The legal aid and poverty lawyers who challenged the exclusion of illegitimate children and their parents from Social Security benefits noted the laws' race-based disparate impact, but by the mid-1970s constitutional disparate impact claims based on race, especially in the context of federal government benefits, seemed like a non-starter after decisions in cases such as *Washington v. Davis* (1976) confirmed that the Court would require proof of discriminatory intent to prove an equal protection violation.[47]

Bringing race to the surface of illegitimacy penalty cases involved risks as well as benefits. On the one hand, judges who were sympathetic to the civil rights cause or frustrated with the intransigence of white segregationist resisters might view evidence of racially disparate impact as sufficient to suggest actionable discriminatory intent. Judges like William Keady of Mississippi, who confronted pitched battles over school desegregation the moment he ascended the bench in 1968, could

46. For in-depth discussions of *Andrews*, see Mayeri, *Marital Supremacy*, *supra* note 1, at 1316, 1319–20; SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION ch. 5 (2011).

47. *See* Washington v. Davis, 426 U.S. 229 (1976); Pers. Adm'r v. Feeney (1979); MAYERI *supra* note 46, at ch. 4; Katie Eyer, *Ideological Drift and the Forgotten History of Intent*, 51 HARV. C.R.-C.L. L. REV. 1, 50–55 (2016).

hardly fail to recognize what was at stake when he received racist hate mail excoriating him for endorsing "[h]eifers" "breeding kids out of wedlock" at taxpayer expense. [48] On the other hand, advocates did not wish to suggest that African Americans adhered to different moral standards than whites, or that black communities condoned the "schoolgirl pregnancies" that were the ostensible target of school administrators' exclusionary policies. Sensitive to this delicate balance, social psychologist Kenneth Clark emphasized in his *Andrews* testimony that sexual mores and behavior did not differ appreciably along racial lines: black and white Americans alike regularly defied moral proscriptions against nonmarital sex. Rather, he contended, poor African American youth lacked access to contraception and to information about preventing pregnancy.[49] Fannie Lou Hamer's testimony excoriated whites' sexual hypocrisy in laymen's terms: if the school district excluded all employees, white and black, who had ever engaged in nonmarital sex, "lock up the doors. There won't be any school."[50]

Some of the protagonists in illegitimacy penalty cases sought to conform as best they could to existing normative ideals; some rejected the politics of respectability altogether; and still others sought to redefine its terms. At one end of this spectrum, attorneys for the Levy children portrayed their mother Louise, who died of hypertensive uremia after a negligent misdiagnosis in a segregated New Orleans hospital, as a paragon of maternal piety, devotion, and self-sufficiency.[51] Briefs noted that she labored as a domestic worker to send her children to Catholic school and did not depend on welfare.[52] Ms. Levy, this depiction implied, threatened neither the public fisc nor the availability of low-wage labor; her educational choices did not even evoke the specter of public school desegregation. Indeed, attorney Adolph Levy (no relation) emphasized that if the Levy children were denied recovery for their mother's wrongful death, "the tortfeasor

48. MAYERI *supra* note 46, at 157–58.
49. *Id.*
50. *Id.* at 151.
51. Melissa Murray, *What's So New About the New Illegitimacy?* 20 AM. J. GENDER SOC. POL'Y & L. 387, 395 (2012); *see also* Mayeri, *Marital Supremacy*, *supra* note 1, at 1290.
52. *See* Murray, *supra* note 51, at 395.

need reimburse no one. The State must support the tragic victims."[53]

At the opposite end of the spectrum were women who celebrated sexual liberty and viewed single parenthood as a laudable choice, not a regrettable mistake. Sylvester Smith staunchly defended her right to receive aid from the state without divulging her personal business to a caseworker and without forswearing extramarital sex or male companionship. Whereas Katie Mae Andrews and Lestine Rogers, the named plaintiffs in *Andrews*, presented themselves as churchgoing Sunday school teachers who had become parents because of ignorance or inability to access birth control, teacher's aide applicant Violet Burnett unapologetically refused to condemn premarital sex or to model abstinence to her students. When asked how she would counsel a student about engaging in (nonmarital) sexual intercourse, Burnett replied that she saw no harm in it, and would advise students to do as they pleased.[54] Lois Fernandez, an African American community activist from Philadelphia who sued and lobbied to persuade Pennsylvania's governor and legislature to abolish many of the legal disabilities associated with illegitimacy, spoke proudly of single parenthood as a morally valid choice worthy of equal dignity.[55] Fernandez actively fought the "stereotype that mothers of out of wedlock children are promiscuous," and resisted community norms prescribing that children should be given their father's surname.[56]

Many plaintiffs and their advocates neither embraced nor wholly rejected prevailing social and sexual norms, but instead worked to redefine respectability itself by rehabilitating the image of unmarried motherhood. When Mississippi school officials argued that unmarried parents set a poor moral example for their impressionable students, the plaintiffs and their allies countered with a robust defense of single mothers' courage, fortitude, and moral character that emphasized their valiant efforts to obtain education and employment against all odds. Women like Katie Mae Andrews were admirable role models: college graduates who

53. Petitions for Writs of Certiorari and Review to the Court of Appeal, Fourth Circuit, State of Louisiana, at 4, Levy v. State, 193 So.2d 530 (La. 1967) (No. 48518), collected in Dorsen Papers, Box 32, Folder 14.

54. Mayeri, *Marital Supremacy*, *supra* note 1, at 1342.

55. Stephen Franklin, *Mother Wins Fight To End Stigma of Illegitimacy*, THE BULLETIN, Dec. 10, 1978, GB3.

56. *Id.*

sought meaningful employment in order to support themselves and their children. Rather than relying on paltry public assistance benefits to supplement the dead-end, low-wage menial labor traditionally available to African American women, Andrews and her compatriots lifted themselves and their children out of poverty. Fannie Lou Hamer admonished white school officials for placing women like Andrews in a catch-22: "[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."[57] Mae Bertha Carter, the married mother of thirteen children who had almost single-handedly integrated the Drew, Mississippi schools, lent her moral stature to the plaintiffs' cause, testifying that she would be proud to see Ms. Andrews teach her children.[58]

The redefinition of sexual citizenship by women of color expanded the scope of reproductive autonomy to include the right to give birth to and raise children regardless of financial means, marital status, or the presence of a man in the household. In the early 1970s, as abortion restrictions fell and women of color and their allies exposed and protested involuntary sterilization, plaintiffs and their lawyers emphasized that the right to reproductive choice included the right to have children as well as the right not to have them. Some, like Andrews and Hamer, personally opposed or had religious objections to abortion. Hamer had experienced and remonstrated against coerced hysterectomies and tubal ligations, known as "Mississippi appendectomies" thanks to her advocacy. Such abuses, which occurred without women's knowledge or consent, or were required as a condition of receiving medical care or public assistance, were hardly confined to Mississippi; less drastic penalties for nonmarital childbearing such as employment restrictions and denials of public assistance, were even more widespread. Whereas abortion rights jurisprudence highlighted the right not to bear children, and still bore the imprint of population control, feminists in CCR and in grassroots

57. *See* Appendix at 102, Drew Mun. Separate Sch. Dist. v. Andrews, 425 U.S. 559 (No. 74-1318).

58. *Id*. at 113–14.

organizations representing women of color advanced a broader reproductive justice agenda.[59]

This vision of sexual citizenship also encompassed women's prerogative to make independent decisions about their families and households without state interference, to exercise rights commensurate with their responsibilities. The women who challenged Connecticut's mandatory paternity disclosure law in *Roe v. Norton* confronted disapprobation for depriving their children of paternal financial support and a relationship with their fathers: "Why," asked the state attorney general, "should a mother be permitted, by her inaction, to cast her child into the eternal caverns of illegitimacy[?]"[60] Federal district court Judge M. Joseph Blumenfeld, liberal reputation notwithstanding, castigated "recalcitrant mother[s]" for acting against the interests of their "innocent children," and upheld the statute as "operat[ing] prophylactically against the adverse differential treatment which the unwed mothers would impose on their children."[61] Women forced to identify their children's father or face imprisonment protested both the intrusion on their personal privacy and the implication that they were not best positioned to assess their children's best interests. For some women, they insisted, keeping paternity private was the most responsible decision they could make for their families; the alternative, several women testified, was to risk physical violence. Others worried that holding a former sexual partner legally liable for child support would cause a voluntarily involved father to flee, or disrupt an impending marriage to another man willing to adopt the mother's children. Child welfare experts warned that forcing an unwilling mother to identify her child's father would cause material and psychic harm to the child, hardly ever outweighed by the often- illusory promise of material or affective support.[62] Prominent pediatric psychiatrist Albert Solnit testified that incarcerating mothers would be "catastrophic" for children, and, moreover, that "the one who has the care and the responsibility

59. *See, e.g.*, JENNIFER NELSON, WOMEN OF COLOR IN THE REPRODUCTIVE RIGHTS MOVEMENT (2003); DOROTHY ROBERTS, KILLING THE BLACK BODY (1997); JAEL SILLIMAN ET AL., UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZING FOR REPRODUCTIVE JUSTICE (2004).

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

61. Doe v. Norton, 365 F. Supp. 72, 79, 79 n. 23 (D. Conn. 1973).

62. Mayeri, *Marital Supremacy*, *supra* note 1, at 1321.

and the loving affectionate bond" was the ablest and most deserving judge of her child's best interests.[63]

Perhaps even more than plaintiffs, advocates who opposed illegitimacy penalties varied widely in their attitudes toward sexual and family autonomy, sex equality, and the political economy of reproduction, parenthood and poverty. To some degree, this was a matter of context, emphasis, and strategy. When advocates could frame the plaintiffs' position as consistent with the privatization of dependency, they understandably did. For instance, in cases involving employment discrimination, child support, and inheritance law, lawyers often reminded courts that without income from a job or private financial support from a living or deceased father, women and their children would place a burden on the public fisc. Such arguments had less purchase, of course, when finding for the plaintiffs would increase public assistance costs, as in the mandatory paternity disclosure cases. There, advocates argued that government officials' professed solicitude for innocent children masked their real aims of minimizing public welfare expenditures and punishing poor women for nonmarital childbearing.

But advocates who opposed illegitimacy penalties also disagreed more fundamentally about family, poverty, and welfare policy. At one end of the spectrum were adherents of the Moynihanian ethos who saw nonmarital childbearing and "matriarchal" family structure as inherently problematic, if not pathological. To them, "illegitimacy" was both a "psychic catastrophe," in the words of one often-quoted scholar, and a devastating social scourge. These advocates recognized and condemned punitive anti-illegitimacy laws as cruel and racist, but saw their impact on blameless children as the primary harm they wrought. They prioritized the restoration of African American men to their normative roles as breadwinners, husbands, and fathers; to the extent poor men were unable to take their proper place as heads of households, measures to identify and hold them responsible for financial support could at least mitigate the social, economic, and psychological devastation of fatherlessness. At the other end of the spectrum were feminist and welfarist advocates who emphasized women's sexual, reproductive, and economic autonomy, truly equal employment opportunity and access to

63. *Id*. (quoting Albert Solnit).

good jobs but also the freedom to devote themselves to family care without being forced to depend upon a man for financial support.

Between these poles, advocates held varying views of the state's proper role in creating the conditions necessary for women and their families to enjoy freedom and equality. Herbert Semmel, a poverty lawyer who later argued unsuccessfully in the Supreme Court that mothers of nonmarital children should be eligible for Social Security survivors' benefits, believed the emerging emphasis on child support enforcement to be misguided. With anthropologist Carol Stack, who studied extended kin networks in impoverished black communities, Semmel argued in 1973 that "[l]arge-scale efforts to seek contributions from nonsupporting fathers would do little or nothing to help dependent AFDC children" because poor black fathers lacked the job opportunities and resources to make more than sporadic voluntary financial contributions and aggressive enforcement efforts would likely discourage "sorely needed material, psychological and social support which would otherwise be forthcoming from the father and his kin."[64] When low-income fathers did pay child support, such monies went directly to the state as reimbursements or offsets of AFDC funds; mothers and children did not benefit. Ultimately, Stack and Semmel concluded, a "national income maintenance program should offer assistance to all needy persons," regardless of family status or the presence of children in the household; to do otherwise would fail to serve communities in which shifting networks of neighbors and kin provided care and support to families.[65] Harry Krause, in contrast, prioritized paternity determinations and embraced enhanced enforcement efforts: he contended that state and local governments simply could not meet the needs of the growing population of single parent households with public funds, and thus strengthening child support collection was a public policy imperative.[66]

64. Carol B. Stack & Herbert Semmel, *The Concept of the Family in the Poor Black Community*, *in* STUDIES IN PUBLIC WELFARE, PAPER NO. 12 (PART II): THE FAMILY, POVERTY, AND WELFARE PROGRAMS, S. COMM. ON FISCAL POL'Y, 93RD CONG. 294 (Comm. Print 1973).

65. *Id.* at 305.

66. Harry D. Krause, *Child Welfare, Parental Responsibility, and the State*, *in* STUDIES IN PUBLIC WELFARE, *supra* note 64, at 273–74.

By the 1980s, Krause's vision had triumphed, due in part to a convergence between longstanding attempts to penalize nonmarital sex by holding poor and low-income men of color financially responsible for the children of their sexual partners; the efforts of some feminists to hold fathers responsible post-divorce; the conservative fiscal imperative to privatize dependency; and the rise of the divorced fathers' rights movement, which conceded child support obligations in exchange for formal sex equality in custody rights.[67] These forces buffeted unmarried fathers, largely unorganized and often poor; even those who brought constitutional parental rights claims all the way to the U.S. Supreme Court did not do as part of a concerted or mobilized campaign.[68] Nevertheless, in the 1970s and 1980s, nonmarital parenthood became a key battleground for disagreements among feminists and anti-poverty advocates over the role of fathers, mothers, and the state in providing care and financial support to poor children and families.

III. WHITEWASHING NONMARITAL FATHERHOOD

Like unmarried mothers, nonmarital fathers used constitutional litigation to seek rights and to rehabilitate their image. Again, many of the plaintiffs in the early Supreme Court cases were persons of color and of limited means. As in the "illegitimacy" suits, the unwed fathers' cases that reached the Court did so not as the result of a coordinated strategy but rather as a matter of chance. The race, class, and gender politics of fathers' constitutional claims differed significantly from those of nonmarital children and their mothers, however. Leon Quilloin, Abdiel Caban, Curtis Parham, and plaintiffs who challenged discrimination against nonmarital fathers and children in citizenship laws in *Fiallo v. Bell* made sex discrimination claims, but none so much as mentioned race. Poverty law strategy played a central role in advocates' thinking about cases involving parental rights; feminist organizations, deeply conflicted about nonmarital fatherhood, largely stayed out of constitutional

67. For an excellent in-depth treatment of the divorced fathers' rights movement during this period, see generally Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 VA. L. REV. 79 (2016).

68. On the contrast between the mobilized, predominantly white middle class divorced fathers' rights movement and unorganized nonmarital fathers, see Mayeri, *Foundling Fathers*, *supra* note 1, at 2373–92.

litigation in the Supreme Court until the 1980s.[69] But by then, race, poverty, and even sex equality receded almost completely from the jurisprudence of nonmarital fatherhood.

Whereas "unwed mothers" had long been a focal point of policymakers' concern and scholars' attention, nonmarital fathers became objects of sustained study only in the 1960s and 1970s. Efforts to hold impoverished men of color responsible for supporting their biological children—or the children of their nonmarital sexual partners—intensified. Rates of nonmarital cohabitation and childbearing rose; no-fault divorce further increased the ranks of single fathers and raised questions about their rights and responsibilities vis-à-vis children. As sex- and illegitimacy-based classifications became more constitutionally vulnerable, nonmarital fathers began to assert rights to equal treatment with mothers and to procedural and substantive due process as parents.[70]

The first parental rights case brought by a nonmarital father to reach the Supreme Court was Peter Stanley's challenge to an Illinois law that conclusively presumed nonmarital fathers unfit without affording them so much as a hearing.[71] Though the Stanley family was white, and court papers contain virtually no mention of race, race-salient assumptions likely informed the Justices' deliberations. Many who opposed parental rights for men like Stanley worried that affording nonmarital fathers notice and an opportunity to be heard would thwart adoptions, long considered the normatively desirable "solution" to unwed motherhood. But adoption rates varied dramatically by race and class. In the middle decades of the twentieth century, white middle-class parents often sent unmarried girls and young women who became pregnant to maternity homes to give birth, surrender their children, and return to the routines of teenage life, preserving their future marriageability and allowing childless

69. I have explored these conflicts in great detail elsewhere. *See generally* Mayeri, *Foundling Fathers*, *supra* note 1.

70. *See id.* at Part I.

71. For more on the *Stanley* case, see Mayeri, *Foundling Fathers*, *supra* note 1, at 2309–23; *see also* Josh Gupta-Kagan, *The Strange Life of* Stanley v. Illinois*: A Case Study in Parent Representation and Law Reform*, 41 N.Y.U. J.L. & SOC. CHANGE (forthcoming); Josh Gupta-Kagan, Stanley v. Illinois's *Untold Story*, 24 WM. & MARY BILL OF RTS. J. 773 (2016).

married couples to raise children.[72] Adoption was far less common in communities of color; young African American women, especially in poor and low-income households, usually expected to raise their nonmarital children, often with the support and assistance of their own parents and kin networks.[73]

Early draft opinions in *Stanley* appear to reflect these divergent background narratives. Justice Douglas initially saw the Illinois law not as "an invidious discrimination against unwed fathers, but rather a protection of illegitimate children." Most unmarried fathers," he wrote, "are not present at their children's births and like hit-and-run drivers are difficult to locate." Unmarried mothers, Douglas assumed, usually "decide[d] to place their offspring in the care of the state." Children's best interests would be served by "swift and certain placement in adoptive homes," an outcome that rights for biological fathers might jeopardize.[74]

Justice Marshall's draft reflected a very different understanding of the underlying social conditions and of the political economy of impoverished households. The state's characterization of nonmarital fathers as presumptively unfit "suffers from the deficiencies of any stereotype," Marshall wrote. "There are many reasons for illegitimacy in our society," he continued, including the "structure of state and federal welfare programs" that "provide[d] financial assistance only to children in one-parent households." Accordingly, "a father might decline to marry the mother of his children in order to maximize the family's eligibility for financial assistance." Indeed, "[i]n such circumstances, the fact of illegitimacy provides no support whatever for the inference that the father lacks concern for his children; indeed, it may tend to suggest the contrary conclusion."[75]

Marshall's opinion in *Stanley* never saw the light of day because Justice Byron White's draft eventually won a majority, and Marshall joined White's opinion rather than writing a

72. *See generally* REGINA KUNZEL, FALLEN WOMEN, PROBLEM GIRLS: UNMARRIED MOTHERS AND THE PROFESSIONALIZATION OF SOCIAL WORK, 1890–1945 (1993).

73. *See* RICKIE SOLINGER, WAKE UP LITTLE SUSIE: SINGLE PREGNANCY AND RACE BEFORE ROE V. WADE (1993).

74. Mayeri, *Foundling Fathers*, *supra* note 1, at 2317.

75. Justice Thurgood Marshall, Draft Opinion in Stanley v. Illinois (manuscript at 5) (Nov. 1971) (on file with the Library of Congress, Thurgood Marshall Papers [hereinafter *Marshall Papers*], Box 91, Folder 5).

separate concurrence. His clerk, Barbara Underwood, had recently worked on Marshall's vehement dissent in *Jefferson v. Hackney*, however, where Marshall addressed—without passing judgment on—the constitutional claim of plaintiffs challenging Texas's differential funding of AFDC and other public assistance categories as disproportionately affecting African- and Mexican American individuals and families. In *Jefferson*, Marshall criticized the district court and his own colleagues for glibly concluding that "the fact that AFDC is politically unpopular and the fact that AFDC recipients are disfavored by the State and its citizens, have nothing whatsoever to do with the racial makeup of the program."[76] In Marshall's view, "at some point a showing that state action has a devastating impact on the lives of minority racial groups must be relevant."[77] Although Marshall's dissent in *Jefferson* did not discuss the plaintiffs' family status discrimination claims directly, he cited *King v. Smith*'s reference to the community disapproval visited upon AFDC recipients.[78] Reading Marshall's published *Jefferson* dissent and unpublished *Stanley* opinion together, it seems likely that the racial impact of Illinois's exclusion of nonmarital fathers from parental rights was on his mind.

Despite Justice Marshall's strong stance against marital status discrimination in *Stanley*, Leon Quilloin's claim to retain parental rights with respect to his son Darrell did not earn his vote when it came before the Court six years later. Darrell spent several years of his early childhood living in Savannah, Quilloin's hometown, while Darrell's mother Ardell worked in New York and sent money home to help support her son. Court records suggest that Darrell's grandmothers provided most of the day-to-day care for Darrell while he lived in Savannah. Quilloin testified that he provided some financial support when Darrell was an infant, including paying for surgery to repair a hernia, and purchasing milk and clothing; that he had arranged and paid for Darrell to start kindergarten early at a local Catholic school; and that he had built a soundproof nursery in the nightclub where he worked so that his son could spend more time with him.[79] When Darrell was five, he moved to New York to join Ardell, who by

76. Jefferson v. Hackney, 406 U.S. 535, 575 (1972) (Marshall, J., dissenting).
77. *Id*. at 575–76.
78. *Id*. at 575 (discussing King v. Smith, 392 U.S. 309, 322 (1968)).
79. Mayeri, *Foundling Fathers*, *supra* note 1, at 2336.

then had a new husband and baby son. Quilloin had visited Darrell in New York, and paid for his son to travel to Georgia for family visits. While the parties disputed the length and frequency of these visits, all agreed that Quilloin had given Darrell gifts, such as a new bicycle, which his mother felt were "disruptive to family harmony." Her husband, Randall Walcott, wished to adopt Darrell and unite the family under a single surname. Recalling his own absent father, Quilloin testified that he wished to preserve the "little bond between the kid and myself seldom as it's been" and sought visitation.[80]

There is little mention of race in the record in *Quilloin*, other than passing references to Quilloin's mother Mabel Dawson's participation in voter registration drives and get-out-the-vote campaigns during the mid- to late 1960s, the period when Darrell lived in Savannah.[81] As in the other unwed fathers cases, none of the briefs argued that laws disadvantaging nonmarital fathers had a racially disparate impact. Notably, though, the network of extended family care and support that characterized Darrell's early life in Savannah bore a strong resemblance to that of the family celebrated in a concurring opinion signed by Justices Brennan and Marshall just a few months earlier, in *Moore v. City of East Cleveland*. There, these Justices wrote separately to emphasize how a city zoning ordinance criminalizing an African American grandmother for taking her orphaned grandson into her home denigrated family structures that were especially common in black communities.[82]

Moore reflected internal disagreement among the Justices about the desirability of linking family pluralism with race, ethnicity, and class. As Marshall wrote privately to his colleagues, "I cannot agree with [the] conclusion that there is no constitutionally protected right…for a grandmother to perform

80. *Id.* at 2336–37.

81. Other sources reveal that Quilloin's sister, Carolyn Quilloin Coleman, participated in lunch counter sit-ins protesting segregation while in high school in the early 1960s, became a leader in the NAACP, and much later served as a special assistant to the governor of North Carolina. *See, e.g.*, 153 CONG. REC. 2125 (daily ed. Jan. 23, 2007) (statement of Hon. G.K. Butterfield).

82. Moore v. City of East Cleveland, 431 U.S. 494, 506 (1977) (Brennan, J., concurring). Justice Powell, who ultimately authored the majority opinion, wrote in the margins of Brennan's first draft: "I see no racial overtones here." *See* First Draft of Dissenting Opinion in Moore v. City of East Cleveland, Feb. 14, 1977, *Powell Papers*, *supra* note 28, at Box 458, Folder 16.

the duties of a mother for her grandchildren. . . . I have seen too many situations where a strong grandparent literally held the family together and was responsible for the education and upbringing of decent, law-abiding youngsters, to agree as a matter of constitutional law that the 'nuclear' family is 'the basic building block of our society.'"[83] When Marshall incorporated this sentiment into a draft dissent from what was to be Chief Justice Burger's majority opinion upholding the ordinance, he referred to grandparent involvement as particularly important among "immigrant groups, the poor, and blacks," and wrote, "I cannot agree that the norms of middle-class suburban life set the standards of constitutional law for all people at all times." Justice Powell wrote in the margins: "Nonsense! Middle-class may well respect the family more than 'the rich' or 'the poor.' But none of these generalizations is much more than loose rhetoric."[84] His clerk, David Martin, "like[d Justice Marshall's draft] very much," but pointed out that "it would not be easy" to join without also signing Brennan's opinion, which went on at much greater length about the importance of extended kin networks in African American families. Powell replied: "Good—but with racial overtones, I'll not join."[85]

Unlike the other unwed fathers cases, sex equality arguments did not play a prominent role in *Quilloin*. Quilloin sought neither full custody nor equal standing with Ardell—he "honestly believe[d] that [Darrell's] rightful place is with his mother." Rather, Quilloin sought to veto Walcott's adoption of Darrell in order to prevent the court from rendering him a legal stranger to

83. Justice Thurgood Marshall to Chief Justice Warren Burger (cc: the Conference), Re: Moore v. City of East Cleveland, Nov. 23, 1976, *Powell Papers*, *supra* note 28, at Box 458, Folder 6. Justice Marshall reiterated this view in what was to be a brief, separate dissent, later withdrawn after a majority of the Court voted to invalidate the ordinance. *See* Thurgood Marshall, First Draft of Dissenting Opinion in Moore v. City of East Cleveland, Feb. 16, 1977, *Marshall Papers*, *supra* note 75, at Box 194, Folder 2. Justice Stewart took umbrage at an early draft of Justice Brennan's opinion, which, Stewart wrote to his colleagues, "seeks to convey the invidious message that the ordinance…is racially discriminatory. Nothing could be further from the truth," Stewart contended, noting, *inter alia*, that East Cleveland was "over ninety percent Negro . . . ." *See* Potter Stewart to the Conference, Feb. 16, 1977, *Marshall Papers*, supra note 75, at Box 194, Folder 2.

84. Thurgood Marshall, First Draft of Dissenting Opinion in Moore, Feb. 16, 1977, *Powell Papers*, *supra* note 28, at Box 458, Folder 16.

85. *Id*.; R.A. Lenhardt, *The Color of Kinship*, 102 IOWA L. REV. (forthcoming 2017). For a fascinating and comprehensive discussion of *Moore*, see R.A. Lenhardt, *The Family as Racial Project: Understanding the Real Lessons of* Moore v. City of East Cleveland, 85 FORDHAM L. REV (forthcoming 2017).

his son: he sought to be treated as a "de facto divorced father." Nevertheless, a unanimous Court, in an opinion authored by Justice Marshall, denied Quilloin's claim. Quilloin, unlike a father who had married the mother of his child, or who had lived in the same household with his family, had never taken legal or actual responsibility for his son. As applied to Quilloin, then, Georgia's statute did not violate equal protection. Whereas in *Stanley*, Justice Marshall had grilled the Illinois attorney general about the relevance of a marriage license to Peter Stanley's relationship to his children, in *Quilloin* he wrote that the state "was not foreclosed from recognizing" the difference between a divorced and a never-married father's "extent of commitment to the welfare of the child."[86]

There are several possible explanations for Justice Marshall's—and his colleagues'—lack of sympathy for Leon Quilloin, none of them mutually exclusive. Melissa Murray has argued that *Quilloin* is consistent with the Court's preference, in the unwed fathers' cases, for fathers who act like normative husbands, providing financial support for their children and living together with mothers in the same household.[87] Further, unlike Peter Stanley, Quilloin's adversary was not a state department of social services proposing to place his child in foster care rather than with a biological parent, but rather a fit and caring mother and prospective stepfather who had lived with Darrell for a little more than half his life. Justice Marshall's draft opinion in *Stanley* was careful to stipulate that "[t]his case does not present the question whether the father and the mother are entitled to equal rights in a custody contest between them, and we intimate no views on that question, which may involve considerations quite different from those presented by this case."[88]

Quilloin therefore presented a host of thorny questions *Stanley* had not broached. The ACLU's internal correspondence reveals advocates deeply torn over whether to provide amicus support to Quilloin. On the one hand, civil libertarians and poverty lawyers increasingly feared that child welfare authorities removed children from their homes and terminated parental rights on grounds of neglect when poverty was the real culprit. But nonmarital fathers' parental rights, when they conflicted with

86. Quilloin v. Walcott, 434 U.S 246, 256 (1978).
87. Murray, *supra* note 51, at 402–405.
88. Marshall, *supra* note 75 (manuscript at 7 n.4).

mothers' prerogatives, posed a profound dilemma for many feminists. For married couples, feminists wholeheartedly supported egalitarian parenting. But when parents divorced—or had never been married in the first place—many feminists were more ambivalent. If a father had been relatively uninvolved in a child's care during a relationship, perhaps he did not deserve equality post-dissolution. And some feminists worried that mothers, who bore primary responsibility for the care of nonmarital children, would pay an unfair price for nonmarital fathers' rights. The feminist skeptics won this argument in *Quilloin*, and the ACLU ultimately declined to file a brief.[89]

Caban v. Mohammed presented the sex discrimination claim that *Quilloin* did not, and Abdiel Caban's stronger facts—he had lived for several years with his children *and* their mother—attracted amicus support from the ACLU and other groups. After flirting with language that would have embraced full formal equality for mothers and fathers, Justice Powell's opinion for the Court embraced sex neutrality in circumstances where a nonmarital father had developed a relationship with his children comparable to that of their mother.[90] Dissenters from the 5-4 decision continued to express concern that rights for nonmarital fathers would jeopardize newborn adoptions, still considered the most desirable option for illegitimate children.[91]

Caban marked the apex of nonmarital fathers' constitutional rights in the Supreme Court.[92] Subsequently, the Court ignored cases that presented feminist arguments for sex equality in nonmarital parental rights and decided the cases that did produce full opinions narrowly on due process grounds, maintaining distinctions between fathers based upon marital status. The Justices never grappled with the central questions that troubled feminists and poverty lawyers—the subordination of women and state intrusions on poor families' autonomy. Instead, the values of the divorced fathers' rights movement and traditionalist advocates of adoption animated the Court's jurisprudence.[93]

89. Mayeri, *Foundling Fathers*, *supra* note 1, at 2338–40.

90. Caban v. Mohammed, 441 U.S. 380 (1979).

91. *Caban*, 441 U.S. at 394–401 (Stewart, J., dissenting); *id.* at 401–17 (Stevens, J., dissenting).

92. For more on *Caban*, see Mayeri, *Foundling Fathers*, *supra* note 1, at 2342–48.

93. *Id.* at 2378–82.

Ironically, the Court consistently rejected claims from nonmarital fathers that reflected the experiences of unmarried parents of color caring for children, and did not involve the feminist dilemma posed by the competing claims of a mother. In *Fiallo v. Bell*, the plaintiffs were fathers and nonmarital children denied certain beneficial exemptions available to mothers and their nonmarital children and to married parents and their children under the Immigration and Nationality Act: Dominican national Ramon Fiallo-Sone, whose U.S. citizen son Ramon Martin Fiallo could not ease his father's path to legal residency or confer exemption from immigration quotas as he could have if his parents had married or if he had been Fiallo's mother; Serge Warner, the West Indian-born son of a naturalized U.S. citizen father, Cleophus Warner, who could not bypass the quota system to become a permanent resident, as he could have done if his mother had been a U.S. citizen, or if his parents had married; and teenagers Trevor and Earl Wilson, permanent U.S. residents whose Jamaican father Arthur Cecil Wilson could not obtain a visa to move to the United States after their mother's death, though a mother or a "legitimate" father could have done so.[94]

The named plaintiffs in *Fiallo* had undertaken nontraditional gender roles not unlike the married couples Ruth Bader Ginsburg represented in the canonical constitutional sex equality cases of the 1970s. According to court papers, Fiallo-Sone "assumed the role of primary caretaker and constant companion to his son" shortly after the child was born in New York in 1971, while the child's mother, Celia Rodriguez, "assumed the role of bread-winner."[95] When the class action challenging the discriminatory statute and regulations was filed in 1974, Fiallo was "a pre-school age child" and "very dependent upon and attached to his father," with whom he lived in Brooklyn.[96] For her part, Rodriguez continued to support the family financially, and "believe[d] that it [was] in the best interests of the child to live with his father in the United States." Short of Fiallo-Sone adopting his son, or marrying Rodriguez—to neither of which Rodriguez would consent[97]—no

94. *Id.* at 2328.

95. Amended Complaint, Fiallo v. Saxbe, Civ. No. 74 C 1083 (E.D.N.Y.), in Joint Appendix at 6, Fiallo v. Bell., 430 U.S. 787 (1977).

96. *Id*.

97. Court papers explain simply that, "For personal reasons, Ramon Fiallo-Sone and Celia Francisca Michel Rodriguez have never married." Brief for Appellants at 10, *Fiallo*.

path to "legitimation" existed. Accordingly, Fiallo-Sone, who had tried and failed to obtain the otherwise necessary labor certification, would be unable legally to remain in the United States with his son.[98]

Like Stephen Wiesenfeld, who sought Social Security survivors' benefits to care for his newborn after his wife Paula, the household's primary breadwinner, died in childbirth,[99] Jamaican citizen Arthur Cecil Wilson wished to move to the United States to care for his teenage sons Trevor and Earl after their mother, Leony Moses, passed away. Wilson had lived with and supported his sons until they were eleven and nine years old and moved with Moses to New York, where the children became permanent residents. Granted a temporary emergency visa to visit his sons, Wilson had been denied further extensions and returned to Jamaica where "he could work [legally] and contribute something to the support of his children."[100] Wilson's chances of obtaining the required labor certification to work in the U.S. were nil, as he described his skills and work experience as those of a "handyman."[101] In the meantime, Trevor and Earl apparently lived with their mother's sister, who supported their efforts to obtain permanent residency for Wilson. Plaintiff Serge Warner came to the United States at the age of nine to visit his father, who had "always supported and maintained him"; shortly thereafter, his mother married another man and asked Cleophus, a naturalized U.S. citizen, to "keep their son." Cleophus and Serge lived together in Queens thereafter; a defeat in court, they averred, would mean that Serge would "be forced to return to a country where there is no one to care for him."[102] Because their children were over the age of fourteen, Wilson and Warner could not become "parents" for the purposes of exemption from the

If Fiallo-Sone were to adopt his biological son, Rodriguez would presumably have had to relinquish her own parental rights.

98. Amended Complaint, *supra* note 95, at 28. Though Fiallo-Sone successfully obtained a stay of deportation pending the resolution of the case, he and his son departed for the Dominican Republic before he became aware of the stay. Brief for Appellants, *supra* note 97, at 11 n.11.

99. *See* Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

100. Amended Complaint, *supra* note 95, at 10.

101. Fiallo v. Levi, 406 F. Supp. 162 (E.D.N.Y. 1975).

102. Amended Complaint, *supra* note 95, at 32.

immigration quota system. Neither man could "cure" his son's illegitimacy by marrying the children's mother.[103]

National origin, gender, family status, and class—in the form of an inability to obtain labor certification for low-skilled jobs—thus combined to prevent the *Fiallo* plaintiff fathers from receiving relief from immigration restrictions that would have enabled them to care for their children in the U.S. Relying on a small but growing social science literature investigating paternal involvement in children's care and development, and highlighting unmarried fathers' increasing participation in their children's lives, the plaintiffs resisted "stereotypes which depict the father of an illegitimate child as having little interest in and only a superficial relationship with his child and with the child's mother."[104] Indeed, as their supporters emphasized, Fiallo-Sone's, Wilson's, and Warner's demonstrated devotion to their children's care and support throughout their lives belied such generalizations.

In parental rights and stepfather adoption cases such as *Quilloin* and *Caban*, fathers' and mothers' interests clashed; in *Fiallo*, rights for nonmarital fathers aligned with those of mothers. Indeed, Ruth Bader Ginsburg wished to file an amicus brief for the ACLU, presumably in order to argue that discrimination against unwed fathers devalued mothers' citizenship rights and reinforced sex-based stereotypes that assigned the care and support of nonmarital children exclusively to mothers. ACLU Legal Director Mel Wulf rejected her request, and the Legal Aid Society's brief only gestured to this argument in a footnote.[105] Over a dissent from Justices Brennan and Marshall, who viewed them as clearly unconstitutional sex discrimination, a majority of the Court upheld the challenged laws as within Congress's plenary power to regulate immigration.[106]

103. In order for Cleophus Warner to legitimate Serge under the law of the French West Indies, marriage to his mother, Elenore Carmelie Gibs, was required, and she was married to another man. The Wilsons' mother was deceased.

104. Amended Complaint, *supra* note 95, at 25.

105. See Mayeri, *Marital Supremacy*, *supra* note 1, at 1329; *see also* Davis, *supra* note 10, at 99.

106. Fiallo v. Bell, 430 U.S. 787 (1977). For more on *Fiallo*, see Mayeri, *Marital Supremacy*, *supra* note 1, at 1327–31; Mayeri, *Foundling Fathers*, *supra* note 1, at 2327–30. The Supreme Court has considered issues similar to those presented in *Fiallo* in several subsequent cases. For more, see *id.* at 2385–88. Shortly before this essay went to press, the Court decided Sessions v. Morales-Santana, 582 U.S. ___ (2017) (invalidating provision of

Parham v. Hughes, decided by the Court on the same day as *Caban*, also highlighted the claims of nonmarital fathers of color who provided not merely financial support but also care and nurture to their children. Curtis Parham sought to recover for the wrongful death of his six-year-old son Lemuel, who perished in a car accident alongside his mother, Cassandra Moreen. Unlike Abdiel Caban, Parham had not lived with the mother of his child, nor did he have legal custody of Lemuel. Like Leon Quilloin, Parham had not formally legitimated his son (though he had signed Lemuel's birth certificate, acknowledging paternity), but unlike Quilloin, Parham said that he had consistently provided financial support, "maintained charge accounts at grocery stores for food and other necessities,"[107] visited Lemuel daily, and taken care of him on many weekends.[108] Indeed, Richmond County Superior Court Judge Franklin H. Pierce characterized Parham as having "in every respect treated [Lemuel] as his own."[109] And unlike *Quilloin*—and *Caban*—*Parham* presented no obvious feminist dilemma: his claim did not conflict with Lemuel's mother's rights.[110]

Indeed, at least insofar as court records reveal, Quilloin's and Parham's claims arose from caregiving arrangements that deviated from the ideal of the marital nuclear family but reflected the reality of many families of color: cooperation between extended family members (the grandmothers who helped Leon Quilloin care for Darrell in Savannah while his mother worked in New York) and non-cohabiting parents who did not live in marriage-like households but nevertheless participated in what we would now call co-parenting (Parham and Moreen). In

derivative citizenship law's differential residency requirements for U.S. citizen fathers and mothers of nonmarital children born abroad).

107. Order, Parham v. Hughes, Findings of Fact, in Joint Appendix at 6, Parham v. Hughes, 447 U.S. 347 (1979).

108. The lower court found that "Curtis Parham visited regularly with the deceased child and in fact saw him virtually every day and had the child with him on many weekends." Order, *supra* note 107, at 6.

109. Pierce rejected the defendant's motion for summary judgment, ruling that given fathers' primary support obligation under Georgia law, "where the father of an illegitimate child in fact has provided some level of support for that child and has acknowledged his paternity by execution of the birth certificate and has in every respect treated the child as his own, the State cannot constitutionally deny that father the right to maintain an action for the wrongful death of his child where the mother of said child is also deceased." Order, *supra* note 107, at 6.

110. His claim may have conflicted with the rights of Lemuel's maternal grandmother, though there is no indication in the record that this affected the Justices' deliberations.

contrast, Abdiel Caban and Maria Mohammed had lived together with their children but had a troubled history that may have included domestic violence (Mohammed alleged that their relationship dissolved in part because Caban "beat her without reason") and Caban absconding with the children to Puerto Rico.[111]

A decade before *Parham* reached the U.S. Supreme Court, a different collection of Justices had ruled in *Glona v. American Guarantee and Liability Company* that a Louisiana statute denying *mothers* of illegitimate children the right to sue for their wrongful death violated the federal constitution.[112] Like Curtis Parham, Minnie Brade Glona had lost her son in an automobile accident. Like Parham, Glona did not have amici arguing on her behalf. Unlike Parham, Glona was a mother and brought her case in the waning days of the Warren Court, both of which likely contributed to the more sympathetic reception her claim received. Whereas the Court invalidated Louisiana's exclusion of mothers from wrongful death recovery in 1968, in 1979 a bare majority of the Court rejected Curtis Parham's claim.[113] Justice Potter Stewart's plurality opinion ignored the *Glona* precedent, declaring that the illegitimacy cases rested upon the premise that penalizing children for the transgressions of their parents was "illogical and unjust," a rationale inapplicable to a parent's claim. And Stewart rejected Parham's sex-based equal protection claim on the ground that mothers and fathers of illegitimate children simply were not "similarly situated." Justice Powell, author of *Caban*—handed down the same day—disagreed with the plurality's view that Georgia's law did not discriminate on the basis of sex, but found the distinction between fathers and mothers to be substantially related to the important governmental objective of avoiding the difficulties associated with proving paternity.[114]

In the following decade, race, sex, and even class mostly disappeared from the jurisprudence of nonmarital fatherhood. In contrast to the 1970s plaintiffs, all of whom had been indigent, of color, or both, the 1980s plaintiffs were white and working or middle class. The Court avoided deciding two cases that squarely

111. *See* Joint Appendix, Caban v. Mohammed, 441 U.S. 380 (1979).
112. Glona v. Am. Guar. & Cas. Co., 391 U.S. 73 (1968).
113. Parham v. Hughes, 447 U.S. 347 (1979).
114. *Id.* at 359–61 (Powell, J., concurring).

raised sex discrimination claims—both involving the adoption of newborns by strangers—and instead decided *Lehr v. Robertson* (stepfather adoption) and *Michael H. v. Gerald D.* (marital presumption) narrowly, on due process grounds that solidified the legal primacy of marriage but did not consider the ramifications of fathers' parental rights for sex equality.[115] As the intersectional experience of nonmarital fathers of color faded into the background, the Court continued to evaluate the constitutionality of family status and sex discrimination using measures that had little to do with the concerns of poverty lawyers and feminists who weighed government intrusion into poor families and the subordination of women heavily in the balance.[116]

CONCLUSION

The constitutional canon of family status largely ignores the race, gender, and even class-based implications of privileging marriage and marital families. This silence endured despite constitutional arguments by plaintiffs and their advocates that highlighted the class- and race-based disparate impact of marital supremacy; how discrimination against illegitimate children and their parents subordinated women by imposing economic burdens on those responsible for nonmarital children's care and support, curtailing reproductive freedom, and punishing nonmarital sexuality; and the importance of fathers' care and nurturance as well as financial support for children, regardless of birth status. Indeed, litigants, scholars, and advocates advanced expansive conceptions of sexual citizenship, feminist accounts of illegitimacy penalties' harm, and, to some degree, a vision of nonmarital fatherhood that valued care and nurturance as well as the financial support prioritized by lawmakers and judges.

In theory, a constitutional regime protective of non-normative family status and reflective of these more expansive visions of individual freedom and family pluralism would not necessarily incorporate racial, economic, or even gender equality rationales. It is possible to imagine a constitutional jurisprudence that is universalist in scope and uses the experiences of

115. For much more on *Lehr* and *Michael H.*, see Mayeri, *Foundling Fathers*, *supra* note 1, at 2362–73. On the cases the Court avoided and decided during this period, see *id.* at 2354–63 (discussing Kirkpatrick v. Christian Homes of Abilene and McNamara v. Department of Social Services).

116. For more, see Mayeri, *Foundling Fathers*, *supra* note 1, at 2373–82.

marginalized communities as the starting point for thinking about which negative rights should be protected from government intrusion, and which positive rights should be promoted by constitutional law and public policy. Such a jurisprudence might consider family pluralism a positive value, and adaptive, nonmarital, and extended family structures a normative ideal rather than a deviation from the nuclear family norm. It is also possible to imagine a gender-neutral vision of individual autonomy and of parenting that values sexual freedom and valorizes and rewards caregiving regardless of who performs it, and in which the state takes an active role in supporting sole parenting, co-parenting, and extended family care irrespective of family structure or marital status.

Conversely, the recognition that illegitimacy penalties have a race- and class-based disparate impact by no means guarantees a substantively progressive jurisprudence of family status. Race-based disparate impact arguments arguably helped judges who were sympathetic to civil rights to see injustice in the illegitimacy cases. In the welfare rights cases such arguments were a second-best constitutional hook—better than relying on reversible statutory interpretation grounds but less salutary than recognizing a constitutional right to subsistence. But race and even poverty-based discrimination arguments also were perfectly compatible with an approach that focused on the harm of penalizing blameless children for the "sins" or "transgressions" of their parents, and with a Moynihanian focus on ascertaining paternity and holding fathers to account for child support. Similarly, the unwed fathers cases, and the divorced fathers' rights movement, illustrate how sex discrimination arguments that focus on formal equality may help individual men achieve positive results but do not necessarily address, and may in some circumstances aggravate, the subordination of women. The feminist dilemma—how to promote paternal involvement in caregiving without impinging on maternal prerogatives under conditions of gender-based social and economic inequality—left many feminists ambivalent, at best, about the utility of formal sex equality in nonmarital parenthood.

What is lost, then, in the constitutional family status cases, is the *substance* of the claims plaintiffs and advocates derived from intersectional experience: how women, especially women of color, suffer the economic burdens of laws that deprive "illegitimate"

children of public and private support; how laws that penalize nonmarital sexuality violate women's sexual autonomy and reproductive freedom; how laws that limit fathers' rights—especially when there are no competing maternal rights at stake—redound to the detriment of all parents by discouraging and demeaning caregiving work performed by men, and by diminishing the benefits of women's citizenship. It is not the disappearance of race, class, and sex discrimination theories per se, but rather the erasure of the lived experience at the intersection of these categories that impoverishes the constitutional law of family status.